LOS ANGELES
Daily Journal
www.dailyjournal.com
MONDAY, APRIL 8, 2013

PERSPECTIVE

Fewer lawyers per capita in French system

By J. Robert Renner

Since the time of the American and French Revolutions, there has been a significant and consequential sharing of ideas between the U.S. and France. In the entrance hall of Thomas Jefferson's Monticello, one finds busts of Voltaire and Turgot; versions of the Statute of Liberty can be found both in New York and Paris (the replica on the *île aux Cygnes*); and the popular appeal of Benjamin Franklin while serving as American minister to France is a story still widely told. The two countries' legal systems have likewise shared important ideas, and much can be learned by comparing the systems as they exist today. To an American civil lawyer, it is the differences between the two systems that stand out.

France does not use juries in civil cases. This does not mean, however, that cases are tried before a single judge, as is the situation in the U.S. where the right to a jury trial is waived. All cases above a jurisdictional minimum are tried before three-judge panels. The judges, moreover, are not elected or appointed by the executive branch from among the state's practicing lawyers, as is the case in the U.S., but are selected through a civil service system. In the majority of cases, university students (the maximum age is 31) apply to a national judge's school (*l'École nationale de la magistrature*) through a competitive examination, are ranked upon graduation, and serve as judges for their entire careers, until they reach the mandatory retirement age of 65. Promotions within the system are based on seniority and on the recommendations of more senior judges, of a judicial advancement commission, and of a national judicial council (*le Conseil supérieur de la magistrature*), subject to formal (nominal) appointment by the president. Judges are not removable except for specific cause as determined by the judicial council sitting as an adjudicative body. Students do not pay tuition to attend the judge's school; they receive a salary while attending.

French civil procedure is predominantly written, and it can be said that there is no "trial" in the common law sense. Although civil trials in France are, as in the U.S., oral, public proceedings, what takes place is actually a hearing (*l'audience*) consisting primarily of arguments made by counsel concerning the contents of a judicial file (*le dossier*) prepared in advance. Most cases are assigned at the outset to a preparatory judge (le juge de le mise en état), who prepares the file to be used at trial. The parties are required to turn over to the other party all documents upon which they intend to rely, and on application may be ordered to produce additional documents in the discretion of the preparatory judge. The judicial file will normally include certain materials submitted by the parties, including statements of the parties' claims and defenses, legal arguments, documentary evidence and witness affidavits. In addition, the preparatory judge may take oral evidence from the parties and from third parties, questioning the witnesses himself and reducing the testimony to a signed memorandum (*le procès-verbal*) to be included in the file. If expert testimony is needed, the preparatory judge will appoint a single, neutral expert who will conduct an investigation and prepare a written report to be included in the file. The trial will be conducted before the preparatory judge and two other judges, and will commence with an oral summary by the preparatory judge, followed by the arguments of counsel. There are normally no live witnesses. Costs and attorney fees are awarded to the prevailing party, subject to the court's discretion to reduce or eliminate these amounts in the interests of equity.

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In France the first level appeal constitutes a complete reexamination of any components of the judgment appealed from, both as to fact and law. The parties are thus entitled to have the case decided anew by a second three-judge panel, of greater seniority than the judges who heard the matter in the first instance. Enforcement of the judgment is suspended while the appeal is pending. The rules of procedure on appeal are similar to those of the lower court. A preparatory judge (*le conseiller de la mise en état*) will normally be appointed, new evidence can be introduced, and an oral hearing will be held before the three-judge appellate panel. The original judicial file, however, will carry forward from the lower court, and thus the appellate proceeding is not a trial *de novo*. A second level appeal limited to questions of law (l*e pourvoi en cassation*) lies to a national supreme judicial court (*la Cour de cassation*).

The procedures described above suggest a system in which judges have more power than in the U.S. This may be true in relation to the parties' lawyers, in the context of specific litigation, but it is not true in other respects. Indeed, the modern (post-revolutionary) French legal system applies the doctrine of separation of powers more rigidly to the judicial branch of government than is the case in the U.S. In this regard, judicial decisions do not constitute binding precedents and are not a formal source of law. For this reason, judicial opinions, succinct by American standards, do not discuss case law precedents. Further, the normal, judicial courts are not considered to have the power to issue orders to administrative bodies of the French state. A completely separate administrative court system exists for this purpose, giving rise to jurisdictional conflicts between the two systems, which are resolved by a special conflicts tribunal (l*e Tribunal des conflits*). Lastly, judges of the judicial order do not have the power to declare legislative acts unconstitutional. This power is reserved to a separate constitutional court (*le Conseil constitutionnel*), which is not considered to be part of the judicial or administrative systems. Underlying many of these rules is a unifying concept stated in article 5 of the French Civil Code: judges are forbidden to decide cases submitted to them by way of general and regulatory provisions.

One might reasonably ask, in this era of budget cuts, what the French system costs. Without attempting any comprehensive answer, I will note that by my estimate there are approximately 70,000 lawyers in France (counting all categories of licensed lawyers [a*vocats, avoués, and notaires*], as well as judges and prosecutors), while there are approximately 1,245,205 lawyers in the U.S. (using the American Bar Association's figure for the number of licensed lawyers in 2011). On a per capita basis, assuming populations of 65 million and 316 million, respectively, there are 3.66 times more lawyers in the U.S. than in France. Admitting that these figures are crude (and may be comparing apples to oranges), they nevertheless tell us something important about costs. The quality of the respective systems would be even more difficult to measure empirically, although any practicing lawyer could be expected to have opinions on the subject.

Even if one wished to do so, it would be impossible to transplant the French legal system to the U.S., given the stark differences between the systems. Most of those differences derive from the heritage of the U.S. in the English common law. Nevertheless, it is reasonable to suppose that Americans can learn from the French example (or from other comparative law examples), and could adopt specific measures where appropriate.

J. ROBERT RENNER
Duane Morris LLP

J. Robert Renner *is a partner with Duane Morris LLP in the firm's Los Angeles office. He can be reached at rrenner@duanemorris.com.*