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Civil Justice Reform – Law Firms

LCJ's Associate Member Law Firms Support Corporate Counsel Goals – The E-Discovery Example

The Editor interviews Martha Dawson, a partner in the K&L Gates Seattle office. She co-leads the firm's e-Discovery Analysis and Technology (e-DAT) Group and with her firm is an associate member of the Lawyers for Civil Justice, which is a national coalition of over 30 corporations and 65 associate member law firms supporting civil justice reform.

Editor: How long have you been associated with LCJ?

Dawson: I went to my first meeting as a guest in 2003 and later that year the firm joined the LCJ network. We liked LCJ's commitment to civil justice reform. At that time, LCJ was at the forefront of seeking federal rules that would take into account e-discovery issues of concern to our corporate clients. The focus of my practice had been on e-discovery since 1997, and I wanted to get involved in the work that LCJ was going to be doing in this area.

Editor: I gather that you first participated in LCJ's e-discovery reform efforts at the Fordham Conference in February of 2004.

Dawson: The Fordham Conference attracted well over 100 attendees, plus the whole Advisory Committee on Civil Rules of the Federal Judicial Conference. The Advisory Committee is chaired by The Hon. Lee Rosenthal. The Fordham Conference was the first public conference where the members of the Advisory Committee



Martha Dawson

could actually hear from practitioners, corporations and other interested groups about their experiences under the existing rules and why they needed to be changed.

LCJ invited our firm to attend along with one of our clients, Microsoft. Later, during the public hearings on the proposed rule changes, we assisted interested corporate citizens who offered comments either at the regional public hearings or in writing. It was remarkable to me because as a practicing lawyer who had not previously been involved in rules changes, I was pleased to see how interested the members on the Advisory Committee were in hearing from those who wished to comment.

LCJ played an important role during the

entire process in bringing together an interested but diverse group of lawyers and corporate clients who shared common concerns of the need for rule changes. Exceptional leadership from Al Cortese, Cortese PLLC, Tom Allman, formerly general counsel of BASF and then with Mayer Brown, Chuck Beach of Exxon Mobil and others encouraged a scholarly and practical approach to the important issues being considered. Several practitioners and corporate counsel (which, in the case of the regional hearings, included those from the region) worked with LCJ to provide important written or oral testimony.

What became clear was that the issues involved in e-discovery were too complex to be handled under the existing rule and that rule changes were required.

Editor: Tell us about your role in the LCJ effort.

Dawson: Because my firm was a member of the LCJ Network, I became a member of LCJ's E-Discovery Committee, co-chaired by Chuck Beach and Tom Allman. I worked actively with the group drafting comments on the proposed new rules. I made our interested clients aware of the issues and offered support to the LCJ effort where that was needed.

The thing that I particularly like about LCJ is that it harnesses the energy of people that are passionate about the issues. That works well in terms of making sure that you've got enough people to help do the work that needs to be done – and to advance

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a cause in which they are interested.

LCJ brought to the table not only the people who were students of the subject like Al, Chuck and Tom, but also trial counsel who had wrestled on a daily basis with e-discovery issues. Corporate counsel (including many companies who were not members of LCJ) provided insights into the nature and costs of the burdens their companies had to bear and their need for relief. What LCJ accomplished was to forge a team that brought together all these different perspectives and then worked together to help achieve a just and balanced result.

Editor: Did corporate counsel participate actively in the hearings?

Dawson: Yes, corporate counsel actively participated by appearing and commenting at the hearings and by submitting written comments. It was important for the Advisory Committee to hear the comments of those who are directly feeling the pain; that is, from corporations and their in-house counsel. The anecdotal evidence they provided was essential in helping the Advisory Committee understand the difference between the e-discovery world and the paper world and the implications of making e-discovery crippling versus making it something that is fair to all of the parties and reasonable under the circumstances.

