



International Law Potpourri

*Presented by the CBA International Law Practice Group
In collaboration with the University of Cincinnati College of Law and the Southern Ohio District Export Council*

Thursday, November 15, 2018





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Agenda

- 8:30 a.m. Ethical Responsibilities for Lawyers Representing Foreign Clients** **TAB A**
Charles F. Hollis, III, Esq.,
The Hollis Law Firm LLC
- 9:30 a.m. Data Privacy in Europe** **TAB B**
Curtis Scribner, Esq. and Susan Shook, Esq.,
Procter & Gamble
- 10:30 a.m. Break**
- 10:45 a.m. International Estate Planning** **TAB C**
John Campbell, Esq.,
Kohnen & Patton
- 11:15 a.m. Adjourn**

TAB A



Charles F. Hollis III, Esq.
The Hollis Law Firm, LLC

Charles F. Hollis, III (“Chuck”) is a graduate of Northern Kentucky University, the University of Cincinnati College of Law, and the University of Helsinki in Finland, where he earned an LL.M. in Public International Law. He has also done coursework at the State Pushkin Institute for Russian Language and Lomonosov Moscow State University.

Chuck has been practicing law since March 1998. He is licensed in Ohio, Kentucky, and Indiana. In March 2013, Chuck established The Hollis Law Firm, LLC. A solo practitioner, he concentrates his practice on immigration and personal injury matters.

Chuck’s immigration practice covers a variety of matters, ranging from family and employment-related matters to asylum, naturalization, and citizenship. He speaks Russian, and has a working knowledge of French and German, as well as some Polish. He has assisted clients from over 100 different countries with their immigration matters. He has lectured both nationally and internationally on various topics in U.S. immigration law. Chuck has been named a “Super Lawyer” in the field of immigration law every year since 2014.

Chuck is devoted to his clients and practice, but he refuses to be a desk jockey. He does his best to reserve evenings and weekends as family time. After ten years of marriage, he remains hopelessly in love with his wife Angelika, who is a native of Poland. In their spare time, Chuck and Angelika relish traveling with their two children, Ian and Natalie. In middle age, Chuck is fulfilling his childhood dream of learning to play the piano.

Seven Golden Rules for Counseling the Foreign Client

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Why is it important to know something about counseling foreign clients?

- 2010 Census Data for the U.S.:

12.7% of those living in the U.S. were born abroad
(About 40 million people)

20.1% speak a language other than English at home
(About 62.5 million people)

Why is it important to know something about counseling foreign clients? (Cont'd)

- 2010 Census Data for Ohio:

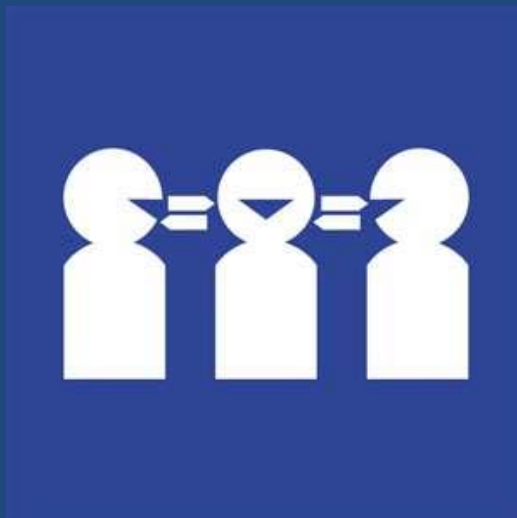
3.9% of those living in Ohio were born abroad

(Over 450,000 people)

6.5% speak a language other than English at home

(Over 750,000 people)

Rule #1: When in doubt, always use an interpreter.



How well does your client understand English?

- Determine this before meeting in person
 - How much English did your client study in school?
 - How much time did your client spend in an English-speaking country?

Client may feign understanding in order to appear polite

You may need to speak slowly, clearly and in basic English

- If this isn't enough, get an interpreter

How well do you understand your client's English?

- Some accents are easier than others to understand
- It gets easier with repeated exposure
- If you're having too much difficulty understanding your client, get an interpreter

How well can you communicate in the client's language?

That high school Spanish from 20 years ago will not suffice.

True fluency is needed

Usually acquired by living abroad for a period of time.

Should include an in-depth understanding of legal and technical vocabulary.

If you're not truly fluent, you should use an interpreter

Finding an interpreter

Interpreters vs. Translators

Interpreters assist with speaking

Translators assist with writing

Not always qualified to interpret

Finding an interpreter (continued)

Should be experienced in working with attorneys

Certified court interpreters are ideal

Supreme Court of Ohio's Court Interpreter
Certification Program

Be sure your client is willing to pay for an
interpreter

Finding an interpreter (continued)

Try to find an interpreter who speaks your
client's dialect

Ex. Québécois vs. Senegalese

Should not be a friend "off the street"

Finding an interpreter (continued)

Interpreter should be familiar with Ohio's Code of Professional Conduct for Court Interpreters and Translators (Superintendence R. 84 and Appx. H)

Canon 1: High Standards of Conduct.

Canon 2: Accuracy and Completeness.

Canon 3: Impartiality and Avoidance of Conflicts of Interest.

Finding an interpreter (continued)

Canon 4: Confidentiality

Canon 5: Representation of Qualifications.

Canon 6: Proficiency.

Canon 7: Assessing and Reporting Impediments to Performance.

Finding an interpreter (continued)

Canon 8: Duty to Report Ethical Violations.

Canon 9: Scope of Practice.

Canon 10: Restrictions from Public Comment.

Finding an interpreter (continued)

- The interpreter should have excellent work habits

Easily reached

Punctual

Well-dressed

Appropriate demeanor

Rule #2: Emphasize your ethical duties to your client



Emphasize your ethical duties (continued)

- In many parts of the world corruption is pandemic
- In the U.S., foreign clients are often easy prey for dishonest attorneys
- Positive first impressions are vital

Good eye contact & sincere comportment

Emphasize your ethical duties (continued)

Discuss your duties to the client under Ohio's Rules of Professional Conduct, and the consequences of violating them:

Competent representation (1.1)

Scope of representation (1.2)

Diligence (1.3)

Communication (1.4)

Reasonable fees (1.5)

Confidentiality (1.6)

Rule #3: Educate yourself about your client's home country.



Educate yourself about your client's home country (continued)

Shatter the unfair "ignorant American" stereotype

Establish an easier rapport with the client

Become the "go to" attorney in that client's community

Good starting point: U.S. State Department Country Reports:

<https://www.state.gov/j/drl/irf/rpt/>

Educate yourself about your client's home country (continued)

You'll learn a lot, and maybe even have some fun along the way

One big caveat:

When discussing your client's home country, do not discuss politics, religion or sex unless it is relevant to your case!

Rule #4: Be extra patient.



Be extra patient (continued)

Some attorneys are ill-suited to counsel foreign clients

Cultural differences may impact the client's:

Punctuality

Organization

Candor

Be extra patient (continued)

Fees:

In some cultures, haggling is just part of doing business

Be sure your client clearly understands the fee and payment arrangements up front

Sometimes you'll need to stand firm

Rule #5: Allot extra time.



Allot extra time (continued)

More needs to be explained

Basic legal concepts

How judicial or administrative processes work

Your role as the attorney

Fees

Allot extra time (continued)

Working with an interpreter?

Meetings will last twice as long

Develop a “rhythm” with the interpreter and your client

Rule #6: Be directly available.



Be directly available (continued)

Your foreign clients are uniquely dependent on you

Don't over-delegate to support staff

Unless your assistant speaks their native language

They should never feel as though they are bothering you.

Rule #7: Enjoy counseling your foreign client.



Questions





THE HOLLIS LAW FIRM

Where clients come first.

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RULE 80. Definitions.

As used in Sup.R. 80 through 89:

(A) Ancillary court services

“Ancillary court services” means any activity, other than a case or court function, that includes the exchange of legal or general court-related information with the public or parties in interest and is paid for or provided by the court. “Ancillary court services” includes, but is not limited to, the following:

- (1) Alternative dispute resolution programs;
- (2) Evaluations;
- (3) Information counters;
- (4) Probation or criminal diversion program functions;
- (5) Pro se clinics;
- (6) Specialized dockets and dedicated-subject-matter dockets.

(B) Case or court function

“Case or court function” means any hearing, trial, pre-trial conference, settlement conference, or other appearance before a court in an action, appeal, proceeding, or other matter conducted by a judge, magistrate, or other court official.

(C) Consecutive interpretation

“Consecutive interpretation” means interpretation in which a foreign language interpreter or sign language interpreter waits until the speaker finishes an entire message rendered in a source language before rendering the message in a target language.

(D) Crime of moral turpitude

“Crime of moral turpitude” means either of the following:

- (1) A crime punishable by death or imprisonment in excess of one year pursuant to the law under which the person was convicted;
- (2) A crime involving dishonesty or false statement, regardless of the punishment and whether based upon state or federal statute or local ordinance.

(E) Deaf blind

“Deaf blind” means a combination of hearing and vision loss of any varying degree that causes an individual extreme difficulty in attaining independence in daily life activities, achieving psychosocial adjustment, or obtaining vocational objectives.

(F) Foreign language interpreter

“Foreign language interpreter” means an individual who, as part of any case or court function, facilitates communication between or among legal professionals and a limited English proficient or non-English speaking party or witness through consecutive interpretation, simultaneous interpretation, or sight translation.

(G) Limited English proficient

“Limited English proficient” means an individual who does not speak English as a primary language or who has a limited ability to read, speak, write, or understand English and requires the assistance of a foreign language interpreter or sign language interpreter to effectively communicate.

(H) Provisionally qualified foreign language interpreter

“Provisionally qualified foreign language interpreter” means a foreign language interpreter who has received provisional certification from the Supreme Court Language Services Program pursuant to Sup.R. 81(G)(3).

(I) Registered foreign language interpreters

“Registered foreign language interpreter” means a foreign language interpreter who has registered with the Supreme Court Language Services Program pursuant to Sup.R. 87.

