The Metropolitan Corporate Counsel®

SPECIAL SECTION

Civil Justice Reform

LCJ: Marshalling Legal Expertise To Meet The Challenges Of Civil Justice Reform

The Editor interviews ***Lewis Collins****, President, Lawyers for Civil Justice.*

Editor: Please tell us the history of your involvement with LCJ and the defense bar.

Collins: My initial involvement was with the Florida Defense Lawyers Association (FDLA). I became its President in 1995. I was also involved at the time with the Federation of Defense & Corporate Counsel (FDCC). I served on the board of the FDCC from 1995 to 2007 and became President of this organization in 2005. During my tenure as an officer of the FDCC I also served on the board of the DRI and Lawyers for Civil Justice. In 2006 I was elected as an officer of LCJ, becoming its President this year.

Editor: Can you describe for us some of your personal goals that you have for the organization while you are president.

Collins: The primary focus is to begin work on the reform of the Federal Rules of Civil Procedure as the rules relate to discovery and pleading requirements. In my 30-plus years as a defense lawyer I have seen how the rules and case decisions interpreting them have evolved and have led to discovery abuses. The focus of cases has shifted from issues and facts to how far parties can push discovery to make the process costly and complicated for their opponents. Discovery disputes have taken the focus off the real issues in cases and have made lawsuits more complicated and costly. This concerns me as a defense trial lawyer because issues related to the cost of discovery are now the overriding consideration for my clients when considering whether to take a defensible case to trial.

Additionally, I have tried to expand the membership in the LCJ to spread the responsibility that we in the defense community have to assure a level playing field in civil litigation. I am convinced that many defense lawyers and corporations who are not actively involved in civil justice reform are getting "free rides" from all the hard work and dedication of a few who lend their time, talents and money to the cause of civil justice reform. There is much more we could do, if only we had more involvement and financial support.

Editor: Please describe some of LCJ's underlying goals before we focus on this year's legislative and rule-making agenda?

Collins: We have the following goals:

(1) help enact meaningful reform of the fundamental precepts of the 1938 federal civil procedural rules to include fact pleading, strict limits on discovery, improved e-discovery rules, new cost allocation rules, and early identification of issues and disposition of motions is our top priority;

(2) reduce the burdens and costs associated with intrusive discovery of electronic information (e-discovery) at the state and federal level;

(3) enact state legislation or rules designed to prevent the unwarranted waiver of the attorney-client privilege and work product protection based on newly enacted Federal Rule of Evidence 502 (FRE 502) and pass federal legislation in this Congress to provide a stronger foundation for attorney-client privilege and work product protection;

(4) continue to support adoption of beneficial FRCP amendments to facilitate summary judgment practice and to protect work product under new expert discovery rules;

(5) support laws and rules preserving discretion of judges to issue protective orders and seal settlement agreements, which are necessary to protect fundamental privacy and property rights of individual and corporate litigants. The LCJ believes that this leads to the efficient operation of the judicial system; and

(6) improve state legal standards designed to eliminate "junk science" from the courtroom.

Editor: What role does LCJ hope to play in supporting this agenda for reform?

Collins: LCJ brings valuable support to civil justice reform by engaging both corporate and defense counsel in a program designed to restore the essential balance to the civil justice system by focusing on legislative and procedural rules initiatives at both the federal and state level.

LCJ was formed by leading defense lawyer organizations in concert with major corporations to debunk the "myth" that defense lawyers don't support civil justice reform. We have shown that defense counsel, working in tandem with corporate counsel on common goals of civil justice reform, can accomplish much. That is what makes LCJ different from other organizations involved in the reform process – and that is what gives us our persuasive power. LCJ provides the brain power and experience of defense trial lawyers who are actively engaged in supporting legal reform outside of the courtroom to help shape policy and laws that have an impact on the litigation landscape. The LCJ mission is to support legal reform by providing a defense perspective on important issues that are debated in Congress, state houses and judicial rule-making bodies. The Washington office not only tracks legislation but engages both corporate and defense counsel in the process of supporting changes which create a more favorable climate for resolving disputes.

Lewis Collins

Editor: What do you see as the current political landscape and how does LCJ fit in?

