Civil-procedure rules 'Roadshow' draws crowds, but critics remain, 2016 WLNR 15887846

On May 13, the Rules Amendments Roadshow sponsored by the American Bar Association's Litigation Section and Duke Law Center for Judicial Studies pulled up to the Moakley Courthouse, the penultimate stop on its 17-city tour. At the event, a standing-room-only crowd discussed changes to the Federal Rules of Civil Procedure that took effect last Dec. 1.

At the heart of the discussion, as the event's title - "Hello 'Proportionality,' Goodbye 'Reasonably Calculated'" - implies, is a key change to Rule 26(b), which seeks to streamline the discovery process and rein in costly abuses.

But what attendees may not have realized is that, to some, this was anything but just another continuing legal education opportunity, perhaps remarkable only for its star-studded panels featuring federal judges and notable practitioners.

Indeed, the "Roadshow" has detractors, who say the event is the latest stage in a concerted attempt by a private entity to ensure the amended rules are interpreted in a business-friendly manner. The critics

University of Illinois College of Law professor Suja A. Thomas first sensed something amiss when Duke Law Center solicited public comment on guidelines it was drafting on the proposed amendments to the Federal Rules of Civil Procedure last August.

"This struck me as odd," she wrote on the American Constitution Society's blog. "Public commentary is an important part of the official rulemaking process. On the other hand, public commentary generally does not occur for private initiatives. Why was public commentary sought for these private guidelines?"

Eventually, a suspicion would crystallize, which Thomas took to the chief justices of the federal courthouses set to serve as stops on the Rules Amendments Roadshow.

In a letter last October, Thomas suggested that Duke's 11-page set of "guidelines and practices" - "the result of a private corporate-sponsored initiative" - posed a Rules Enabling Act issue.

"Through a parallel process designed to be akin to the rulemaking process under the Rules Enabling Act, this private initiative has attempted to portray itself as part of the official rulemaking process," she wrote.
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But rather than adhering to the strictures of the REA, Duke's process, which began with an "expensive 'Invitation Only' conference," was shrouded in secrecy, Thomas noted.

Not only was it secretive, but the process also bore the "imprimatur of approval," an appearance that would be furthered by two members of the Advisory Committee on the Federal Rules of Civil Procedure who were leading the Roadshow: U.S. District Court Judge Lee H. Rosenthal, who chaired the committee, and University of Oklahoma professor Steven Gensler.

Thomas also shared her letter with the United States Judicial Conference's Committee on Rules of Practice and Procedure. Judges Jeffrey S. Sutton, John D. Bates and David G. Campbell rejected the suggestion of a Rules Enabling Act problem, but they did ask Duke Law Center to state clearly that the guidelines do not represent the views of any judicial conference committee.

"We also reminded members of the Advisory Committee of the need to preserve the committee's independence, both in fact and in appearance," they wrote in a letter to Thomas.

In a separate letter to the chief justices of the courthouses hosting the Roadshow, the trio sought "to avoid any confusion" over whether the event was "official" judge training. They asked that the letter be shared with judges throughout the districts. Dispute deepens

Thomas elaborated on the business-friendly spin she felt was being put on the amendments in a Nov. 4 column on Law360, titled "Via Duke, Companies Are Shaping Discovery."

"Through funding, corporations have successfully lobbied academics and judges to define this proportionality rule in their favor," she wrote, noting that Duke Law Center counts among the members of its advisory council general counsel and litigation department heads from Merck, GlaxoSmithKline, Pfizer, ExxonMobil, Bayer, Microsoft and Home Depot.

As of last Dec. 1, the split on the council was 13 corporations, six defense counsel and six plaintiffs' counsel, though three additional plaintiffs' lawyers have since been added to the council, Duke Law Center's website indicates.

The big businesses' corrupting influence, she said, could be seen in a guideline advising judges to require disclosure at the beginning of a case on only "subjects and sources that are most clearly proportional to the needs of the case." The words "most clearly" do not appear in the rule, she said, but in application would lead to "corporate-friendly, early restricted disclosure."

Such restricted disclosure could thwart a plaintiff's case, Thomas added, laying out a hypothetical age discrimination case in which the plaintiff never learns that other workers have been improperly fired.

Such concerns are not off base, said Harvard Law School professor and retired federal Judge Nancy Gertner, who has written about how "ostensibly neutral procedural rules skew outcomes," particularly in the discrimination context.

During the comment period on the proposed amendments, Gertner opined that a concern for a small number of discovery abuses "has led the Committee to propose rule changes that will profoundly disadvantage plaintiffs in the vast majority of cases."