(J) Sight translation

“Sight translation” means interpretation in which a foreign language interpreter or sign language interpreter renders in a target language a written document composed in a source language.

(K) Sign language interpreter

“Sign language interpreter” means an individual who, as part of any case or court function, facilitates communication between or among legal professionals and a deaf, hard-of-hearing, or deaf-blind party, witness, or juror through the use of sign language or other manual or oral representation of a spoken language.

(L) Simultaneous interpretation

“Simultaneous interpretation” means interpretation in which, after a brief pause to listen for or view key grammatical information, a foreign language interpreter or sign language interpreter renders in a target language the message of a person rendered in a source language as the person continues to communicate.

(M) Supreme Court certified foreign language interpreter

“Supreme Court certified foreign language interpreter” means a foreign language interpreter who has received certification from the Supreme Court Language Services Program pursuant to Sup.R. 81.

(N) Supreme Court certified sign language interpreter

“Supreme Court certified sign language interpreter” means a sign language interpreter who has received certification from the Supreme Court Language Services Program pursuant to Sup.R. 82.

(O) Telephonic interpretation

“Telephonic interpretation” means the use via telephone of a foreign language interpreter who is in a location that is physically separate from that of the party or witness who is limited English proficient and requires the services of the interpreter for meaningful participation.

(P) Translator

“Translator” means an individual who, as part of any case or court function, takes written text composed in a source language and renders it into an equivalent written text of a target language.

RULE 81. Certification for Foreign Language Interpreters.

(A) Certification

A foreign language interpreter may receive certification from the Supreme Court Language Services Program and be styled a "Supreme Court certified foreign language interpreter" pursuant to the requirements of this rule.

(B) General requirements for certification

An applicant for certification as a Supreme Court certified foreign language interpreter shall satisfy each of the following requirements:

- (1) Be at least eighteen years old;
- (2) Be a citizen or legal resident of the United States or have the legal right to remain and work in the United States;
- (3) Have not been convicted of any crime involving moral turpitude.

(C) Application for certification

An applicant for certification as a Supreme Court certified foreign language interpreter shall file an application with the program. The application shall include each of the following:

- (1) Verification the applicant is at least eighteen years old;
- (2) Verification the applicant is a legal resident or citizen of the United States or has the legal right to remain and work in the United States;
- (3) A copy of a completed criminal background check showing no conviction of a crime involving moral turpitude;
- (4) A nonrefundable application fee in an amount as determined by the program.

(D) Orientation training

An applicant shall attend an orientation training session conducted or sponsored by the program providing an introductory course to interpreting and addressing ethics, legal procedure and terminology, modes of interpretation, and other substantive topics. The program may waive this requirement upon demonstration by the applicant of equivalent experience or training. The program shall charge the applicant a nonrefundable fee in an amount as determined by the program for attendance at a program-sponsored training session.

(E) Written examination

(1) An applicant for certification as a Supreme Court certified foreign language interpreter shall take the written examination of the National Center for State Courts. The examination shall be administered by the program in accordance with the standards described in the test administration manuals of the center.

(2) To pass the written examination, an applicant shall receive an overall score of eighty percent or better in the English language and grammar, court-related terms and usage, and professional conduct sections of the examination.

(3) An applicant who fails the written examination shall wait one year before retaking the examination.

(4) An applicant who has taken the written examination in another state within the past twenty-four months may apply to the program for recognition of the score. The program shall recognize the score if it is substantially comparable to the score required under division (E)(2) of this rule.

(F) Post-written examination training course

Upon compliance with the written examination requirements of division (E) of this rule, an applicant for certification as a Supreme Court certified foreign language interpreter shall attend a training course sponsored by the program focusing on simultaneous, consecutive, and sight translation modes of interpretation in English and the target language of the applicant. The program may charge the applicant a nonrefundable fee in an amount as determined by the program for attendance at the training course.

(G) Oral examination

(1) After attending the post-written examination training course pursuant to division (F) of this rule, an applicant for certification as a Supreme Court certified foreign language interpreter shall take the oral examination of the National Center for State Courts. The examination shall be administered by the program in accordance with the standards described in the test administration manuals of the center.

(2) To pass oral examination, an applicant shall receive a score of seventy percent or better in each of the sections of the examination.

(3) An applicant who receives a score of less than seventy percent but at least sixty percent in each of the sections of the oral examination shall receive provisional certification from the program and be styled a "provisionally qualified foreign language interpreter." The applicant may maintain provisional certification for up to thirty-six months following the examination. If the applicant fails to receive an overall score of at least seventy percent in the sections of the examination within this time frame, the provisional certification of the applicant shall cease.

(4) An applicant who receives a score of at least seventy percent in two of the sections of the oral examination may carry forward the passing scores for up to thirty-six months or three testing cycles, whichever occurs last. If the applicant fails to successfully pass any previously failed sections of the examination during the time period which passing scores may be carried forward, the applicant shall complete all sections of the examination at a subsequent examination. An applicant may not carry forward passing scores from an examination taken in another state.

(H) Written and oral examination preparation

The program shall provide materials to assist applicants for certification as Supreme Court certified foreign language interpreters in preparing for the written and oral examinations, including overviews of each examination. The program also shall provide and coordinate training for applicants.

(I) Reciprocity

An applicant for certification as a Supreme Court certified foreign language interpreter who has previously received certification as a foreign language interpreter may apply to the program for certification without fulfilling the training and examination requirements of division (D) through (G) of this rule as follows:

(1) An applicant who has received certification from the federal courts shall provide proof of certification and be in good standing with the certifying body.

(2) An applicant who has received certification from another state shall provide proof of having passed the oral examination. The program may verify the test score information and testing history before approving certification.

(3) An applicant who has received certification from the National Association of Judiciary Interpreters and Translators shall provide proof of having received a score on the examination of the association substantially comparable to the scores required under divisions (E)(2) and (G)(2) of this rule. The program may verify the test score information and testing history before approving reciprocal certification.

(4) Requests for reciprocal certification from all other applicants shall be reviewed by the program on a case-by-case basis, taking into consideration testing criteria, reliability, and validity of the examination procedure of the certifying body. The program shall verify the test score of the applicant after accepting the certification criteria of the certifying body.

(J) Oath or affirmation

Each Supreme Court certified foreign language interpreter and provisionally qualified foreign language interpreter shall take an oath or affirmation under which the interpreter affirms to know, understand, and act according to the "Code of Professional Conduct for Court Interpreters and Translators," as set forth in Appendix H to this rule.

RULE 82. Certification for Sign Language Interpreters.

(A) Certification

A sign language interpreter who has received a passing score on the “Specialist Certification: Legal” examination of the Registry of Interpreters for the Deaf may receive certification from the Supreme Court Language Services Program and be styled a “Supreme Court certified sign language interpreter” pursuant to the requirements of this rule.

(B) General requirements for certification

An applicant for certification as a Supreme Court certified sign language interpreter shall satisfy each of the following requirements:

- (1) Be at least eighteen years old;
- (2) Be a citizen or legal resident of the United States or have the legal right to remain and work in the United States;
- (3) Have not been convicted of any crime involving moral turpitude.

(C) Application for certification

An applicant for certification as a Supreme Court certified sign language interpreter shall file an application with the program. The application shall include each of the following:

- (1) Verification the applicant is at least eighteen years old;
- (2) Verification the applicant is a legal resident or citizen of the United States or has the legal right to remain and work in the United States;
- (3) A copy of a completed criminal background check showing no conviction of a crime involving moral turpitude;
- (4) Proof of having received a passing score on the “Specialist Certification: Legal” examination;
- (5) A nonrefundable application fee in an amount as determined by the program.

(D) Oath or affirmation

Each Supreme Court certified sign language interpreter shall take an oath or affirmation under which the interpreter affirms to know, understand, and act according to the “Code of Professional Conduct for Court Interpreters and Translators,” as set forth in Appendix H to this rule.

RULE 83. Revocation of Certification.

The Supreme Court Language Services Program may revoke the certification of a Supreme Court certified foreign language interpreter or a Supreme Court certified sign language interpreter or the provisional certification of a provisionally qualified foreign language interpreter for any of the following reasons:

- (A) A material omission or misrepresentation in the application for certification from the interpreter;
- (B) A substantial breach of the “Code of Professional Conduct for Court Interpreters and Translators,” as set forth in Appendix H to this rule;
- (C) Noncompliance with the applicable continuing education requirements of Sup.R. 85.

RULE 84. Code of Professional Conduct for Court Interpreters and Translators.

Supreme Court certified foreign language interpreters, Supreme Court certified sign language interpreters, provisionally qualified foreign language interpreters, and translators shall be subject to the "Code of Professional Conduct for Court Interpreters and Translators," as set forth in Appendix H to this rule.

RULE 85. Continuing Education.

(A) Requirements

(1) Each Supreme Court certified foreign language interpreter and Supreme Court certified sign language interpreter shall complete and report, on a form provided by the Supreme Court Language Services Program, at least twenty-four credit hours of continuing education offered or accredited by the program for each two-year reporting period. Six of the credit hours shall consist of ethics instruction and the remaining eighteen general credit hours shall be relevant to the work of the interpreter in the legal setting. The interpreter may carry forward a maximum of twelve general credit hours into the following biennial reporting period.

(2) Each provisionally qualified foreign language interpreter shall complete and report, on a form provided by the program, at least twenty-four credit hours of continuing education offered or accredited by the program within twenty-four months after the date of the last oral examination of the National Center for State Courts administered by the program.

(B) Compliance with requirements

The program shall keep a record of the continuing education hours of each Supreme Court certified foreign language interpreter, Supreme Court certified sign language interpreter, and provisionally qualified foreign language interpreter, provided it shall be the responsibility of the interpreter to inform the program of meeting the continuing education requirements.

