METROPOLITAN
CORPORATE
COUNSEL®

May 2015

WWW.METROCORPCOUNSEL.COM

IN-HOUSE OPS

Civil Justice Playbook

IDEAS, INITIATIVES & INFLUENCE

"Right-Sizing" Litigation

The group calls its initiative "Rule One." The name, and the heart of its mission, is straight out of the Federal Rules of Civil Procedure: "These rules . . . should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."

Mark those words: just, speedy, inexpensive.

Rule One (Fed. R. Civ. P. 1 for you Bluebook sticklers) is an initiative of the Institute for the Advancement of the American Legal System (IAALS). The group, which operates from the campus of the University of Denver, is the brainchild of a former Colorado state jurist, Rebecca Love Kourlis. Ten years ago, Kourlis resigned her seat on the Colorado Supreme Court to found IAALS. Her mission was a doozy: We're going to fix our broken U.S. legal system.

You could almost hear the strains of the "The Impossible Dream" welling up from the orchestra pit. Kourlis, daughter of a three-time Colorado governor who served briefly as Richard Nixon's energy czar, seemed to be setting herself up as a kind of judicial Don Quixote.

Early observers, including the former general counsel of GM, Thomas Gottschalk, writing in these pages, used words such as "audacious" and "dubious" to describe the Rule One Initiative. As it turned out, however, Kourlis wasn't tilting at windmills (or, as some would have it, the plaintiffs bar).

By the time Gottschalk weighed in, IAALS had joined forces with the prestigious American College of Trial Lawyers (ACTL). Working with ACTL's "Task Force on Discovery," the groups laid the groundwork for reform in 2008 with an influential nationwide survey of ACTL fellows that showed that more than four out of five of the elite trial lawyers considered the civil litigation system too expensive. (Truth be told, they considered the system a bit of a train wreck.) A report on the survey in *Judicature* ran under the headline: "Survey of experienced litigators finds serious cracks in U.S. civil justice system."

> ***"This report has more conclusiveness."***
>
> —Rebecca Love Kourlis
> *Executive Director*
> *Institute for the Advancement of the American Legal System*

In March 2009, IAALS-ACTL released its "Final Report." It featured 29 principles that, they hoped, would "ultimately result in a civil justice system that better served the needs of its users" – just, speedy, inexpensive. Gottschalk, calling on fellow GCs to engage with the reform efforts, called the roadmap a "breathtaking proposal to rethink almost the whole body of pretrial management rules and procedures, including pleadings and discovery."

A centerpiece of the 29 principles, indeed the #1 principle, is a call for common sense. "The 'one size fits all' approach of the current federal and most state rules is useful in many cases," the report says, "but rulemakers should have the flexibility to create different sets of rules for certain types of cases so that they can be resolved more expeditiously and efficiently."

Equally important given Rule One's focus on discovery as the heart of the heart of the problem is the concept of "proportionality." Though it doesn't rear its head until the discovery section of the report, where fully 16 of the 29 principles resided, its entrée on the stage is a scene stealer.

"Proportionality should be the most important principle applied to all discovery," states the Principle. "Discovery is not the purpose of litigation. It is merely a means to an end. If discovery does not promote the just, speedy and inexpensive determination of actions, then it is not fulfilling its purpose."

As it turned out, the 2009 "Final Report" was not – final, that is. Earlier

this month, Rule One added an exclamation point with its "Report on Progress and Promise." The 29 Principles have been whittled down – to 25 – but not watered down. Quite the opposite. Unlike the first iteration, which has something of a tippy-toe quality to it, the Progress and Promise update has sharper elbows – as if Rule One had resolved to just go ahead and nail the damn thing to the courthouse door a la Martin Luther and let the fur fly.

The shift from 2009 to 2015 is not inconsiderable. In 2009, the principles kick off with the above-quoted nod to the utility of the one-size-fits-all approach to procedure. But the new iteration briskly elbows that aside in favor of a new Principle #1: "Procedural rules should be construed and administered by the courts, the parties, and their *lawyers* [emphasis added] to secure the just, speedy, and inexpensive determination of every action." (Those words again!)

Indeed, when the new report gets to one-size-fits-all, it gives it the back of its hand. "The 'one size fits all' approach of the current federal and most state rules should be discouraged."

Wow. From "useful" to "discouraged." What gives?

Plenty. According to Kourlis, much has happened since IAALS jumped into the civil justice fray 10 years ago. For one, e-discovery has exploded – like a massive star collapsing into a black hole. And many states have gone into overdrive: Utah, New Hampshire, Minnesota and, of course, Kourlis' Colorado, which has tested a new process for business cases. The Conference of Chief Justices of the United States appointed a Civil Justice Initiative Committee that is noodling over its own changes. And the feds are also in the game with proposed amendments to the Federal Rules under which process would be proportionate to the needs of the case and the onus for making it all work would be on not just the judges but the lawyers as well.

So, yes, the new report has a harder edge to it, an edge Kourlis attributes to the empirical data flowing from the state court experiments. "This report has more conclusiveness," says Kourlis. "One judge we work with calls it 'right-sizing' civil litigation."

The in-house bar also is paying close attention. "The efforts of IAALS and others to ensure 'just, speedy, and inexpensive' process highlight the need for change and have developed concrete, practical and effective strategies to improve the system," says Richard N. Baer, senior vice president and general counsel of Liberty Media Corporation. "This process promises to benefit all those who seek resolution though our courts."

Amen, says Kourlis. The more the merrier. "The ultimate objective is that people start bringing their disputes back to the courts," she says. "That would be a great thing."

–Joe Calve