Another thing that corporate counsel brought to the hearings was conveying to the judges the complexities of technology. The technology used by companies is designed to meet business needs. It is not necessarily reasonable that something should now be discoverable simply because the technology exists to retrieve it – cost and the effect on normal business operations have to be considered as well. That was one perspective that corporate counsel brought to the attention of the Advisory Committee.

Editor: What were some of the major points of contention with the plaintiffs' bar?

Dawson: The so-called safe harbor provision was one area of contention. We don't know exactly what protection that particular rule is going to give to companies as we are still waiting for the case law to develop. That was probably the most controversial section. Another area of contention was the definition and treatment of accessible versus not reasonably accessible data.

Editor: Putting on your hat as a trial lawyer, what change in the rules had the greatest effect on your practice?

Dawson: The requirement that at the outset of litigation, the parties sit down to discuss and seek to resolve e-discovery issues. If the parties, and ultimately, the judge do this at the beginning of a case it can identify and resolve issues early on that can otherwise become contentious and difficult.

Editor: How much effect did the efforts of the LCJ team have on the final form of the federal rules?

Dawson: It's impossible to know the exact impact from each of the participants, but I believe the efforts of the LCJ had an immense impact. The Advisory Committee draft of the new rules promulgated after the hearings demonstrated that its members had carefully considered the oral and written comments during the hearing process, including those of the LCJ team. It made me feel very good to be able to be part of the process. LCJ rallied interested parties to offer comments either separately or as part of the LCJ response. This allowed the committee to consider a wide range of comments and approaches.

Editor: I understand that the LCJ E-Discovery Committee is now focusing on the need for many of the states to update their rules with respect to e-discovery.

Dawson: Yes, after the changes to the federal rules, many of the states initiated efforts to revise their rules. Although it sounds like a huge mountain to climb, LCJ can not only draw on its members, but can also, as it did in the case of the federal rules, draw upon the membership of DRI, other national defense organizations and state and local defense counsel organizations.

Editor: Civil justice reform sometimes seems so difficult to accomplish. How do you account for LCJ's success?

Dawson: Like many other law firms, we are looking for ways that we can be helpful to our clients. One of the good things that LCJ does is to enable us to alert our clients to civil justice reform issues. We are all busy practitioners, but we closely follow the issues that LCJ feels are important. I believe that corporate counsel should be able to look to their law firms for services

that go beyond just helping with a particular case. They should be able to look to their law firms to help eliminate systemic problems like those that characterized e-discovery — systemic problems that could make a case more complicated, more expensive or maybe cause a case to be lost.

LCJ encourages law firms to take a long view of their relationships with clients. The short view might be that, if the system is not fixed, it will be good for a firm because the client will have to keep coming back. The firms that support LCJ don't feel that the short term view is productive either for the client or in the long run for their relationships with their clients. If the system is broken, we try to fix it. What LCJ does is it gets law firms to think long range and to think about the interests of their clients in addressing systemic problems.

To me, this is why I value my and our firm's relationship with LCJ. I joined it largely because of the e-discovery issues, but participation in LCJ meetings enables me to alert our firm and our clients to many initiatives where we can use our talents as trial lawyers to accomplish needed reforms. And, I like the fact that LCJ opened its membership up to associate members by creating the LCJ Lawyers Network so that more lawyers and law firms can be involved in its work – and LCJ has utilized the resources of its associate members so well.

I see more associate members participating. I see them standing up and taking assignments and following through on them. This has much to do with the leadership of LCJ and its structure. If we didn't have this organization, I don't know where I'd get some of the information that I have, or where I would find an organization where I could use my knowledge to help to eliminate systemic problems crying for a solution.

Although the corporate membership of LCJ may be considered by some as a relatively small group of large corporations, it provides huge benefits for corporations generally, including opportunities to participate in LCJ's efforts – we saw this in its e-discovery initiative. Concern for a broad range corporate issues is assured through the participation of the associate members and the defense counsel organizations that provide its leadership.

I can attest to the fact that LCJ is addressing issues that are important to corporations generally. One of the reasons why I value working with LCJ is that they pick issues that affect a broad range of our clients.