Civil Justice Reform – Law Firms

LCJ: How Strong Advocacy Makes Good Things Happen

The Editor interviews ***Deborah D. Kuchler*** *and* ***Sarah E. Iiams****, both shareholders with Abbott, Simses & Kuchler and whose practices deal with mass and toxic torts and other areas of liability.*

Deborah D. Kuchler

Sarah E. Iiams

Kuchler: Our firm's introduction to Lawyers for Civil Justice ("LCJ") came about through my membership in the Federation of Defense & Corporate Counsel ("FDCC"). We were impressed with that group's emphasis on trying to be sure that all defendants are treated fairly in the civil justice system. Our firm became more active on the state level than we used to be as a result of our membership in LCJ, and we're now working on matters involving the Federal Rules.

Iiams: I, along with Charles Miers and Leigh Ann Schell of our firm, have been working closely with LCJ in studying the proposed amendments to the Federal Rules of Civil Procedure. Through my membership in Defense Research Institute ("DRI"), I have been working with a LCJ subcommittee to generate comments and testimony on the proposed amendments to Rule 56. Our position is that the granting of summary judgment should continue to be mandatory when a party has met the burden of demonstrating that material facts are not in dispute and that a party is entitled to judgment as a matter of law. Charles Miers and Leigh Ann Schell have been working with LCJ on Rule 26 issues, focusing on the disclosure and discovery relating to expert witness testimony, as well as discovery of expert communications. Both of these provisions are beneficial to corporate defendants in terms of obviating the need to provide written reports for certain types of experts, as well as curtailing the broad discovery now permitted as to written communications between lawyers and experts. Mr. Miers also became involved through his membership with DRI, and Ms. Schell was asked to work through her membership in the IADC. So it was through our activity and involvement in these different defense groups that we became active in the current efforts with respect to the Federal Rules amendments.

Editor: **There's a general impression of federal courts that they provide a better quality of justice than the state courts, generally, and that it's unlikely that most federal judges would defer action on a motion for summary judgment as opposed to what might happen in the state courts. Is that consistent with your experience?**

Kuchler: It is consistent. Yet, there are so many federal judges across our country who deal with their dockets in various ways. With this rules initiative, our aim is to make the process a little more uniform. Taking uncertainty out of the process, when a party is clearly entitled to summary judgment, our intent for the rule is to make summary judgment easier to obtain. It should be granted when it is clear that the other party cannot refute it.

Editor: Is there a timing factor, as well as a mandatory aspect implicit in Rule 56, by adopting the word "must"? One of the complaints about courts is that, in many cases, because of the size of the docket, they will defer acting on a summary judgment motion until you're almost on the courthouse step.

Iiams: There is a timing aspect in the sense that the proposed language makes it clear that it is not discretionary. If a party files a meritorious motion at a stage in the litigation well in advance of trial, the court must grant it.

Kuchler: One of the goals of the amended rule would be to curtail unnecessary litigation expenses. If summary judgment is appropriate early in the process, then it should be granted at that point.

Editor: My overarching question relates to how corporate counsel benefits from the quick resolution of an issue?

Kuchler: Cost efficiency has been a focus of many of our clients for many years, but this year in particular. Given the general status of the economy, corporate clients, insurance company clients and law firms are under more and more pressure to get litigation resolved in a cost-effective manner.

Editor: Are your clients aware of the ways you are benefiting them?

Kuchler: They are. Also, our corporate partners, through LCJ, make our good works well-known. Many of our efforts this past year were focused on the state of Louisiana's rules as opposed to federal rules. We are happy to report that our work in drafting and testifying in favor of a uniform rule in Louisiana on the *Daubert* procedure resulted in a favorable bill being passed by the legislature, providing more uniform procedures. Our corporate partners who worked with us to get that done have touted our work in the field to other clients, so we've been gratified by that.

Editor: As a DuPont Preferred Provider Firm, your firm is certainly working in tandem with DuPont's philosophy in terms of favoring a *Daubert*-type rule in Louisiana as well as improvement in the summary judgment language. DuPont has long had a policy with respect to its law firms to encourage them to resolve disputes at an early stage.

Kuchler: Early case assessment has been one of the focal points of the DuPont legal model from the beginning, and so we routinely take an early and hard look at each case as it comes in to see whether it can be resolved quickly or whether it is going to take longer. This is in sharp contrast to the traditional defense model of automatically prolonging discovery and launching into expensive litigation when there might be another more creative business solution.