Collins: The plaintiffs' bar is one of the strongest lobbying groups in the country – funneling significant contributions to both major political parties and consistently ranking among the top donor groups in the country when it comes to political contributions.

Although the defense bar does not have a PAC, LCJ fills a valuable role by encouraging its members to support legal reform initiatives through "sweat

For More Information About LCJ And The Needs It Serves:

See Issues & Overview page 22 for information about LCJ's membership meeting on December 3 and 4.

The index to "Controlling Legal Costs" on page 11 lists articles and interviews highlighting cost issues relevant to some of the legal reforms discussed by Mr. Collins.

equity" and the brain power only experienced defense trial lawyers can provide. This includes:

(1) testifying on legislation at hearings;

(2) reviewing and providing analyses of bills to determine if the defense perspective is being reflected;

(3) performing hands-on lobbying; and

(4) assisting in the authoring of scholarly articles, treatises and white papers.

The voice of the corporate community is also strengthened by having defense counsel who can amplify their concerns on civil justice issues. LCJ coordinates these activities closely with the U.S. Chamber of Commerce, the Civil Justice Reform Group and other corporate community organizations.

Editor: Can you give us some examples of accomplishments of LCJ in recent years with respect to broad civil justice issues?

Collins: Yes. LCJ has been at the vanguard of civil justice reform for over 20 years and has a proven record of success in leveling the playing field for corporations and their insurers in civil actions. LCJ, being that unique partnership of corporate and private practice defense counsel, is devoted to accomplishing civil justice reform through collaborative efforts by providing a counterbalance to the organized plaintiffs' bar.

One landmark achievement was the enactment of the new federal rules pertaining to the discovery of electronic information – specifically the enactment of new e-discovery rules in 2006. Only a few years ago, many judges were under the impression that a push of the button was all that was needed for a responding party to comply with requests for electronically stored documents – including emails. It was clear that without federal rules or guidelines on e-discovery, courts were headed in a direction which would have resulted in various rules and interpretations that would have resulted in defendants being required to spend vast sums of money and personnel resources to respond to e-discovery. Also, a patchwork quilt of conflicting and confusing e-discovery rules were developing that would have made it very difficult for national corporations to effectively manage electronically stored information. We considered this an unacceptable predicament.

Editor: How did LCJ respond?

Collins: LCJ led an effort, with input from its corporate and defense bar affiliates, to encourage the Federal Judicial Conference (FJC) to advance new e-discovery rules. On numerous occasions we responded to proposals by the various committees of the FJC by presenting testimony and position papers outlining LCJ's positions on proposed new e-discovery rules. I was so pleased that so many of our LCJ members testified at hearings held by the FJC on the issues involved. The LCJ also worked very closely with the Chamber Institute for Legal Reform (ILR) and the defense bar to present written support for our arguments. The result of this process and focused action resulted in, what we believe, is a very favorable set of e-discovery rules. LCJ was able to achieve this outcome only through the time and attention devoted by the defense community (both corporate and outside counsel) coming together to expressing their views on this subject.

Editor: And now we are all familiar with the new federal e-discovery rules. But might we not still have the same problem that you encountered — specifically a myriad of conflicting rules at the state level?

Collins: LCJ undertook the development of a model state bill that in many respects mirrored the new federal rules. This "new and improved" model bill was actually embraced by the American Legislative Exchange Council (ALEC). ALEC is an organization that is supported by state legislators. The model bill provides defendants in civil litigation an enormous benefit because it is designed specifically to address issues such as: balancing of costs and burdens of production; form of production; preservation, obligations, and spoliation. LCJ has worked with state "action teams" who work in those states which have been identified as appropriate for e-discovery reform. Top priority e-discovery states include: Connecticut, Illinois, Michigan, New York, Pennsylvania, South Carolina, Mississippi and Tennessee. But we suspect there will be more of these in 2010. This is one area where LCJ has and will continue to make a critical difference.

But our program is focused on other states where either action to amend the rules is underway or contemplated. We provide these local action teams with the resources they need to "grow" these rules locally. The resources we provide include model legislation or rules, background papers and analyses of the rules and scholarship. LCJ has found that all of these resources have been helpful to our action teams in effecting a positive result. Our positions reflect a tremendous amount of legal scholarship and analyses that have taken place over several years and that reflect the viewpoints of many different individuals who participate on the LCJ E-Discovery Committee. This hard working committee meets monthly by conference call and at least twice a year in person.

