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Panel Discussion: Money Laundering, Cybercrime and Currency Manipulations

Authors

Michael Gordon, James E. Roselle, Charles Blau, Charles J. Muller, Rodrigo Labardini, and Carlos Loperena Ruiz

PANEL DISCUSSION: MONEY LAUNDERING, CYBERCRIME AND CURRENCY MANIPULATIONS

MODERATOR: PROF. MICHAEL GORDON*

PANELISTS: JAMES E. ROSELLE, CHARLES BLAU,
CHARLES J. MULLER, LIC. RODRIGO LABARDINI,
LIC. CARLOS LOPERENA RUIZ**

GORDON: We are going to analyze some hypothetical situations in an attempt to determine some of the obligations of attorneys in these situations. These hypothetical situations involve Gonzalez y Fernandez, a ten-member law firm located in Polanco in Mexico City. Their clients are a mix of Mexican and foreign individuals and business entities. Some of the partners have held government positions and the firm prides itself on its connections with government officials. Gonzalez y Fernandez has a contractual "relationship" with Smith & Ramsey, a law firm that has offices in Dallas and Miami. The relationship includes some revenue sharing of the proceeds from both law and consulting activities.

ISSUE #1: The Gonzalez y Fernandez firm represents numerous Mexicans who have established bank accounts in Europe and the United States. These accounts are used to deposit checks and electronic funds the law firm's clients receive from foreign business. For example, Juan Sanchez in Monterrey has a successful firm that exports to many countries, including the U.S. and countries in Europe. For European sales, he bills buyers in their currency and often gives directions to send the checks or electronic transfers to Gonzalez y Fernandez, which in turn sends them to U.S. banks. For U.S. sales, he bills buyers in U.S. dollars and often gives directions to send the checks and electronic transfers to Smith & Ramsey, which in turn sends them to European banks. The law firms receive three percent of the value of the checks as their fee.

Do any of these practices of Gonzalez y Fernandez raise possible violation by their clients of Mexican or U.S. law? Should they be aware that these types of transactions may be close to being considered illegal activities or indeed perhaps already constitute illegal activities?

ROSELLE: Let me discuss some of what should be done in the U.S. That will help to illustrate the kind of risk that the law firm may be taking on.

U.S. banks have been subject to the Bank Secrecy Act¹ for many years going back to the 1970's, and it requires four key things. First, they have to collect information about currency transactions and deposits in excess of \$10,000.² Second, they have to file Suspicious Activity Reports (SAR's) if they form a suspicion that there might be an illegal activity involved in any of the accounts.³ Third, they have to develop and maintain compliance programs for the Bank Secrecy Act.⁴ These programs may include policies and procedures, compliance officers, employee training, audit

* A summary of the background of each of the participants in this panel discussion follows the last page.

** The comments by Mr. Roselle in this panel discussion are his personal opinions and do not reflect the view of Bank One.

1. Bank Secrecy Act, 12 U.S.C.S. §§ 1730d, 1829b, 1951-1959; 18 U.S.C.S. § 6002; 31 U.S.C.S. §§ 321, 5311-5314, 5316-5322 (Law Co-op. 2003).

2. 31 U.S.C.S. § 5313.

3. 31 U.S.C.S. § 5318(g).

4. 31 U.S.C.S. § 5318(h).

testing, and things of that sort.⁵ Fourth, they have to check against the list kept by the Office of Foreign Assets Control in the Department of the Treasury and other government lists.⁶

The law firm will need to set up a bank account in the U.S. and to do that, particularly under the Patriot Act⁷ as it is now, it will need to provide a fair amount of information. At a minimum, it will need to indicate what the account is to be used for and who are the beneficial owners of the money in the account.⁸ To the extent that it is willing to act as a conduit for these payments from customers of the Mexican company, the law firm is putting itself at risk in setting up bank accounts and funneling money through it. The bank should first ask why it is appropriate or important for the law firm to set up this account rather than for the account to be opened in the name of the company itself.

When the bank receives this information from the law firm, it needs to keep those records for a minimum of five years under proposed Patriot Act regulations.⁹ Additionally, it will need to have a fair amount of information about the usage of the account.¹⁰ These are all issues that the law firm ought to be particularly concerned about when they set up a bank account.

BLAU: The purpose of the Bank Secrecy Act¹¹ is simply a records keeping statute which requires the tracking of certain cash transactions, usually above \$10,000. There are four required forms. First, if you deposit or withdraw cash of \$10,000 or more from an account in a bank or other defined financial institution, that bank is required to file a Form 4789¹² which identifies the owner, the real party-in-interest in the account, and even identifies the types of currency bills that are involved in the transaction. The second important form is Form 4790¹³ which requires you to report to the U.S. Customs Services if you take money into or out of the U.S. in excess of \$10,000.¹⁴

In 1984, Congress passed Internal Revenue Service Code §60501¹⁵ that essentially picked up this bookkeeping regulatory theme and required all trades or businesses in the U.S. that take in cash of above \$10,000 to file IRS Form 8300.¹⁶

The final major form under the rubric of Title 31 record keeping scheme requires that if you maintain a foreign bank account in some jurisdiction other than the U.S. with a certain amount of currency activity in that account, you must file an FBAR

5. *Id.*

6. 31 U.S.C.S. § 5318(D)(2)(C).

7. USA PATRIOT Act. The term "USA PATRIOT Act" means the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

8. USA Patriot Act, § 312; 31 U.S.C. § 5318(i).

9. USA Patriot Act § 312; 31 U.S.C. 5318(i).

10. *Id.*

11. Bank Secrecy Act, 12 U.S.C.S. §§ 1730d, 1829b, 1951-1959; 18 U.S.C.S. § 6002; 31 U.S.C.S. §§ 321, 5311-5314, 5316-5322 (Law Co-op. 2003).

12. IRS Form 4789, Currency Transaction Report.

13. Customs Form 4790, Report of International Transportation of Currency or Monetary Instruments.

14. 31 U.S.C. § 5316.

15. 26 U.S.C.S. §60501 (Law Co-op. 2003).

16. FinCEN Form 8300, Report of Cash Payment over \$10,000 received in a Trade or Business.

form identifying the currency transactions, locations of the bank, and the real parties-in-interest regardless of the ownership of the monies in the account.¹⁷

The overall intent of the government is to create records of large cash transactions with the principal idea that a lot of large cash transactions may be in some part associated with illicit activity. The U.S. bank or the U.S. law firm that receives these monies from Mexico, assuming the monies are over \$10,000, would be required, under I.R.C. §6050I to file Form 8300, identify itself, identify whose money it is, and provide any other information the Treasury requires on the form. This can be an extensive process.

There are also new statutes that will effect this situation. For example, in the Patriot Act, an entity could be charged with operating an unregulated currency transmission business, which now carries a five-year felony penalty.¹⁸ By conducting currency transactions on behalf of their clients the law firm could find itself being treated as an unregulated financial institution and having criminal exposure for five years for moving money for 3 percent. A law firm should never put itself in this position. Likewise the lawyers involved in these transactions are also at risk.

MULLER: There are many statutes that are implicated in this hypothetical. Although we do not have all the details, this is a fact pattern that is very similar to *United States v. Klein*. The hypothetical states in short that the proceeds of U.S. sales by a Mexican national are being transmitted through Smith & Ramsey to European banks.

First of all, is U.S. taxation involved? If so, a statute that could be implicated is the Conspiracy Statute, which makes it a crime to conspire to impede and impair governmental functions.¹⁹ If the structuring of these deals is to impede and impair administration of governmental functions in the U.S., it may be a violation of the Conspiracy Statute.²⁰

GORDON: How could this information be used against the law firms?

MULLER: It would be evidentiary. It would not be an element of the offense under a Conspiracy Statute.

Another statute that may be implicated is 18 U.S.C. § 1001, which is normally only associated with false statement, but also applies to schemes and artifices to defraud.²¹ It can also involve the money-laundering statute.²² If you have an underlying tax violation or an attempt to evade tax or to file false tax returns, that becomes one of the specific violations which then becomes a money-laundering violation.²³ Whenever you see this sort of structuring you need to understand that in the U.S. there are a myriad of statutes that can be used or which might be violated.

GORDON: Can you briefly explain the Patriot Act?²⁴

17. 31 USC §5314.

18. USA Patriot Act § 373; 18 U.S.C. §1960(a).

19. 18 U.S.C. § 371, ch. 19 Conspiracy (Law Co-op 2003).

20. *Id.*

21. 18 U.S.C. § 1001, Ch. 47 Fraud and False Statements (Law Co-op. 2003).

22. Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-1957 (1986).

23. *Id.*

24. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

ROSELLE: It is a very broad statute with a long history. It started out in the 1970's with the Bank Secrecy Act that was amended in the 1980's. In the mid-to-late 1990s there were a number of attempts to put in place some additional statutes to tighten up the reporting and other aspects to gain better control of the money-laundering issue. Those efforts largely failed until 9/11 changed the landscape. Within a month to a month and a half after 9/11, the Patriot Act was passed.

The Patriot Act does a number of different things. First of all it extends the Bank Secrecy Act and in many ways and tightens it up. It requires a large number of financial institutions in the U.S. to establish compliance programs to prevent money laundering.²⁵ Whereas the Bank Secrecy Act originally only covered banks, the Patriot Act now extends that kind of coverage to mutual funds, broker-dealers, insurance companies, and a host of other entities that are considered to be financial institutions for various purposes.²⁶

The Patriot Act also expanded the criminal statutes to add additional money-laundering offenses to include activities that may involve bribes of foreign public officials,²⁷ foreign banks that may be involved in money-laundering schemes,²⁸ illegal money transmitting operations,²⁹ and various other things. It also made a number of jurisdictional changes. It established long-arm jurisdiction to go after money launderers anywhere in the world, even outside the U.S.³⁰ It expanded forfeiture provisions to permit bank accounts of foreign persons or even correspondent banks that have accounts in the U.S. to be subject to forfeiture if the government questions their involvement in money laundering.³¹

The Patriot Act adds to the complexity of trying to deal with money laundering and by adding an overlay of terrorism regulation. Historically, money-laundering statutes were created to prosecute organized crime or drug dealing. Terrorism adds a very new element because terrorists are typically not interested in moving large amounts of money for the sake of gaining or shielding the money. They are interested in moving to support their terrorist activities. This involves a very different pattern of activity.

BLAU: I have a different view of the Patriot Act.³² I think it was a compilation of items on the wish lists of the Justice and Treasury Departments that would never be passed in any normal setting. The legislative history of the Act lacks any explanation or history.³³ It is a major extension of the Bank Secrecy Act.³⁴ About 90 percent of that Act deals with banks and the manner in which currency is financially handled. With a long arm of U.S. law, it drafts foreign banks, correspondent banks, and that sort of entity into the regulatory process of finding

25. USA Patriot Act §§ 311-312; 31 U.S.C.S. § 5318.

26. USA Patriot Act § 321; 31 U.S.C.S. § 5312(2)(E).

27. USA Patriot Act § 315; 18 U.S.C.S. § 1956(c)(7)(1)(C)(iv).

28. USA Patriot Act § 318; 18 U.S.C.S. § 1956(c)(6); The Act amends the definition of "financial institution" to include any institution described under 31 U.S.C. § 5312(a)(2) or any foreign bank described in 12 U.S.C. § 3101(7).

