

Q&A with the Honorable Arthur Nakazato By Tu-Quyen Pham



[Editorial Note: Judge Nakazato earned his J.D. in 1978 from Temple University School of Law where he served on the law review, and his B.A. in 1975, cum laude, from University of Pittsburgh. His parents, to whom he attributes his success, are former WWII internees who stressed education, hard work, and hon-

or. Judge Nakazato was the first Japanese American in the continental United States to become a federal magistrate judge in 1996. He has survived a rare form of lymphoma and has been honored by numerous organizations in recent years, including the Orange County Women Lawyers Association, the National Asian Pacific American Bar Association and the Southern California Chinese Lawyers Association. Judge Alicemarie Stotler even called 2010 "the Year of the Nakazato."]

Q: You started both the Orange County Asian American Bar Association and the Orange County Japanese American Lawyers Association. What motivated you to do that?

A: I just felt that it would be a nice way to meet some
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Opening the Floodgates: *Riverisland's* Reversal of the *Pendergrass* Limitation to the Fraud Exception to the Parol Evidence Rule By Taylor R. Dalton

Your client's agreement has fallen apart and now you are headed toward litigation. The contract clearly lays out the terms of the agreement, and even states that the parties have relied on their own investigation and understanding in reaching the agreement. Now your client is hit with a suit containing fraud claims and the other side wants to bring in evidence that your client misrepresented the terms contained in the agreement to prove its fraud. What to do?



At first you may think you can use the parol evidence rule to shield your client and stop the flood of parol evidence early on in the case. But, under the current state of the law, the parol evidence rule may not save you from stopping the evidence from coming in and having your contract dispute submerged by the dispute over your client's fraud. Your client may now wonder what the point was of having a written agreement laying out all the terms?

The California Supreme Court recently expanded the scope of the fraud exception to the parol evidence rule. *Riverisland Cold Storage Inc., et al, vs. Fresno-Madera Production Credit Association* (January 15, 2013) (S190581). The *Riverisland* decision reversed its own precedent from nearly seventy-eight years ago. See *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258. The decision's implications for practicing civil litigators cannot be understated. Previously, an integrated contract could be a bar to promissory fraud allegations when the statements allegedly underlying the "promissory fraud" contradicted or were at odds with the written contract language. The *Riverisland* decision reverses this line of caselaw for a host of reasons, which will more likely than not permit plaintiffs to survive demurrer and summary judgment based on memories of conversation. The fraud ex-

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The President's Message

By Mark D. Erickson



We are excited for 2013 at ABTL and it is an honor and a privilege to serve as president of our Orange County chapter this year. I recognize that Melissa McCormick has set the standard high as outgoing president as we seek to continue the ABTL tradition of educational programs that encourage discourse between the bench and bar. We thank Melissa for her commitment and service.

I am fortunate to have a great Executive Committee this year with Jeff Reeves as Vice-President; Michele Johnson as Treasurer; and Scott Garner as Secretary. Linda Sampson continues her above and beyond service as Executive Director and our chapter is privileged to have the committed support of our federal and state judiciary on our Board of Governors, Judicial Advisory Council, and as program speakers. The opportunities for quality interaction with the bench through ABTL are unrivaled and we appreciate the valuable insight that they provide to our membership.

Our Orange County chapter welcomes the Honorable Thomas J. Borris of the Superior Court to our Judicial Advisory Council in 2013. Judge Borris continues as Presiding Judge of Orange County Superior Court, a position he has held since 2010. We also welcome three new members to the Board of Governors:

James Carter, a partner in the Labor & Employment Section of Paul Hastings. He counsels and defends employers in all aspects of employment law, including discrimination, harassment, wrongful termination, retaliation, wage and hour claims, class action cases, and breach of contract claims.

Todd Friedland, a partner in the law firm of Stephens Friedland. Todd's practice focuses on commercial litigation and strategic counseling including complex contract disputes, class actions, unlawful business practices, trade secrets, business torts, real estate and appellate matters. Todd was also just elected the secretary of the Orange County Bar Association.

John Holcomb, a partner in the firm of Knobbe Martens Olson & Bear. John is a litigation partner specializing in intellectual property litigation, including trademarks, patents and copyrights.

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The Foreign Corrupt Practices Act Guidance: A Useful (But Not Perfect) Resource for Dealing with Enforcement Actions

By Thomas S. McConville and Christina Von der Ahe



Introduction

On November 14, 2012, the U.S. Department of Justice (“DOJ”) and the U.S. Securities and Exchange Commission (“SEC”) issued a 120-page “Resource Guide to the U.S. Foreign Corrupt Practices Act.” The Resource Guide, the first of its kind and a self-proclaimed “unprecedented undertaking,” claims that its goal is to

“provide helpful information to enterprises of all shapes and sizes – from small businesses doing their first trans-

actions abroad to multi-national corporations with subsidiaries around the world.” DOJ & SEC, FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act (“Resource Guide”) at Foreword (Nov. 14, 2012). To an extent, the Resource Guide achieves that goal, because it provides a comprehensive summary of the positions that the DOJ and SEC have been taking in FCPA enforcement actions to

date. Unfortunately, the Resource Guide is also sure to disappoint industry groups and FCPA practitioners, who asked for something clearer, newer, and binding on the federal agencies tasked with enforcing the Foreign Corrupt Practices Act. On this front, many perceive the Resource Guide as coming up short. This article provides a summary of some of the main provisions of the Resource Guide, along with some background information on enforcement actions under the Foreign Corrupt Practices Act.

