

## MEMORANDUM

Date: January 15, 2010

To: Bench-Bar Liaison Committee

From: Lynn E. Calkins  
Partner, Holland & Knight LLP

Re: Executive Summary of Sixth Biennial Bench-Bar Conference

On October 30, 2009, approximately 160 members of the federal bar assembled at the Greenbelt Courthouse for the Sixth Biennial Bench-Bar Conference to discuss ideas and best practices relating to "Making Discovery Manageable" with the members of the bench.

The conference opened with a brief introduction by myself and a warm welcome by Judge Deborah Chasanow. Among her comments, Judge Chasanow concisely expressed the general sentiment of why we were gathered together. She noted:

We all recognize, of course, the central role that discovery plays in any case, whether civil or criminal. Particularly in today's economic and financial climate, it's wise to study the process, to explore ways to make sure that discovery is conducted efficiently and serves its proper role in litigation.

Following Judge Chasanow's remarks, Magistrate Judge James Bredar introduced Justice Rebecca Love Kourlis, executive director of the Institute for the Advancement of the American Legal System. In her keynote speech, Justice Kourlis discussed the nationally debated report issued jointly by the Institute and the American College of Trial Lawyers. In doing so, Justice Kourlis explained several other reports on the subject, including the October 2009 report issued by the Federal Judicial Center.

Among the information provided by Justice Kourlis, the attendees learned that:

Over 80% of the American College fellows that we surveyed reported turning away cases when it's not cost effective to handle them and over 80% similarly reported that litigation costs drive cases to settle that should not settle.

Given that statistic, Judge Kourlis offered:

So my premise to you is that we need to rethink the way that pretrial litigation is conducted. So that we neither sacrifice the search for the truth nor capsize the system under the cost burden. It's important for both sides of the case.

In light of the nationwide debate on these issues, Justice Kourlis reflected on the unique opportunity we now have to examine these issues and our obligation to do so. She explained her philosophy:

We need to be sharing our best ideas. We need to be sharing what doesn't work. So that out of this, when we look back 10 or 15 years from now, we can say "that was a very dynamic period, and we were able to come up with solutions to some of our problems that are now in place." We don't have to accept mediocrity. We don't have to accept a system that is rife with gamesmanship. We have an opportunity to shape it, and, if not us, then who?

Following the inspiration provided by Justice Kourlis, the attending practitioners heard from a spirited panel of distinguished judges, in-house counsel, and practicing attorneys about whether there are issues experienced in this District and, if so, what they are and how can we address them. The panel included Judge Catherine Blake, Judge Roger Titus, Jonathan P. Graham - Senior Vice President and General Counsel, Danaher Corporation, Roann Nichols - U.S. Attorney's Office for the District of Maryland, Deputy Chief, Civil Division, Christopher B. Mead - Partner, London & Mead, and David L. Douglass - Partner, Shook, Hardy & Bacon. Chief Magistrate Judge Paul W. Grimm moderated the panel by adding his nationally recognized expertise and posing several probing questions regarding the perspectives of the panelists.

E-discovery was the principal focus of discussion, but the panel was spilt as to whether there is a crisis. Judge Blake and Judge Titus, who decide discovery disputes, do not believe there is a crisis while Jonathan Graham, who pays for e-discovery, believes there is. As most panel members thought there remain at least significant concerns relating to e-discovery, David Douglass aptly compared the present to when Zubalake was first decided and noted that, since then, "the period of crisis has passed but the system is still under a lot of stress." That stress is unlikely to dissipate quickly, for as Roann Nichols explained: "e-discovery is self perpetuating in almost an exponential way" and that "there are huge expenses involved." When asked who was at fault for any of the problems we may experience, both sides of the aisle joked it was the other side, but, in all seriousness, the panel agreed that judges need to become more involved. Judge Blake reflected on the need for sound, prompt judicial involvement as follows:

It's enforcing rules, but it's not just enforcing rules, it's about solving problems. There are counsel who may be both working in the best of faith and the most reasonable and they still have a disagreement.

And, recognizing the leadership of this District on the issue, Judge Titus stated:

I think I can say with some pride that this Court is getting more involved in discovery, both by having gurus like Paul Grimm around to refer discovery disputes to if they need to be referred, but also, hands-on talking to the people at the beginning of the case and forcing them to read Mancia and talking to them before they

start discovery and letting them know you are available to help them sort out an unbelievable mess when they get into it.

