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

August 2, 2010

To Our Clients and Friends:

We recently sent an update on the Duke Conference on Civil Litigation, a gathering of general counsel, lawyers, judges and academics, where those responsible for amending the Federal Rules of Civil Procedure heard complaints that, particularly in large and complex cases, the current rules foster escalating costs and delays. The Duke Conference may or may not lead to significant changes in the rules. In the meantime, however, the Duke Conference also made clear that corporate defendants are not always using the Federal Rules' *existing* cost-saving and streamlining tools to maximum advantage.

"Proportionality." Rule 26(b)(2)(C) *already requires* the court, on motion or on its own, to limit discovery if "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action and the importance of the discovery in resolving the issues." Although judges may not always apply this rule in the manner defendants would prefer, defendants improve their chances if they can quantify and explain the costs of requested discovery and the relationship between those costs and the value of the discovery likely to be obtained.

Expert Communications. Beginning in December of this year, assuming no intervening Congressional action, the rule respecting expert witness disclosures will change. Under the new rule, drafts of expert reports and many types of communications between experts and counsel will be considered protected work product and need not be disclosed. The new rule recognizes that parties often go to great lengths to avoid producing an expert's work product and communications. Even before the new rule goes into effect, however, parties may be able simply to agree that expert drafts and communications need not be disclosed.

Privilege Non-Waiver Agreements. Federal Rule of Evidence 502(d) allows parties to enter into agreements providing that inadvertent or even intentional disclosure of privileged material (such as in the context of a "quick peek" inspection or by producing all documents from a custodian thought unlikely to possess privileged documents) does not constitute a waiver, and to have those agreements so ordered by courts in order to make them effective even in other proceedings and with non-parties. These agreements will not be appropriate in every case, but when they can be used, they have the potential to reduce significantly the cost of conducting privilege reviews of documents before production. Judges in attendance at the Duke Conference urged participants to make greater use of this procedure.

E-Discovery Pilot Program. The Seventh Circuit Court of Appeals is conducting a pilot program requiring parties to exchange information about their electronic documents at the earliest stages of a case, including the steps each side has taken to preserve documents, in what format each side prefers to see electronic documents produced, and how electronic documents should be searched (*e.g.*, by keywords) to determine responsiveness. The steps being taken in this pilot program merely echo what e-discovery practitioners have found to save considerable time and money, and therefore reflect what all parties can and should consider doing *now*, in any complex case in any federal court.

Agreements With Opposing Counsel. One of the major themes of the Duke Conference was that cooperation between lawyers helps save time and money. Many conferees encouraged lawyers to focus litigation on real issues, not procedural distractions. Among the suggestions raised were that parties should (a) agree that discovery disputes will be discussed by email and/or phone before any are raised to the court; (b) set a finite number of depositions and reasonable time limits for them, and agree that the jury may hear any statement made by counsel at a deposition; (c) retain a single court reporter at a discounted rate to transcribe all depositions in the case and (d) agree to email service of court papers and no additional time for email service.

Unquestionably, these steps would be easier to implement if the rules gave judges more tools to streamline cases. The Duke Conference showed widespread dissatisfaction with the current state of affairs in the largest and most complex cases. The rulemakers, who convened the conference, have just begun the years-long process of considering rule amendments. It therefore falls to litigants and their lawyers to use the Rules' existing procedures to try to reduce costs wherever they can.

The tools are available for users of the system to litigate cases more efficiently and effectively. Lawyers can and should meet today's challenges with creativity and the tools outlined above to make litigation more efficient without sacrificing quality or results.

Please feel free to contact us with any questions.

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