History of the Enforcement of the FCPA

The United States Foreign Corrupt Practices Act (“FCPA” or “Act”), 15 U.S.C. §§ 78dd-1, *et seq.*, was enacted in 1977 in response to Congressional concern regarding U.S. corporate bribery of foreign officials. The Act sought to curb such behavior in two main ways: (1) by making it unlawful to pay foreign officials for the

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Advising Clients About Social Media

By Andrea Bird

Ready or not, social media matters when it comes to litigation. In this article, I outline issues to consider when advising clients on how to deal with social media, including updating retention policies, adding social media to litigation holds, carefully drafting social media requests in discovery, and authenticating data for admission into evidence.

1. Social Media Matters

Social media sites are a fairly recent development – Facebook has only been around for eight years, and Twitter for six – and even five years ago most litigators would not have guessed that social media would ever play a big role in litigation. But in 2011, technology research company Gartner, Inc. estimated that by 2012, half of all companies will have been asked to produce social networking site content in e-discovery requests. (Gartner, Inc., Press Release (February 17, 2011), available at <http://www.gartner.com/it/page.jsp?id=1550715>.)

As of 2011, fifty-eight percent of Fortune 500 companies maintained a Facebook page, and sixty-two percent used Twitter. (UMass Dartmouth Center for Marketing Research, “The 2011 Fortune 500 and Social Media Adoption: Have America’s Largest Companies Reached a Social Media Plateau?,” available at <http://www.umassd.edu/cmr/studiesandresearch/2011fortune500/>.) These numbers are only for official Twitter accounts and Facebook feeds – accounts of employees are not included. Given these statistics, it is not surprising that so many companies are involved, or soon will be involved, with discovery of social media.

Accordingly, if your clients have not had to deal with discovery of social media yet, it is a foregone conclusion that they will need to deal with it some day soon, so now is the time to prepare for that eventuality.

2. Before Disputes Arise, Clients Should Update Retention Policies

Unless you look forward to scrambling at the last minute to respond to discovery requests and explaining why your clients have no record of deleted Twitter and Facebook posts, now is the time to talk to your clients about preserving social media. Because social media is in its infancy, most companies have not updated their retention policies to include the methods for capturing and storing it. Even if litigation is not yet foreseeable, getting ahead of the curve by updating reten-

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other attorneys who were also Asian and had similar backgrounds. We could compare notes and see what everybody else was doing and have another resource.

Q: What was the size of the Asian-American community at the time when you started these organizations, compared to now?

A: It was smaller, so there weren't quite as many of us. But there were still a significant number of attorneys of Asian descent that were living and practicing in Orange County. Several attorneys, some of whom I already knew and others I did not, expressed an interest in forming a group and I thought it was a nice way to meet other people. I had already been active in the Orange County Bar Association at the time. Consequently, that is how I think they found me and at that point I decided, yeah, why not?

Q: How important do you think being part of a bar association is for lawyers today?

A: I think it's important to participate and be involved in the legal community because it is the quickest and fastest way for both new and old lawyers to just keep in touch with people who are actively involved in the community. Lawyers who are generally involved with the bar associations are usually people who are also involved in other community organizations.

Q: How early in your career did you know you wanted to become a judge?

A: I didn't start out ever planning to be a judge. I enjoyed being a lawyer, but then as I progressed in my legal career, I did feel that I had pretty much done what I had sought out to accomplish. Also, I did really enjoy the time I appeared in federal court. When I got involved with the Orange County Bar Association I eventually ended up chairing the Federal Court Committee and becoming a Ninth Circuit lawyer delegate for our district and I thought it would be nice to be part of the court and to have a career that was both one where I could become a public servant and also pursue my interest in law at a 100% level, free of administrative matters or having to deal with some of the more unpleasant aspects of practicing law.

Q: Do you have any advice for young lawyers today who aim to be a judge one day?

A: Well, number one, they need to be substantively good lawyers. The judicial selection process at both the state and federal levels are very good about screening. They carefully look at every applicant and they generally tend to focus on attorneys who have a good reputation as a lawyer. That is something that you need to develop fundamentally number one. Then, after you have demonstrated that you do have the substantive skills, you also need to again make sure people know who you are and that you have a reputation as a good attorney. One of the best ways to do that is to get involved with the bar associations.

Q: For young attorneys who appear in the courtroom for the first time, do you have any advice for us, especially in your courtroom?

A: There is nothing like preparation. You will know when you are prepared because as you do your research and get yourself familiar with the relevant facts with respect to whatever motion or case that you are going to try, you will know because you won't become reliant on your notes. If you have to rely on your notes for everything, then you are not prepared. Notes become a distraction. You have to be able to look the judge in the eye and when the judge asks a question, be able to answer immediately because you know the case.

Q: Can you describe your judicial philosophy, the way you approach being a judge?

A: I just try to make sure that I am reaching the right result based upon the facts. I don't go in with any preconceived agendas. I think my philosophy is to just be practical and realistic and to do the right thing. I don't worry about a decision I ultimately make as long as I feel that I've done my research and I've looked at the matter objectively. Once I've done that, I am very comfortable in making a decision.

Q: Is there anything you know now as a judge that you wish you had known when you were a practicing attorney?

A: Probably just the nature of the workload. It actually is quite heavy in this district. It does require you to work quickly. It does require you to be very focused and extremely organized, and I have always been organized so I have that advantage. I have also been a fast reader so that helps too. But I would say the level of work, it's the volume. Some judges have likened it to taking a sip from a fire hose, and it is, but once you get used to it, like anything else, it's manageable.

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Q: If you weren't a judge or a lawyer, had you ever considered any other careers?