29. USA Patriot Act § 373; 18 U.S.C.S. § 1960.

30. USA Patriot Act § 377; 18 U.S.C.S. § 1029.

31. USA Patriot Act § 319; 18 U.S.C.S. § 981(k)(1).

32. USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

33. See H.R. REP. NO. 107-3162 (2001).

34. Bank Secrecy Act, 12 U.S.C.S. §§ 1730d, 1829b, 1951-1959; 18 U.S.C.S. § 6002; 31 U.S.C.S. §§ 321, 5311-5314, 5316-5322 (1970).

and maintaining information on their clients.³⁵ Indeed U.S. banks are going to be held to a much higher standard in the next six months as to the type of information they gather on each one of us as clients of the financial institution and how long they must keep it. There are many things in this Bill which are there because of 9/11 or the incidents following 9/11.

GORDON: Lic. Loperena Ruiz and Lic. Labardini, does Mexican law impose any similar concerns upon the law firm members?

LABARDINI: Why would the law firm be willing to receive money from a client in this fashion? It is a mixture of representation of clients and participating in a business enterprise with the clients. The fact that the law firm is receiving a fee for the transaction leads you to conclude that it is conducting some kind of financial intermediary activity. It is not quite clear. According to the *Ley General de Organizaciones de y Actividades Auxiliares del Crédito*,³⁶ the General Act for Organizations and Auxiliary Activities of Credit, it would be unregulated because it receives money from the general public. That is not quite the same as our case because they receive money from the clients themselves, but in a way it is an "intermediate financial activity." In principle it would be violating this law. The law firm is a direct commercial agent because it is receiving the money on behalf of its own client and depositing it into its own account.

In the second question, the three percent is presented as a fee for the presentation. That seems to implicate that the whole scheme is criminal. Is there a criminal activity that is not shown in the hypothetical? The way this scheme works reminds me of the black market peso exchange system that was developed by money launderers from Colombia vis-à-vis the U.S. The drug traffickers want to launder the money but they do not send it to Colombia. Instead, the drug trafficker contacts a local individual who wants to buy a refrigerator or a dishwasher or some other appliance. The drug trafficker will purchase the appliance with the illicit proceeds in the U.S. and the local individual will receive his item in Colombia. At the same time the local individual gives his money to the trafficker. Those activities were considered intermediate financial activities, so there may be similarities.

There are many things that are troublesome, and it seems that this law firm would not be very bright if it acted in this manner.

LOPERENA RUIZ: I question whether it is really a financial intermediary. The question is whether the law firm acts in this manner in isolated cases, one or two occasions, or is acting as an intermediary on a regular basis? How many times and how often has it acted this way? Sometimes it is not easy to define when someone or something is acting as a financial intermediary. Because I am a law practitioner, I would try to look for the favorable point of view to the law firm. However, I would not recommend that the firm act in this fashion. A firm that is being accused of money laundering would have to show that the money was not derived from illicit activity, that these transactions were only done on some occasions, and that and it is not a regular business practice nor the main purpose of the firm. To withhold the fee is not the best way to charge. I prefer to issue an invoice and receive a check or

35. USA Patriot Act § 377; U.S.C.S. §1029; and USA Patriot Act § 311; 31 U.S.C.S. §5318(a).

36. The General Act for Organizations and Auxiliary Activities of Credit (*Ley General de Organizaciones de y Actividades Auxiliares del Crédito*) D.O., Jan. 6, 2001. Available through <http://www.cddhcu.gob.mx/leyinfo/> (last visited March 23, 2003).

wire transfer with the specific fee and with the value-added tax included on the invoice. This makes the transaction very transparent and very clear and leaves no room for interpretation. It is better to be very clear to begin with and not need to provide any description later.

Regarding criminal accusations, it is not easy in this case because the behavior has to be described perfectly in the statute to be considered a criminal offense.

MULLER: The U.S. law has a willful blindness standard. For example, if it were to turn out that the products that Juan Sanchez was exporting were perhaps falsely classified or perhaps contraband, and the law firm was involved in this sort of structuring, the controlling precedent would be *United States v. Jewell*.³⁷ This is the lead case for what I refer to as the “load car” cases. We as lawyers do not want to be caught driving the load car, so to speak. That case involved someone using a defense that he had driven a car across the border without knowledge that the car actually had contraband in it. However, the driver was aware that the car had secret panels and that it sat low on the ground when it was loaded. What happens in those contexts and would, in my opinion readily apply to a law firm in this position is the application of the willful blindness test. Under the willful blindness test, the jury is charged to find that if you close your eyes to facts that should have alerted you, you can be convicted of having the requisite knowledge.

BLAU: I assure you that the average customs agent would be looking at this situation and asking, “Why are they doing this? Why are they involved? What is this three percent business? If this is such a clean transaction, why is it going through the law firm’s trust account or the law firm account? Why is it not coming directly from the businesses?” When you start asking those types of questions it is not difficult to connect the action to the proceeds themselves. This puts the burden upon the sender (i.e. the law firm, the real parties in interest, or the owners of the money) to explain why these are non-criminal proceeds. All of these statutes have forfeiture provisions attached to them with big teeth, and any time you are in one of these “black peso exchange” scenarios the usual response from U.S. Customs is to seize the money and make you defend. Not only does the law firm run the risk of being indicted or being viewed criminally, it also may have to explain to its clients why their money is suddenly frozen in the U.S.

ROSELLE: Let me just add another point. It is virtually certain that the bank where their account is located in the U.S. is going to have to file a Suspicious Activity Report (SAR) based on that type of account activity.³⁸ Let me just give you one recent example. Great Eastern Bank of Florida in Miami was fined \$100,000 by the Treasury Department for failure to file a SAR in a fact situation fairly similar to this hypothetical.³⁹ They received over \$900,000 in 29 wire transfers from a foreign company and most of the money was wired out the next day to the customer’s account at another bank. That kind of activity leads the bank to file a suspicious activity report or risk prosecution for not doing so. What happens after the report is filed remains to be seen; they are not always acted on quickly. The law firm is

37. *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976), cert. denied, 426 U.S. 951, 96 S.Ct. 3173 (1976).
38. 31 U.S.C. § 5318(g).

39. Department of Treasury, Financial Crimes Enforcement Network, Assessment of Civil Money Penalty, Case No. 2002-02, available at <http://www.fincen.gov/geassessfinal.pdf> (last visited April 6, 2003).

going to be at risk that someone at FinCEN⁴⁰ or in the U.S. Attorney's office will get a referral and will start investigating.

LOPERENA RUIZ: In Mexico we do not have escrow accounts. I know that it is common in the U.S. for law firms have a separate account for funds belonging to the clients,⁴¹ but not in Mexico. Under the Mexican tax law, all money, that is all income goes into bank accounts and is presumed to be taxable income.⁴² The law firm runs the risk of tax authorities auditing the firm and finding large amounts of taxable money. The firm would have to prove that all these proceeds are not legal fees, and thus not taxable. The law firm would face practical problems in receiving other people's money, even if the money is only in the account fifteen minutes.

GORDON: The second and third issues bring into play the *casas de cambio*, currency exchange businesses, that have been in the news a great deal because of the amounts of money that poor Mexican workers in the U.S. have been charged to wire money transfers back to their families in Mexico.

ISSUE #2: Over the past several years Mexicans with whom Gonzales y Fernandez had never dealt with previously have wired large amounts of money from their correspondent bank accounts in a U.S. bank to the law firm in Mexico. The latter receives the same amounts, less some fees, from a Mexican *casa de cambio*. The Mexicans have asked the firm to immediately transfer the money to accounts in Miami and Zurich. The money goes into the firm's escrow account and some accounts of the firm's partners. The law firms receive three percent of the value of the currency. One of the Mexican clients was killed last week in Tijuana in a shoot-out with Mexican and U.S. drug enforcement officials.

Should the law firm be suspicious of any of the requests of these new clients? Is the law firm itself at risk of violating any laws?

ISSUE #3: Gonzalez y Fernandez has been concerned with the fees received by the *casa de cambio* in the above transaction and have established their own *casa de cambio*. They have now discovered a way to make very substantial amounts of money, by offering its services to the millions of Mexican migrants working in the U.S. and wishing to send needed money home to their families. The fees are small compared to those in the situation above, but there are many small fees that amount to great profits. The fees do not seem so small to the Mexican migrant laborers, often amounting to 20-30 percent of the amount wired.

Is the *case de cambio* violating any laws?

40. Financial Crimes Enforcement Network, United States Department of the Treasury. The mission of the Financial Crimes Enforcement Network (FinCEN) is to support law enforcement investigative efforts and foster interagency and global cooperation against domestic and international financial crimes; and to provide U.S. policy makers with strategic analyses of domestic and worldwide money laundering developments, trends and patterns. FinCEN works toward those ends through information collection, analysis and sharing, as well as technological assistance and innovative, cost-effective implementation of the Bank Secrecy Act and other Treasury authorities. Available at <http://www.fincen.gov/> (last visited Mar. 26, 2003).

41. See MODEL RULES OF PROF'L CONDUCT DR 9-102 (2003).

42. *Ley del Impuesto Sobre la Renta* D.O., Jan. 24, 2002. Available through <http://www.cddhcu.gob.mx/leyinfo/> (last visited April 6, 2003).

LABARDINI: I imagine the client in Issue #2 was not a bystander. The hypothetical seems to implicate that the client did not get killed in direct confrontation with a DEA agent.

GORDON: We will assume that it was an accurate shooting.

LABARDINI: I would be a little worried and I would ask the following questions: Who was he? What happened? What was he doing? As you read further into the hypothetical you realize that Gonzales y Fernandez is really leaving the law firm aside and becoming new entrepreneurs in other fields that are apparently not clean and not very transparent.

Similar to the U.S., Mexico has SAR's, but those are applicable only to financial institutions.⁴³ We have covered almost all the financial sectors in Mexico with this SAR, but it is not yet applicable to professions in Mexico. There is a draft law that attempts to make lawyers and accountants into something similar to gatekeepers. Under the proposed law they would need to file their own SAR in the future.

I would imagine that this firm is violating its own charter of incorporation by not adhering to the corporate purpose of providing legal assistance. The law firm should be suspicious of any of the requests where the money comes from the U.S. and is then being entrusted to them to send back to the U.S. or to Zurich.

With regard to the 20-30 percent, there is a minimum or a maximum fee that they can impose. The law of the land regulates a *casa de cambio*, so I would imagine that the 20-30 percent fee is acceptable. However, they are diverting their focus as a law firm to that of a financial institution. This is not a good step.

BLAU: With respect to the money laundering, I believe that there are two or three issues. First of all, the Money-Laundering Statute⁴⁴ will be implicated in the transfer of illicit funds from Mexico to Miami through this mechanism. Second, these *casas de cambio* are either regulated or unregulated. If it is a non-regulated *casa de cambio*, they violate the Patriot Act⁴⁵ which carries a five-year felony to operate a currency exchange business in an unregulated fashion. Third, any of the illicit proceeds that end up in Miami are subject to forfeiture.⁴⁶ Fourth, the law firm in Mexico may be viewed as aiding and abetting or co-conspiring with these drug dealers.⁴⁷ Most federal agents would certainly take a cold, hard look at that issue to determine whether the law firm itself was an innocent bystander or part of the conspiracy to launder drug money.

MULLER: You are required to make these reports. For example, if you are a regulated financial institution, you are required to file your suspicious transaction reports (STR's), or if you are a business you file Form 8300.⁴⁸ However, the filing of those forms does not excuse you from possible criminal activity and may be evidence. If these are in fact the proceeds of unlawful activity, and you file a report, it will simply be prosecutorial discretion that determines whether or not your report will be used as evidence against you.

43. Financial Institutions Law (*Ley Federal de Instituciones de Finanzas*) D.O., Dec. 29, 1950. Available through <http://www.cddhcu.gob.mx/leyinfo/> (last visited April 6, 2003).

44. 18 USC 1956.

