Response to Professor Suja Thomas’s Opinion Piece

A few points about the November 5, 2015, letter from Professor Suja Thomas posted on Law360.

Professor Thomas’s letter on the Duke Law School Center for Judicial Studies and the Guidelines and Practices developed by a distinguished group of practitioners – drawn from both sides of the “v” – is based on an incorrect understanding of the Duke Center, the process used to generate the Guidelines and Practices, and the role the Guidelines and Practices are intended to serve.

The letter begins by describing the sponsorship of the Duke Law Center. Contrary to her statement, the Duke Law School and the Center are funded primarily by tuition, endowment, and alumni giving. The Center is mostly funded by a $5 million foundation grant from The Duke Endowment, a respected, neutral foundation that supports Duke University and other schools and institutions in the Carolinas. This substantial endowment provides the Center financial independence. The Center receives additional donations from alumni and others across the spectrum of practice who believe in the mission of the Center – to bring leading lawyers, judges, and academics together to fairly examine the most pressing issues facing our judicial and legal systems. The Center also receives support from one of the general funds of Duke Law School. The discovery conferences at issue here were all self-funding through registration fees. The process of drafting the Guidelines and Practices involved modest expenses, which was funded from the school’s general funds.

A group of leading attorneys – including those who typically represent plaintiffs, those who typically represent defendants, and those who are general counsels for a variety of entities – comprise a board that helps the Center select issues that deserve thoughtful, disciplined attention from the bench, bar, and academy, learning from each other. These issues have recently included discovery in civil cases, multi-district litigation, and preserving access to courts. These board members make a standard contribution to the Center, which goes into a general Law School fund. The sponsorship contributions of any one is a trivial part of the Center’s overall funding.

No one involved in drafting the Guidelines and Practices received a penny of compensation from or through Duke Law School for their work. Professor Thomas’s comparison of these discussions, conferences, and work product to corporate-sponsored research is baffling. Moreover, all of the educational programs that the Center runs for judicial officers strictly comply with all the ethical and disclosure standards formulated by the Administrative Office and the Judicial Conference of the United States courts, including Advisory Opinion 67, Judicial Conference Committee on the Codes of Conduct.

The Guidelines and Practices were the work product of lawyers, judges, and academics. The work and the participants are described on the second page of the document. Over 30 distinguished practitioners, representing plaintiffs and defendants in different types of cases and clients, committed to careful review and detailed comments. The result was an inclusive effort that produced diverse views and opinions. Each draft reflected extensive revisions and changes made in response to the many comments and criticisms received. There was no preconceived result or conclusion, and no type of group or view was excluded.

The letter states that Duke did not include the NAACP Legal Defense Fund in an initial conference on the proposed amendments; but this is inaccurate. The NAACP was invited to attend and accepted a substantially reduced registration fee routinely made available to enable lawyers, academics, and public interest groups who request it. Another late commitment arose, preventing the NAACP from
attending. The Center is committed to providing financial assistance to those who cannot afford the expense to attend its conferences but whose voice should be heard.

The letter incorrectly describes the nature of the Guidelines and Practices themselves. They are not intended to be an official or required set of rules, nor has Duke or anyone else ever made such a claim. To the contrary, the introduction to the Guidelines specifically states that they are “not part of the rules and have no binding effect” but instead were developed as “a resource for judges, lawyers, and litigants who must understand the amendments and their impact.” They are suggestions, intended to foster discussion among judges and lawyers about different ways to understand the proposed new rules and to think together about the challenges of implementing them fairly, wisely, and well in the variety of cases that arise in the federal courts.

The Guidelines and Practices are one of many efforts to understand and implement the proposed amendments, which will go into effect on December 1, 2015, and immediately apply to all pending cases to the extent just and practicable. The Guidelines and Practices stand on their own and will be as persuasive as they are helpful. Undoubtedly, they will bear revision in light of experience over the next few years. We should not lose sight of the ultimate goal: a fairer, prompter, and less costly litigation system that serves the American people.

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