10 QUESTIONS *for* Nancy J. Winkler

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INTERVIEW BY BART D. COHEN

Nancy J. Winkler is a partner at Eisenberg, Rothweiler, Winkler, Eisenberg & Jeck, P.C. and is president of the Philadelphia Trial Lawyers Association. In her role as president, she recently wrote a letter to the Administrative Office of United States Courts' Advisory Committee on Civil Rules, addressing her organization's concerns over proposed changes to the Rules of Civil Procedure. In the letter, Winkler wrote that the rules changes will deny equal access to justice to the court system.

BART D. COHEN: The Philadelphia Trial Lawyers Association letter, which was endorsed in substance by the Philadelphia Bar Association, addresses the change in rule 26B1, which would limit the scope of discovery in the most general sense relying on a concept called proportionality, the premise of which is that discovery in all cases should be proportional to the issues in the case defined in part by how much money is at stake and certain other things. The letter notes that adoption of this proportionality standard would result in people of modest means being allowed less discovery than people of substantial means. Without diminishing the importance of that, can you tell us about any other harmful effects you see coming if this rule is adopted as it's proposed?

NANCY J. WINKLER: If the rule is adopted, it would deny equal access to justice. What it purports to do is to limit the scope of discovery. If there are abuses of discovery, we have a mechanism in the federal rules right now whereby people file motions. But first and foremost, it is my belief that we need to allow people to try their cases on their merits, and I think that's the purpose of our rules of court. That is one of the fundamental principles by which the Philadelphia Trial Lawyers Association operates – trying to make sure that all individuals have access to the court system. By limiting the scope of discovery at the outset with this proportionality rule, what I think will happen is that folks that have a smaller claim will have a much more difficult time in obtaining the information that they need to present their case.

The amendment to the rule would allow greater discovery in instances where large corporations are involved or cases that are perceived to be of more significance. But individuals who have smaller claims, even by federal court standards, would have a much more difficult time in getting the information that would be critical to be able to present their claims in a courtroom, and to be able to allow them to have a just and fair trial.

That shouldn't be how we try our cases. Our cases should be tried on their merits. If there is an abuse of discovery, there is a mechanism in the court system to bring it to a stop. Motions can be filed by any party if the discovery sought is overly broad, burdensome, oppressive, and that's how things have been done. Some judges hold scheduling conferences so that they can closely monitor the cases that come before them. By doing that, they have control over what's going on with discovery. They allow the litigants to send letters if there is a discovery dispute at the outset. They allow telephone calls and telephone conferences to be had so that things do not get out

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of hand with discovery. Judges often lay the groundwork so that the parties that are involved in the litigation know at the outset what the judge believes is fair game for discovery.

I believe that regularly scheduled conferences are very helpful and can solve many discovery disputes. But to limit the scope of discovery at the outset as proposed will not only deny access to justice for individuals, but it will also foster more and more litigation. There will be more motions filed at the beginning of discovery because if a defendant or plaintiff says, "I don't believe that I should be subject to this discovery under the proportionality rule," then in order to obtain the discovery, they will need to file a motion with the court. Courts will be inundated with motions.

Now, you suggest that frequent court intervention is a good thing. Certain judges might disagree as to that. And that's somewhat related to another point you made, the idea that

we want to be able to try cases on the merits as frequently as possible. As you know, trials on the merits are diminishing rapidly over the course of time. Do you have any sense from either the corporate community or the judicial community that what they would prefer to see is a reduction in motion practice, and a reduction in trials on the merits for the judges' purposes to limit their workloads, and then on the other hand for the defendants' purposes because they just don't want claims brought to trial?

Yes, I think that all federal judges, all state judges, every judge that I've ever encountered, wants fewer motions to be filed, no doubt. And I think the mechanism for that happening, is to have the magistrate judges get involved at the outset with the discovery process and the case management process. I've seen this in a number of my cases that I've handled in the federal courts. By holding conferences and allowing the parties to bring a grievance before the magistrate judge before filing a motion, it really decreases motion practice and resolves a lot of the discovery issues.

If there is a judge that is holding regular conferences and allows the parties to present either a letter or ask for a telephone conference if there is a discovery dispute, in my experience, it generally nips the problem in the bud. The judge tells us "hey, you know, this is basically what I think" without issuing an order, and helps the parties to try and work it out, giving the parties an idea as to what the judge will do. Then if the parties can't resolve the dispute, they need to file a motion. In my experience, fewer motions are filed when the judges hold conferences. There is less abuse of discovery. Cases get through the system more swiftly, and cases are ready to be tried on their merits more quickly.