45. USA Patriot Act § 373; 18 U.S.C.S. § 1960.

46. USA Patriot Act § 319; 18 U.S.C. § 981

47. See: 18 U.S.C.S. § 371, ch. 19 Conspiracy (Law Co-op 2003).

48. FinCEN Form 8300, Report of Cash Payment over \$10,000 received in a Trade or Business.

LOPERENA RUIZ: They say in financial institutions “KYC,” that is “know your customer” or “know your client.” This rule applies to law firms, not only in circumstances of money laundering or suspicious activities but in any kind of professional practice. I never receive a client who is unknown to me. First, I ask who recommended me to them. If their response is that they saw my name in a legal directory, or referred to the Mexican Bar Association, or they were passing in front of my business and contacted me as a result, I simply tell them that I cannot take their case. I tell them that I do not want to know what their case is and that I will not receive them as a client. I know that there are lawyers who advertise in the newspapers, mainly here in the U.S., and will receive any kind of clients. However, my advice and my practice is not to receive a client who I do not know and has not been adequately referred. It may be that the opposing party has sent somebody to my firm to try to determine how I operate, how I resolve cases, how I handle specific matters, how I charge, where my files are located, the location of my archives and any other type of information. As a result, I do not take cases from unknown people, not because of illegal activities, but just as a matter of strategy in my firm.

BLAU: How many people take cash from clients? This is a very interesting question for a law firm. In my practice, I have had people place bags of cash on the desk for various criminal defenses. I used to get quite concerned about it until we established a policy in the firm to not take any cash. We made clients get cashier’s checks; but we found that in certain circumstances they structured the money to avoid the reporting requirement and brought the cashier’s checks back to us. It was almost as dangerous to tell them that any cash payment would have to be reported and to inform them of the reporting requirement. You are always at risk in a scenario where the government could say that you told them how to structure the transaction to avoid a reporting requirement and put yourself in the middle of a criminal act. I have now come 180 degrees. With the I.R.C. §6050I⁴⁹ requirements and Form 8300,⁵⁰ we will take the cash, report it, and tell them that we are going to report it. This is a big issue and there are attorneys that have been indicted for failing to comply.

MULLER: For a while in the U.S. some lawyers did not want to reveal the identity of their clients when they filed their reports. They would report the identity of the law firm, the amount of the transaction, the numbers of bills, but would claim privilege with respect to the identity of the client on the theory that this was the last link in a chain of evidence. For example, maybe the client was someone already under investigation by the IRS or by the federal government. To reveal their name and the fact that they had made a large currency deposit with the law firm or payment to the law firm would be a link in the chain of evidence. As a result, they would assert Fifth Amendment privilege.⁵¹ There is some case law that gives a very limited upholding of that exception, although it is strictly applied.⁵² The law firm could find itself under a civil penalty from the Internal Revenue Service. The

49. 26 U.S.C.S. §6050I (Law Co-op 2003).

50. FinCEN Form 8300, Report of Cash Payment over \$10,000 received in a Trade or Business.

51. U.S. CONST. Amend. V.

52. *United States v. Gertner*, 873 F. Supp. 729; *United States v. Sindel*, 53 F.3d 874; *But see United States v. Goldberger & Dubin P.C.*, 91-2 USTCP 50315.

amount of the penalty for a willful violation of failure to completely and fully report these transactions is the greater of \$25,000 or the amount involved in the transaction.⁵³ In effect, if you have a \$10,000.01 transaction that you do not report, the penalty is \$25,000. If it is a \$100,000 transaction, the penalty is \$100,000. In addition, subject to an additional ten percent penalty, you have to file a report with the client before January 31st of the following year indicating to the client that you have made these reports to the federal government. Clearly, there are a great deal of civil penalties in addition to the criminal enforcement that goes along with a I.R.C. §6050I business transaction report.

BLAU: However, the majority of the U.S. Federal case law goes the other way. This case law states that the identity of a client is not privileged.⁵⁴ The lawyer loses. All the reported cases, with the exception of one or two go against the lawyers on that issue.⁵⁵

ROSELLE: For lawyers, reporting includes receipt of cash and things of that nature. What lawyers have not been subject to so far, in the U.S. at least, is the need to report suspicious activities or suspicions that their clients are engaged in illegal activity. Clearly in this hypothetical the issue is not attorney-client privilege. They are really engaging in facilitating a business transaction. There is a movement towards requiring lawyers engaged in business transactions or facilitating them, to report suspicious activities of their clients. Although not the case in the U.S., the Financial Action Task Force (FATF),⁵⁶ which is a group of 29 countries⁵⁷ and two international organizations⁵⁸ that is part of the Organization for Economic Cooperation and Development (OECD),⁵⁹ is studying financial crimes and ways to combat them. The FATF released a position paper at the end of May, 2002 that, among other things, addresses the so-called "gatekeeper issue."⁶⁰ It suggests that lawyers and other professionals, including accountants, should, under various circumstances when engaged in facilitating financial transactions, have to report their suspicions. It requires them to develop compliance programs to guard against the lawyer facilitating illegal activity. It also proposes that lawyers may have to report, either to the bar association, a Non-Governmental Organization (NGO) or to a law enforcement organization. There may also be a suggested prohibition against a lawyer tipping off his client. This has been the law for about seven or eight years now in the United Kingdom. In the last couple of months there was the first reported case of a lawyer pleading guilty and going to jail for six months for failing to report suspicious activity on the part of his client. The lawyer was not involved in any illegal activity himself; he simply did not report his suspicions. The

53. 26 U.S.C.S. § 6721(e).

54. *In re Grand Jury Proceedings*, 680 F. 2d 1026, 1027 (5th Cir. 1982).

55. *In re Grand Jury Proceedings*, 517 F.2d 666, 674 (5th Cir. 1975).

56. Financial Action Task Force on Money Laundering, at <http://www.fatf-gafi.org/> (last visited Mar. 2, 2003).

57. Argentina, Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Italy, Japan, Luxembourg, Mexico, the Kingdom of the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

58. The European Commission and the Gulf Cooperation Council.

59. Organization for Economic Cooperation and Development, at <http://www.oecd.org/> (last visited Mar. 2, 2003).

60. The Forty Recommendations, FATF, Recommendation 9, at <http://www.fatf-gafi.org/> (last visited Mar. 2, 2003).

European Union (E.U.) just adopted its second money-laundering directive, which proposes that each country in the E.U. adopt laws that would require lawyers to report as well.⁶¹ The U.S. government is considering whether to adopt this as part of its law. There is no proposal and there is no U.S. government position at the moment, but if the FATF recommendation is finalized, the ground swell may move to the U.S. As lawyers, not only should we develop and implement the appropriate kinds of compliance programs and client due diligence now, but at least we should be aware that on the horizon, our client relationship could be impacted by a need or requirement to report suspicious activity under these circumstances.

MULLER: What is really outrageous is that the amounts you receive for your fee are forfeitable. If you receive these suspicious transactions into your law firm, there is a U.S. Supreme Court case, *Caplin & Drysdale*⁶² that states that if the funds are in fact paid to you under a situation where you have at least some notice that they are the proceeds of unlawful activity, they are forfeitable and they may be forfeitable against substitute proceeds if you used them for legal fees. You may have an innocent purchaser defense otherwise. Not only are you reporting the activity, but you have also received potentially forfeitable fees. That compounds the problem.

BLAU: This idea that lawyers would have to report their suspicions has sort of worked its way into the Sarbanes-Oxley Act⁶³ in the securities areas. In the last three or four years, it has brought home over and over again how important the attorney-client privilege is and how important it is to make sure that you are operating under the privilege. In other words, you need to make sure that you are not having non-legal discussions about business transactions that could take these discussions outside of the privileged communications that you have with your client. I can see how any kind of communications connected with the hypothetical transactions involving the three percent "fee" can be taken out of an attorney-client privilege and cause everything to be discoverable.

One other practical point: over the last five years because of these currency transactions changes in U.S. law, I never meet clients alone. I will always have another person in the room with me to talk to a client. I also make a confidential memo to the file of any kind of communications with the client. In this area, where people are talking about movement of funds or how to structure transactions or how to move money, these discussions can be easily misinterpreted by the government. The best way to look at it is that the attorney can tell a client what the law requires, but can never advise how to avoid it.

MULLER: There is an administrative exception concerning the forfeitability of the amounts received by the attorneys. The Department of Justice (DOJ) has published guidelines that state that if I receive a fee from a client who is a criminal or possibly under criminal investigation, but I do not otherwise, other than through communications with my client, discuss the origin of the fees, the exception applies to fees in those circumstances.⁶⁴ Where a high-profile lawyer has a big forfeiture

61. European Union, Proposal for a directive COM(1999) 352 final – Official Journal C 177 E, 27.06.2000, at <http://www.eurunion.org> (last visited April 6, 2003).

62. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 S.Ct. 2646 (1989).

63. Sarbanes-Oxley Act of 2002, Pub. L. No. 107, 116 Stat. 745 (Law Co-op 2002).

64. Department of Justice Criminal Resource Manual § 2316 Compelled Disclosure of Confidential Communication During the Course of the Representation.

case in a situation where the lawyer is already on public notice concerning the forfeitability of the fees, i.e. a pending forfeiture action against the client or a pending indictment, that DOJ policy does not apply. There is also another issue. If I learn of my client's criminal activity by virtue of his discussion with me, my fee will be protected and I will be entitled to innocent purchaser defenses, unless I have otherwise received notice of the forfeitability of the fees.

GORDON: This is an interesting area when you look at it from the perspective of professional responsibility and the long debate within the American Bar Association (ABA) about client privilege. It seems that these new developments will have a very big impact. I think this discussion is an extraordinarily important commentary on the issue and we will see major forces address some of the attorney-client privilege issues in the near future.

LABARDINI: I have a question in that respect. If by way of your conversation with the client, you learn about his criminal activities, would you then not be aiding and abetting, resulting in the need to report him at the same time?

BLAU: That is a very good question. Under the ethical canons that we operate in the U.S., if we come to the information that a client has committed a criminal act, we would not be required to report it.⁶⁵ If, on the other hand, the client says, "I'm going to commit a crime," then we do have an ethical obligation to tell the client to cease and desist or withdraw from the representation if he does not.⁶⁶ In Texas that rule has been modified where the offense involves possible death or serious bodily injury; then there is an affirmative obligation to report.⁶⁷

ROSELLE: Lawyers in the U.S are principally regulated by their state associations or state disciplinary commissions. There are about 38 or 40 states that permit disclosure in certain circumstances and about four states that may make it mandatory. There has been a real debate in the ABA over what is called Model Rule 1.6.⁶⁸ Last year, there were two proposals to amend that Model Rule. One proposal was to permit reporting where you believe your client is about to engage in a crime involving bodily harm or death. That proposal passed. Another proposal that would have permitted disclosure in the case of serious fraud did not pass. It may be up for reconsideration, but it certainly is not clear at this point that you really have the duty or the right to report financial crimes at the current time.

65. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

66. MODEL RULES OF PROF'L CONDUCT R. 1.6(b); See also MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

67. Tx. State Bar Rules, Art. 10 § 9, Rule 1.02(d); 1-3 Dorsaneo, *Texas Litigation Guide* §3.04: When a lawyer acquires confidential information "clearly establishing" that the client is likely to commit a fraudulent or criminal act that is likely to result in substantial injury to the financial interests or property of another, the lawyer must promptly make reasonable efforts under the circumstances to dissuade the client from committing the crime or fraud.

68. MODEL RULES OF PROF'L CONDUCT R. 1.6(a): CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

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

GORDON: We now turn to Issue # 4. For the purposes of this hypothetical, we will be giving the law firms a clean slate.