(C) Accreditation

The program shall accredit continuing education programs, activities, and sponsors and establish procedures for accreditation, provided any continuing education programs or activities offered by the National Center for State Courts, the National Association of Judiciary Interpreters and Translators, and the Registry of Interpreters for the Deaf shall not require accreditation. The program may assess a reasonable nonrefundable application fee in an amount as determined by the program for a sponsor submitting a program or activity for accreditation.

RULE 86. Certification Roster.

The Supreme Court Language Services Program shall maintain a roster of each Supreme Court certified foreign language interpreter, Supreme Court certified sign language interpreter, and provisionally qualified foreign language interpreter who is in compliance with the applicable continuing education requirements of Sup.R. 85(A). The program shall post the roster on the website of the Supreme Court.

RULE 87. Registered Foreign Language Interpreters.

(A) Registration

The Supreme Court Language Services Program may register foreign language interpreters to whom both of the following apply:

- (1) The interpreter is ineligible for certification as a Supreme Court certified foreign language interpreter due to the lack of an oral examination of the National Center for State Courts for that language;
- (2) The interpreter demonstrates to the program's satisfaction proficiency in the interpreter's target language and sufficient preparation to properly interpret case or court functions.

(B) Title

A foreign language interpreter registered with the Supreme Court Language Services Program pursuant to division (A) of this rule shall be styled a "registered foreign language interpreter."

RULE 88. Appointment of a Foreign Language Interpreter or Sign Language Interpreter.

(A) When appointment of a foreign language interpreter is required

A court shall appoint a foreign language interpreter in a case or court function in either of the following situations:

- (1) A party or witness who is limited English proficient or non-English speaking requests a foreign language interpreter and the court determines the services of the interpreter are necessary for the meaningful participation of the party or witness;
- (2) Absent a request from a party or witness for a foreign language interpreter, the court concludes the party or witness is limited English proficient or non-English speaking and determines the services of the interpreter are necessary for the meaningful participation of the party or witness.

(B) When appointment of a sign language interpreter is required

(1) A court shall appoint a sign language interpreter in a case or court function in either of the following situations:

- (a) A party, witness, or juror who is deaf, hard of hearing, or deaf blind requests a sign language interpreter;
- (b) Absent a request from a party, witness, or juror for a sign language interpreter, the court concludes the party, witness, or juror is deaf, hard of hearing, or deaf blind and determines the services of the interpreter are necessary for the meaningful participation of the party, witness, or juror.

(2) When appointing a sign language interpreter pursuant to division (B)(1) of this rule, the court shall give primary consideration to the method of interpretation chosen by the party, witness, or juror, in accordance with 28 C.F.R. 35.160(b)(2), as amended.

(C) Appointments to avoid

A court shall use all reasonable efforts to avoid appointing an individual as a foreign language interpreter pursuant to division (A) of this rule or sign language interpreter pursuant to division (B) of this rule if any of the following apply:

- (1) The interpreter is compensated by a business owned or controlled by a party or a witness;
- (2) The interpreter is a friend or a family or household member of a party or witness;

- (3) The interpreter is a potential witness;
- (4) The interpreter is court personnel employed for a purpose other than interpreting;
- (5) The interpreter is a law enforcement officer or probation department personnel;
- (6) The interpreter has a pecuniary or other interest in the outcome of the case;
- (7) The appointment of the interpreter would not serve to protect a party's rights or ensure the integrity of the proceedings;
- (8) The interpreter does or may have a real or perceived conflict of interest or appearance of impropriety.

(D) Appointment of and certification requirement for foreign language interpreters

(1) Except as provided in divisions (D)(2) through (4) of this rule, when appointing a foreign language interpreter pursuant to division (A) of this rule, a court shall appoint a Supreme Court certified foreign language interpreter to participate in-person at the case or court function.

(2) Except as provided in divisions (D)(3) and (4) of this rule, if a Supreme Court certified foreign language interpreter does not exist or is not reasonably available to participate in-person at the case or court function and after considering the gravity of the proceedings and whether the matter could be rescheduled to obtain a Supreme Court certified foreign language interpreter to participate in-person at the case or court function, a court may appoint a provisionally qualified foreign language interpreter to participate in-person at the case or court function. The court shall summarize on the record its efforts to obtain a Supreme Court certified foreign language interpreter to participate in-person at the case or court function and the reasons for using a provisionally qualified foreign language interpreter.

(3) Except as provided in division (D)(4) of this rule, if a Supreme Court certified foreign language interpreter or provisionally qualified foreign language interpreter does not exist or is not reasonably available to participate in-person at the case or court function and after considering the gravity of the proceedings and whether the matter could be rescheduled to obtain a Supreme Court certified foreign language interpreter or provisionally qualified foreign language interpreter to participate in-person at the case or court function, a court may appoint a foreign language interpreter who demonstrates to the court proficiency in the target language and sufficient preparation to properly interpret the proceedings to participate in-person at the case or court function. Such interpreter shall be styled a "language-skilled foreign language interpreter." The court shall summarize on the record its efforts to obtain a Supreme Court certified foreign language interpreter or provisionally qualified foreign language interpreter to participate in-person at the case or

court function and the reasons for using a language-skilled foreign language interpreter. The language-skilled foreign language interpreter's experience, knowledge, and training should be stated on the record. Each language-skilled foreign language interpreter shall take an oath or affirmation under which the interpreter affirms to know, understand, and act according to the "Code of Professional Conduct for Court Interpreters and Translators," as set forth in Appendix H to this rule.

(4) If a Supreme Court certified foreign language interpreter, provisionally qualified foreign language interpreter, or language-skilled foreign language interpreter does not exist or is not reasonably available to participate in-person at the case or court function and after considering the gravity of the proceedings and whether the matter could be rescheduled to obtain a Supreme Court certified foreign language interpreter, provisionally qualified foreign language interpreter, or language-skilled foreign language interpreter to participate in-person at the case or court function, a court may appoint an interpreter to participate in the case or court function through telephonic interpretation. The court shall summarize on the record its efforts to obtain a Supreme Court certified foreign language interpreter, provisionally qualified foreign language interpreter, or language-skilled foreign language interpreter to participate in-person at the case or court function and the reasons for using an interpreter who will participate in the case or court function through telephonic interpretation. In appointing the interpreter, the court shall follow the order of certification preference in divisions (D)(1) through (3) of this rule and comply with the "Standards for the Use of Telephonic Interpretation," as set forth in Appendix J to this rule.

(E) Appointment of and certification requirement for sign language interpreters

(1) Except as provided in divisions (E)(2) through (4) of this rule, when appointing a sign language interpreter pursuant to division (B) of this rule, the court shall appoint a Supreme Court certified sign language interpreter.

(2) Except as provided in divisions (E)(3) and (4) of this rule, if a Supreme Court certified sign language interpreter does not exist or is not reasonably available and after considering the gravity of the proceedings and whether the matter could be rescheduled to obtain a Supreme Court certified sign language interpreter, a court may appoint a sign language interpreter who holds one of the following certifications:

(a) A "National Interpreter Certification" from the National Association of the Deaf and the Registry of Interpreters for the Deaf;

(b) A "Certification of Interpretation" and "Certification of Transliteration" from the Registry of Interpreters for the Deaf;

(c) A "Comprehensive Skills Certificate" from the Registry of Interpreters for the Deaf;

(d) A "Master Comprehensive Skills Certificate" from the Registry of Interpreters for the Deaf;

- (e) A “Level V Certification” from the National Association of the Deaf;
- (f) A “Level IV Certification” from the National Association of the Deaf.

(3) If the communication mode of the deaf, hard-of-hearing, or deaf-blind party, witness, or juror is unique and cannot be adequately accessed by a sign language interpreter who is hearing, a court shall appoint a sign language interpreter certified as a “Certified Deaf Interpreter” by the Registry of Interpreters for the Deaf.

(4) If the communication mode of the deaf, hard-of-hearing, or deaf-blind party, witness, or juror requires silent oral techniques, a court may appoint a sign language interpreter who possesses an “Oral Transliteration Certificate” from the Registry of Interpreters for the Deaf.

(5) A court shall summarize on the record its efforts to obtain and reasons for not using a Supreme Court certified sign language interpreter.

(F) Appointment of multiple foreign language interpreters or sign language interpreters

(1) To ensure the accuracy and quality of interpretation, when appointing a foreign language interpreter pursuant to division (A) of this rule or sign language interpreter pursuant to division (B) of this rule, a court shall appoint two or more foreign language interpreters or sign language interpreters in either of the following situations:

- (a) The case or court function will last two or more hours and requires continuous, simultaneous, or consecutive interpretation;
- (b) The case or court function will last less than two hours, but the complexity of the circumstances warrants the appointment of two or more interpreters.

(2) To ensure the accuracy and quality of interpretation, a court shall appoint two or more foreign language interpreters or sign language interpreters for a case or court function involving multiple parties, witnesses, or jurors requiring the services of an interpreter.

(G) Examination on record

(1) In determining whether the services of a foreign language interpreter are necessary for the meaningful participation of a party or witness pursuant to division (A) of this rule, the court shall conduct an examination of the party or witness on the record. During the examination, the court shall utilize the services of a foreign language interpreter, who may participate remotely. However, in doing so the court is not required to comply with the requirements of division (D) of this rule.

(2) In determining whether the services of a sign language interpreter are necessary for the meaningful participation of a party, witness, or juror, pursuant to division (B) of this

rule, the court shall conduct an examination of the party, witness, or juror on the record. During the examination, the court shall utilize the services of a sign language interpreter, who may participate remotely. However, in doing so the court is not required to comply with the requirements of division (E) of this rule.

(H) Waiver

A party may waive the right to a foreign language interpreter under division (A) of this rule or sign language interpreter under division (B) of this rule, unless the court has determined the interpreter is required for the protection of the party's rights and the integrity of the case or court function. When accepting the party's waiver, the court shall utilize the services of a foreign language interpreter or sign language interpreter, who may participate remotely. However, in doing so the court is not required to comply with the requirements of division (D) or (E) of this rule.

