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The Brazil Practice Newsletter of Quinn Emanuel Urquhart & Sullivan, LLP

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U.S. Discovery 101: What Is It And What Can You Get?

Discovery is at the heart of the U.S. litigation system. In 1933, Edson Sunderland, one of the drafters of the discovery rules embodied in the U.S. Federal Rules of Civil Procedure ("FRCP"), wrote that the "discovery procedure serves much the same function in the field of law as the X-ray in the field of medicine and surgery": to discover facts so that the outcome is not determined by a mere "game of chance." For U.S. litigants, "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (Murphy, J.).

It is a truism that the U.S. legal system provides for more extensive production of evidence mechanisms than most other jurisdictions around the world. The FRCP provides litigants extensive powers to request and compel disclosure of evidence, including pre-trial admissions of facts and answers to allegations, from each other and, to a lesser extent, from third parties who are strangers to the suit. As the US Supreme Court noted in *Intel v AMD*, "[m]ost civil-law systems lack procedures analogous to the pretrial discovery regime operative under the Federal Rules of Civil Procedure." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 262 (2004).

How much information can a party discover? Under FRCP 26(b)(1)(b), unless otherwise limited by court order, parties may obtain discovery regarding *any* nonprivileged matter that is *relevant to any party's claim or defense* and proportionate to the needs of the case. Further, the FRCP provide that information within the scope of discovery need not be admissible in evidence to be discoverable, thus broadening the scope of what can be discovered. As

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Former Head of DOJ's Fraud Section Joins Quinn Emanuel

Quinn Emanuel added power to its white-collar defense lineup, tapping Sandra L. Moser for a key leadership role in the firm's criminal defense, investigations and crisis practice areas. "Quinn Emanuel's reputation as the leading firm in litigation and white-collar criminal defense, coupled with the firm's unique culture, made this an easy decision for me," Moser said.

Sandra L. Moser, a 12-year veteran of the DOJ, has been for the last two years at the helm of the Criminal Division's Fraud Section – a job she left in January. In the chief role and in prior roles at the Fraud Section, Moser oversaw the DOJ's enforcement of all Foreign Corrupt Practices Act (FCPA) cases across the nation along with a broad swath of white-collar prosecutions, including securities fraud, the spoofing of the commodities markets, and complex cross-border matters. **"Brazil has been a very active jurisdiction in this space, and one that has increasingly attracted DOJ's scrutiny,"** said Moser, who has joined the firm as a partner and co-head of the firm's Investigations, Crisis and White Collar Criminal Defense Practice.

At DOJ, Moser personally played a lead role in investigating and prosecuting many of the world's largest financial institutions and their employees for manipulating

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one U.S. appellate court noted: "Few if any foreign jurisdictions permit the scope of discovery available in our courts." *Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir. 2015).

The discovery process is largely conducted directly between the parties. Although courts ultimately supervise and police the process, including by quashing requests that are unduly burdensome or clearly irrelevant, the parties have broad powers to discover one other's sensitive personal and business information and use it against each other in the litigation. This presents a stark contrast to Brazilian litigation, where the parties have considerable discretion to select the document they wish to disclose to the adversary.

The U.S. discovery system is also directly available to litigants in foreign proceedings. U.S. federal law allows an "interested party" to a foreign proceeding (such as a foreign plaintiff or defendant in a Brazilian litigation) to obtain discovery in the U.S. for use in that foreign proceeding. Specifically, 28 U.S.C § 1782(a) provides as follows:

"The district [i.e., federal trial] court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."

A Section 1782 application can be a powerful tool for parties involved in foreign proceedings who wish to take advantage of the broad approach to discovery adopted by U.S. federal courts to obtain evidence (i.e., documents and/or deposition testimony) that they are otherwise unable to obtain in the foreign proceedings. Earlier this month, Quinn Emanuel succeeded in obtaining a court order allowing Brazilian clients to obtain documents and testimony from a person located in the U.S. for use in a proceeding before the Brazilian Federal Supreme Court ("STF")—Brazil's highest court.

The breadth of U.S. discovery tools present risks and opportunities to domestic and foreign litigants alike. Quinn Emanuel can assist you and your business navigate the U.S. discovery system to achieve positive outcomes in US and international disputes.

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the London Interbank Offered Rate (LIBOR) and the foreign exchange (FX) markets, helping secure five felony guilty pleas from major banks in 2015.

An expert in cross-border matters, Ms. Moser was named as one of the world's "Top 100 Women in Investigations" for 2018 by Global Investigations Review. In recognition of her work at DOJ, she received the Attorney General's Award for Distinguished Service in both 2014 and 2016, as well as the Assistant Attorney General's Award for Exceptional Service in 2014.

"Sandra is a superstar," said Bill Burck, co-managing partner of Quinn Emanuel's Washington, DC office and Co-Chair of its Investigations, Government Enforcement and White Collar Criminal Defense Practice. "Quinn Emanuel's reputation as the leading firm in litigation and white-collar criminal defense, coupled with the firm's unique culture, made this an easy decision for me," Moser said.