A: Yes. For a long time I thought I would be an orthodontist because I am extremely good with my hands and I am fairly creative when it comes to making things. But when I was in college I dislocated my jaw during wrestling practice and I went to the dental school to get my jaw worked on. I had seen in the waiting room some patients that had some pretty awful looking teeth and looked like maybe gum infections. I was sitting in the chair talking to the student dentist who was working on me and I made a comment about the other patients and the student said, "Well that's my next patient after you." That did it for me. I said no, I can't do this. So that is when I decided to look for a different career.

Q: How did you fall into law after that?

A: I enjoyed theoretical-type thinking. I majored in Economics and English Literature, so I enjoyed reading. I also enjoyed analyzing things and somebody once said, "Well, you know, maybe you ought to consider looking at becoming a lawyer." And I thought, "Hmm, that's a good idea, that is a good way to delay going out in the real world for three more years." And that is what I ended up doing.

The ABTL thanks Judge Nakazato for his time.

♦ *Tu-Quyen Pham is an associate in the Orange County office of Gibson, Dunn & Crutcher LLP.*

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ception to the parol evidence rule can now allow commercial disputes to be flooded with evidence of fraud.

The Parol Evidence Rule and Evidence Code 622

The parol evidence rule is a well-established principle of common law of which any first year law student should have a basic understanding. However, despite the rule's notoriety, confusion abounds regarding its intricacies. In California, the parol evidence rule is codified in Code of Civil Procedure section 1856 and Civil Code section 1625. The parol evidence rule generally prohibits the introduction of either oral or written extrinsic evidence to vary, alter, or add to the terms of an integrated written agreement. The rationale behind the rule is that a written integrated contract establishes the terms of the agreement between the parties and evidence that contradicts the written terms is irrelevant. The integrated agreement is the writing that constitutes the final expression of one or more terms of the agreement.

The California Evidence Code also includes a conclusive presumption that follows the same rationale behind the parol evidence rule. Evidence Code 622 states: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration." An "instrument," as described in the code, is a written legal document that defines rights, duties, entitlements, or liabilities, such as a contract. The provision only applies to "essential facts" contained in the writing, thus as a corollary, extrinsic evidence of nonessential facts may be admitted. This code provision essentially codifies the doctrine of estoppel by contract as between the parties to the instrument. Thus, because the facts in the written instrument are presumed true, no evidence can be received to the contrary.

The two doctrines, the parol evidence rule and Evidence Code 622, have been linked and the doctrines have developed side-by-side. The doctrines serve as protectors of agreements that have been reduced to ink and paper. But with any time-tested doctrine, both are fraught with exceptions—and exceptions to the exceptions.

The Pre-Riverisland Fraud Exception and Exceptions to the Exception

Code of Civil Procedure 1856 describes when the parol evidence rule does and does not apply, such as when the agreement itself is in dispute, to explain an extrinsic ambiguity, or to otherwise interpret the terms of the agreement.

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Most importantly here, the section provides the substantial, but seemingly simple, carve out for parol evidence that establishes fraud. Similarly, *Miller v. Criswell* (1942) 54 Cal.App.2d 524, and subsequent cases have held that Evidence Code 622 was also not a bar to an assertion of fraud or other ground for rescission. This exception to the parol evidence rule sits at the end of the statute, seemingly innocuous. However, the ramifications of this exception seem to open up the rule and let a flood of parol evidence wash away the contract.

Prior to the *Riverisland* decision, California courts had established an exception or limit to the fraud exception: the exception for promissory fraud. Promissory fraud is a promise made without any intention of performing it. The fraud exception to the parol evidence rule does not apply to such promissory fraud if the evidence in question is offered to show a promise which contradicts an integrated written agreement. The California Supreme Court in *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258 established this exception and the rationale that favored the parol evidence rule over supporting the fraud cause of action. The court explained: “Our conception of the rule which permits parol evidence of fraud to establish the invalidity of the instrument is that it must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing.” (*Id.* at 263.) Under *Pendergrass*, parol evidence of a promise that conflicts with the promise reduced to writing was not admissible.

The legal landscape complicated the *Pendergrass* decision in the subsequent decades. For example, courts created a further exception to the exception of the exception—or possibly a limitation on the *Pendergrass* limitation—that addressed contemporaneous misrepresentations of the terms of the contract. *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375. In *Greene*, a borrower entered into several loan agreements with a bank using various things as collateral. The borrower’s wife bought one piece of collateral, a trailer, and assumed the loan, with the agreement of the bank. The wife entered into a guaranty agreement that listed the amount of the loan on the trailer as the wife’s maximum liability, but defined the indebtedness as all of the borrower husband’s loans. The bank eventually sued the wife for the amounts due under the borrower husband’s loans. The wife asserted that bank employees assured her that she was not guarantying any of her husband’s other loans, to which the bank objected as inadmissible evidence. The appel-

late court agreed that the statements contradicted the terms of the guaranty agreement, thus making such statements inadmissible to interpret the language of the guaranties. However, the appellate court held that the statements were admissible under the fraud exception. The *Greene* court observed that the judicial limitation stated in *Pendergrass* “should not be further extended to preclude parol evidence of a misrepresentation of fact over the content of the physical document at the time of signing. Such an extension would conflict with the Legislature’s express and unqualified statutory exception for fraud—a policy judgment that we have no power to overrule—and is unnecessary to safeguard the vitality of the parol evidence rule (which was *Pendergrass*’s purpose in narrowing the scope of the fraud exception).” (*Id.* at 379.)

***Riverisland: The Supreme Court
Opens the Floodgates***

The California Supreme Court granted review of the *Riverisland* case on April 20, 2011. The issue to be decided was whether “the fraud exception to the parol evidence rule permit[s] evidence of a contemporaneous factual misrepresentation as to the terms contained in a written agreement” (Admin. Office of Courts, Supreme Ct. Summary of Cases Accepted During the Week of April 18, 2011.)