(I) Administration of oath or affirmation

A court shall administer an oath or affirmation to a foreign language interpreter appointed pursuant to division (A) of this rule or sign language interpreter appointed pursuant to division (B) of this rule in accordance with Evid.R. 604.

RULE 89. Use of Communication Services in Ancillary Services.

(A) Limited English proficient individuals

A court shall provide foreign language communication services to limited English proficient individuals in conjunction with ancillary court services. Dependent upon the significance and complexity of the ancillary court service, the following individuals may provide the communication services in person, telephonically, or via video:

- (1) An employee of the court, other than a Supreme Court certified foreign language interpreter or provisionally qualified foreign language interpreter, who has demonstrated proficiency in English and the target language in accordance with standards set by Supreme Court Language Services Program and who the program has determined is qualified to conduct communication services directly with a limited English proficient individual in the target language;
- (2) A Supreme Court certified foreign language interpreter;
- (3) A provisionally qualified foreign language interpreter;
- (4) A registered foreign language interpreter.

(B) Deaf, hard-of-hearing, and deaf-blind individuals

A court shall provide sign language communication services to deaf, hard-of-hearing, and deaf-blind individuals in conjunction with ancillary court services. Dependent upon the significance and complexity of the ancillary court service, the following individuals may provide the communication services in person, telephonically, or via video:

- (1) A Supreme Court certified sign language interpreter;
- (2) A sign language interpreter listed in Sup.R. 88(E)(2) through (4);
- (3) A sign language interpreter employed by a community center for the deaf.

APPENDIX H

CODE OF PROFESSIONAL CONDUCT FOR COURT INTERPRETERS AND TRANSLATORS

Preamble.

Foreign language interpreters, sign language interpreters, and translators help ensure that individuals enjoy equal access to justice, including case and court functions and court support services. Foreign language interpreters, sign language interpreters, and translators are highly skilled professionals who fulfill an essential role by assisting in the pursuit of justice. They act strictly in the interest of the courts they serve and are impartial officers of those courts, with a duty to enhance the judicial process.

Definitions.

As used in this code, “provisionally qualified foreign language interpreter,” “Supreme Court certified foreign language interpreter,” “Supreme Court certified sign language interpreter,” and “translator” have the same meanings as in Rule 80 of the Rules of Superintendence for the Courts of Ohio.

Applicability.

This code applies to Supreme Court certified foreign language interpreters, provisionally qualified foreign language interpreters, Supreme Court certified sign language interpreters, and translators. This code shall bind all agencies and organizations that administer, supervise, use, or deliver interpreting or translating services in connection with any case or court function.

A court may use this code to assist it in determining the qualifications of any individual providing services as an interpreter under Rule 702 of the Rules of Evidence.

Canon 1. High Standards of Conduct.

Interpreters and translators shall conduct themselves in a manner consistent with the dignity of the court and shall be as unobtrusive as possible, consistent with the ends of justice.

Commentary

Interpreters and translators should maintain high standards of conduct at all times to promote public confidence in the administration of justice.

Canon 2. Accuracy and Completeness.

Interpreters and translators shall render a complete and accurate interpretation or translation without altering, omitting, or adding anything to what is spoken or written, and shall do so without explaining the statements of the original speaker or writer.

Commentary

In order to preserve the record of the court and assist in the administration of justice, interpreters should completely and accurately interpret the exact meaning of what is said or written without embellishing, explaining, omitting, adding, altering, or summarizing anything. This includes maintaining accuracy of style or register of speech, as well as not distorting the meaning of the source language, even if it appears obscene, incoherent, non-responsive, or a misstatement. Interpreters and translators have a duty to inform the court of any error, misinterpretation, or mistranslation so that the record may be promptly corrected. The terms "accurately," "completely," and "exact" do not signify a word-for-word or literal interpretation, but rather mean to convey the exact meaning of the discourse of the speaker or writer.

Canon 3. Impartiality and Avoidance of Conflicts of Interest.

Interpreters and translators shall be impartial and unbiased. Interpreters and translators shall refrain from conduct that may give the appearance of bias and shall disclose any real or perceived conflict of interest.

Commentary

Interpreters and translators must disclose to the court any prior involvement with a case or court function, parties, or witnesses that creates or could be viewed as creating a conflict of interest, provided such disclosure must not include anything that is privileged or confidential. The court must then determine whether the interpreter or translator may continue on the case or court function. Counsel for either party may petition the court for appointment of a different interpreter or translator on the basis of a conflict of interest and the court must determine on the record whether to release the interpreter or translator from the case or court function.

Canon 4. Confidentiality.

Interpreters and translators shall protect from unauthorized disclosure all privileged or other confidential communications, documents, or information they hear or obtain while acting in a professional capacity.

Commentary

Interpreters and translators must maintain confidentiality with respect to any communication, document, information, or other type of confidential matter, including police and medical records and attorney-client privileged communications protected under section 2317.02 of the Revised Code. Interpreters and translators must not derive, either directly or indirectly, any profit or advantage from any confidential communication, document, or information acquired while acting in a professional capacity.

Canon 5. Representation of Qualifications.

Interpreters and translators shall accurately and completely represent their credentials, certifications, training, references, and pertinent experience.

Commentary

Interpreters and translators have a duty to present accurately and completely any applicable credentials, certifications, training, references, and pertinent experience, consistent with Canon 6 of this code. It is essential that interpreters and translators present a complete and truthful account of their qualifications before appointment to allow the court to fairly evaluate their qualifications for delivering interpreting or translating services.

Canon 6. Proficiency.

Interpreters and translators shall provide professional services only in matters in which they can proficiently perform.

Commentary

By accepting an assignment, interpreters and translators warrant they have the skills, training, and understanding of terminology to interpret or translate accurately and effectively in the given setting, are fluent in the required languages, and have the ability to understand regional differences and dialects. Interpreters have a duty to request from the court and the parties all pertinent information and materials necessary to prepare for the case or court function.

Interpreters and translators should strive continually to improve language skills and knowledge of specialized vocabulary and familiarize themselves with the judicial system and any applicable court rules. Interpreters and translators are responsible for having the proper dictionaries and other reference materials available when needed.

Canon 7. Assessing and Reporting Impediments to Performance.

Interpreters and translators shall at all times assess their ability to perform effectively and accurately. If an interpreter or translator discovers anything impeding full compliance with the oath or affirmation of the interpreter or translator and this code, the interpreter or translator shall immediately report this information to the court.

Commentary

Interpreters and translators must immediately inform the court of any condition interfering with their ability to provide accurate and complete interpretation or translation. This may include excessively rapid, quiet, or indistinct speech, physical interference such as inability to see exhibits, noise in their surroundings, or any other interfering factor.

Interpreters and translators must inform the court if they are having difficulties obtaining pertinent information or materials required to prepare for a case or court function that may impede their ability to perform adequately. If at the time of a hearing or trial the interpreter or translator has not been provided with necessary information or materials, the interpreter or translator must inform the court on the record and request a recess to review such information or materials.

Interpreters and translators should withdraw from an assignment if they are unable to understand or satisfactorily communicate with the non-English speaking, limited English proficient, deaf or hard-of-hearing party, witness, or juror, or if they lack required skills, preparation, or terminology to perform effectively in the case or court function for which they have been summoned.

Canon 8. Duty to Report Ethical Violations.

Interpreters and translators shall report to the court any efforts to impede their compliance with any law, this code, or other official policy governing interpreting or translating. Interpreters and translators shall promptly report to the appropriate legal or disciplinary authority if they observe another interpreter or translator improperly performing an assignment; accepting remuneration apart from authorized fees; disclosing privileged or confidential communications, documents, or information; or otherwise committing a breach of this code.

Commentary

Interpreters and translators must report to the court any ethical violation, action, or information that refers to the persistence of a party demanding that an interpreter or translator violate this code, subject to any applicable privilege.

Canon 9. Scope of Practice.

Interpreters and translators shall not give legal advice, communicate their conclusions with respect to any answer, express personal opinions to individuals for whom they are interpreting or translating, or engage in any other activity that may be construed to constitute a service other than interpreting or translating while serving as an interpreter.

Commentary

Since interpreters and translators are only responsible for enabling others to communicate, they should exclusively limit themselves to the activity of interpreting and translating. Interpreters and translators should refrain from initiating communications while interpreting or translating or at all times except as set out below.

Interpreters may be required to initiate communications during a case or court function when they find it necessary to seek assistance in performing their duties. Examples of such circumstances include seeking direction when unable to understand or express a word or thought, requesting speakers to moderate their rate of communication or repeat or rephrase something, correcting their own interpreting errors, or notifying the court of reservations about their ability to satisfy an assignment competently. In

such instances the interpreter should refer to him or herself in the third person, making it clear and on the record that the interpreter is speaking for him or herself.

At no time may an interpreter give advice. An interpreter should not explain the purpose of forms, services, or otherwise act as counselor or advisor. The interpreter may sight translate language on a form, but may not provide independent legal advice as to the purpose of the form or instruct the litigant as to the proper manner of completing the form.

Interpreters and translators should not personally serve to perform acts that are the official responsibility of other court officials including, but not limited to, court clerks, pretrial release investigators or interviewers, or probation officers, except as required by and in the presence of such officials.

Canon 10. Restrictions from Public Comment.

Consistent with Canon 4 of this code, interpreters and translators shall not publicly discuss, report, or offer an opinion concerning a matter in which they are or have been engaged, even when that information is not privileged or required by law to be confidential.

Commentary

Interpreters and translators must refrain from making public comments or giving opinions or reports concerning any particulars of a case or court function in which they are or have provided professional services, regardless whether the information is privileged or confidential. This restriction does not apply to general public comments or reports concerning the interpreting or translating professions.

TAB B





Curtis Scribner is Senior Counsel in The Procter & Gamble Company's Global Privacy, Cybersecurity and IT law group where he focuses on consumer programs and third party compliance. Prior to P&G, he was an associate at Shearman & Sterling LLP. He is a 2007 graduate of the University of Cincinnati College of Law.