ISSUE #4: Members of the two law firms have recently met with Putin Rasputin, a Russian investor who has made enormous amounts of money in Russia by favorable purchases and resales of government-owned factories disposed of under Russia's privatization plan. In addition, Rasputin has made significant amounts of money by establishing and operating an offshore bank that does electronic banking and internet gaming. Persons wanting to play in the internet gaming operation are required to utilize the offshore bank. Rasputin has never been charged with any criminal violations. The lawyers want Rasputin to personally contribute and raise additional money to establish a combination casino, restaurant and hotel in Palm Springs, California. They convince Rasputin that there is much money to be made, because the lawyers know of ways to move many low-wage Mexican illegal immigrants from Mexico to California to staff the business. They disclose to Rasputin that they have already been doing that on a smaller scale with some motels that the lawyers jointly own. Those hotels are owned and controlled from a corporation the lawyers jointly own in the Cayman Islands. Rasputin is a little concerned about the plans because he has never knowingly violated any laws and does not wish to place any of his other investments at risk, much less face criminal charges. He wonders if he should talk to some other lawyers in the U.S. and what they might say about the plans.

What would you advise Rasputin to do? Should he associate with the two law firms? Are any of Rasputin's proposed activities likely to violate Mexican or U.S. laws?

LOPERANA RUIZ: It is incredible that a Mexican law firm would engage in these types of activities. Concerning the question, what would you advise Rasputin to do? Should he associate with the two law firms? The answer is no.

GORDON: Are any Mexican laws violated by any of the proposals that he makes?

LABARDINI: The first thing that comes to mind is from the conversation on organized crime requiring three or more people trying to do something.⁶⁹ In this case the organized crime would be trafficking of migrants from Mexico to California. While the Mexicans are legally leaving Mexico, almost by definition, they are entering the U.S. as illegal aliens. It would then also be a crime in Mexico. In the U.S. it would definitely be a crime because not only are they being brought in the U.S., but they are being knowingly employed. Therefore, I would imagine it implicates several statutes both in Mexico and the U.S. In Mexico it may implicate the organized crime statute because they are trying to organize the trafficking of migrants, to say the least.⁷⁰

Another factor to take into consideration is whether the resale of government-owned factories is legal. Will Russian law allow Rasputin to actually purchase the companies from the Russian government in the first instance and, if so, is there a period of time in which he was prevented from doing so? In Mexico, public officials are not allowed to do business within the field they dealt with for at least a year. Sometimes they do not follow this rule, but in general try to. There could

69. *Codigo Penal Federal*, Libro Segundo, Titulo Tercero, Capitulo II, Articulo 164.

70. *Id.*

be some form of foreign corruption under 222 bis⁷¹ or the Foreign Corrupt Practices Act.⁷²

GORDON: What about U.S. law? Does the fact that these businesses, casinos, and restaurants seem to be businesses that frequently engage in cash transactions make any difference?

ROSELLE: If the offshore bank is a so-called shell bank that is in a bank secrecy jurisdiction, particularly if it is in a country that has been designated by the FATF as being a non-cooperating country, there is going to be a very high level of scrutiny. If it is a shell bank, it would be illegal for any bank in the U.S. to deal with it.⁷³ There are some real problems in setting up an off-shore bank of any kind and operating it, particularly if it is a shell bank.

Internet gaming is a difficult issue right now. Consider how an internet gaming operation is set up. Typically you set up a company or a bank in an off-shore jurisdiction. The gaming is conducted through the internet. People usually pay for the gaming with credit cards. Many courts in the U.S. refuse to enforce any sort of obligations on citizens to pay gaming debts. Credit card issuers are now building in screens that will screen out any internet gaming operation from access to their credit card system. As a result, there have been a number of class actions suits filed by people who have lost money in internet gaming operations against banks and others to try to get back some of the money they have lost. It is a highly risky operation and very suspect. Trying to operate either of these types of business can pose real problems.

BLAU: There is a case of the Second Circuit called *US v. Cohen*,⁷⁴ which upheld the conviction of an individual operating internet gaming platforms that were in an offshore jurisdiction. The issues for the DOJ have been whether it is an illegal activity and if so where does that activity legally take place. In short, it is illegal to make a bet in New York or New Jersey because it violates state law. But does it violate the law of the Cayman Islands or the Netherlands Antilles or any other offshore jurisdiction? Probably not. A number of states have filed civil actions against operators of offshore betting platforms. The DOJ has wrestled with this issue and with a decision on possible action. They are now tackling this issue and taking it seriously. In essence the DOJ is saying that under the current laws of the U.S., with the exception of maybe Nevada, offshore gaming is illegal under state and federal law.⁷⁵ Therefore, if you gain monetarily from an offshore jurisdiction, you commit a federal offense.

MULLER: Turning to the migrant's side of this hypothetical, there are at least two U.S. federal criminal statutes that would be violated. One would be transporting an illegal alien⁷⁶ and the other aiding and assisting an alien to elude detection.⁷⁷ A

71. Código Penal Federal, Libro Segundo, Título Decimo, Capítulo X, Artículo 222 bis.

72. Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in scattered sections of 15 U.S.C.).

73. USA Patriot Act § 313; 31 U.S.C. § 5318(j).

74. 260 F.3d 68, 2001 U.S. app. LEXIS 17000 (2d Cir. N.Y. 2001).

75. Department of Justice, Statement of John G. Malcolm, Deputy Assistant Attorney General Criminal Division, at the special briefing: Money Laundering and Payment of Systems in Online Gambling, November 20, 2002 at <http://www.usdoj.gov/criminal/cybercrime/> (last visited April 6, 2003).

76. 8 U.S.C.S. § 1324(a)(1)(A) (Law Co-op. 2003).

77. 8 U.S.C.S. § 1324(a)(1)(A)(v)(II) (Law Co-op. 2003).

conspiracy charge could be added under §371.⁷⁸ This is a conspiracy to violate federal law and to defraud the government. The law firm and Rasputin acting jointly with respect to the illegal immigrants would violate several U.S. federal criminal provisions and also implicate the aiding-and-assisting statute §2.⁷⁹

BLAU: It takes a great scheme and artifice to defraud under wire fraud or mail fraud. That is a starting point to go to the money-laundering statute.

MULLER: That was the interesting part. We were just trying to decide whether or not transporting aliens or an immigration violation would be a predicate act for money-laundering charges. Mr. Blau has just illustrated how a smart prosecutor would pursue the matter. He would find some use of the wire, the mails or the telephones and charge a wire fraud or a mail fraud. Those would then be predicate acts so that all the proceeds of this scheme for illegal immigration would then become money laundering as well.

GORDON: Issues #5 and #6 are somewhat related.

ISSUE #5: The new U.S. lawyers who helped Rasputin have a new client. It is a Mrs. Jones who lives on a boat currently anchored in Cozumel, off the coast of the State of Yucatan in Mexico. Her husband had flown back to the U.S. on business but his plane crashed in the Gulf and he was killed. She found papers on the boat that included a will. She inherited a great deal of money and the law firm helped her with the estate and in her investments. She has continued to live on the boat at Cozumel. One day she brought \$20,000 to the law firm to pay in cash since her husband also left considerable cash on the boat and in small house he owned on Cozumel. She was keeping the cash, estimated at \$500,000, in a safe in the house. She has insisted that the law firm not file reports in the U.S. about the cash payments. She is willing to have \$1,000 or even lesser amounts transferred to the law firm daily if it would help. She assures the lawyers that she does not know the source of the funds but that her husband was never involved in any wrongful activity, at least to her knowledge. After a few months of paying with cash, she mentioned that occasionally some rough looking men visited them while cruising and each time left some bags. She did not especially like the men. Her husband never told her who the men were, or what was in the bags. She never asked. She thinks the men were with her husband when the plane crashed. No bodies were ever recovered in the shark-infested waters off Cozumel, and she has never seen the men since.

What is your advise to Mrs. Jones? To the U.S. lawyers that represent her? Are there any disclosures that Mrs. Jones should make?

MULLER: If she just comes in and pays her legal charge the issue there is whether or not this is a reportable currency transaction. Under I.R.C. §6050I statute, two issues are raised.⁸⁰ First, I.R.C. §6050I covers business transactions, and clearly paying a law firm for its services is a business transaction. Next, a transaction can be exempted if it is a foreign transaction because only domestic business transactions are covered by I.R.C. §6050I.⁸¹ The key issue is whether this is an exempted foreign transaction. The suggestion is that this is a Mexican law firm and

78. 18 U.S.C. § 371, ch. 19 Conspiracy (Law Co-op 2003).

79. 18 U.S.C.S. §2 (Law Co-op 2003). *See also* United States v. Humberto Rosales-Lopez, 617 F.2d 1349 (9th Cir. 1980).

80. 26 U.S.C.S. § 6050I.

81. *Id.*

a Mexican-based transaction. She is going to the Mexican affiliate office and paying the currency entirely in Mexico. This would nonetheless be considered a domestic U.S. transaction because this was an estate for a U.S. citizen, where the estate was handled in the U.S., they were engaged in U.S.-based services and she is paying for U.S.-based services in Mexico in cash. This illustrates how this is a foreign currency transaction and is reportable by the law firm.

BLAU: We handle many financial transactions and deal with clients with these types of financial issues, although not exactly identical to this hypothetical. Another good practice point is to consider that where you have two opposing views, i.e. is it exempted or is it non-exempted, it is always prudent for the lawyer issuing an opinion concerning the reportability of a financial transaction to go outside the law firm for a second opinion. If somebody ever second guesses whether or not we were involved in some criminal activity, it should be clearly understood that before we issued the opinion we sought external legal advice as to whether our advice to the client was appropriate.

ROSELLE: This is also a classic structuring transaction in that she requested that she be able to pay them a thousand dollars a day. If the law firm permits that to be done, the law firm is just as subject to prosecution for aiding and abetting as she is herself.

MULLER: The I.R.C. §6050I requires the law firm to report related currency transactions.⁸² The lawyers can claim that it is not structuring if the lawyers report properly because she will bring in her thousand dollars a day and the law firm will then have to report the transaction every time it accumulates more than \$10,000.⁸³

The first \$12,000 would be a reportable transaction, and then the next time they got a total of \$10,000, they would have to report that again as well.⁸⁴

BLAU: Only if this law firm is subject to I.R.C. §6050I, and I would argue that they are not and therefore do not have any reporting responsibilities at all.

MULLER: Are you basing that on the fact that the transaction occurs in Mexico? Here you have services that are provided by U.S. lawyers who are not licensed to practice in Mexico. They could not have rendered legal services to this widow in Mexico for which they charged \$12,000. The services necessarily had to be U.S.-based legal services.

GORDON: In Issue #6 we have a person who actually wanted to do some good.

ISSUE #6: Mrs. Jones introduced the lawyers to a friend in Cozumel, the widow of the former CEO of a large U.S. corporation. She was quite wealthy and involved in numerous good things for children, from building schools to paying for college for Cozumel high school graduates. During her first visit to the firm she brought \$12,000 in cash to pay for the formation of a charitable corporation in the U.S. to help in one of her charitable projects. She hopes that she can convince friends in the U.S. to contribute and undertake even more charitable work in Cozumel. She also wants to contribute and undertake even more charitable work in Cozumel. She also wants to transfer \$35,000 in cash to the attorneys to pay for a boat she is purchasing in the U.S. to be used to transport school children from Cozumel to some better schools on the mainland.

82. *Id.*

83. *Id.*

84. *Id.*

What is your advice to Mrs. Jones' friend? To the U.S. lawyers that represent her? Are there any disclosures that Mrs. Jones' friend should make?