The case arises out of an agreement between borrowers and a lender. The plaintiff borrowers’ operating loan from the defendant lender went into default when they failed to make a required payment. The parties then entered into a written forbearance agreement in which the borrowers agreed to provide additional security, which included their residence and a truck yard, to the lender. The forbearance agreement also contained an integration clause. The borrowers failed to make the necessary payments. They later sued for fraud, negligent misrepresentation, rescission, and reformation. In their complaint, the borrowers alleged that they had been induced to enter into the agreement by the lender’s oral misrepresentations regarding the additional collateral made at the time of execution of the agreement when the lender represented that only a pledge of two orchards was needed as additional security—even though the written agreement provided that their residence and a truck yard were part of the additional collateral. The borrowers alleged that they had not read the written agreement.

The lender moved for summary judgment asserting that the borrowers were barred by the parol evidence rule from presenting evidence of any prior or contemporaneous oral agreement that contradicted the terms of the written agreement. The trial court accepted the lender’s argument and

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excluded the borrowers' evidence of misrepresentations pursuant to the parol evidence rule.

On appeal, the court held that the borrowers *could* invoke the fraud exception because they were not alleging a promise made without intent to perform that was directly at variance with the promise of the writing. The exception applied to fraud committed by misrepresenting the content of a written agreement in order to induce another to sign it. Under such circumstances, the evidence was not admitted to alter, vary, or add to the provisions of an integrated agreement; rather, it was admitted to prove the written contract was not the actual, integrated agreement of the parties. The court relied on *Greene* in its holding, specifically noting the distinction between promissory fraud and misrepresentations of fact over the content of an agreement at the time of execution. The court thus declined to apply the *Pendergrass* limit on the fraud exception to misrepresentations of the contents of the written instrument.

In its brief to the Supreme Court, Fresno-Madera argued that the fraud exception should not permit a party who has had a full opportunity to review a written agreement to introduce evidence of prior or contemporaneous representations as to the terms contained in the agreement that are directly contradicted by the signed writing. If a party had a chance to review the agreement before signing, then relying on an inconsistent statement about its contents would be unreasonable and thus one could not show justifiable reliance—a key to any fraud claim.

The *Riverisland* decision rejected Fresno-Madera's argument and, in so doing, overturned the 78-year old *Pendergrass* opinion. The court eliminated the *Pendergrass* limitation for five reasons: (1) there is no support language in the statute; (2) it is difficult to apply; (3) it conflicts with the doctrine of the Restatements, treatises, and a majority of sister-state jurisdictions; (4) it departed from established California law at the time it was decided; and (5) the limitation may actually provide a shield for fraudulent conduct. The court emphasized that the *Pendergrass* limitation was inconsistent with the principle reflected in section 1856 that a contract may be invalidated by a showing of fraud.

The *Riverisland* decision seemed to be most concerned about the possibility that *Pendergrass* could be used as a shield for fraud. In making that determination, the court clarified that promissory fraud is a species of fraud, and any distinction between promises deemed consistent with the writing and those considered inconsistent

does not change the fact that evidence of fraud should not be precluded. The court simply notes that "*Pendergrass* has had its defenders" and does not spend much energy discussing those concerns, namely the fact that commercial disputes over contract terms will be litigated with an "arsenal of tort remedies." In the end, because the Legislature did not adopt the *Pendergrass* limitation when it revised section 1856 and *Pendergrass* was inconsistent with California case law at the time, the court overruled *Pendergrass* and its progeny. Attorneys for Fresno-Madera have told reporters for Law360 that they intend to challenge the "reasonable reliance" element of fraud based on the defendants' failure to review the agreement before signing. But for now, there is no limitation on the fraud exception to the parol evidence rule to hold back the flood.

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- ♦ Only members receive this Report.
- ♦ The Young Lawyer Division ("YLD") has judicial brown bag lunches, educational programs and attorney mixers planned for 2013, all of which are limited to members practicing 10 years or less.

To establish your 2013 membership, please visit us on-line at www.abtl.org.

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We are creating new committee positions on the Board of Governors and Tom McConville of Orrick has agreed to serve as head of our Public Service Committee, overseeing and expanding on ABTL's community outreach programs, including Habitat for Humanity Build Days and the Holiday Gift Giving Opportunity. We will look for new and additional opportunities to give back to our local community. Elizabeth McKeen of O'Melveny & Myers has agreed to serve as head of our Sponsorship Committee that will seek partnerships for ABTL with legal service vendors.

We open our 2013 dinner programs on February 6th with "What Every Civil Litigator Should Know About the Foreign Corrupt Practices Act" that should be informative and help all of us in our role as counselors to our clients. A point of emphasis in our programs this year will be civility and professionalism. We have a county that is sufficiently small in size that our membership can influence the way law is practiced in our area and we want to be leaders on this front. To that end, our Young Lawyer Leadership Development program and ABTL Report will also integrate these values into its series.

Please use our website and email blasts to stay apprised of our 2013 programs and opportunities to be involved in the ABTL mission. In addition to dinner programs in April, September and November, the Orange County chapter will be hosting its annual winetasting fundraiser for the Public Law Center on June 5th. You should also mark your calendars for the ABTL Annual Seminar on October 3rd to the 6th which will be very accessible at The Ritz-Carlton Resort in Laguna Niguel.

If you have thoughts and suggestions on how we can be of better service to the Orange County legal community, please contact me directly at my email. We are here to serve.

