OPINION: Via Duke, Companies Are Shaping Discovery

Law360, New York (November 4, 2015, 2:41 PM ET) --

Recently, the New York Times reported that corporations in the food industry have paid academics to lobby for and against genetically modified food. A similar phenomenon is happening in our legal system in the battleground around controlling litigation costs.

A recent example involves a new change to the scope of discovery — in other words, the information that is exchanged between parties in a case. Parties can win or lose based on the information that is disclosed. This issue has become hot as corporations argue that discovery should be substantially limited because it is too costly. A new federal rule responds to this concern. In the past, any nonprivileged, relevant information was subject to disclosure. Now, under the new rule — scheduled to go into effect on Dec. 1 — a party is required to produce only information “proportional to the needs of the case.”

Through funding, corporations have successfully lobbied academics and judges to define this proportionality rule in their favor. Those corporations sponsor the Duke Law Center for Judicial Studies. With corporate influence, Duke has published guidelines that permit corporations not to disclose information that is required under the federal rule, and federal judges are being educated on those guidelines. For example, under one guideline, judges are advised to require disclosure at the beginning of a case on only those “subjects and sources that are most clearly proportional to the needs of the case” while the actual rule requires disclosure of information that is “proportional to the needs of the case.”

This guideline could result in a plaintiff losing. For example, an employee who alleges age discrimination might seek information about the employer’s firings of other older workers. Following the “most clearly proportional” guideline, the judge likely will decide the employee’s own firing is most clearly proportional to the needs of the case. Information about other workers is not. Without this information, the plaintiff may not learn of relevant witnesses, cannot show any pattern of discrimination against older workers, and ultimately may not show the employer discriminated against him.

These guidelines are becoming law. This process began with an event on implementing the proportionality rule. Led by the Duke Center’s Advisory Council, which is comprised of several major corporations, the “invitation only” conference was held under rules of secrecy protecting the identity and affiliation of the speakers. Many companies on the council, such as GE, Pfizer and ExxonMobil, sponsor the Center and testified in favor of the proportionality rule. In addition to corporate representatives, judges and lawyers from law firms participated. Many groups and individuals were not invited to attend and some could not afford the expensive event, including the NAACP Legal Defense Fund.
Later, as the follow-up to the Duke conference, a federal judge — a member of the Duke Center’s board — and a professor along with other judges drafted over 10 pages of guidelines and practices to interpret the less than one sentence proportionality rule. Showing the specific influence of corporations, the guidelines included matters not in the rule, including the previously mentioned corporate-friendly, early restricted disclosure.

The leaders of these guidelines had special governmental stature. The judge formerly chaired a governmental body called the Advisory Committee on Civil Rules — the body that forms the official federal rules — and the professor was a committee member. Due to their former official affiliations, they were given access to speak to 60 federal magistrate judges — judges who assist primarily with fights about the disclosure of information. According to a Duke email, the judges were “train[ed]” on the private guidelines at a workshop of the Federal Judicial Center, an education agency for the federal courts.

These guidelines are trumping the federal rulemaking process. Under the official process, after the Advisory Committee proposes a federal rule, other bodies examine it and then the Supreme Court reviews it. After the court adopts the rule, if Congress does not act to change or reject it, the rule becomes effective on Dec. 1. At that point, judges in federal courthouses go about interpreting the federal rule — using the language of the rule and possibly using an explanatory note crafted by the committee.

Despite this required procedure, the guideline initiative changed how the proportionality rule may be interpreted. Magistrate judges were trained on the guidelines even though no law gives these private guidelines any weight. Moreover, they were trained even though the Supreme Court and Congress had not yet approved the proportionality rule.

The Duke Center has further acted to control how the federal rule is interpreted. Led by the judge and the professor, education programs featuring the guidelines will be held in 13 major federal courthouses beginning next week. More judges will be advised to follow the guidelines.

The Advisory Committee itself is not connected to the Duke guidelines. However, individual past and present committee members have led and helped create the guidelines. Moreover, they will now lead the courthouse programs. All of these connections give the guidelines official esteem.

In 1936, in a letter, the United States Supreme Court denounced guidelines like these that involved former or present Advisory Committee members. It specifically “disapprove[d]” of members participating in the interpretation of rules, including publication of materials, before the official process was completed. The court also strongly indicated that members and former members should never be involved in such interpretive efforts. It was concerned that such efforts would improperly appear “official.”
Putting aside these governmental connections, there is little doubt that the former court would simply have disapproved of judges being educated on privately generated guidelines that purport to interpret a federal rule.

—By Suja A. Thomas, University of Illinois College of Law


**DISCLOSURE:** The author has corresponded with the rulemakers and chief judges (in the 13 courthouses) about this issue. Also, in February 2014, she testified before the Advisory Committee about the proportionality rule, using a Federal Judicial Center study to argue that the rule was over-inclusive. She also argued for requiring a proportionality log, if the rule were adopted.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2015, Portfolio Media, Inc.