BLAU: If you take Mr. Muller's view that this is a reportable transaction, then the U.S. lawyers owe a form 8300⁸⁵ under I.R.C. §6050I for the \$35,000 in cash. Obviously failure to make that report subjects the firm to criminal action. From a reporting standpoint, it is fairly simple. If it is an exempt transaction, it does not have to be reported on anything. If it is not, then it must file Form 8300.⁸⁶

MULLER: The answer to this dilemma is in the statute itself, which includes the definition of the word "transaction." The transaction is not defined as the exchange of the currency. The transaction is defined as the underlying transaction.⁸⁷ If the underlying transaction is the payment for U.S. legal services or the payment for a boat purchase in the U.S., then you have a U.S. domestic transaction, and that makes it reportable.

GORDON: Issue #7 was really devised from Watergate. In that instance there was a Mexican law firm that had been sent money by the Republican National Commission or Organization. They were then asked to hold that money and to disburse the money as directed. From the Mexican law firm's point of view, they were not doing anything wrong at all. From the comments on the first couple of problems, I suspect that you would not recommend this be done in a Mexican law firm now.

ISSUE #7: A few weeks ago Arturo Gonzalez, senior partner of the firm and a dual Mexican-U.S. citizen, received a telephone call from the chairman of the Texas Committee for the Reelection of President Bush. He inquired about engaging the firm to establish a trust account in a Mexican bank where deposits could be made to be drawn upon as needed during the forthcoming campaign. The deposits would be checks from individuals and businesses who favor the reelection of the President. The only details Arturo learned about was that the secrecy was allegedly to protect the individuals and businesses from identification with what as to be a very "dirty" smear-based campaign. Arturo was assured that his only role was to manage the trust account. Arturo and most of his firm believed that Mexico was doing well with President Bush in office and they wished to see his term renewed to extend the benefits to the Mexican people for another four years.

Are there any Mexican laws violated by the actions of Gonzalez y Fernandez? Are they violating U.S. law? Does Gonzalez's dual citizenship affect the situation?

LOPERENA RUIZ: Issue number seven seems to be historical in some way. A Mexican lawyer was involved in the Watergate case because he gave some money to the Nixon supporters and it created a little scandal when Watergate arose. The lawyer was a very honest and well reputed lawyer in Mexico who did not know that the transaction of funds was for some illegal activity in the U.S. However, in the hypothetical, the lawyers know that there is some dirty activity, and they are hiding the money. If not 100 percent, it is very close to the money-laundering description

85. FinCEN Form 8300, Report of Cash Payment over \$10,000 received in a Trade or Business.

86. *Id.*

87. 18 U.S.C. § 1956(c)(3).

in the Mexican law. In this case, the lawyers would be investigated and maybe prosecuted by the General Attorney's office regarding money laundering.

LABARDINI: If this were to be a very dirty smear-based campaign, would a smear-based campaign be considered defamation or just the truth put it in a bad perspective? Yes, he drinks and he is a terrible drinker which may or may not be true, but there is some truth in the substance of the statement. I think it goes more to the possibilities of whether U.S. authorities would have jurisdiction over him due to his U.S. nationality.

BLAU: The law firm would have some severe problems with the Foreign Corrupt Practices Act⁸⁸ and perhaps even some money-laundering issues. Keep in mind that part of the money-laundering statute says that if a financial transaction is conducted to conceal the ownership of the funds, then these funds could be readily identified as illicit proceeds because of the way they are being handled. You could have a money-laundering violation as well.

MULLER: I was a young lawyer in the Tax Division of the Department of Justice during the Watergate period. This is a story that is a precursor to the Foreign Corrupt Practices Act. If you will recall, there were some forty corporations who had made illegal campaign contributions to the Committee to Re-elect the President, and the Watergate prosecutor offered misdemeanor pleas if they would come confess. However, there was no protection as to other criminal violations. In that case, members of the corporations came in and took their misdemeanor pleas. One of the corporations involved was Phillips Petroleum. In Phillips the chief executive officer of the corporations had carried \$40,000 in an envelope to give to Mitchell in the Department of Justice. Mitchell had then sent him to the Committee to Re-elect the President. I had the job of investigating where that \$40,000 came from, and the method by which that money was generated. Phillips had a Panamanian subsidiary which had contracted to build a refinery for Phillips in Cochin, India. There had been an extra \$2 million inserted in the cost basis for that refinery. That \$2 million had been sent to bank accounts in Switzerland. From there \$1 million went to Cochin, India, to pay the Ministry of Finance, and the other million was carried in the company jet by the chief executive officers who would go to Switzerland and use code names like "Pierre la Grand" to withdraw this currency and carry it back to Bartlesville, Oklahoma. Once there, they would hold it in the company safe to give to political candidates, primarily in Texas. This is the kind of conduct that the Foreign Corrupt Practices Act was designed to stop.

BLAU: It is illustrative how broad the money-laundering statute is.⁸⁹ Mr. Gonzalez has dual citizenship, and it does not matter whether he is in the U.S. or not. The long-arm of the money-laundering statute would reach him world wide, regardless of whether any part of this transaction ever touched the U.S. It is a very broad long-arm statute for U.S. citizens, and, for that matter, even foreign nationals today.⁹⁰

ROSELLE: Put aside for a minute the purpose of the payments and let me focus on just the fact that the trust account is meant to preserve secrecy of the beneficial owners, or the people who put the money into that account. One of the real

88. Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in scattered sections of 15 U.S.C.).

89. Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956 - 1957 (1986).

90. 18 U.S.C. § 1956(f).

difficulties of going after money laundering from the point of view of law enforcement agencies is running into a stone wall in finding out who is really moving the money and who are the real owners. First of all, if it were being done in the U.S., §312 of the Patriot Act⁹¹ would require banks in the U.S. that open an account for a private foreign individual to know who are the beneficial owners of the money in the account. They have to investigate with due diligence. It is not good enough for the Mexican bank in this case simply to trust the law firm and not ask further questions about where the money is coming from. With respect to the Mexican bank itself, the Bank for International Settlements,⁹² which is sort of a central bank of central banks, has proposed customer due diligence for banks around the world, which include banks taking steps to make sure that there are not anonymous accounts in the bank.⁹³ If the Mexican bank complies with its own standards, it would need to determine who are the beneficial owners and how the money will be used. In addition, if the Mexican bank is in turn transmitting that money into a corresponding bank account in the U.S., the U.S. bank is going to have to conduct due diligence for that Mexican bank.⁹⁴ We are now required to get certifications from foreign banks that have correspondent accounts in the U.S. as to two things: first, they must certify that they are not a shell bank⁹⁵ and second, that they will not permit the account to be used indirectly to provide banking services for shell banks.⁹⁶ In addition, the foreign bank must appoint a process agent in the U.S. Therefore, if improper activity comes to the attention of the U.S. authorities an action can be brought immediately against the Mexican bank in the U.S.

Part of the forfeiture provisions would permit the U.S. government to go after funds that the Mexican bank has in the U.S., even if those funds were not directly implicated in the wrongful activity.⁹⁷ In other words, let us assume for the sake of argument the Mexican bank has been doing something improper with the funds in Mexico, but it has other funds in its correspondent account with the U.S. bank. The U.S. government now can go after those funds in the U.S. without having to trace them through to the specific illegal activity.⁹⁸ In addition, the Mexican bank is probably going to have to conduct a higher level of due diligence than what is indicated here.

GORDON: Continuing with Issue #8, which we have already been discussing a little, we introduce the Foreign Corrupt Practices Act.⁹⁹ I would like our Mexican colleagues to consider a sort of opposite situation, the application of Mexican law where the Mexican firm is going into the U.S. and doing these same kinds of things in the United States.

91. USA Patriot Act § 312; 31 U.S.C.S. § 5318(i)(3)(A)

92. Bank for International Settlements, at <http://www.bis.org> (last visited Mar. 23, 2003).

93. *Customer Due Diligence for Banks*, Basel Committee Publications No. 85, Bank for International Settlements (Oct. 2001) at <http://www.bis.org> (last visited Mar. 23, 2003).

94. USA Patriot Act § 312; 31 U.S.C. 5318(i).

95. USA Patriot Act § 313; 31 U.S.C. 5318(j).

96. *Id.*

97. USA Patriot Act § 319; 18 U.S.C. 981(k).

98. *Id.*

99. Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in various sections of 15 U.S.C.).

ISSUE #8: One of the law firm's clients is a large Delaware corporation, Processed Foods, Inc. (PFI). The company purchases agricultural products from sources from throughout the world, and sells processed foods in the U.S., Canada and Mexico. PFI has obtained various foods from Mexico for years, processing it and shipping some back to Mexico as canned food. In 1995, at the urging of some Mexican investors, PFI agreed to establish a small processing plant in Mexico to process tomatoes to stewed tomatoes, tomato paste, etc. Some domestic processing firms used all their political connections to keep the plant from opening. But PFI wined and dined government officials of the Mexican federal and state agencies that in one way or another had to give approval. PFI also made several campaign contributions to some key Mexican legislators who faced reelection, and who were being pressured by the domestic processors to deny approval. After considerable negotiations PFI received approval after it agreed to establish employee housing, construct recreational facilities adjacent to its plant and subsidize employee transportation to the plant. The final approval came at PFI's executive offices in New York City. PFI had flown the four most involved Mexican federal and state officials, and their spouses, to New York for the ceremony. They were given a tour of the company's facilities and for several days attended sports and cultural events in various parts of the U.S. They enjoyed unquestionably gracious living.

The plant functioned profitably for two years. There were occasional difficulties with the importation into Mexico of glass jars and metal cans. The normal process for clearing customs often took several months. On more than one occasion, when the company feared the possibility of halting production and laying off Mexican workers, cash payments of about \$1,000 dollars were given to several Mexican customs officials, who in return gave priority status to the clearance of containers.

Worldwide tomato consumption suddenly dropped due to a report linking processed tomatoes to cancer. The board of directors decided a year later to sell the Mexican plant. It informed the government of its plans. The state government decided to purchase the plant to keep the workers employed, offering the company about 60% of its value. At about the same time, a French company agreed to purchase the plant at full value. For unstated reasons, the Mexican federal government blocked the sale. After several months of frustration, PFI was approached by the Gonzalez y Fernandez Mexican law firm. The firm also does consulting and is known to have excellent connections within the Mexican government. Some senior partners were former career high level government officials. It has a reputation for "getting things done." The law firm suggested to PFI that government delays were often occasioned by inefficient procedures, a maze of bureaucratic regulations and other minor obstacles with which they had experience surmounting. The fee of \$200,000 for obtaining approval of the sale at first appeared to be unusually high. But it was not unreasonable in view of PFI's desire to withdraw, and the serious reduction of production efficiency since the news of its impending withdrawal had become known to the employees. The company paid the fee, expressly telling the law firm that the company did not need to have any accounting as to how the money was used. Within two weeks of retaining Gonzalez y Fernandez, the proposed sale was approved by the federal and state governments. Three months later it was disclosed in newspapers in Mexico that some of the money that had been paid to the law firm had allegedly been paid to some Mexican officials by direct

deposit sent to Miami banks. The only records in PFI's books of any of the above transactions are entries listed as "ordinary promotional expenses."

Do any of the transactions violate the U.S. Foreign Corrupt Practices Act?¹⁰⁰
Do any violate Mexican law?

LABARDINI: On its face it seems that *cohecho*¹⁰¹ would apply, first for the original approval, then for the \$1,000 to the Mexican official.

GORDON: What about the situation where the company has wined and dined government officials of the various agencies?

LABARDINI: There is a limit on the amount that public officials may receive. I do not recall the exact amount right now, but it is something like 500 pesos, which obviously is less than any of these.

GORDON: Is that per meal or per entree?