Arthur Miller of Wright and Miller fame has publicly expressed the view that the judicial community and similarly minded outsiders have, over the last 25 to 30 years, chipped away at plaintiffs' ability to get cases to trial on the merits. And it's his view that the Supreme Court and the Advisory Committee in Washington have done that, not because they're in the pockets of the business community as many believe, but so as to lighten the workload of district court judges who they perceive to be overburdened. Can you speak to this growing inability to get a case to trial on its merits?

I think that cases still get tried on their merits. I think there are fewer cases getting tried in both the state court system and the federal court system today than ever before. It is always a concern. It's a concern of the Philadelphia Trial Lawyers Association. We want to assure that the right to a trial by jury is always preserved for all individuals, and that we always have open access to the courts. That's what I think this is about for all of us, whether you represent a plaintiff or a defendant. However, I think there are other mechanisms by which cases are moved forward today. A lot of cases move forward through mediation or high-low binding arbitration. However, we don't want to lose sight of the fact that if individuals seek to have their cases tried by a jury of their peers, they should have a right to do so.

The object is not just to get cases tried speedily and inexpensively, but it's to allow justice to occur.

Whether it's a corporate defendant, an individual plaintiff, a large pharmaceutical company, whoever it might be, the right to trial by jury is a fundamental right that we should continue to preserve. I don't think that the main reason for the proposed amendments to the federal rules is to lighten the caseload of the judges by thwarting the ability to have a case tried by a jury. I don't think that's true.

The proponents of the change in the scope of discovery and most of the other proposed changes as well say that this change is necessary to comply with the goals of rule one, the just, the speedy and inexpensive determination of every action and proceeding. Now, you suggested there are other means by which that could be achieved. Is there anything else that you would add to address what these people say is a necessary change?

I think that first and foremost, we can't forget about the most important part of rule one. The object is not just to get cases tried speedily and inexpensively, but it's to allow justice to occur. First and foremost, that is what the federal rules are about in my view, and that's what our job as trial lawyers is about; to be able to bring a case to court and to have justice prevail by having a jury decide the case on its merits. There are several suggestions as to how to effectively promote rule one without changing the scope of discovery. Changing the scope of discovery is just wrong and denies equal access. The committee from the Philadelphia Bar Association that studied this for more than six months has made some suggestions. As I said, one is to have the judge more involved in the case and to have regularly scheduled conferences. I was born and raised in Philadelphia and I never really thought of being a lawyer. I had no lawyers in my family. As a matter of fact I had no one who had even graduated college. And the thing that introduced me to the law is when I was in high school I participated in the Boy Scouts Law Explorers Post. And the interesting thing is the two individuals who were the post leaders were [former Pennsylvania Bar Association President] Michael Reed and Judge Marlene Lachman and they left a lasting impression on me about a career in law.

The other suggestion that they also had was for a judge to allow more of a less formal motion practice so that instead of having to file motions, a judge could hear a dispute by way of either a letter or a telephone conference, and to thereby avoid the more costly and timely motion practice. To have a magistrate judge hold conferences and have a less formal way of trying to decide disputes is a terrific way to have rule one be complied with by the parties and the judiciary. So I think those are two mechanisms which are very important to set into place.

One of the complaints of the plaintiffs' bar in the course of this debate, at least at the national level, is that the corporate community is relying too heavily on either narrow or anecdotal evidence to prove the alleged need for a change in the scope of discovery. It strikes me that there are instances, however, where limited discovery may have resulted in miscarriage of justice as to plaintiffs. And I'm wondering if you can identify any instances, for example, where a motion to compel, which was granted and perhaps reached the outer edge of what is now allowed, resulted in evidence that turned the case in Plaintiffs' favor.

I can give you an example from a case that I handled in federal court. I represented a family of a gentleman who died while being held as a detainee in jail. He had just been arrested due to a domestic dispute. Unfortunately he died in jail less than 24 hours after being detained over the New Year's holiday. Because of what had occurred and a lengthy delay in family members finding out about this, the case came to us fairly late in the game. We had a difficult time obtaining discovery. There was a criminal investigation that was ongoing. It made it very difficult for us to gather some crucial documents that we needed. However, we had a terrific magistrate judge who held scheduling and management conferences.

With the assistance of the magistrate judge and filing motions and subpoenas that he enforced, both with regard to the criminal investigation, and then later on with regard to certain items of information including some videotape from the jail, we were able to gather the information that we needed to bring our case and ultimately to obtain a successful result for the family. If we did not have the benefit of this judge intervening in the way that I suggest, handling motions informally, enforcing subpoenas, and really moving the case along with the parties, I don't believe that we would have been able to gather the documents that we needed to be able to not only prepare our case, but to get the case resolved.