Basics of EU Privacy & Data Protection



Susan Shook and Curtis Scribner

Agenda

- GDPR
- Data Transfers
- Brexit
- Russia Data Localization

GDPR

- Introduces **uniform data protection regime** throughout the EU
 - but **WATCH OUT**: room for national derogations (that is, Member State exceptions/add-ons)
- Applies to all Personal Data – employee/consumer, etc.
- Follows the spirit and principles of the previous legislation but imposes **extensive additional obligations**
- **Effective as of May 25, 2018**



GDPR - Why?

- External landscape is evolving
 - Regulators seeking to protect EU data subjects against advancing technology
 - Historical learning (collection of personal data for initially low risk purposes can lead to unintended high stakes consequences – e.g., WWII ethnic cleansing)
- Regulators' belief that some entities see privacy chaos as method of doing business; historical fines not high enough to modify such behavior
- Growing consumer/personal data stakeholder awareness of privacy concerns and monetization value of their data





Introduction to “Personal Data”

What is Personal Data?

Personal data are any information which are **related** to an identified or identifiable natural person.

Personally identifiable information (“PII”) are any information that can be used on its own or with other information to identify, contact, or locate a single person.

All PII is personal data but not all personal data is PII.

Linked vs. Linkable Information



Linked information is Personal Data
Linkable Information is potentially Personal Data

Linked information is any data set of personal information that ON IT'S OWN, on its face, can be used to instantly identify an individual (i.e., essentially PII).

Linkable information, on the other hand, is information that on its own may not be able to identify a person, BUT WHEN COMBINED with another piece of information could identify, trace, or locate a person.

Example of how Linkable Information Becomes Personal Data (Employee example)

- HR conducts a voluntary organizational survey. HR collects the following data from participants:
 - Level of Seniority
 - Years of Service
 - Gender
 - Department
 - Ethnicity

Has HR collected Personal Data?



Knowledge Check # 1

HR sponsors a 5K race as part of its employee health initiatives. In the registration form, HR asks employees only for their work email address. Is HR collecting Personal Data?

Answer: Yes



Knowledge Check # 2

As part of a Facebook promotion, your company asks participants to fill out a questionnaire on their laundry habits, including their first name, birth date, and postal code. Is the vendor collecting Personal Data?

Answer: Likely



Knowledge Check # 3

Your Company is doing an occupancy study of your offices. In order to conduct the study, the Company collects a log of dates and # of times when badges were scanned (but not the individual badge numbers). Is Security sharing Personal Data with the vendor?

Answer: No



Sensitive Personal Data

Personal data that are “particularly sensitive in relation to the fundamental rights and freedoms” and, therefore, deserve special protection:

- Racial or ethnic origin
- Political opinions
- Religious or philosophical beliefs
- Trade Union membership
- Genetic or biometric data processed for the purpose of identifying a person
- Health Data
- Sex life or sexual orientation

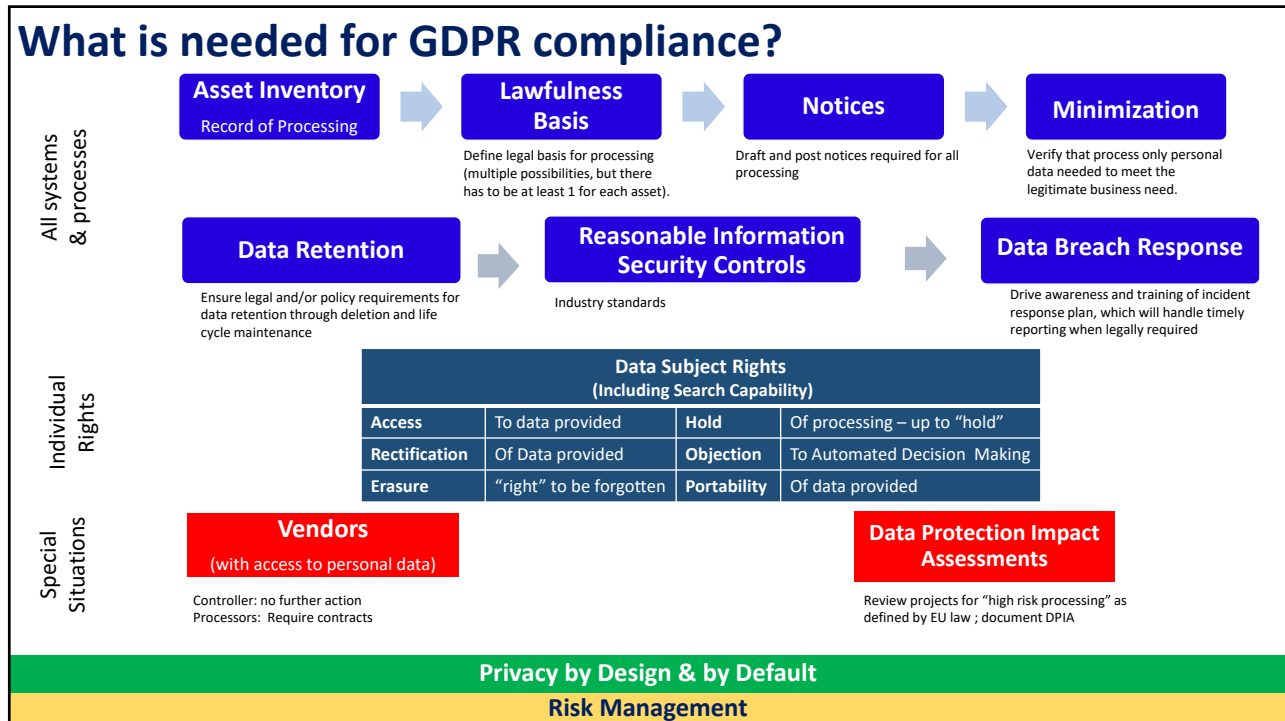
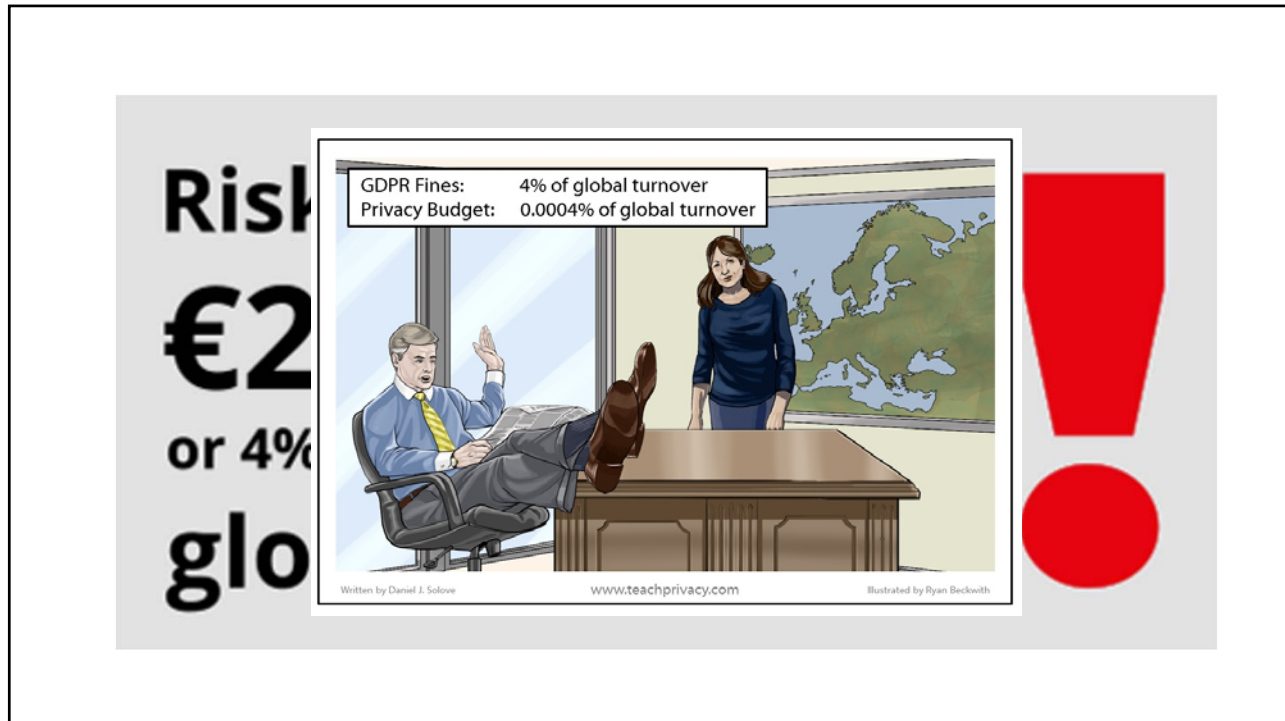


Introduction to the EU General Data Protection Regulation (GDPR)



GDPR – Snapshot of Changes

Previous Data Protection Directive	General Data Protection Regulation
European reach only	Global reach (any entity processing EU stakeholder data)
Local law divergence across 28 EU member states	Uniform regulation across all 28 EU member states
Limited accountability	Accountability key! (That is, can you show evidence that you complied.)
Liability against “controllers” of the data (the party who decides to process the data itself or through vendors)	Liability against controllers and “processors” (i.e., parties hired to manage data for controllers)
Small fines, extensive variation in levels across member states	Huge fines
No obligation to report data security breaches	Obligation to report data security breaches without delay
No consistent obligation to have data protection officers	Requirement for EU-wide data protection officer for some entities



Lawful Basis for Processing Personal Data

- GDPR requires a lawful basis to process Personal Data.
- GDPR specifies six processing conditions:
 1. **CONTRACTUAL NECESSITY** (eg employment contract)
 2. **LEGAL REQUIREMENT**
 3. **LEGITIMATE BUSINESS INTEREST**
 4. **CONSENT** (must be freely given, specific & informed, and unambiguous)
 5. **VITAL INTEREST**
 6. **PUBLIC TASK**

Provide Notice at time of Data Collection

- GDPR requires companies to inform the data subjects about what will be done with their data.
- Consent must be:
 - Freely Given
 - Specific and Informed
 - Unambiguous and Explicit

Apply Privacy by Design

- Privacy by Design is the practice of integrating privacy safeguards during the development phase of a project or business process rather than retrofitting technologies
- Goal is to incorporate privacy best practices, data security, and controls for users from the start.