LABARDINI: No, actually that is the entire amount.

GORDON: For the total for the year?

LABARDINI: Yes. I used to work in the Central Bank of Mexico and I was the one authorizing this type of a *cambio*, or change. You could not imagine the type of gifts that were sent to us. They look great, but you have to deliver and report them and possibly return them. There were always discussions among ourselves when we were unsure of what action to take. In the end, if we felt uncomfortable, we would just send it back. It was the simplest way to do things.

GORDON: What is the U.S. view on the wining and dining.

ROSELLE: It is not a crime to buy somebody lunch, and under the statute I believe that these would be exempt payments.

MULLER: There are even some DOJ rulings stating that if it is not unduly extravagant wining and dining, i.e. going to wine and dine the Mexican official in Hawaii, but instead going to a restaurant in Mexico City, these would be exempt payments. They would probably be exempted under the Foreign Corrupt Practices Act except that the Foreign Corrupt Practices Act does not exempt payments that are in violation of foreign law. In effect, you might get back doored on the grounds that it violated Mexican law.

BLAU: If that is the case, then after the Patriot Act you might trigger a violation of the money-laundering statute because of violations of the Foreign Corrupt Practices Act are predicate acts of the money-laundering statute.¹⁰²

GORDON: There is an affirmative defense in the Foreign Corrupt Practices Act.¹⁰³ The Act exempts payments defined as facilitating payments in connection with routine governmental transactions, such as payments to obtain or accelerate issuances of official foreign permits, licenses and other official documents. It was surprising when this law was passed that it did not address something as common as wining and dining.

LABARDINI: Maybe they willfully forgot about it. Going back to the *cohecho*, its definition includes a very nice word. It says that "in the crime of bribery, *cohecho*,

100. Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in various sections of 15 U.S.C.).

101. *Codigo Penal Federal*, Libro Segundo, Titulo Decimo, Capitulo X, Articulo 222 bis.

102. 18 U.S.C. § 1956(c)(7)(D).

103. Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in scattered sections of 15 U.S.C.).

it is the public official who receives directly or through somebody else, soliciting or receives, for him or for somebody else, money or any other *dadiva* (gift), compensation, equivalent, or accepts and makes a promise to do or not do something just or unjust, related with its duties."¹⁰⁴ Therefore, anything you do or do not do related with your functions -pulling up the file a little higher- that is just or unjust in doing your duty would definitely fall within *cohecho*.

GORDON: These provisions deal with Mexicans as recipients. What about the other side, when this is a Mexican company going into the U.S. and it is the Mexican company officials that are wining and dining U.S. officials?

LABARDINI: That is the new Article 222 bis referred to earlier.¹⁰⁵ It refers to bribing, soliciting or going to a foreign official in order to influence him or her to do something inappropriate.

GORDON: Wining and dining?

LABARDINI: I would need to review the statute, but I would imagine it follows the practice that we have here, the limitations of what you can receive and it is probably related with the official duties.

BRUCE ZAGARIS, Washington, D.C.: Another variation on this would be for Processed Foods, Inc. (PFI) to hire a U.S. person who would then register under the Foreign Agents Registration Act¹⁰⁶ and would be permitted to wine and dine officials as long as the U.S. agent filed on his six-month report to the Department of Justice the fact that he wined and dined the U.S. official and how much money was spent. That would be permissible.

GORDON: What about the section that covers the participants if they use an agent, knowing or having reason to know, that the agent is going to give payments?

BRUCE ZAGARIS: A situation where a U.S. agent takes someone out for a meal in order to persuade him or her about a policy by itself would be permissible, but to actually give gifts would be another issue.

BLAU: In the history of the statute and the case law you quickly see that low-level payments, like lunches, grease payments for facilitation of a contract or for action or for moving the project forward, have been traditionally put aside. The DOJ is not interested in those kinds of things. Although it may be a technical violation, the intent and the emphasis of the statute is to stop the real kickbacks and bribes of foreign officials. The question that is raised here is fundamental. If it is a violation of Mexican law, we are back to ground zero as to whether or not it violates the Foreign Corrupt Practices Act.

104. *Codigo Penal Federal*, Libro Segundo, Titulo Decimo, Capitulo X, Articulo 222 bis.

105. *Id.*

106. Foreign Agents Registration Act of 1938, 22 U.S.C.S. § 611 et seq.

LABARDINI: Article 222 bis¹⁰⁷ says that whoever offers, promises or gives money or any other compensation or gift, whether in goods or services, to public officials, to do or not do, to carry out a paperwork or not carry out the paperwork, for somebody else to go and require and do things, and the definition of foreign agent or a foreign public official encompasses anybody working in the *encargo público*,¹⁰⁸ is considered as deemed so by the foreign law, whether in the legislative, executive, judicial bodies.¹⁰⁹ Not only are we talking about administration officials, but also about congressmen, judges and the *autónomos independientes*¹¹⁰ as well as independent organisms or public international organizations. Essentially it includes anybody who has some kind of a public official clout.

LOPERENA RUIZ: Recently my firm was asked for a legal opinion from a large U.S. bank about the gifts and small contributions to the judiciary in Mexico. This large U.S. bank has litigation all around Mexico because of collection types of cases. If you do not give \$20 to the clerk of the court, the complaint is not served on the defendant. You can wait for centuries and your case will still be there. Everybody in the local Mexican judiciary does this, but not in the federal judiciary. The bank asked us if it was customary to give presents to the judges at Christmas and whether it was illegal or not? We answered, yes, it is illegal, even if the gift was under the \$50. No gift can be given to a judge. Second, it is customary. You can visit the courthouse in December and you will see the office of the judge full of gifts.

MULLER: In San Antonio we are very close to Mexico and I am afraid that those things happen in the U.S. as well. The relevant statute in the U.S. is the Hobbs Act,¹¹¹ on the theory that you have to curry favor with these clerks in order to get them to do what they are supposed to do, i.e. to issue your summons or whatever. That is a form of extortion. It is interesting to see that it goes on in every country and unfortunately penalties are probably not enforced as often as they should be in any country.

107. Código Penal Federal, Libro Segundo, Título Decimo, Capítulo X, Artículo 222 bis.

ARTICULO 222.bis- Cohecho a servidores publicos extranjeros

Se impondrán las penas previstas en el artículo anterior al que con el propósito de obtener o retener para sí o para otra persona ventajas indebidamente en el desarrollo o conducción de transacciones comerciales internacionales, ofrezca, prometa o dé, por sí o por interpósita persona, dinero o cualquiera otra dádiva, ya sea en bienes o servicios:

I. A un servidor público extranjero para que gestione o se abstenga de gestionar la tramitación o resolución de asuntos relacionados con las funciones inherentes a su empleo, cargo o comisión;

II. A un servidor público extranjero para llevar a cabo la tramitación o resolución de cualquier asunto que se encuentre fuera del ámbito de las funciones inherentes a su empleo, cargo o comisión, o

III. A cualquier persona para que acuda ante un servidor público extranjero y le requiera o le proponga llevar a cabo la tramitación o resolución de cualquier asunto relacionado con las funciones inherentes al empleo, cargo o comisión de este último.

Para los efectos de este artículo se entiende por servidor público extranjero, toda persona que ostente u ocupe un cargo público considerado así por la ley respectiva, en los órganos legislativo, ejecutivo o judicial de un Estado extranjero, incluyendo las agencias o empresas autónomas, independientes o de participación estatal, en cualquier orden o nivel de gobierno, así como cualquier organismo u organización pública internacionales.

Cuando alguno de los delitos comprendidos en este artículo se cometa en los supuestos a que se refiere el artículo 11 de este Código, el juez impondrá a la persona moral hasta quinientos días multa y podrá decretar su suspensión o disolución, tomando en consideración el grado de conocimiento de los órganos de administración respecto del cohecho en la transacción internacional y el daño causado o el beneficio obtenido por la persona moral.

108. public sphere

109. Código Penal Federal, Libro Segundo, Título Decimo, Capítulo X, Artículo 222 bis.

110. Public corporations in which there is government participation

111. 18 U.S.C. § 1951.

BLAU: Who can ever forget those memorial video tapes in the *Abscam* case of the congressman taking the money out of the agent's brief case and stuffing it into his suit, a case that the FBI has never recovered from.¹¹²

GORDON: There are some questions from the audience at this point that we will address. Go ahead.

BILL KRZYDA, Mexico City, Mexico: When was the new Article 222 bis enacted? **LABARDINI:** It was enacted just two or three months ago, or around June 2002.

GORDON: It is interesting to see how far we have come over the last 30 years in reducing the kind of payments that were disclosed in 1974. Do you remember the issues of *Time* magazine and *Newsweek* that had "payola" and "bribery" on their covers. Substantial payments were being made. Those articles outlined the already disclosed payments by Northrup and Lockheed. Lockheed wanted to destabilize the Japanese government and the Northrup payment had been allegedly made to Prince Bernard in the Netherlands. I was lecturing in Seattle that week, as I did a great deal in the 1970's for the Council on Foreign Relations at their various committees. You never know who will be in the audience when you are the speaker. You have a dinner, you give a lecture and then people are allowed to ask questions. My presentation concerned the Latin American investment policies that restricted Mexican laws, Nigerian laws and Indian laws that were very interesting in the 1970s. Inevitably, the conversation in each one of those presentations that week turned to the practices of Lockheed and Northrup. Someone asked whether I thought that Boeing was involved in making these kinds of payments as well. I said, "Inevitably, yes." I did not get any further when two people stood up. One introduced himself as Vice President of the International Division of Boeing, and the other held some equally high position. For the next twenty minutes, they lectured and I listened. They lectured about yellow journalism and comments that had no backing. All I could say was that time would be on my side because they could not possibly compete with Northrup and Lockheed unless they had been playing by the rules of the game. The rules of the game in those days included making these payments. Time was on my side. The very next week, the front page of the *Wall Street Journal* had one of those wonderful little drawings of the man who had stood up and lambasted me, who had just announced that Boeing had made the largest payments of any company yet announced to date. The interesting comment that he made was, "We have agreed with the SEC that we will not have to disclose to whom we have made our payments, but we do want it known that we, too, have our Prince." They did not want to be upstaged by Northrup, which had apparently been paying Prince Bernard, but they did not want to have to disclose to which Prince or higher rank they had made their payment. We have come a long way from those days when we were literally causing very serious dislocations in governments, like toppling the Honduran government, destabilizing the Italian government, allowing Euro-communism to move in more and destabilizing the Japanese government.

JOHN STEPHENSON, Dallas, Texas: In Issue #8, there are some statements about PFI flying four Mexican federal and state officials to New York for a ceremony and a tour of the company's facilities. I know that at least in the past it has been

112. See *United States v. Jannotti*, 673 F.2d 578 (3rd Cir. 1982).

appropriate for U.S. companies to bring foreign officials over to their company to introduce them to their company and to educate them about their process. This is especially common in the oil industry.

However, in this situation the Mexican law states that it is not permissible to pay anything to them if it is a *cohecho*, or bribe. Does that bring us right back to the beginning? If it is a violation of Mexican law, then it is now no longer appropriate under the FCPA?

MULLER: As I recall, the DOJ guidance rulings distinguish bringing in officials in to train them on the operation of the equipment. Under the DOJ analysis that would be acceptable, as opposed to taking them to New York to wine them and dine them. I would think that under Mexican law if there is a legitimate purpose for the travel and entertainment in terms of the Mexican government functions, I would suspect that that would be permissible as well.

GORDON: Is it permissible under Mexican law to bring people in for training?

JOHN STEPHENSON: There is a mixture of both business and pleasure here.