♦*Mark D. Erickson is a litigation partner at Haynes and Boone LLP in Irvine and can be reached at mark.erickson@haynesboone.com.*

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purpose of obtaining or retaining business; and (2) by requiring companies whose securities are listed in the United States to keep accurate books and records. The Act was amended once in 1988 and again in 1998, but remained largely unenforced by the pair of entities entrusted with enforcing it, the DOJ and the SEC. After the turn of the century, however, things changed. The year 2006 marked the beginning of a dramatic uptick in the number of FCPA enforcement actions.

In that year, the DOJ brought seven enforcement actions against individuals and companies – the largest number of enforcement actions brought in a single year since the FCPA was enacted. *See DOJ, FCPA and Related Enforcement Actions: Chronological List*, <http://www.justice.gov/criminal/fraud/fcpa/cases/2006.html> (last visited Dec. 15, 2012). The next year, the DOJ more than doubled that number. *Id.* In 2009, and again in 2010, the DOJ brought more than 30 enforcement actions. *Id.* In 2011 and 2012, the DOJ brought more than 10 enforcement actions each year. *Id.*

The DOJ paired these high enforcement numbers with harsher penalties and enthusiastic statements regarding the importance of FCPA enforcement. For example, in 2009, Assistant Attorney General Lanny Breuer commented proudly: "One can say without exaggeration that this past year was probably the most dynamic single year in the more than thirty years since the FCPA was enacted." *See DOJ, Lanny A. Breuer, Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act* (Nov. 17, 2009), available at <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf>. In 2010, Assistant Attorney General Breuer announced: "We are in a new era of FCPA enforcement." *See DOJ, Assistant Attorney General Lanny A. Breuer Speaks at the 24th National Conference on the Foreign Corrupt Practices Act* (Nov. 16, 2010), available at <http://www.justice.gov/criminal/pr/speeches/2010/crm-speech-101116.html>.

The SEC has followed the same trend as the DOJ. In 2006, the SEC brought the most enforcement actions it had ever brought in a single year – eight. *See SEC, SEC Enforcement Actions: FCPA Cases*, <http://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml> (last updated Dec. 17, 2012). The next year, the SEC brought eighteen enforcement actions. *Id.* In 2010, the SEC created a specialized unit, the Foreign Corrupt Practice Unit, to "enhance its enforcement of the FCPA." *Id.* In 2011 and 2012, respectively, the SEC has brought fifteen and nine FCPA enforcement actions. *Id.*

The practical result of this sudden rise in enforcement actions was that it forced the SEC, the DOJ, and the Courts to

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interpret provisions of the FCPA that had never truly been vetted in legal proceedings. *See* Organization for Economic Co-operation and Development, Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions (“OECD Report”) ¶ 96 (2010) (“[A]lthough enforcement under the FCPA is strong and increasing, there is relatively little jurisprudence that has developed since its entry into force 30 years ago (only a small number of judicial opinions regarding interpretation of the FCPA have been given since June 2005).”). And, naturally, the SEC and the DOJ took aggressive positions as to the meanings of those provisions. By 2008, commentators noted that the DOJ and SEC had taken positions that “expanded concepts of jurisdiction,” “lowered thresholds on proving knowledge,” “heightened presumptions,” and “increased fines, penalties, disgorgement and deferred prosecution agreements,” among others. *See* R. Martin, J. Musoff, and Toi Frederick, *The Foreign Corrupt Practices Act: Thirty Years and Still Growing* (September 2008).

Accordingly, by 2010, industry groups and compliance professionals were calling for further guidance on the FCPA. *See* OECD Report ¶ 97. These groups, such as the U.S. Chamber of Commerce, asked that U.S. regulators provide “more certainty to the business community when trying to comply with the FCPA.” U.S. Chamber Inst. for Legal Reform, *Restoring Balance: Proposed Amendments to the Foreign Corrupt Practices Act 7* (2010) (“Restoring Balance”). The Resource Guide was their response.

The Resource Guide

The Resource Guide describes itself as “non-binding, informal, and summary in nature.” Resource Guide at Inside Cover. It “does not in any way limit the enforcement intentions or litigating positions of the U.S. Department of Justice, the U.S. Securities and Exchange Commission, or any other U.S. government agency.” *Id.* Accordingly, it is not a resource upon which companies can rely conclusively. However, it does constitute a good summary of the SEC’s and DOJ’s positions, and contains some highlights worth noting.

The Guide Attempts to Define “Foreign Official” More Clearly.

The FCPA’s anti-bribery provisions apply to corrupt payments made to “any foreign official.” Resource Guide at 19. The FCPA defines a “foreign official” as an officer or employee of a foreign government or an “instrumentality” of a foreign government. *Id.* Throughout the period of heightened enforcement actions, companies were grappling with the FCPA’s definition of these terms. The Resource Guide attempts to clarify what constitutes an “instrumentality” of a foreign government by setting forth a non-exhaustive list of factors to be considered in determining whether a particular entity constitutes an “instrumentality.” *Id.* at 20. These factors include “the foreign state’s extent of ownership of the entity;” “the foreign state’s degree of control over the entity;” and “the foreign state’s characterization of the entity and its employees.” *Id.* Perhaps most notably, the Resource Guide then states that, while no one factor is dispositive, “as a practical matter, an entity is unlikely to qualify as an instrumentality if a government does not own or control a majority of its shares.” *Id.* at 21.

While companies and legal professionals may have liked a more bright-line definition of what constitutes an “instrumentality,” they will find this summary of applicable factors useful.

The Guide Describes “Hallmarks of Effective Compliance Programs.”