Privacy by Design: best practices

- **Data Minimization**: limiting the collection of personal data to what is directly relevant/necessary to accomplish a specified purpose.
- **Retention Limits**: keep data for the minimum time needed/required.
- **Reasonable Security Controls**: Industry standard
- **Data Protection Impact Assessments (DPIA)** to identify high risks to the privacy rights of individuals when processing their personal data.

Anonymization vs. Pseudonymization

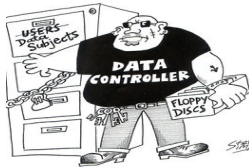
- **Anonymization** irreversibly destroys any way of identifying the data subject (eg by aggregating the data).
- **Pseudonymization** substitutes the identity of the data subject in such a way that additional information is required to re-identify the data subject.

Third Party Vetting & Governance

- Determine the vendor classification (controller vs processor)
 - Controller: determines the purposes and means of processing personal data.
 - Processor: responsible for processing personal data on behalf of a controller
- GDPR requires companies to have GDPR compliant contracts with all of their processors
- Incentive to limit the number of vendors

Third Party Classification: “Controller” vs. “Processor”

- **Data controller**: determines **how** and **why** Personal Data is processed; e.g., local company entity that collects the employees’ government ID number to comply with local labor laws
- **Data processor**: processes Personal Data only **on behalf of/upon instructions of** data controller; e.g., a third party IT platform that stores Personal Data of employees upon company’s instructions



WATCH-OUT: “Process” can mean any of the following activities: Collect, host, transfer, analyze, qualify, delete, modify, review, etc. It includes any visibility/access to the Personal Data.

Knowledge Check # 1

Market research company runs a consumer study assembling a panel on behalf of and in accordance with Company's detailed instructions. Company owns the Personal Data generated from the campaign.

-> Vendor is data processor



Knowledge Check # 2

Market research company uses its own consumer database to carry out an independent study on market trend insights and shares these insights with Company. Company does not receive the Personal Data but does receive the anonymous data analysis generated by the study.

-> Vendor is data controller

(it has independent liability regarding its personal data database).



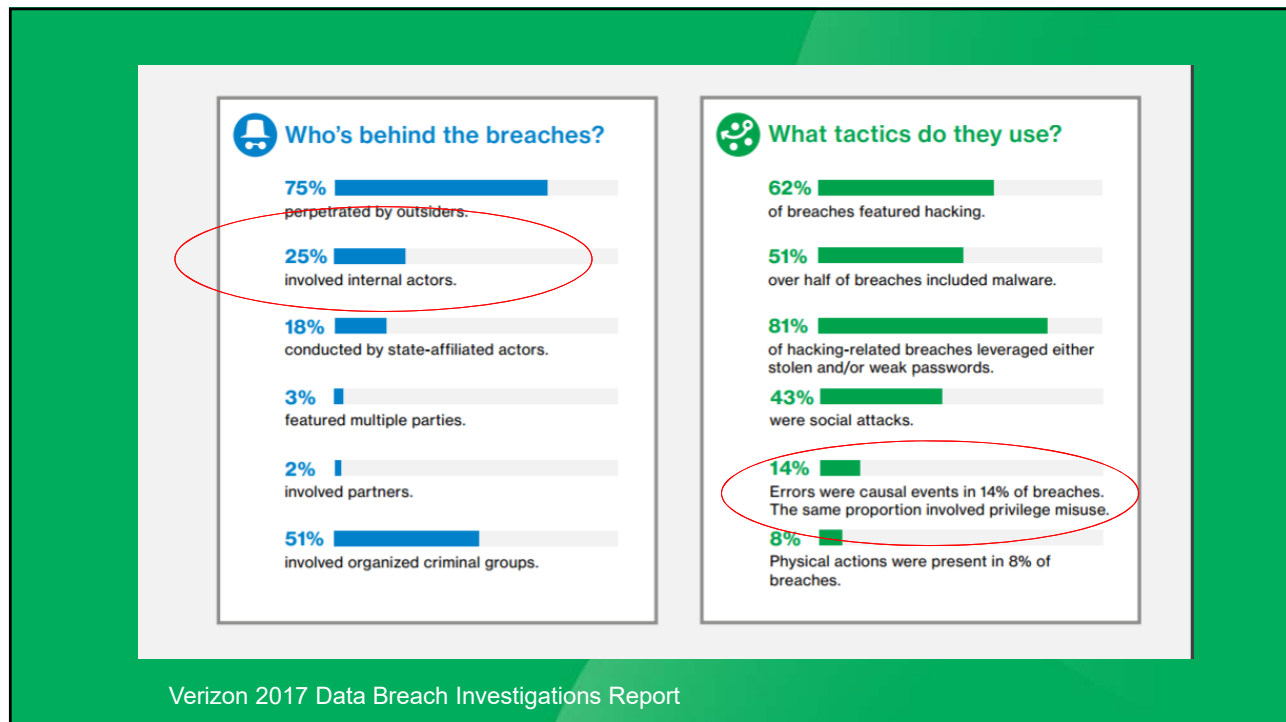
Vendor Contractual Requirements

- Processors must sign GDPR-compliant contracts (Article 28).
- This means contracts must include
 - Privacy contractual requirements
 - Model Clauses- Only if the vendor will process Personal Data of EU residents AND will transfer the data out of the EU (or allow third parties, such as IT technicians, outside the EU to access the data on EU servers)
 - Information Security contractual requirements regarding reasonable security controls.



GDPR and Breach Notification

- Notify personal data breach to supervisory authority no later than 72 hours after having become aware of it
- Notification should include broad information
- If this information is not available immediately, it should be provided in phases in a timely manner.

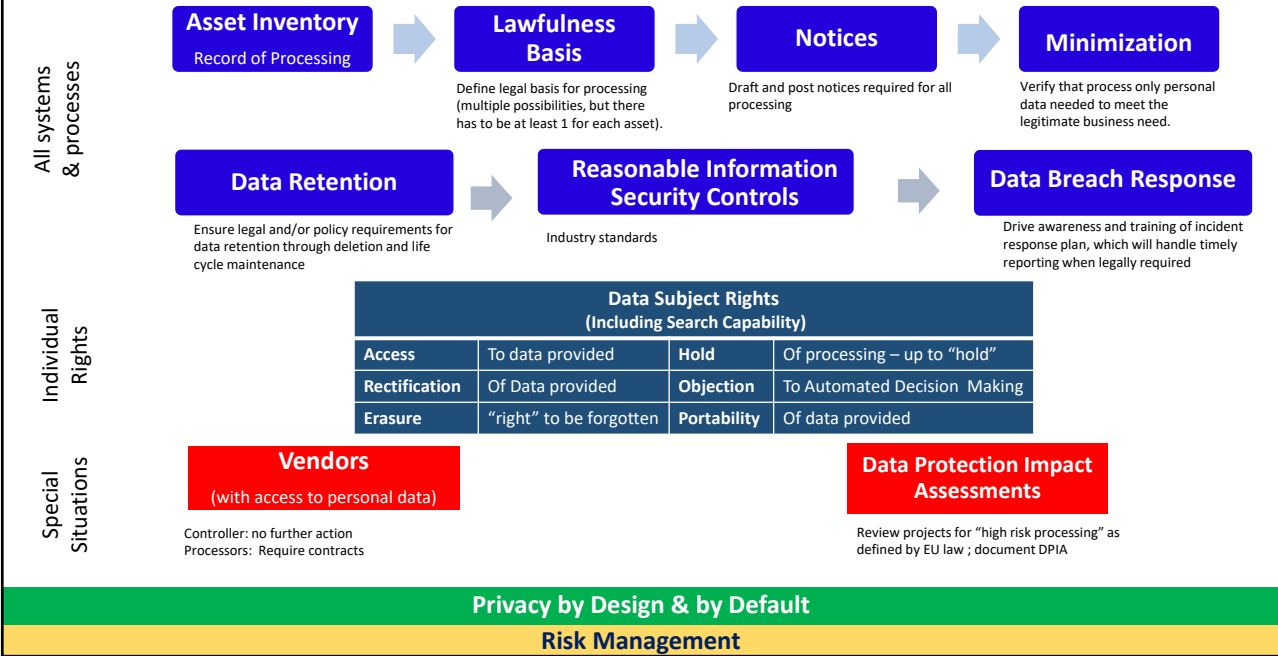


Managing Data Subject Rights

Access
Rectification
Erasure (RTBF)
Restriction
Portability
Object
No automated decision making

- Companies must facilitate (unless unidentified)
- Free of charge & without undue delay
 - max. 30 days unless suitable explanation
- Applies to any individual whose personal data is processed by companies (employees, consumers, suppliers,...)
- These data rights **aren't absolute**, particularly for employees and retirees
 - some subject rights may be limited by other regulations such as tax and employment law.

What is needed for GDPR compliance?



Data Transfer Requirements

- GDPR sets out legal requirements for transferring EU data to another country, including
 - Adequacy decision
 - No adequacy decision for U.S.
 - Appropriate safeguards
 - *Privacy Shield* - self-certification and determination to comply with data protection principles
 - Future is not certain
 - *Binding Corporate Rules* – Agree to operate under certain restrictions approved by regulatory authority; No external sharing
 - *EU standard contractual clauses*- incorporate protections by agreement
 - Data subjects' consent

Brexit



What about the UK?

No agreed form of departure

- Updates to law and other privacy regulations?
- Increased cybersecurity risk?

GDPR legal requirements apply (Data Protection Bill 2018).



Russia Data Localization

Russia

Requires companies that process personal information to store information relating to Russian citizens in servers and data centers located within Russia.