GORDON: The hypothetical says they attended sports and cultural events in various parts of the U.S. and enjoyed unquestionably gracious living. Do we need to know more?

JOHN STEPHENSON: In the context of what Mr. Muller just said, at least the things that I had looked at were a little broader than just being trained. An education about the process, the company and that sort of thing would still be permissible, but these other things create the problem.

LABARDINI: Section 2 of Article 222 of the *cohecho* says “*cohechos* committed by the public official” and then we have very interesting language: who ever spontaneously gives or offers money or any other compensation *dadiva*, that is gift to any of the persons of the public officials, so that the public official does or omits a just or unjust act related to his office. It seems to imply that just the offer itself would be a basis for the *cohecho*.

GORDON: Did that language seem to assume that the decision has not yet been made? In this case, the approval of the contract has been granted.

LABARDINI: It does say that if a public official *haga o omita*, does or does not do, implying a future action. This is really a technicality. This basically refers to any type of activity related to their official functions. In this case, the officials have revealed that they are connected to the approval of PFI and the whole operation. It is definitely linked to their positions as public officials.

Just one further comment on the hypothetical: it states that the FBI was contributing to the election campaigns of key Mexican legislators who face reelection. However there is no immediate reelection in Mexico.

BILL KRZYDA: I think the key here is a determination of the basic purpose of the invitation to wine and dine. We are not talking about money but about wining, dining and showing up the facilities. It could be fairly expensive to show them two plants, one in the U.S. and one in Europe perhaps. In many of these cases the purchasing agents do not necessarily know all the details of the manufacturing, or even the type of airplane they might be buying. Naturally they need an education on the process and the product. They are educating these individuals in preparation of a future sale. It may not even be open for bidding yet. You are simply trying to educate somebody about your kind of a product. It is just like advertising or sending them a brochure.

BLAU: Under the Foreign Corrupt Practices Act, with the exception of Mexico at the moment, that action would be perfectly legitimate.¹¹³ I represent a lot of defense contractors. Not a day goes by that these defense contractors do not receive a flood of visitors to be educated or to look at a new product. This law gives me great pause in advising those types of clients, especially if the prospective customer is from Mexico. It appears that under this law a violation of the Mexican law would occur that would in turn take them outside the protection of the exemptions that are built into the Foreign Corrupt Practices Act in the U.S.¹¹⁴

ALEJANDRO POSADAS, Durham, NC: I would not jump completely or outright to the conclusion that it is a violation of Mexican law. The *cohecho* is simply bribery, and it is a quid pro quo relation in Mexico as well. In order for it to be a criminal violation in Mexico, you have to show that the decision resulted directly from the dining. It is very challenging to prove in court. I am not saying that perhaps as a precaution you should advise clients not to enter into that type of activity, but it is still a quid pro quo.

LABARDINI: Taking public officials to tour the company or to a hotel has an ulterior motive, even if that motive is not openly clear, and it can be illegal. Their action is related to the fact that they want the operation approved. Although they are not expecting an immediate answer, they may expect at the very least to be given more consideration in the future. In that sense, nobody will outright say, "Let me take you to see the Dodgers games and you can remind yourself about this excellent game when the time comes to make a decision about approving this operation."

BLAU: I am going to spend \$100,000 on you to wine and dine you and take you to Dallas. We may even visit England. At the end of the day, you react favorably to my overtures and you sign a contract with me. Because of the amount spent, would that trigger any kind of criminal act?

LABARDINI: That will constitute at least strong evidence to build a case of bribery. However, I do not know of any actual case in Mexico of bribery for dining an official.

ALEJANDRO POSADAS: There is another interesting twist. We should ask if this is a federal official or state official. Of course it is implied that it is federal official in some way, but it is not clear. The federal law is much stricter. States laws may not be as strict in terms of the types of activities that will constitute bribery.

LABARDINI: If I were the official who received this trip and this lavish treatment, would I have received it except for the fact that I was that specific public official? Had I been a normal citizen or another public official in another sphere of government, would I have received that type of treatment? The answer is a simple no. I received that only because I am in that specific position because in the future, I may be able to remember the trip and the lavish treatment.

GORDON: I think what has been pointed out is that culture becomes reflected in the statutory law. In many ways there is more of a clash of cultures than a clash of laws. When Lic. Labardini stated that he has never heard anybody before complain about giving a dinner, that may be reflective of mere courtesies under Mexican culture.

113. Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in scattered sections of 15 U.S.C.).

114. *Id.*

This reminds me of the time I was working for the State Department in Muscat, Oman. We passed the Ministry of the Interior and all the vehicles in front of the building were BMW's. Just down the street was the Ministry of the Education and all the vehicles there were Mercedes. And I said to my host, "Isn't that interesting, the way people like cars. If they work for the Interior, they prefer BMWs; if they work with Education, they prefer Mercedes." And he said, "No, no, no. The Minister of Interior has the BMW franchise and the Minister of Education has the Mercedes franchise." I asked him if there was any kind of conflict of interest in that. He replied, "I don't really understand what you mean, but if you mean who gets the best service and all, of course, the BMWs are always serviced first if they're owned by people who work for the Ministry of the Education." He simply did not understand what I was talking about. It is difficult for two countries to draft laws that are going to effectively address bribery issues when a bribe has not yet been clearly defined in accordance with the different cultures.

LOPERENA RUIZ: During the 1970's a transfer of technology law was passed in Mexico. In some cases, it was necessary for a Mexican official to travel abroad to visit the plant where the technology was produced to better understand some of the concepts. In my experience, these officials did not receive bribes. They were a team of people who worked honestly and fairly, but the client of the lawyers tried to be very kind to these officials anyway. They were not immoral but the companies were generous in their intentions towards these people. They did not give presents, but the officials were taken to the best hotels and given first-class airplane tickets and so forth.

MIGUEL JÁUREGUI, Mexico City, Mexico: For years Mexican lawyers wanted transparency. We wanted a statute that would govern government officials' behavior substantially, in an important manner and prevent corruption. I think we have overdone it with the current law. I would like you to discuss something that concerns me a great deal. As I understand the statute and the way case law is now developing in Mexico, the property of government officials may be embargoed, or attached by the SECODAM,¹¹⁵ without any notice until they can clear up the case. If the government official did not commit a crime that contravened Mexican law or regulations, then they simply release the funds and the property. What do you think about that and whether we have an *amparo*¹¹⁶ proceedings that could stand up in court to defend an official that is being subjected to that law.

LOPERENA RUIZ: In my opinion, it would be against the Bill of Rights, because he is deprived of his or her assets before a final judgment is rendered. But it is a kind of precautionary attachment much like attachments in commercial law, even in criminal procedures. The Supreme Court has ruled that the preventive attachments in commercial cases with the credit instruments are constitutional. It could be constitutional in this case, as well.

MIGUEL JÁUREGUI: Presuming this is correct, according to constitutional law, because you allow it in one case, you allow it in the other. In order to get precautionary measures, you must set up a bond that is fixed on a discretionary basis

115. Secretaria de Contraloría y Desarrollo Administrativo, at <http://www.secodam.gob.mx> (last visited Mar. 23, 2003).

116. Constitutional appeal proceeding

by the judge. In this case, there is no bond set up by the Ministry of SECODAM. Therefore, if your patrimony is hurt, and in many cases it has been hurt, there is no manner of repair of that damage, at least in my view.

LABARDINI: You mean *es embargado*, the property is embargoed?

JAUREGUI: *El secretario de la controlaría puede embargar tus bienes y después pregunta que pasó, y ya pasado en varios casos.* (The Ministry of SECODAM can embargo [attach] your property and then ask what happened, and this has already happened in several cases.) What we are discussing is a form of procedure law and commercial law and civil law. If you want a precautionary embargo or attachment of property, you must guarantee that what you are asking for will not hurt the person that you are embargoing. In our case there is no such guarantee that I am aware of.

LABARDINI: Mexico has overdone several things in several respects. The administrative responsibilities for public officials and organized crime units are just an example. These units are very small to ensure that those agents are really trustworthy. Years ago, there was a drug-trafficking agenda that was seized in Yucatan, and it had the names of three Mexican agents and three U.S. agents. The fact that the names appeared means nothing, per se. It could be these are the bad guys or these are the good guys. We need to take care of them or we need to get rid of them. It could easily go both ways. With respect to the Mexicans, a thorough investigation concluded that two of them were not corrupt and one might have been. In the U.S. no investigation occurred. These three agents were set aside from the unit because their names had appeared on the agenda. It was an extreme measure. This was done to eliminate the slightest doubt. The same thing has happened here. It is an extreme measure now, but maybe Mexican business requires it. Going back to the embargos and the precautionary attachment, these measures are extreme and beyond any constitutional point where *amparo* is required.

MIGUEL JAUREGUI: I am concerned that good people will fear going into public office because of this ominous threat. What is Mexico trying to save the government from? The law will probably work against our best interests because good people and careful people will not like to be treated in this manner.

BLAU: From a U.S. perspective, if the funds were in the U.S. and the Mexican government requested a seizure, they would be frozen in the U.S. because the Patriot Act now allows the government to seize those funds and put them in suspense on the request of a foreign government.¹¹⁷

LOPERENA RUIZ: In commercial attachments, it is not necessary to file a bond in any case. If you have a promissory note, you do not need a bond. However, the promissory note could be a forgery, and you are attached before the end of the case. Even the prosecutors freeze the assets of the suspects without a judicial resolution and without a final judgment declaring the person guilty in money-laundering cases. They can freeze your bank accounts without bond, and without any other procedure in which you are given the opportunity to defend yourself. We do not know if it is convenient or not, because you are dealing with criminals who are very dangerous and are very capable. The people who are laundering money and are in organized crime are very smart. If you do not have these types of measures in place, you cannot fight them. However, if you are dealing with honest people who want to

117. USA Patriot Act §323; 26 U.S.C. 2467(3).

serve as public officers, it is very difficult. Today, nobody wants to work in the government because they do not sleep at ease.

GORDON: Let us move to the largest payment, and then we can perhaps work our way back. The hypothetical links a payment of \$200,000 to a third party, in this case a firm that is known to have pretty good connections, back to Gonzales y Fernandez. This situation closely follows the organization of a consulting firm in Guatemala City that was retained by United Fruit Company after they had a great deal of difficulty getting approval of their sale to Del Monte back in the late 1970's. A consulting firm who said they could get approval for a fee of \$500,000 pesos approached them. They retained them, and the sale went through very quickly. The understanding was that this local consulting agency knew who to pay, what to pay and how much to pay. Is this a violation of the U.S. Foreign Corrupt Practices Act and/or a violation of the Mexican law?

MULLER: The test here would be: what would be a reasonable fee for the legal services actually rendered? If the evidence showed that the reasonable fee for the representation would be \$25,000, there is an extra \$175,000 of unexplained consideration going to the law firm. There is a duty to be able to internally explain why this extraordinary amount is being paid to the law firm and to receive some reasonable assurances that the law firm will not use the amounts inappropriately to influence someone.

BLAU: I take a different view. This is a violation, front, back center. When you look at this as a prosecutor, you question why the law firm was hired for this amount of money? The simple answer is because they can get me out of this situation. The government obviously has 20-20 hindsight. When they learn, after the fact, that certain amounts of money have been passed on to public officials in consideration for their action or inaction to get these people out of this contract, then you are squarely within the gun sights of the Foreign Corrupt Practices Act.

MULLER: I would make this analogy: I play football on Sundays. Occasionally I run with the ball, but I do not make nearly as much as Emit Smith. Likewise, some lawyers, because of their experience, are entitled to a fee that might be better than the fee that I would get. I would not assume that there is improper conduct based on the amount of the payment without further inquiry.