For companies that are subject to the FCPA, many attempt to avoid running afoul of the FCPA’s penalties by implementing compliance plans. Unfortunately, not all compliance plans are considered equal by the DOJ and SEC. The Resource Guide attempts to provide some guidance on what constitutes an effective compliance plan. According to the Resource Guide, the DOJ and SEC “consider the adequacy of a company’s compliance program when deciding what, if any, action to take” against a company. *Id.* at 56. The Resource Guide then spends seven pages describing the “Hallmarks of Effective Compliance Programs.” *Id.* at 56-62. While the Resource Guide points out that the DOJ and SEC “have no formulaic requirements regarding compliance programs” and that “they employ a common-sense and pragmatic approach to evaluating compliance programs,” *Id.* at 56, the Resource Guide lists the basic elements the DOJ and SEC typically consider:

- Commitment from Senior Management and a Clearly Articulated Policy Against Corruption

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- Code of Conduct and Compliance Policies and Procedures
- Oversight, Autonomy, and Resources
- Risk Assessment
- Training and Continuing Advices
- Incentives and Disciplinary Measures
- Third-Party Due Diligence and Payments
- Confidential Reporting and Internal Investigation
- Continuous Improvement: Periodic Testing and Review

This portion of the Resource Guide is a must-read for anyone attempting to create or update a compliance program. At a minimum, the Resource Guide provides a clear message regarding compliance plans: not only must a policy be in place, but a company must also effectively implement any plan.

The Guide Discusses What Gifts, Travel, and Entertainment May Be Permissible.

The text of the FCPA does not provide those subject to the FCPA with adequate guidance on a common business practice: the giving of a token of appreciation. The Resource Guide attempts to clarify what sorts of gifts constitute bribes, and what sorts of gifts are permissible. It states “[a] small gift or token of esteem or gratitude is often an appropriate way for business people to display respect for each other. Some hallmarks of appropriate gift-giving are when the gift is given openly and transparently, properly recorded in the giver’s books and records, provided only to reflect esteem or gratitude, and permitted under local law.” *Id.* at 15. Gifts that are permissible include “cab fare, reasonable meals and entertainment expenses, or company promotional items.” *Id.* Gifts that are not permissible include sports cars and fur coats. *Id.* Regardless of the size, for a gift or other payment to violate the FCPA, “the payor must have corrupt intent—that is, the intent to improperly influence the government official.” *Id.*

Of course, this portion of the Resource Guide leaves a very large gray area between the “permissible” cab fare and the “impermissible” sports car. As such, the Resource Guide does not go as far as it could in providing

practitioners and companies with bright line rules in dealing with a common business practice.

The Guide Sets Forth A Broad Theory of Agency for Parent-Subsidiary Relationships.

Under the FCPA, U.S. companies can be liable for the actions of its overseas subsidiaries. Of course, not all companies have the same approach for dealing with foreign subsidiaries. The Resource Guide attempts to provide some guidance on this front. The Resource Guide states that a parent may be liable for a subsidiary’s criminal conduct “under traditional agency principles.” *Id.* at 27. According to the Guide, “the fundamental characteristic of agency is control.” *Id.* Also according to the Guide, the “control” that can give rise to liability for a parent company can constitute either: (1) direct control over the corrupt acts; or (2) “the parent’s knowledge and direction of the subsidiary’s actions . . . generally.” *Id.* While the first category is not remarkable, the second definition of control could be problematic. Essentially, the Guide seems to set forth the position that a parent company can be liable for the FCPA violations of its subsidiary, even when the “control” that the parent company exercises over its subsidiary has nothing to do with the FCPA violations. This broad theory of agency for parent-subsidiary relationships discussed in the Resource Guide could have the potential to draw more companies into the FCPA enforcement net.

The Guide Clarifies Successor Liability for Acquiring Companies.

The FCPA has been applied by the government to impose sanctions on companies that acquire other companies, when the acquired company has run afoul of the FCPA. In the context of mergers and acquisitions, the Resource Guide makes clear that the DOJ and SEC would be unlikely to bring an enforcement action against an acquiring company for the pre-acquisition conduct of the acquired company. *Id.* at 28-30. The Guide encourages acquiring companies “to conduct pre-acquisition due diligence and improve compliance programs and internal controls after acquisition.” *Id.* at 28. The Guide continues:

In a significant number of instances, DOJ and SEC have declined to take action against companies that voluntarily disclosed and remediated conduct and cooperated with DOJ and SEC in the merger and acquisition context. And

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DOJ and SEC have only taken action against successor companies in limited circumstances, generally in cases involving egregious and sustained violations or where the successor company directly participated in the violations or failed to stop the misconduct from continuing after the acquisition. *Id.*

This guidance contains a clear message: in the acquisition context, it is better to be proactive, identify past violations, and work affirmatively with the DOJ and SEC.

Finally, the Resource Guide makes clear that if a company acquires a foreign company that was not previously subject to the FCPA's jurisdiction, the mere acquisition of that foreign company will not retroactively create FCPA liability for the acquiror. *Id.*

CONCLUSION

The Resource Guide provides useful information for the industry and FCPA practitioners. It is a must-read for companies that do work overseas (and those who advise them). The Resource Guide compiles, in one place, the positions that the SEC and DOJ have been taking in enforcement actions to date, and provides some information about future plans. As expected, in some areas, such as parent-subsidiary liability, it confirms that the SEC and DOJ will continue to aggressively pursue cases. In other areas, such as compliance programs and successor liability, it provides reassurance that the SEC and DOJ will remain receptive to arguments that FCPA liability should not attach when companies take reasonable, considered approaches to avoid running afoul of the FCPA. Of course, the Resource Guide must be read and understood with one big caveat: the Guide is not binding precedent, and the views of the DOJ and SEC may change.

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tion policies will help ensure that discovery goes smoothly if and when litigation does happen.