You've referred several times to your practice in state courts. Can you speak to what effect this change might have on the scope of discovery in State Courts?

Pennsylvania court rules are not modeled specifically on the federal rules. I also practice in New Jersey where the rules are more closely modeled on the federal rules. I think that if there are changes made to the federal rules, the sector of the community that had promoted those changes in the federal court system, will then try to affect the same changes in the Pennsylvania courts. I certainly hope that this would not happen regardless of what happens in our federal system. I think that our state court system and specifically our Philadelphia Court of Common Pleas has run just swell. While there is always room for improvement, our discovery system in state court is both efficient and effective. I would not like to see any changes like this in our state system. To do so would be a miscarriage of justice for all of the reasons I've stated.

To stand tall for something that you believe in is what the Philadelphia Bar Association has always been about, and what the Philadelphia Trial Lawyers Association is about.

Several other bar associations submitted comments to the Advisory Committee, but only one, that being the Tennessee Bar Association, other than Philadelphia, opposed this change in the scope of discovery. Having gone through all the comments they really bucked the tide in this regard as opposed to other bar associations. Having been involved in the bar association yourself, do you have a sense as to the reason for that?

I applaud the Philadelphia Bar Association and the Board of Governors specifically. To stand tall for something that you believe in is what the Philadelphia Bar Association has always been about, and what the Philadelphia Trial Lawyers Association is about. When you look at the mission statement of the Philadelphia Bar Association, what is talked about is fostering the understanding of involvement in and access to the justice system for all individuals. What better way to effectively continue to promote its mission than by standing tall to oppose a proportionality rule when the consensus of the governors was that it did deny equal access to justice? So I applaud the Philadelphia Bar Association, and I say shame on the other bar associations that didn't stand tall for their members.

Is there any sense among either the local or national trial lawyers with whom you associate as to which way the Advisory Committee will ultimately go as to the proportionality issue?

I'm not sure. I think it depends on who you ask, and maybe on what day of the week. There are a number of trial lawyers associations across the country that have weighed in. I,

along with our President-Elect, Larry Cohan, wrote a letter on behalf of the Philadelphia Trial Lawyers Association to the Advisory Committee opposing certain of the changes, including the proportionality rule. I'm an optimist, so I'm not one to say we're doomed about anything. I'm a fighter and that's how I've always practiced law, that's how I live my life.

So I sincerely hope that the Advisory Committee considers the letters and the comments of the trial lawyers associations, the bar associations and all of the comments that have been made. My hope is that they look closely at this proportionality rule and what it could do to the justice system and how disastrous the outcome could be.

The PTLA chose to comment on only one of the many proposed amendments, and I think most people agree that is the most significant one. Is there any sense though within the organization as to whether any of the other proposed amendments are either good, bad or indifferent?

Yes. In fact, when I wrote to the committee, besides the proportionality rule, I also expressed that the proposed changes to Rules 30, 31, 33 and 36 are of concern. Plaintiffs often rely on the use of these inexpensive discovery tools to obtain information. They need to meet their burden of proof. Instead of leveling the playing field and affording all individuals equal access to justice, the proposed amendments to these rules tip the scales of justice toward the side of the big corporations and make it difficult, if not impossible for individuals to obtain the information necessary to try their cases on their merits.

There are some changes that I thought were good. For example, there was a change proposed to rule 34(b)(2)(B) that the grounds for objecting should be stated specifically, and there is a new requirement in 34(b)(2)(C) that an objection state whether any responsive materials are being withheld on the basis of the objection. I think these are both positive changes.

You've suggested some changes at the margins or changes in particular cases that might remedy whatever abuses out there exist. In your ideal world, or the ideal world of trial lawyers in general, is there any wide-ranging change that you would like to see put in place above and beyond anything we've discussed today? And I'm limiting that to just, you know, discovery, and primarily in Federal Courts.

I think one of the proposed changes is an excellent start. If either party is objecting to providing certain documents, you should specifically state that you're withholding documents subject to this objection. So I think that is a start. I think that too often in answers to discovery you only get objections. Nothing is produced. Then you have to file motion after motion after motion to try and get anything. So I think that that's a good start. I think that we do need to be a little bit more specific in our responses to discovery requests so that we can try and move the case forward efficiently and in a less costly manner. Interrogatories and requests for production are important tools that everybody can utilize. These are tools that aren't costly. That's why I think it's important not to change the permissible number of interrogatories and requests for production. ■

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