Iiams: It is a policy that we follow in all our cases, for all of our clients. Through early case assessment, we have been able to get rid of many cases at an early stage, particularly in the toxic tort arena.

Editor: Tell our readers more about your role in getting Louisiana to adopt the *Daubert* rule.

Kuchler: Senate bill 308 creates a uniform procedure for the qualification of expert witnesses. According to the U.S. Chamber/Harris poll of corporate legal departments, Louisiana was rated worst of all the states in the nation for allowing junk science in the courtroom. Much of the work that we do involves heavy science issues, so we're frequently right in the middle of *Daubert* issues in state court. What we strove for with this bill and were able to accomplish is a new rule which will require a court on motion of either party to hold a pre-trial hearing on expert witnesses at least 30 days before the trial. This brings the *Daubert* motion right into the judge's focus and requires that detailed Daubert findings and conclusions be issued by the judge at least five days in advance of the trial. This is a huge improvement over the process that had existed – basically the entire *Daubert* process rested with the judge who could elect to have a hearing or not. This bill will take effect on January 1, 2009. We were pleased to have been able to work with the Coalition for Common Sense along with some of our corporate partners like Dow Chemical and Shell Oil and others.

Editor: Were you there as representatives of LCJ?

Kuchler: While they were not instrumental in getting this piece of legislation passed, they have been most helpful in providing models for legislation generally. They have been particularly helpful in our efforts to pass asbestos reform legislation in Louisiana. In some of our sister states, Texas and Georgia, they helped to pass helpful asbestos medical criteria bills, and so when we started looking at trying to enact a similar provision in Louisiana, we looked to resources like the models developed by LCJ. Unfortunately we were not successful in pushing through an asbestos medical criteria bill at the last session, but it's still on the table for future consideration. Also, we're working on an asbestos transparency bill that we hope to bring to light at the next legislative session in the spring. So we do look to our LCJ friends to give us help on that front, along with mobilizing local resources. LCJ and groups like DRI, the FDCC and IADC have a lot of troops on the ground whom we can call upon to write their legislatures to give input on these proposals that we wish to promote.

Editor: You mentioned earlier that Charles Miers and Leigh Ann Schell are working on Rule 26 proposals. Can you explain that a little further, namely the situation with respect to having to get a report from a treating physician or an investigating officer.

Iiams: The current rule requires reports if the expert is one retained or specially employed to provide expert testimony in the case, or is one whose duties as a party's employee regularly involve giving expert testimony. In practice, some courts have required reports of experts who fall outside of those limits, as you mentioned – treating physicians and investigating officers. This practice has made it difficult for defendants or other parties to secure testimony from those witnesses who aren't accustomed to preparing these reports. To eliminate that problem, the proposed revision provides an obligation to disclose simply a summary of the facts and opinions of a trial witness expert who falls outside of the scope of those for whom a report is required. By allowing the attorney to prepare that summary, the burden is lifted from those experts, such as treating physicians who are not accustomed to preparing these reports. We think it would be a good measure because the defendant will save the cost of the expert's report and gain the assistance of those experts who might not otherwise become involved.

Editor: **Let me ask you about the other aspect of the amendments, which is requiring that all written communications between lawyers and expert witnesses be disclosed. Has that been a big problem?**

Iiams: The current version of the rule allows free discovery of information considered by the expert. We have seen in our practice that most courts have allowed wide-open discovery of exchanges of information between attorneys and the experts, so counsel do have to be very cautious. It is because of that that this whole process of retaining dual sets of experts is born.

Editor: And that's certainly an added cost.

Iiams: Absolutely. To provide for protection from discovery, parties often retain consulting experts in addition to their trial experts, because the consulting experts are protected from discovery by the present rule. So what the proposed amendments were intended to eliminate is that practice, which will cut litigation costs substantially for the corporate defendants.

Editor: Not only do your clients admire what you're doing, but it's a wonderful way to get some background on the legislative and rule-making side.

Kuchler: I've found myself thinking that very thing. After I testified before the Louisiana Senate Judiciary committee on the *Daubert* bill – what a great educational experience it was for me to see, from the inside out, how legislation is handled, to see how many people devote their entire lives and careers to it. It was extremely interesting and gave me an entirely different perspective on the process.

Iiams: Deb really encouraged me to get involved, based on her positive experience in this area. I am equally excited about working on these issues.

Please email the interviewees at deb-kuchler@abbott-simses.com or siiams@abbott-simses.com with questions about this interview.