BLAU: I am not assuming that either. However, I am assuming that other facts become known that prove that some of the \$200,000 was funneled through to the acting official. If that happens, then these people are toast.

MULLER: Under the Foreign Corrupt Practices Act in the accounting provisions, you have an affirmative duty to make sure that these are appropriately paid and classified and reported on the books.¹¹⁸

ROSELLE: It seems telling that the company itself is telling the law firm they do not have to account for how the money is used. That is pretty damning evidence.

GORDON: It seems to me that we are really dealing here with the interpretation of the word "knowing." If you remember, in the original Act the language was "knowing or having reason to know."¹¹⁹ That was the language that was removed

118. Foreign Corrupt Practices Act of 1977, Pub. L. No. 105-366 (codified as amended in scattered sections of 15 U.S.C.).

119. Pub. L. No. 95-213, 15 U.S.C.S. §§ 78(a) et seq. (1977).

in the amendments in 1988¹²⁰ which caused William Proxmire to say “We’ve just created a loophole in the Foreign Corrupt Practices Act large enough to fly a Lockheed through,” Lockheed having been one of the companies. The definition of “knowing” is very interesting because it says that a person’s state of mind is “knowing,” and this is knowing how the money is going to be used. If you are aware that such person is engaging in such conduct, that such circumstance exist, or that such a result is substantially certain to occur, or such person has a firm belief that such circumstance exists or that such a result is substantially certain to occur, then you “know.” They removed “reason to know” out of the initial definition of knowing or having reason to know, leaving only “knowing” there, but then defined “knowing” as including “having reason to know.”

BRUCE ZAGARIS: The fact that the money was paid directly into their Miami accounts is also something that comes right out of the FCPA red-flag guidelines. This would be bull’s eye for coming within the FCPA.

ROSELLE: I think the other point worth mentioning is that it is not only a violation of the FCPA but also the Sarbanes-Oxley Act¹²¹ which creates the need for Chief Financial Officers (CFO’s) and Chief Executive Officers (CEO’s) to certify their financial statements.¹²² They have some potential personal liability as well.

MULLER: This provision of the Sarbanes-Oxley Act makes the making of a false entry or record or an entry that is made to conceal in a matter that is in the projected ambit of an administrative investigation a twenty-year violation. For example, if this transfer of money to the Miami bank account is done for the purpose of concealing the entries that are made in the books or even just the transaction that occurs, it could fall within this new black hole of criminal law in the Sarbanes-Oxley §1519.¹²³

BLAU: In addition to that, there is a very clear-cut money-laundering violation when you transfer the funds into the bank for the purposes of paying a bribe or funding a bribe that has already been paid. You may be looking at some other additional charges as well. The normal prosecutor is going to turn this into a wire fraud case. This carries a thirty-year felony. Transferring these funds as a scheme and artifice, some type of fraud, as well as the money-laundering statute itself may be implicated.

GORDON: It is interesting that for the first 15 years of the FCPA, we talked about interpretations of the language in the FCPA in isolation. Now, the money-laundering statute and the Patriot Act have become of great importance because of the possibility that these payments will violate local laws. It has really expanded what we need to know about the Foreign Corrupt Practices Act enormously.

MULLER: §1519 states, “Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document or tangible object with intent to impede, obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or in relation to or contemplation of any such matter or case shall

120. Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100-418, 102 Stat. 1415 (1988).

121. Sarbanes-Oxley Act of 2002, § 302, Pub. L. No. 107, 116 Stat. 745 (Law Co-op 2002).

122. Sarbanes-Oxley Act § 802; 18 U.S.C. § 1519.

123. *Id.*

be fined under this title, imprisoned not more than twenty years, or both."¹²⁴ The situation that concerns me is being under an IRS audit of your tax return and the agent wants you to give him a receipt for your dining expenditure while you were in Santa Fe, and you create a false receipt. You know you ate at the Old House and spent \$109, but you do not have the receipt. So, you create a false receipt and give it to the agent. That is a twenty-year violation for that minor document falsity. You need to make appropriate entries in your book to correctly classify your expenditures. Consider the \$200,000 expenditure in the hypothetical. If you classified it as an attorney's fee, it could be a false entry, with a corresponding a false entry in your books, and a false classification. You implicate the Sarbanes-Oxley Act and the federal Foreign Corrupt Practices Act. You probably could also find a mail fraud and wire fraud, money laundering and other crimes attached to that action.

BLAU: Is there any way we could make this payment legal?

LABARDINI: In the description here it states that the law firm suggested to PFI that the delay was due to inefficient procedures, and the many severe counter regulations and other minor obstacles. In principle, apparently this would be some grease payments or facilitating payments, even though it is a very high facilitating payment.

GORDON: What happened if the letter came back from Gonzales y Fernandez and outlined how that money was going to be spent, leaving a little bit for maybe grease payments, but otherwise filling up the full \$200,000. Would that solve your problem?

MULLER: It would certainly be some evidence that I would want to look at.

BLAU: I certainly like it a lot better than the fact scenario in the hypothetical.

GORDON: Let us look at the issue of the \$1,000 grease payments made to Mexican customs officials. Are these okay under the routine government action provisions under U.S. law?

BLAU: I like them. I do not have a problem with them.

GORDON: How about under Mexican law?

LABARDINI: \$1,000 is 10,000 pesos. 10,000 pesos is more than the salary of the Deputy Director within Mexico.

GORDON: What if it were \$10?

LABARDINI: If it were \$10, we would then apply the rule of the high 500 pesos. \$1,000 by all means seems just more than a facilitating payment of any situation. That is clear coercion.

BLAU: This takes us back to the same argument. If it is illegal under Mexican law, then it is outside the protection of the exemptions of the Foreign Corrupt Practices Act.

GORDON: I am currently working on a case that involves country X and company Y which is a very large infrastructural company in country X. We sued Company Y in the U.S. and were facing forum non-convenience charges. We tried a couple of suits in Country X. One case was successful. In discussing the case with the local attorneys, I explain the obstacles we faced. Because we were successful in at least one case, how can we then argue that the whole legal system of Country X was

124. Sarbanes-Oxley Act § 802; 18 U.S.C. § 1519.

ineffective and that the matter should not be sent to the U.S? One of the attorneys responded that we could establish the ineffectiveness of the legal system because he took a \$15,000 bribe to the judge in that country!

CHRISTOPHER BAUMAN, Albuquerque, N.M.: In Mexico you have *casas de cambio*, currency exchange businesses and *centros cambiarios*, currency exchange centers. Until recently, *centros cambiarios* were organizations that were completely unregulated. These are the typical mom-and-pop store on the street that will exchange money. These *centros* are now being regulated in the sense that Mexican banks now are closing their checking accounts so that they are not able to purchase third-party checks and negotiate them. These merchants are now coming up to the U.S. to open bank accounts and attempting to deposit these third-party checks, most of which are U.S. originating. The article in the book says there is \$9.2 billion being sent from the U.S. into Mexico.¹²⁵ Most of these third-party instruments are being issued from the U.S., going to Mexico, being purchased by the *centros cambiarios*, who are in turn trying to deposit these U.S.-originating instruments in U.S. banks. What has happened is that some of these third party instruments are fraudulent in nature. When one of these fraudulent instruments hits the U.S. banks, the bank writes their suspicious activities report and close the account. As a result, these *centros cambiarios* are now going off shore. What has occurred is the exact opposite of the purpose of these laws, which is to increase transparency. What has in fact occurred is that they are increasing the lack of transparency. Are we not really in essence, by enacting these very strong laws that have everybody scared, affecting the exact opposite of what we are trying to do?

LABARDINI: We have basically developed the criminals. The moment we detect criminal activity, we go against it and we draft a law. But they are not stupid. They find a loophole. Once we discover it, we cover it again which creates a continuous effort on both ends. The more we draft, the more little loopholes they go into. In a way we have been making them better in order to try to avoid our laws. Secondly, this also goes more into the aspect of law enforcement itself. They are clearly trying to avoid the law. For now, they will not work in Mexico. They move to the U.S. or go offshore.

BAUMAN: I guess my point is that in enacting these laws, we are affecting innocent individuals. Most of these *centros cambiarios* are not dealing in hundreds of thousands of dollars; they are transactions that are certainly less than \$10,000 and a lot of times less than \$500. We are adversely impacting the Mexican nationals who are trying to send money back home by enacting these money-laundering laws that are intended to really capture the big fish.

BLAU: Congress looked at this issue of the *casa de cambio* and the black market peso and made some fairly telling findings that these were vehicles that were used to launder money. In the overall picture, the U.S. government is trying to track the ownership of large amounts of cash, wherever they may come or wherever they may go. The recording of an individual reporting transaction includes knowing whose money it is, their address, other identifying information, the amount of money, to see if we can follow the money. It is that simple. If you are an illegal, non-

125. Jim Abrams, *High Fees Drain Money Sent By Hispanics to Families Back Home*, Associated Press.

registered business, transferring funds, you are subject to a five-year felony.¹²⁶ Good or bad, it is consistent with the theme that the U.S. be able to track all large cash transactions into and out of the country. It is that simple.

LABARDINI: We also have to understand that there are differences in societies. If you are living in New York and do not have a credit card, you are nobody. If you are live in Oaxaca and have a credit card, you are also nobody because nobody has a system for credit cards. We are trying to go against the big fish, against the problem itself, but the fact is we are also affecting the lives of other individuals and maybe in a way preventing those individuals. It is a balance between what you want to do and what you are able to achieve. Law enforcement needs to be prudent and actively pursue the bad guys while understanding the other situations, both culturally and socially. At least in Mexico.

ROSELLE: I would agree with what others have said. What is really happening here is a movement towards greater transparency around the world with regard to financial transactions. Often the crooks are one step ahead of the rest of us. That is how they have the money. They keep moving it around in different ways. The attempt of our government and others to try to create greater transparency and to try to cut down on these flows of illegal money is legitimate and we should support that goal. There are ways in which the Patriot Act and perhaps some other statutes have gone over the top and risk interfering unnecessarily in rights of privacy and confidentiality, and the rights of people to transact their business in an appropriate way. Perhaps we will come back to a more appropriate balance. An example might be the *casas de cambio*. In the past they have had to have bank accounts with banks in the U.S. to facilitate their money transfers between the U.S. and Mexico. Our own government has said that they are high-risk organizations, so they have put a much higher risk profile on them. They have not said you cannot do business with the *casas*, but they have made it much riskier to do so. Now, the *casas* themselves are becoming more regulated in Mexico and elsewhere. They are registering in the U.S., and that creates the greater transparency and makes it more feasible to do business in a more normal fashion. We still have a big problem with the money flow between the U.S. and Mexico in terms of Mexican nonresidents who are sending money back to Mexico, usually in relatively small amounts. A lot of creative ways have to be thought of to try to create greater security for those payments, to permit those legitimate payment flows to take place, but in a way which preserves the safety of those payments but does not permit criminal conduct to be facilitated.

BLAU: In terms of the money-laundering statutes themselves, having been one of the contributors to the two statutes, there are attempts to attack illegal proceeds, wherever the government could find them. In the broadest form the two statutes in fact do that, subject to abuse by prosecutors around the country. However, these statutes do in fact attack the financial transaction of proceeds that are derived from illicit activities. In essence it makes it illegal in any form to deal with proceeds of an illegal activity. It is just that plain. They have had a huge impact. They have big teeth in them, including forfeiture and long jail sentences. Government prosecutors are actively using them. When you analyze almost any financial international

126. USA Patriot Act §373; 18 U.S.C. 1960.

transaction now, you have to understand how these statutes work and obviously understand when they can be used and advise your clients appropriately, because running afoul of these money laundering statutes can create tough criminal problems.

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