Avoid Litigation Trouble With Our Communication Tips

John Adams, one of the Founding Fathers of the United States, once famously said that "facts are stubborn things." As litigation practitioners well know, facts acquire a higher degree of stubbornness when put in writing, particularly in electronic form. Indeed, in today's world, one should never assume that an email or other electronic message is unrecoverable simply because it has been "deleted". Instead, one should always assume that emails or messages will be made public and that nothing is ever deleted for good. This is particularly so in the United States where the "discovery system" allows parties to obtain emails, electronic documents, and other evidence from each other to advance their cases. Non-parties may also need to disclose information for use in US-based litigation as well as foreign proceedings pursuant to Section 1782 (a statute that allows foreign litigants to obtain evidence from persons in the United States for

use in foreign actions).

The risk of unearthing compromising information during the discovery process is real and has the potential to derail one's case. This is compounded by cybersecurity risks, including hacking and leaks, where information may be disclosed by outsiders.

A few helpful reminders and tips could help you minimize these risks:

- First and foremost, **think before you write**, and **edit before you send**. Remember to use simple and clear language when you write, reflecting exactly what you mean, and keep all communications professional and respectful. Your written words may be read out of context in the future and will be taken at face value.
- Always ask yourself how would you feel if your parents or the media saw your message. **Would you be embarrassed?** Use phone calls and in-person meetings to discuss sensitive topics but **avoid voicemail**, as such records are also discoverable.
- One of the worst nightmares for trial attorneys are the dreaded emails or messages from their clients that read **"delete this message after reading"** or "it would be best to talk by phone" and similar suggestive warnings. Do not turn to mobile applications that automatically delete messages or fail to record them by default. This may damage your litigation position as it creates a perception that you are trying to hide something.
- It is also a bad idea to use **sarcasm, hyperbole, speculation or jokes** in written communications, given that tone and context are often lost and can be misinterpreted. Avoid offensive, inflammatory or profane language at all costs. Overzealous expressions such as **"killing the competition"** or "dominating the market" can put you in trouble when facing an antitrust or other regulatory investigation.
- Never use messages to vent **personal frustration** or expose internal disagreement. Talk instead. Remember not to speculate in writing about the cause of a potential problem or admit liability.
- Use **"reply all"** with moderation and consider whether each addressee should be a recipient of your message. Be careful when copying new people on a chain and double-check autocompleted email addresses. Check for incorrect attachments and limit sending those only to the people who needs them.
- Do not mix internal and external **distribution lists**, because doing so significantly heightens the risk of inadvertent disclosure of sensitive information. If someone was excluded from an email chain, do not add the person again without prior confirmation.
- Verify that the sender's email address is correct. Hackers often use email addresses almost identical to trusted ones to trick a busy reader to click on a link or respond with sensitive information. Develop a cyber-security policy and best practices if your organization doesn't have one.
- Where there is a **potential dispute** on the horizon, limit written messages to the greatest extent possible. Once litigation actually starts, never send non-privileged communications on the subject of the litigation. Moving discussions to mobile applications or outside of the organization is a mistake. Keep in mind that **text messages**, intra-office messaging apps, and **social media messages** (such as WhatsApp) can be used in litigation and made public just the same as emails, and understand that your personal devices are also subject to discovery.
- Take extra care with **privileged communications**. They should not be shared with outside parties. You should label messages subject to the attorney-client privilege if there is a reasonable basis for doing so, and only distribute them internally if there is a concrete need to know.
- Understand your organization's **retention policies**. Ideally they should deal not only with email but also texts, messaging apps, social media and other applications. If your organization does not have a policy, take steps now to ensure it is developed.
- As a final recommendation, **share this piece** with your colleagues and friends. It might save them and their lawyers significant trouble in the future.

As the largest business litigation and arbitration firm in the world, Quinn Emanuel has extensive experience navigating the harsh realities of the U.S. litigation system and using the U.S. discovery process to our clients' benefit. We look forward to assisting you achieve your objectives.

Bankruptcy Practice Update: Quinn Emanuel Scores Chapter 15 Victory For Avianca

Quinn Emanuel is counsel to Oceanair Linhas Aéreas S.A. (d/b/a Avianca do Brasil) ("Oceanair"), the fourth largest airline in Brazil. Oceanair faced financial difficulties resulting from the combined effects of the economic crisis in Brazil, dramatic increases in fuel prices, and the diminishing value of Brazil's currency relative to the United States dollar. In late 2018, Oceanair engaged in negotiations and discussions with its principal creditors to restructure its debt obligations, but was unable to reach an extra-judicial resolution. Oceanair commenced a voluntary Brazilian insolvency proceeding, known as *recuperação judicial*, on December 10, 2018.

Oceanair engaged Quinn Emanuel to assist in obtaining protection from creditors in the United States. The firm filed a Chapter 15 bankruptcy case for Oceanair on December 27, 2018, and by January 3, 2019, had obtained an injunction from the US Bankruptcy Court barring creditors from taking any actions adverse to Oceanair's property within the territorial jurisdiction of the United States, pending a final hearing. At a hearing on January 22, 2019, Quinn Emanuel obtained an order from the US Bankruptcy Court extending this stay indefinitely. As a result, Avianca has been able to continue operating its flights to the US without the threat that a US creditor would seize an aircraft within US territory. This "breathing spell" will provide Oceanair essential protection as it seeks to restructure its debt obligations in Brazil. Q