THE TIMES THEY ARE A CHANGIN': BRINGING LITIGATION INTO THE TWENTY-FIRST CENTURY (PART I)

July 8, 2010

To Our Clients and Friends:

There has been a resounding call for reform from corporations and corporate lawyers as the escalating costs and delays of litigation have crippled the civil justice system. In May 2010, that call for reform was heard by the rule makers empowered to change the legal system as we know it – and change is coming.

THE DUKE CONFERENCE ON CIVIL LITIGATION

Leaders in law and business descended on Duke University Law School this spring to discuss and debate the future of the civil justice system. The Duke Conference was convened for the benefit of the federal rule makers – who are known as the Judicial Conference Advisory Committee on Civil Rules – to explore how the system is working for its users. These users were represented at the Duke Conference by general counsel of several Fortune 500 companies, representatives of large and small law firms, public interest groups, government lawyers, judges, and academics.

Lorna Schofield, Debevoise & Plimpton LLP partner and Chair of the American Bar Association Section of Litigation, attended the Duke Conference and spoke on two of its panels.

AREAS WHERE CHANGE HAS BEEN ADVOCATED

Some of the least satisfied users of the civil justice system are large corporations that regularly face complex litigation and see costs skyrocketing under the current rules that govern civil practice in the federal courts. Although there is broad consensus that throwing out the current Rules and starting over is not necessary, there are several areas in which reform was strongly advocated and which the rule makers are studying.

E-Discovery

National Standards on Document Preservation. Differing national standards make it extremely difficult for corporations to predictably prepare for litigation. The Duke Conference participants asked for more clarity regarding when the duty to preserve is triggered and to what it applies, including custodians, relevant data, locations, platforms and whether third parties should be notified to preserve. There was consensus that the current common law "reasonably foreseeable litigation" standard does not meaningfully inform the parties on the duty to preserve.

Spoliation Sanctions. A patchwork of common law standards for spoliation sanctions also add to the difficulties that corporations and their lawyers have preparing for litigation. There was a strong call for national standards.

Backup Tapes and Deleted Materials. Several groups advocated that production of backup tapes and restoration of material deleted in good faith should be reserved for the most extraordinary circumstances, not merely for situations where there is good cause.

Cost Shifting. Many corporations and defense lawyers requested more consistent and predictable standards for cost shifting, so that cost shifting negotiations can stay between lawyers and clients and away from the courts where motions and briefing lead to escalating costs and delays.

Discovery

Scope. Representatives of large corporations and corporate law firms advocated for narrowing the scope of discovery through rule changes focused on better enforcement of proportionality.

Initial Disclosure. Initial disclosure faced widespread disapproval from all of the users of the system. Although some groups sought to expand it to include more material at the outset of a case, other groups advocated its elimination altogether, and others argued for application of specific initial disclosure rules based on the complexity of a case.

Model Discovery Forms. Several groups also called for uniform, non-objectionable discovery tools, such as form document requests and interrogatories, suited for specific types of cases, in order to minimize process-oriented arguments at the outset of a case.

Pleadings

***Twombly* and *Iqbal*.** The topic of pleadings at the Duke Conference led to contentious debate over the two recent Supreme Court decisions which require plaintiffs to plead claims that are "plausible," a departure from the pure notice pleading standard. While defense-oriented bar associations and their clients argued for codification of the *Twombly/Iqbal* standard in the Federal Rules, plaintiffs' groups argued that the heightened standard prevents meritorious claims from reaching discovery when information necessary to plead a claim plausibly is in the hands of the opposing party. Bar associations representing both plaintiffs' and defense lawyers suggested a more tempered standard, higher than the pre-*Twombly* notice pleading standard, but short of the plausibility standard that is current law.

Judicial Management and Education

Judicial Management and Cost Control. All groups called for early and consistent judicial management to help narrow issues and resolve discovery disputes without requiring lawyers to submit motions on discovery issues.

Judicial Decision Making. Lawyers universally expressed dissatisfaction regarding the time it takes for judges to decide motions to dismiss and motions for summary judgment, calling for imposition of time limitations for judges to decide motions. In turn, judges called for more responsible judgment from lawyers and their clients in deciding when it is cost-effective and sensible for a motion to be filed. Judges also placed focus on the types of motions now submitted, and argued that for judges to do their jobs faster, lawyers must submit leaner motions focusing on key issues instead of taking a kitchen-sink approach.

Early and Consistent Judicial Management. There was broad consensus that early and consistent judicial management saves time and money for litigants, and that additional education for judges regarding e-discovery and general case management is required.

A Call for Cooperation

Civility Saves Time and Money. Universally, participants at the Duke Conference agreed that when lawyers act in a civil and cooperative manner, that behavior saves time and money for their clients. One General Counsel reminded lawyers and rule makers that cases with bad documents are settled. In the grey area where cases are actually litigated, clients want reasonable, responsible behavior from their lawyers in making requests and responding to adverse parties.

NEXT STEPS: EMPIRICAL STUDIES AND PILOT PROJECTS LEADING THE WAY TO REFORM

The Civil Rules Committee has begun to study results of empirical research and pilot projects in several areas of the country geared towards making the Federal Rules and civil justice system as a whole more manageable for its users.

E-Discovery Preservation and Sanctions. The Civil Rules Committee is studying whether national rules can provide better guidance to practitioners and their clients, and whether there is authority under the Rules Enabling Act to adjust standards for preservation and sanctions.

Pleadings. The rule makers continue to study the impact of *Twombly* and *Iqbal*. The Federal Judicial Center has undertaken empirical research on how both trial and appellate courts are handling dismissals under the new standard to help determine whether the Federal Rules of Civil Procedure should be amended.

Tracking Cases. Recognizing that applying one set of rules to cases of varying complexities and stakes can be akin to setting a square peg in a round hole, the Advisory Committee is exploring whether there should be simplified rules for simple cases pending in the Federal courts, whether cases should be tracked based on complexity and different rules applied for more complicated cases, or whether judges can apply the existing rules more flexibly to manage cases as needed.

Judicial Education. The Federal Judicial Center has also recognized a need to change the way judges are trained to manage cases. While case management may have once been limited to holding status conferences and setting trial dates, judges need to be educated more than ever about the use and importance of existing tools to limit and manage discovery. Judges also need a greater degree of education on how to manage e-discovery problems and disputes. The Federal Judicial Center has begun to effect these changes in its judicial training programs.

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While the final impact of the Duke Conference will not be known for several years, the clear message coming out of the Conference was that the current system is not working well for some of its most important cases. Those empowered to make changes have heard the call for reform and have begun seriously to address those issues.

Part II of this memorandum, to follow, will make practical suggestions for practices that can be implemented immediately by lawyers and general counsel to better control the costs and delays associated with civil litigation.

Please feel free to contact us with any questions.

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