Once information is stored in Russia, it becomes subject to existing data protection laws, which place restrictions on cross-border transfers of information to countries that lack adequate privacy protections.

TAB C



United States Estate and Gift Tax – Advice to International Executives

CBA Presentation – International Law Committee

**11/15/2018
Kohnen & Patton LLP
Ann M. Seller
John L. Campbell**

**UNITED STATES ESTATE AND GIFT TAX –
ADVICE TO INTERNATIONAL EXECUTIVES**

**CBA Presentation – International Law Committee
November 15, 2018**

OUTLINE

- I. Engage Foreign Counsel.** Where the client has any residual tax liability in another country, has real estate in another country, states an intention to move to another country, or has beneficiaries whom he or she wishes to designate in a trust residing in another country, it is important to work with a competent advisor in that country to review proposed estate planning steps.
- II. Foreign Executive Relocating to the U.S.**
- a. *Temporary Move:* the person is a non-U.S. citizen not domiciled in the U.S. (a “Resident Alien”)
 - i. **Gift and Estate Tax Implications for Resident Alien** **Note that this tax scheme also applies to a non-U.S. citizen not domiciled in the U.S. living outside of the U.S. but investing in U.S. real estate or businesses.*
 - 1. **Gifts Tax for Resident Aliens.** Inter vivos transfers of intangible personal property will not be taxable by the U.S. Transfers of tangible assets located in the U.S. (i.e. real estate and tangible property) will be taxable, but may qualify for the annual exclusion, which is currently \$15,000 per individual donee per annum.¹
 - 2. **Estate Tax At Death of Resident Aliens.** Transfers at death of U.S. situs assets by Resident Aliens are taxed according to the uniform tax rate then in effect² but will qualify for credit of only \$13,000.³ However, testamentary transfers of intangible personal property by a non-citizen who is not domiciled in the U.S. will only be taxable if the asset has a U.S. situs.
 - a. U.S. Situs Assets Examples:
 - i. Real estate and tangible property located in the U.S.; Shares in U.S. company; Stock Options in U.S. company
 - b. Non-U.S. Situs Assets Examples:
 - i. Bank Accounts; Portfolio Debt Obligations, Life insurance proceeds payable on a Non-resident Alien’s life.
 - 3. **Transfers to Resident Alien Spouse**
 - a. Gifts. Inter vivos transfers to a non-citizen spouse will not qualify for the marital deduction but will qualify for an

¹ I.R.C. § 2503(b).

² I.R.C. § 2101.

³ I.R.C. § 2102(b).

- annual gift tax exclusion of \$152,000.⁴ Non-citizen spouses who are not U.S. domiciles may not split gifts.⁵
- b. **Transfers at Death.** Federal taxation of transfers at death to a non-citizen spouse will not qualify for a marital deduction⁶ unless the assets are placed in a Qualified Domestic Trust⁷, or the provisions of an applicable treaty provide for a marital deduction.
4. **Treaties.** There may be some treaty considerations if one or both of the spouses is a dual citizen. In this case, the tie breaking rules of one of the sixteen transfer tax treaties may apply.⁸ These treaties vary dramatically so that it is necessary to review the terms of the treaty to see if one of the tie breaking rules applies. The applicability of a Treaty may depend upon the residence of the clients before moving to the U.S. For example, a Canadian citizen who has been living in the United Kingdom for many years before moving to the U.S. to work may not qualify for the partial marital exemption available for spouses under the Canadian Protocol, if the Canadian has not become a U.S. resident for U.S. estate tax purposes and is not a Canadian resident, having lived in the U.K.
- ii. **Estate Planning Necessities for Resident Aliens**
 1. **Documents.** The estate plan should be based out of the country of domicile.
 2. **Transfer of U.S. Assets.**
 - a. **U.S. Will -** A U.S. Will may be necessary if the client has young children or holds investments in U.S. situs property (i.e. real estate located in the U.S.).
 - i. The Will should align with the client's foreign estate planning documents.
 - ii. Be careful that the U.S. Will does not inadvertently revoke a foreign Will and vice versa.
 - b. **U.S. Trust –** Foreign tax issues can arise with trusts if the client's country of domicile does not recognize them.
 - c. **Probate Avoidance** through the use of Beneficiary Designations.
 - iii. **Other Planning Ideas for Resident Aliens.** Non-resident non-citizen spouses who hold U.S. situs intangible assets in one or more joint accounts should consider separating such assets into individual accounts in the separate name of each spouse. Since there is no gift tax on the transfer of intangible assets held by non-residents who are not citizens, this transfer can be done without incurring gift tax. Assets held by a deceased spouse

⁴ I.R.C. § 2523(i)

⁵ I.R.C. § 2513(a)(1).

⁶ I.R.C. § 2056(d).

⁷ I.R.C. § 2056A.

⁸ The following are the sixteen countries with which the U.S. has a transfer tax treaty or protocol: Australia, Austria, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Netherlands, Norway, South Africa, Switzerland, and the United Kingdom.

in joint name with a surviving spouse who is not a citizen will be includable in the estate of the deceased spouse except to the extent that the surviving spouse can prove that the assets were contributed by him or her.⁹ The transfer of such assets into separate accounts avoids this issue of proof at the death of one spouse.

iv. Planning for Permanent Resident Status. If there is any possibility that a Resident Alien will become a permanent U.S. resident (Green Card Holder) in the future, the Resident Alien should arrange assets so as to take advantage of the various tax thresholds. Because a Resident Alien may transfer intangible assets without U.S. gift tax consequences, it is the appropriate time to equalize the estates of both spouses prior to becoming permanent U.S. residents. It may also be an appropriate time to make major transfers to children, outright, in trust, or into custodian accounts.

1. U.S. Expatriation Tax Scheme. The client should have a full understanding of the implication of obtaining a Green Card. Under the current tax regime certain long-term residents who relinquish their long-term residency on or after June 17, 2008¹⁰ may fall under the definition of a “covered expatriate”.

a. **Covered Expatriate.** To be a covered expatriate, the individual must be a lawful permanent resident (Green Card Holder) who has been such during **8 of the prior 15 year**, who ceases to be a long term resident by leaving the U.S., and who meets one of the following tests: (i) the net worth test (net worth of \$2,000,000 or more); (ii) the taxable income test (average annual net income tax for the preceding five tax years exceeds \$165,000 for 2018 as adjusted annually for inflation); or (iii) the certification test (fails to certify compliance with the U.S. tax obligations for the preceding five years).¹¹

b. **Exit Tax.** If the client fails one of these tests at the time of expatriation, the client will be deemed a “covered expatriate.” As a covered expatriate, the client will face immediate and long term income tax consequences and potential “inheritance tax” consequences for U.S. citizen or U.S. resident family members receiving gifts or bequests

⁹ I.R.C. § 2056 (d)(1)(B) specifically states that I.R.C. § 2040 (b) shall not apply where the surviving spouse is not a U.S. citizen. See also Treas. Reg. 20.2056A-8.

¹⁰ A “long-term resident” under the Internal Revenue Code is person who has been a “lawful permanent resident” of the U.S. and, as of the time the person ceases to be a lawful permanent resident, he or she has been such a resident in at least eight of the previous fifteen taxable years (which is sometimes referred to as the “8 of 15 Rule”). IRC § 877(e). A “lawful permanent resident” is a person who has been “accorded the privilege of residing permanently in the United States as an immigrant,” i.e. a Green Card holder, and such status has not been revoked or administratively or judicially determined to be abandoned. IRC § 7701(b)(6); Treas. Reg. 301.7701(b)-1(b)(3). For purposes of the 8 of 15 Rule, any part of a tax year in which the person is a Green Card holder counts as a year. Treas. Reg. 301.7701(b)-1(b)(1). A tax year, however, does not include any year in which the person is treated as a resident of another country pursuant to a treaty with that other country, and the person has not waived the benefits of the treaty that apply to residents of that country. IRC § 877(e)(2).

¹¹ I.R.C. § 877(a)(2)).

from such “covered expatriate”. The income tax consequences include:

- i. *Mark-to-Market Tax*. This consists of a tax on the deemed gain on the worldwide assets of the person, with the value of each asset “marked to the market” as if each asset had been sold by the taxpayer on the day before the expatriation date at fair market value.¹²
- ii. *Income tax on “specified tax deferred accounts”*.¹³ The taxpayer is treated as receiving a distribution of his or her entire interest in the account on the day before the expatriation date.¹⁴ Thus, income tax will be due at ordinary income rates on the entire taxable amount.¹⁵
- iii. *Tax on certain “deferred compensation items”*. This includes qualified pensions and profit-sharing or stock bonus plans under IRC § 401(a).¹⁶

¹² I.R.C. § 877A(a). In general, gains and losses are recognized and taxed according to the normal rules of Subtitle A (Income Taxes) of the Internal Revenue Code. Note that the amount of gain calculated according to the above rules is reduced by an exclusion that is currently \$713,000 for 2018 (as adjusted for inflation). I.R.C. § 877A(a)(3).

¹³ I.R.C. § 877A(e).

¹⁴ IRC § 877A(e)(1)(A)

¹⁵ “Specified tax deferred accounts” include: (a) Individual retirement plans, meaning an individual retirement account or an individual retirement annuity, other than simplified employee pensions (IRC § 408(k)) and simple retirement accounts (IRC § 408(p)) (These two excepted items, however, are the subject of the tax on certain “deferred compensation items” as discussed below); (b) Qualified tuition programs; (c) Coverdell education savings accounts; (d) Health savings accounts; and (e) Archer medical savings accounts. There is no exemption applicable to this tax and no election to defer payment of the tax, as there are with the mark-to-market tax. The treatment of these accounts as being fully distributed on the day before the expatriation date does not itself trigger an early distribution penalty.