Once the panel discussion ended, the participants proceeded to break-out sessions where they met in small groups with at least one federal judge to discuss the earlier presentations and the proposed changes to the Discovery Guidelines. The break-out groups were not organized by substance or size of practice; rather, for logistical reasons, the participants were divided by the order in which they registered for the conference and by the size of the varying break-out rooms. During the break-out groups, a lawyer facilitator assisted the judge in leading the discussion and a note-taker, usually a member of the Bench-Bar Committee, completed the feed-back forms.

There were a total of twelve break-out groups, and we received feed-back forms for ten of the break-out groups with two of the groups submitting two different forms for their groups.

The forms reflect a positive response to the conference and the topics addressed, but the participants did not reach many potential solutions to the issues raised. The principal suggestion offered is for judges to get involved early in the process, as was discussed during the panel discussion. Related quoted comments include:

- "Judges need to get involved early ..., but judges can't be expected to carry the burden alone – lawyers need to save clients from themselves."
- "True proportionality requires early court intervention and a real understanding of the matters at issue on the part of the bench."
- "Everyone agreed that the two most significant changes would be greater involvement by the bench and a greater emphasis on proportionality of discovery."
- "Getting quicker rulings from a judge or magistrate on disputes."
- "[C]ounsel should cooperate better with each other and that judges should be actively involved."
- "Need for additional judicial intervention."
- "Almost universal agreement that early involvement of the bench in helping to shape e-discovery plan will be helpful; also widespread agreement that many discovery disputes can be "nipped in the bud" if the judge is readily available to confer with counsel."
- "Judges involved at beginning to set discovery parameters; more detailed disclosures as mandatory as [the] judge understands case."
- "Judge must be available and actively involved in the discovery process from the inception of the litigation, including holding a conference with the parties on the record at which types and location of relevant records would be disclosed, persons

with knowledge would be identified, and parameters for depositions and other discovery would be discussed."

- "There are fewer problems when the judge sets the ground rules early in the case and remains available to resolve discovery disputes very promptly."
- Judges should "more actively supervise discovery, including "call-in hours" and other devices to identify and resolve discovery issues."

Most groups did not discuss the proposed Discovery Guidelines in much detail, but the following quoted comments were provided:

- "Everyone agreed that the proposed revisions to the Discovery Guidelines will be helpful."
- "[The group] thought that the proposed changes to the Discovery Guidelines were restating what was already required."
- "Individuals were in general agreement that the meet and confer process worked well."
- "[The] discovery dispute process in [the] rules [is] too slow and cumbersome, need to contact judge and get quick decision or a process that fits the particular dispute."
- "LR 104.8 (motions to compel) causes substantial delay and is expensive."
- "[P]articipants pointed to the local discovery procedures as good models for reasonable conduct of discovery."

A few best practices were discussed, including:

- "Issue an early litigation hold and reach a quick agreement with counsel regarding search terms, persons to be searched by number of individuals or specific names, and the searching system to be used."
- "Suggest to opposing counsel the appropriate length of individual depositions."
- Serve "multiple shorter sets of interrogatories and document requests would help lawyers whittle down the issues. For example, instead of asking for "any and all" documents in a category – concerned that you will miss a key document – make the first round of discovery limited to a small universe of likely witnesses or issues, since you can always follow up for more later. This would be more cost-effective and probably more efficient than current common practice."
- "[M]ak[e] sure fee letters and engagement agreements identify the electronic discovery cost issues so that counsel is not saddled with the expenses for locating and manipulating discovery materials."

And, a few suggestions were offered to the Court, including:

- "Consider a motions day, like in the EDVA, so motions could be heard more quickly."
- "Use [a] special master for complex ESI cases, or assign a duty discovery judge as back-up to assigned judge."
- Require "[m]andatory seminars for new lawyers in basics of e-discovery."
- Necessitate "[e]arly involvement of IT professionals in discussions with counsel and the court."
- Require "briefs of no longer than one page to the judge in support of discovery motions."
- Encourage "[c]ontinuing education of bench and bar on technical issues."

Upon completion of the break-out groups, the participants and judges returned together for Chief Judge Benson Legg's final "State of the Court" address. Thereafter, Judge Alexander Williams, Jr. recognized four attorneys for their dedication to *pro bono* in this District – Grant P. Bagley and John S. McInnes of Arnold & Porter, LLP and Ellen B. Flynn and M. Celeste Bruce of Rifkin, Livingston, Levitan & Silver, LLC. The event ended with a concluding reception organized by Herb Better.

In conclusion, the conference was a success and started the debate on whether there are systemic discovery issues. Few conclusions were reached apart from involving the bench early and often but the conversation has been started. Given the positive reaction, many participants requested that conferences such as this be held with greater frequency so this District can continue to serve as leader on "Making Discovery Manageable" and other similar issues.