Editor: Has LCJ's rule reform achievements been primarily confined to e-discovery?

Collins: No. LCJ also successfully opposed legislation which limits judi-

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cial discretion in issuing protective orders and sealing settlement agreements. Senate Bill 2449, the so called "Sunshine in Litigation Act of 2007" passed out of the U.S. Senate Judiciary Committee by amendment on March 6, 2008. A House version (HR 1508) was introduced in the current 111th Congressional session by Congressmen Robert Wexler (D-FL). LCJ and its allies are working to ensure that this harmful legislation does not progress in the House.

LCJ also enjoyed terrific success in passing new FRE 502. On September 23, 2008, LCJ scored a major legislative victory when President Bush signed S. 2450, which the Judicial Conference had recommended for adoption and which the U.S. Senate and the U.S. House of Representatives passed. This new Rule 502 will help limit the skyrocketing costs and delays that result from the need to conduct the exhaustive privilege reviews that were needed to ensure that defendants did not waiver the attorney client privilege and attorney work-product protection. Suffice it to say that without LCJ'S focused attention, FRE 502 would not have become law. Now the effort is underway to support adoption of similar privilege waiver rules in the states.

Editor: What do you and LCJ hope to accomplish in 2010?

Collins: As I pointed out previously, LCJ is pursuing a broad range of procedural and evidentiary rule reforms, many of which are embodied in the Recommendations of the Task Force on Discovery of the American College of Trial Lawyers (ACTL) and the Institute for Advancement of the American Legal System (IAALS). The American College Report supports the broad based reforms of the principal civil rules that LCJ and its allies have been advocating for years and has spurred the federal rule makers to reexamine the fundamental precepts of the 1938 rules. This is a major and important undertaking.

The report's stated principles (which are being examined by the federal rule makers) are in line with many of LCJ's long held views. These include:

(1) pleadings should be fact pleading, not notice pleading;

(2) the scope of all discovery should be limited to material, proportional information, e.g., information necessary to prove a claim or defense or for impeachment;

(3) discovery should be by initial disclosure followed by focused and limited discovery proportionally tied to claims actually at issue;

(4) early disposition of cases through motions should be a priority;

(5) early identification of the issues to be tried should be required; and

(6) courts should consider staying discovery in appropriate cases until a motion to dismiss is decided.

The concerns over the costs and burdens of e-discovery – not fully addressed in the 2006 amendments – supply much of the impetus for this push for reexamination. The report's stated principles also include support for the LCJ-CJRG proposed E-Discovery and Privilege Waiver Model Rules (ALEC Model 03/26/09 – Final). The report noted that:

(1) electronic discovery should be limited by *proportionality*, taking into account the nature and scope of the case, relevance, importance to the court's adjudication, expense and burdens;

(2) sanctions should be imposed for failure to make electronic discovery only upon a showing of intent to destroy evidence or recklessness;

(3) absent a showing of need and relevance, a party should not be required to restore deleted or residual electronically-stored information, including backup tapes; and

(4) cost shifting/co-pay rules should be considered generally and, for e-discovery in particular, and courts should not hesitate to allocate costs to the requesting party.

This important report has a number of other recommendations, but the key for LCJ is that the rule maker's reexamination will focus on LCJ's prime "procedural" priorities and, if made a business community high priority, could result in groundbreaking reform of all of the federal rules, including e-discovery, that would significantly reduce the costs and burdens of litigation and increase its efficiency.

Editor: This sounds like a major initiative. What will be the keys to success?

Collins: The keys to success are early engagement in the procedural rules process and facilitating sufficiently diverse and broad input so as to be persuasive to those judges who have decision-making responsibilities with respect to the new rules.

Editor: How does LCJ generate support for its program throughout the defense bar?

Collins: In addition to the support of *Fortune* 500 corporations, LCJ is strongly supported by DRI, Federation of Defense & Corporate Counsel and the International Association of Defense Counsel. Additionally, 65 of the most prestigious defense law firms nationwide are actively engaged in the support of this effort. The LCJ founding member defense organizations play a vital role in determining the agenda of LCJ and in generating individual attorneys to advocate and testify on our behalf. These organizations represent over 20,000 defense lawyers throughout the U.S. In this way, LCJ policy positions reflect the coordinated support of leading corporations and a broad spectrum of defense counsel, nationwide.