The social media retention policy should include the technological methods for collection and preservation of social media data. These methods will vary based on the size of the client and the type of social media. Some methods include (1) "web crawling," where a computer program is used to browse the social-media URL and creates copies of the page, including metadata; (2) screenshots, where a program takes an image of social media pages (but does not include metadata); (3) use of Application Programming Interfaces, or "APIs," programs that most major social-media publishers use and that third parties can request in order to collect data; (4) the "Proxy method," where a company requires that its employees interface with social media through a proxy server and captures and monitors all interactions; and (5) social media publisher-specific methods, such as Twitter's "public follow" and Facebook's "download your information" features. (See Barry Murphy, "Are Social Media E-Discovery's Next Nightmare," *Computerworld* (August 20, 2012), available at http://www.computerworld.com/s/article/9230384/Are_social_media_e_discovery_s_next_nightmare_.) For most companies, a social media retention policy should use a combination of these methods, and should be tailored to the needs of the client.

3. When a Dispute Arises, Litigation Holds Should Include Social Media

Clients have a duty to preserve potentially relevant information in their custody or control once they anticipate pending litigation. For example, in federal courts, "[a] duty to preserve evidence arises when there is knowledge of a potential claim." (*Micron Tech. v. Rambus*, 255 F.R.D. 135 (D.Del. 2009), *aff'd* 645 F.3d 1311 (Fed. Cir. 2011).) The duty to preserve evidence extends to social media, and the sanctions for failing to adhere to that duty can be high – not just for clients, but for attorneys as well. Along those same lines, the ramifications for intentional spoliation of social media can be very severe. For example, a Virginia trial court fined an attorney over \$500,000 for instructing his client to "clean up" his Facebook account by removing potentially harmful photographs. (See Next Generation eDiscovery Law & Tech Blog, "Facebook Spoliation Costs Lawyer \$522,000; Ends His Legal Career" (November 15, 2011), available at <http://blog.x1discovery.com/2011/11/15/facebook-spoliation-costs-lawyer-522000-ends-his-legal-career/> (judicial order from *Lester v. Allied Concrete Co.*, No. CL08-150, CL09-223 (Va. Cir.Ct. 09/01/2011), available at this link as well).) A federal opinion also recently noted the duty to preserve social media.

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(See *Howell v. Buckeye Ranch, Inc.*, 2:11-CV-1014, 2012 WL 5265170, at *2 (S.D. Ohio Oct. 1, 2012) (noting that even though discovery requests at issue were overbroad, the plaintiff was on notice to preserve private sections of social media accounts).)

For litigators, this means that litigation hold templates should be updated to include social media. It is also important to interview potential witnesses and/or IT personnel to determine what social media sites are used by both the company and the employees, and determine what kind of preservation will be needed. If clients already have a retention policy, as recommended in Section 2, *supra*, litigation holds of social media should go smoothly because the technology will already be in place.

4. Discovery of Social Media

Social media is discoverable. For example, in federal court, Federal Rule of Civil Procedure 34 applies to Electronically Stored Information (“ESI”). When the rule was amended in 2006 to include ESI, the Advisory Committee noted that the Rule “is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.” (2006 Advisory Committee Notes to Fed. R. Civ. P. 34; *see also Davenport v. State Farm Mut. Auto. Ins. Co.*, 2012 WL 555759 at *1 (M.D.Fla. Feb 21, 2012) (“Generally, [Social Networking Site] content is neither privileged nor protected by any right of privacy.”).)

While social media is discoverable, some courts have been reluctant to compel sweeping requests for discovery of social media. For instance, in *Mailhoit v. Home Depot*, No. CV 11-03892 DOC (SSx), 2011 WL 3939063 (C.D. Cal. Sept. 7, 2012), an employment discrimination case, the defendant requested, among other things, seven years of “profiles, postings or messages (including status updates, wall comments, causes joined, groups joined, activity streams, blog entries) from social networking sites,” “third-party communications to [p]laintiff that place her own communications in context,” as well as “[a]ny pictures of [p]laintiff taken during the relevant time period and posted on [p]laintiff’s profile or tagged or otherwise linked to her profile.” (*Id.* at *1.) The defendant argued that it was entitled to the social networking communications to “test [p]laintiff’s claims about her mental and emotional state.” (*Id.*) The *Home Depot* court rejected the defendant’s argument on the grounds that these requests were “not reasonably calculated to lead to the discovery of admissible evidence.” (*Id.* at *3.)

The court reasoned that even though the plaintiff had “placed her emotional state at issue,” and it was “conceivable that some [social networking site] communications may support or undermine her claims of success . . . the extremely broad description of the material sought . . . fail[ed] to put a ‘reasonable person of ordinary intelligence’ on notice of which specific documents or information would be responsive to the request.” (*Id.* (citing Fed. Rule Civ. P. 34(b)(1)(A)).) The court further noted that the requests were overbroad, and that the defendant failed “to make the threshold showing that every picture of [p]laintiff taken over a seven-year period and posted on her profile by her or tagged to her profile by other people would be considered relevant under [FRCP] 26(b)(1) or would lead to admissible evidence.” (*Id.* at *4; *see also Tompkins v. Detroit Metropolitan Airport*, 278 F.R.D. 387, 388 (E.D. Mich. 2012) (the Federal Rules do not grant a requesting party “a generalized right to rummage at will through information that [the responding party] has limited from public view” but instead require “a threshold showing that the requested information is reasonably cal-

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culated to lead to the discovery of admissible evidence”); *E.E.O.C. v. Simply Storage Mgmt., LLC*, 270 F.R.D. 430, 435 (S.D. Ind. 2010) (“[T]he simple fact that a claimant has had social communications is not necessarily probative of the particular mental and emotional health matters at issue in the case. Rather, it must be the substance of the communication that determines relevance.”); Abigail Rubenstein, “Courts Struggle to Lay Out Social Media Discovery Limits,” Law360 (September 20, 2012), available at <http://www.law360.com/articles/379673>.)