¹⁶ IRC § 877A(d)(4). Deferred compensation items include: (a) A qualified pension, profit-sharing or stock bonus plan under IRC § 401(a); (b) A qualified annuity plan under IRC § 403(a); (c) A government-sponsored plan for its employees (federal, state or local); (d) A Section 403(b) annuity (a “tax-sheltered annuity” or TSA) offered through nonprofits, governments (state and local), and educational organizations; (e) Simplified employee pensions under IRC § 408(k); (f) Simple retirement accounts under IRC § 408(p); (g) A foreign retirement plan (but in this case and in the case of any other deferred compensation item, the tax will not apply to the extent that the services were performed outside the U.S. while the person was not a citizen or resident of the U.S.); (h) Any item of deferred compensation; and (i) Any property, or right to property, which the person is entitled to receive in connection with services described in IRC § 83 and not previously taken into account under such section. There are two categories of deferred compensation items: “eligible” and “other”. The categorization determines whether the tax can be deferred. The classification as “eligible” allows the tax to be deferred and for the tax to be capped at 30%. An eligible deferred compensation item is one where: The payor is a “United States person” (or a person who elects to be treated as a U.S. person and meet the requirements of the Secretary of the Treasury); and the covered expatriate notifies the payor of his or her status as such and makes an irrevocable waiver of any treaty right to claim a reduction in withholding on such item. In this case: The fiduciary or other payor withholds 30% of a distribution from the plan to the covered expatriate, to the extent that the distribution would be taxable to the person if such person were a citizen or resident of the U.S. (often the entire amount of the distribution); and the covered expatriate pays tax on the distribution under IRC § 871, which is the section that taxes nonresident noncitizen on U.S.-source interest, dividends, rents and other items at a rate of 30%. The categorization as “other” generally produces a tax due currently. These are referred to by the IRS as “ineligible deferred compensation items.” All but one of these items is taxed such that the taxpayer is treated as having received a distribution on the day before expatriation equal

- iv. *Tax on distributions from a non-grantor trust* in which the covered expatriate is a beneficiary as of the day before the expatriation date.¹⁷
 - c. **Planning.** If there is any possibility that the client will cease being a Green Card Holder after eight (8) years and the client is married, the client's goal should be to keep the assets of each spouse below a \$2,000,000 threshold to avoid the numerous negative consequences to becoming a covered expatriate.
- b. *Permanent Move:* the person is a U.S. domicile ("Permanent Resident")
- i. **Gift and Estate Tax Implications for U.S. Domiciles**
 - 1. **Gifts Tax and Estate Tax.** Gift Tax and Estate Tax are imposed on worldwide assets.
 - a. Exemptions to Tax:
 - i. Annual Exclusion: A Permanent Resident may make gifts up to \$15,000 to any individual or any number of individuals in each calendar year.
 - ii. Lifetime Exclusion: A Permanent Resident has a unified U.S. estate and gift tax exclusion of \$11,180,000 in 2018,¹⁸ which applies to the sum of all gratuitous transfers during life or at death.¹⁹ For married couples, any unused exclusion at the death of the first spouse can be "ported" to the surviving spouse on a timely filed Estate Tax Return, effectively giving a married couple an exclusion amount of \$22,360,000 in 2018.
 - 2. **Transfers to Permanent Resident Spouse.** The tax rules that apply to Resident Aliens also apply to Permanent Residents (*see discussion above*). Only a U.S. citizen can take advantage of the marital deduction.
 - ii. **Estate Planning Necessities for Resident Aliens**
 - 1. The client should have a comprehensive U.S. estate plan.
 - 2. This estate plan will likely need to be drafted in coordination with foreign counsel if the client holds investments or real estate outside of the U.S.
 - 3. Permanent Resident spouses should equalize their assets to insure that each has assets of less than the estate tax applicable exclusion

to the present value of the accrued benefit. The one item treated differently is property that the taxpayer is entitled to receive in connection with the performance of services when such property has not been previously taken into account under IRC § 83. Such an item is treated as becoming fully transferable and not subject to substantial risk of forfeiture on the day before expatriation. No early distribution tax applies by virtue of such treatment. Appropriate adjustments are made to subject distributions to reflect such treatment.

¹⁷ IRC § 877A(f).

¹⁸ Under current U.S. tax legislation, the increase in the estate and gift tax exemption is set to expire at the end of 2025, and will revert back to the \$5,000,000 base amount adjusted for inflation.

¹⁹ The Lifetime Exclusion is indexed annually for inflation.

amount, currently \$11,180,000. Any such equalizing transfers should be made only after considering the transfer and succession tax consequences and any property law restrictions of the country of origin or residence of the transferor. It is important to insure that there are no unknown taxes imposed upon the transfer and that the transfer does not defeat the rights of heirs under an applicable forced heirship statute.

III. U.S. Executive Relocating Abroad

a. *Estate Planning Necessities*

- i. If the relocation is permanent, the client should have an estate plan based out of the foreign country. U.S. estate planning documents may still be necessary if the client retains U.S. investments but should be updated to conform to the foreign estate plan.
- ii. **Inadvertent Trust Migration:** If the client is not a U.S. citizen and ceases to be domiciled in the U.S., the relocation could cause a U.S. trust of which the client is a trustee to be deemed a foreign trust. This could result in negative U.S. income tax consequences and the client should consider resigning as trustee prior to the relocation.
- iii. **Brokerage Accounts.** The client may find it difficult to establish a relationship with the brokerage firm in the country of relocation as many financial institutions have stopped servicing U.S. clients. Further, once a client ceases to reside in the U.S., his or her U.S. brokerage firms are no longer able to provide financial advice.

b. *Investment in Foreign Property:*

- i. **U.S. Wealth Tax.** If the client is a U.S. citizen or continues to be domiciled in the U.S. while living abroad, foreign investments will be subject to U.S. estate and gift tax.
- ii. **Disposition of Real Property Located In a Foreign Country.** The laws of the jurisdiction in which the real estate is located may prohibit the transfer of property by Will if it conflicts with the statutory provisions that provide for inheritance. This is the case in countries that follow the Napoleonic code. Furthermore, the country may not recognize a transfer to trust if the country does not recognize trusts. In different countries, the transfer taxes will vary depending upon the person to whom the testamentary transfer is made.

IV. Foreign Executive Investing in the U.S.

a. *U.S. Real Estate – issues and potential planning structures.*

- i. **Gift Tax Planning.** The transfer of an interest in real estate by a non-citizen non-resident during life will be taxable as a gift which will only be exempted to the extent of the \$15,000 annual exclusion for gifts to persons other than a spouse and to \$152,000 for gifts to a non-citizen spouse. The value of the U.S. real estate transferred by gift will be taxed as a gift beginning at the first dollar without any exemption. To avoid this, one gift tax planning structure is to invest in the real estate through a single

member Limited Liability Company (LLC), which is a disregarded entity for U.S. income taxation.²⁰

1. To transfer an LLC interest during life, the transferor should make a small initial gift of the LLC Units thereby converting the LLC to an income tax reporting entity.²¹ The following year the transferor could transfer the remaining Units. The recipient will own 100% of the LLC, which will once again be a disregarded entity.
 2. If the non-citizen is not domiciled in the U.S. but dies while holding the Units of a single member LLC organized in one of the U.S. states, the value of the LLC Units will be taxable in the U.S. since the single member LLC is a U.S. situs asset.
- ii. **Estate Tax Planning.** The following are specific considerations for non-citizens who are temporary U.S. residents or are not living in the U.S.:
1. When purchasing the U.S. personal residence, the non-resident couple who is not domiciled in the U.S. should regard this as an opportunity to balance the estates between the spouses. To accomplish this, the spouse with fewer assets should purchase the real estate. Since the non-purchasing spouse is a non-citizen not domiciled in the U.S., he or she can wire funds to an account in the name of the purchasing spouse without gift tax implications. The second spouse can then use the funds to purchase all or a portion of the real estate.
 2. For non-citizen spouses residing outside of the U.S. who cannot benefit from a U.S. treaty, one estate tax planning structure is to hold U.S. real estate in a U.S. Corporation or LLC, which would be owned by a non-U.S. corporation that was formed for significant non-tax reasons. This two-tiered structure should be in place upon purchase of the real estate. The non-U.S. corporation should maintain all corporate formalities in the operation of the non-U.S. corporation.

b. *U.S. Businesses*

- i. **Gift Tax Planning.** The transfer of an interest in a U.S. corporation or Units of a U.S. LLC during life by a non-citizen who is not domiciled in the U.S. will not be taxable as a gift provided that it is not a transfer of the share certificates, but is a transfer by wire or on the books of the corporation or LLC.
- ii. **Estate Tax Planning.** The U.S. corporation share or U.S. LLC Units will be subjected to U.S. estate tax at the death of the owner of such shares or Units. Therefore, the shares or Units should be held by an offshore corporation, the shares of which are owned by the non-citizen non-domicile. U.S. Corporation shares or U.S. LLC Units may be held by a foreign Trust, but they should not be transferred into the foreign trust in the first instance if the transferor retains any powers that would cause the

²⁰ IRC § 7701. See Regs. §§ 301.7701(2) & (3) (b) for rules for default classification of single member LLC as a disregarded entity and a two or more members LLC as a partnership for income tax purposes.

²¹ Normally a Form 1065, "U.S. Return of Partnership Income" tax return is filed.

assets of the Trust to be included in the U.S. taxable estate under I.R.C. §§2035 – 2038. The shares or Units should be purchased by funds contributed to the foreign trust in the first instance.²²

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²² I.R.C. §2104 (b) states that “...any property of which the decedent has made a transfer, by trust or otherwise, within the meaning of sections 2035 to 2038 , inclusive, shall be deemed to be situated in the United States, if so situated either at the time of the transfer or at the time of the decedent’s death.”

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A partner of the firm since 1992, Mr. Campbell works primarily in estate planning and probate administration. He advises clients worldwide in matters relating to United States transfer taxes and the use of trusts, partnerships and limited liability companies to accomplish personal, financial and charitable objectives.

Mr. Campbell practiced international law in Auckland, New Zealand as a barrister and solicitor with Chapman Tripp Sheffield Young from 1989 to 1992.

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