Editor: How useful are the LCJ meetings in supporting this ongoing program?

Collins: LCJ members, corporate counsel, defense bar leaders and defense counsel meet twice yearly. During these meetings, LCJ sets and reviews it's priorities for the year. LCJ also focuses on developing legislative and judicial rulemaking programs to support the initiatives that are contemplated throughout the year. We have been fortunate to have a wide array of key policymakers address our membership at the meetings. These include several federal and state judges, Congressional members and representatives of the various administrations of the Executive Branch. For example, two years ago, the Department of Justice chose the LCJ meeting to introduce a policy change in the way the Justice Department treated the attorney-client privilege. The DOJ announced to the LCJ membership the new policy – known then as the "McNulty Memo." Also, former House Judiciary Committee chair Jim Sensenbrenner chose the LCJ meeting to challenge the defense bar to provide input on a new procedural rule which would clarify the laws pertaining to inadvertent disclosure of privileged information. The challenge was accepted by LCJ and its members and resulted in the enactment of FRCP 502 – which we discussed. As you can see, these important meetings have been productive and groundbreaking!

Editor: What's really going on with Protective Orders and why should others pay attention to it?

Collins: We expect a renewed effort in the Democratic-controlled Congress to pass anti-protective orders legislation next year. This legislation has long been opposed by LCJ.

In April 2008, shortly after the so called "Sunshine in Litigation" Bill was approved by the Senate Judiciary Committee, Congressmen Wexler and Nadler introduced a companion bill in the House. These bills have been strongly opposed by the LCJ and the business community. The House and Senate versions of the bill threaten the fundamental rights of litigants to privacy and property. The bills would also impose substantially burdensome regulatory responsibilities on the courts while, at the same time, restricting judicial discretion to issue protective and sealing orders. LCJ plans to increase awareness about the damaging effects of these bills and will continue its mission to preserve litigants' rights. LCJ recently arranged for one of its members to provide testimony at a hearing before Senator Kohl's Judiciary Subcommittee. We have also submitted written testimony to other subcommittees and LCJ is currently organizing visits with key members of Congress to inform them of the dangers of this bill.

Both the House and Senate versions threaten the fundamental rights of litigants to privacy and property and would impose substantially burdensome regulatory responsibilities upon the courts, while restricting judicial discretion to issue protective and sealing orders.

Although this "Sunshine" legislation purports to protect public health and safety, it is unnecessary and would be harmful to litigants' rights and to the judicial system. Studies conducted and analyzed by the U.S. Judicial Conference Rules Committee shows that no evidence exists to suggest that protective orders create any significant problem in releasing information about public hazards or in impeding efficient sharing of discovery information.

Another strong effort is now underway by LCJ to oppose this anti-privacy legislation. We are working very closely with the Chamber ILR and the defense bar in this effort.

Editor: What else is LCJ involved in?

Collins: Curbing "junk science." LCJ has long advocated *Daubert*-type standards, which emphasize the need for judges to act as good "gatekeepers" to eliminate "junk science" from the courtroom. After conducting a nationwide poll of defense counsel to determine where the appropriate rule-making opportunities exist, we established action teams in key states to support improved expert-testimony-rule reform. LCJ provides these teams with draft model legislation, position papers, and other resources in order to improve the quality of expert testimony in the courtroom.

Editor: Who makes up LCJ as an organization?

Collins: The LCJ network consists of approximately 25 major corporations which have a strong commitment to civil justice reform along with the leadership of DRI, Federation of Defense & Corporate Counsel, the International Association of Defense Counsel, collectively representing over 20,000 members of the organized defense bar, and 65 defense trial law firms which we call Associate Members.

Editor: How may individual defense lawyers join LCJ?

Collins: Law firms are invited to join LCJ. We have all 65 openings for law firm associate memberships currently filled but interested individuals should notify LCJ Executive Director Barry Bauman of their interest in joining so that they can submit an application when vacancies occur. These can be submitted either by calling the LCJ Washington office at 202/429-0045 or submitting an application form to Barry at bbauman@lfcj.com.

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