Civil rights and discrimination plaintiffs, in particular, may have increasing difficulty accessing the circumstantial evidence they need to prosecute their cases, Gertner said.

The backdrop of the rules changes is U.S. Supreme Court decisions Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, which "reshaped the pleading standards" in a more defense-friendly manner, Gertner noted.
Given the similar rationale for the proposed rules changes - a desire to free blameless defendants from having to settle cases to avoid discovery costs - a slight nudge from something like Duke Law Center's guidelines might be all judges need to tip the interpretation of the rules in that direction, Gertner suggested.

As a practical matter, Gertner said she would be "astonished" if judges did not incorporate the guidelines in their decision-making processes, particularly given the rules' mandate for them to be more actively involved in managing cases in their earliest stages. Duke plays defense

John K. Rabiej, director of Duke Law Center, responded to Thomas' Law360 column, saying she had mischaracterized who developed the guidelines, a group he characterized as "a distinguished group of practitioners - drawn from both sides of the 'v.'"

Rabiej said the guidelines went through several revisions as part of "an inclusive effort that produced diverse views and opinions."

"There was no preconceived result or conclusion, and no type of group or view was excluded," he said, telling Lawyers Weekly that the guidelines take the rules and committee's official comments and "put a little more flesh on those bones."

Before coming to Duke, Rabiej spent 20 years as chief of the Rules Committee Support Office, staffing the six rules committees of the United States Judicial Conference. That experience taught him that "judges see through work product that is one-sided," he said. "It is disregarded almost immediately."

The guidelines' drafters did not want to wind up with a "wishy-washy" document, Rabiej said, and 40 volunteers who did the bulk of the work did not agree with everything in the guidelines.

The process of developing the guidelines involved dividing the volunteers into four 10-person teams by practice area. Each team was led by one plaintiffs' attorney and one member of the defense bar.

While the plaintiffs' attorneys may have entered the process more suspicious of the new rules, when the guidelines were finalized, none of the volunteers declined to attach their names, Rabiej noted.

Pains are taken in the guidelines to stress that they are "not part of the rules and have no binding effect," added Rabiej, describing them alternatively as "a resource for judges, lawyers and litigants" and "suggestions intended to foster discussion."

Given the disclaimers, Rabiej doubts any federal judge or magistrate will accord the guidelines the weight of an official document. A 'fairer, prompter' system

The "ultimate goal" of the amended rules, Rabiej said, is a "fairer, prompter and less costly litigation system."

Parties are encouraged to collaborate on a discovery plan and attempt to resolve disputes without resorting to protracted, costly motion practice. Judges also are encouraged to take a more active role in managing cases from the outset.

That's the message attendees of the Boston Roadshow took away, Kenneth R. Berman hopes and believes. The Nutter, McClennen & Fish attorney, who served as the event's regional chairman, said that while Rule 26(b) may have been the focus of the session, Rule 1, which seeks to ensure a "just, speedy and inexpensive determination of every action and proceeding," also was part of the message.
Berman noted the two panels in Boston were balanced, composed of two judges, one plaintiffs' lawyer, one defense attorney and one who represents both sides.

One of those plaintiffs' attorneys was Stuart Rossman, the National Consumer Law Center's director of litigation. While his brethren may have been rightfully suspicious of the rules changes as they were originally proposed, Rossman said, he thinks some of the most problematic limits on the discovery process were ameliorated during the protracted rulemaking process, which began back in 2010.

The concept of "proportionality" has always been in Rule 26, he said; "it's just given a different emphasis, and more focus" by being moved from the "limits" section of the rule to the "scope" section.

Berman said he was aware of concerns such as those expressed by Thomas and Gertner but did not think they were warranted.

"There's no question that the scope of discovery is narrower than it previously was," he said. "But that doesn't mean people will be denied the evidence to prove their cases. People just need to be more thoughtful about how they go about getting the evidence they need."

Thomas, who attended the Chicago stop of the Roadshow, acknowledged that U.S. District Court Judge Rosenthal did provide a "caveat" at the outset of the event, to the effect that the program and the guidelines did not have any sort of official seal of approval.

Rabiej said Rosenthal's minutes-long disclaimers "almost go too far, diminishing the value of the work" of the guidelines' drafters.

At the same time, Thomas was still somewhat troubled by the fact that the program was advertised using the two Advisory Committee members as the draw.

Absent those committee ties, if Duke Law Center put on a program at a courthouse, she said "it would be more obvious where the lines are and more obvious who's working for whom."

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