The *Home Depot* opinion provides some helpful guidance when both drafting and responding to discovery of social media. First, when drafting any discovery, the requests should be specific and not overbroad. Drafting discovery requests concerning social media may require additional care. As to specificity, a “reasonable person of ordinary intelligence” would likely need to know the specific social networking site, the specific type of social networking activity that needs to be captured, and the specific relevant time frame in order to meaningfully respond to the request. To ensure that the requests are not overbroad, these specifics should relate directly to the dispute at hand. Interrogatories relating to what types of social media the opposing party uses or used are helpful in framing requests for production of the social media itself. So, instead of requesting all social media for a seven-year period (as the *Home Depot* defendant did), a more tailored approach would be to first propound an interrogatory requesting information as to what social media sites the plaintiff had used, and then propounding specific document requests based on those specific sites and specifically related to the issues at hand. For example, if the plaintiff had a blog on Google Blogger, a Facebook account, and a Twitter account, and the defendant wanted to discover the plaintiff’s emotional damages as a result of alleged harassment at work, a reasonable time frame might be one year before the alleged harassment to the present (so that the emotional states can be compared before and after the alleged harassment occurred, and ongoing damages can be assessed). Specific requests can then be fashioned based on those parameters. One court held that the following requests were sufficiently specific:

(1) any:

- a) email or text messages that plaintiff sent to, received from, or exchanged with any current and former employee of defendant, as well as messages forwarding such messages;

or

- b) online social media communications by plaintiff, including profiles, postings, messages, status updates, wall comments, causes joined, groups joined, activity streams, applications, blog entries, photographs, or media clips, as well as third-party online social media communications that place plaintiff’s own communications in context;

(2) from July 1, 2008 to the present;

(3) that reveal, refer, or relate to:

- a) any significant emotion, feeling, or mental state allegedly caused by defendant’s conduct; or
- b) events or communications that could reasonably be expected to produce a significant emotion, feeling, or mental state allegedly caused by defendant’s conduct.

(*Robinson v. Jones Lang LaSalle Americas, Inc.*, 3:12-CV-00127-PK, 2012 WL 3763545 (D. Or., Aug. 29, 2012) (granting motion to compel based on this language).)

Accordingly, when drafting discovery requests for social media, one should carefully craft the requests to avoid unnecessary objections or motion practice. Likewise, when responding to discovery requests concerning social media, consider challenging overbroad requests, while keeping in mind that there is no overarching right to privacy in any social media post.

5. Authenticating for Trial

Obtaining (and producing) discovery of social media is only the first step. Additional challenges arise when attempting to get the data admitted into evidence for trial. In particular, the “social” part of social media often means that anyone can post, often anonymously, which makes authentication difficult. (*See People v. Ulloa*, No. B223203, 2011 WL 3131022 (Cal. Ct. App. June 22, 2011) (unpublished), *review denied* (Aug. 31, 2011) (holding that, although it was harmless error, the trial court erred by admitting a MySpace photograph without authenticating it).)

Some courts have resorted to creative and interesting ways of dealing with authentication. In *Barnes v. CUS Nashville, LLC*, 3:09-CV-00764, 2010 WL 2265668 (M.D.

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Tenn. June 3, 2010), the Magistrate Judge stated that he could “create a Facebook account” and then if the witnesses would “accept the Magistrate Judge as a ‘friend’ on Facebook for the sole purpose of reviewing photographs and related comments in camera, he [would] promptly review and disseminate any relevant information to the parties.” (*Id.*) A more likely solution will be to offer metadata to authenticate social media data. (*See, e.g., Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 547-48 (D. Md. 2007) (“Because metadata shows the date, time and identity of the creator of an electronic record, as well as all changes made to it, metadata is a distinctive characteristic of all electronic evidence that can be used to authenticate it under Rule 901(b)(4)” but cautioning that “[a]lthough specific source code markers that constitute metadata can provide a useful method of authenticating electronically stored evidence, this method is not foolproof.”).)

So, while there is always the possibility that your client will be assigned to the rare judge who will be “Facebook Friends” with your witnesses, the most sound method of ensuring that documents can be authenticated, as noted in Section 2, *supra*, is to plan ahead for retention, storage, and

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collection of social media by implementing a social media retention policy.

6. Keeping up with Social Media

To ensure that your clients are prepared when social media discovery becomes an issue, the most important thing you can do is to recommend *now* that clients update their retention policies and litigation hold notices to include social media. Of course, we all have to keep in mind that social media technology and the law surrounding it changes constantly. In order to stay current with the latest decisions, I recommend subscribing to e-discovery blogs and newsletters. Below are a few recommended sources:

- The Electronic Data Discovery Resource Center, Law.com, available at http://www.law.com/jsp/lawtechnologynews/e_discovery.jsp, where you can sign up for their “E-Discovery & Compliance Alert” email list.
- Kroll Case Law Update & E-Discovery News, available at <http://www.krollontrack.com/resource-library/email-updates/>, where you can sign up for Kroll’s “E-discovery Rediscovered” newsletter featuring the latest in e-discovery developments, as well as a “Top 5 Case Summaries” email featuring summaries of judicial opinions relating to e-discovery.
- The “E-Discovery 2.0” Blog, available at <http://www.clearwellsystems.com/e-discovery-blog/>, an interesting blog written by “a group of e-discovery geeks.”
- The “Blog Law Blog,” available at <http://bloglawblog.com/blog/>, a blog about, as the name implies, blog law, written by law professor Eric E. Johnson. You can also follow Professor Johnson on Twitter - @tweetlawtweets.

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