Crowell

CLIENT ALERT

Judge Paul Grimm Weighs In on Parties' Duties to Cooperate in Discovery

October 20, 2008

There has been ongoing debate about the extent to which litigants actually will engage in earlier and more effective cooperation to control escalating e-discovery costs, versus the extent to which "discovery about the discovery" will continue to be a "gotcha" game of tactics that further drives up costs and distracts from the merits of litigation. Chief Magistrate Judge Paul Grimm put his finger on the scale in an opinion issued last week that is certain to gain notice.

In *Mancia v. Mayflower Textile Servs. Co.*, 2008 WL 4595275 (D. Md. Oct.15, 2008), class action plaintiffs in a Fair Labor Standards Act case pursued motions to compel claiming that defendants' responses to discovery were "wholly inadequate," as defendants had responded to discovery using non-particularized, boilerplate objections. At the outset, Judge Grimm notes that that the use of such broad objections violates FRCP 33(b)(4) and 34(b)(2) (requiring that parties state objections to discovery requests with specificity), and likely also violates FRCP 26(g), which requires that a party conduct "reasonable inquiry" before objecting to discovery.

Rule 26(g): The Duty to Conduct "Reasonable Inquiry" when Responding to Discovery

Rule 26(g) has been in the spotlight lately, most recently as central to the discovery sanctions in the *Qualcomm v. Broadcom* litigation. Judge Grimm notes that Rule 26(g) is "one of the most important, but apparently least understood or followed" rules. The Rule requires that discovery responses be signed by the attorney of record or the client, certifying to the court that to the best of the person's knowledge, information and belief ***formed after a reasonable inquiry***, the response is complete and correct. Sanctions under Rule 26(g) are mandatory. Referring to the Advisory Committee Notes for the Rule, Judge Grimm sets forth several take away points that "ought to, but unfortunately, do not, regulate the way discovery is conducted," including that:

- The Rule is intended to ensure that discovery is conducted in a way that is consistent with "the spirit and purposes" of the discovery rules, and requires "cooperation by counsel to identify and fulfill legitimate discovery needs, yet avoid seeking discovery the cost and burden of which is disproportionately large to what is at stake in the litigation."
- The Rule is intended to curb discovery abuse by requiring the court to impose sanctions if violated.
- The Rule "aspires to eliminate one of the most prevalent of all discovery abuses: knee-jerk discovery requests served without consideration of cost or burden to the responding party."

Parties Must Cooperate

Judge Grimm emphasizes that cooperation must be a two-way street. Although the responding party must comply with Rule 26(g) by making reasonable inquiry before responding, the requesting party is also required to act judiciously. In remarking that parties seldom limit their discovery requests, arguing that broad requests are required because the requesting party does not

have enough information to tailor the requests, Judge Grimm proposes several ways that parties can comply with the Rule's mandate:

- Parties should meet and confer before *initiating* discovery.
- Parties should discuss what the amount in controversy is, and how much, what type and in what sequence discovery should be conducted, so that costs are proportional to what is at stake in the litigation.
- Parties should put an end to the practice of objecting to discovery without a factual basis for doing so and should object only after making reasonable inquiry. **Judge Grimm notes that boilerplate objections are prima facie evidence of a Rule 26(g) violation**.

Citing the recent report by the American College of Trial Lawyers that blames the discovery process, especially electronic discovery, for the rising costs of litigation, Judge Grimm stated that "the failure to engage in discovery as required by Rule 26(g) is one reason why the cost of discovery is so widely criticized as being excessive to the point of pricing litigants out of court." He also notes the recently released The Sedona Conference® *Cooperation Proclamation* (2008), which advocates cooperation among parties as a means to reducing the exorbitant costs of litigation.

Critics of "cooperation" have asserted that such behavior is not only contrary to our form of adversarial litigation, but it may go so far as to violate a lawyer's ethical obligations vigorously to defend her clients. In Judge Grimm's view, discovery cooperation is not inconsistent with our adversarial system, which should aim to promote fair adjudication. Cooperation in the context of discovery aids in that purpose "by facilitating discovery of the facts needed to support the claims and defenses that have been raised, at a lesser cost, and expediting the time when the case may be resolved on its merits or settled." Moreover, he notes that "there is nothing at all about [this form of] cooperation . . . that requires the parties to abandon meritorious arguments they may have or to commit to resolving all disagreements on their own."

Despite his admonitions, Judge Grimm did not impose "mandatory" sanctions under Rule 26(g). Instead, he took a page from his own playbook and applied the proportionality standard of FRCP 26(b)(2)(C) to require that the parties meet and confer to work out the remainder of the discovery issues in light of the possible recovery in the case. Nevertheless, Judge Grimm is an important voice in this debate, and his guidance in this area is likely to be followed by other courts.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Jeane A. Thomas, CIPP/E
Partner – Washington, D.C., Brussels
Phone: +1.202.624.2877, +32.2.282.4082
Email: jthomas@crowell.com