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2020 AMENDMENTS TO OHIO CIVIL RULES AFFECTING FAMILY LAW PRACTITIONERS

- Amendments effective July 1, 2020 – see attachment
- **RULE 4 – PROCESS AND SUMMONS**
  - Rule 4(D) now authorizes a plaintiff to request a waiver of service (pursuant to Rule 4.7).
  - Rule 4.7 provides that there is a **duty** to avoid unnecessary expenses of serving summons.
    - Litigants should offer a waiver of service when commencing all litigation **other than civil protection orders** (Rule 4.7(B)).
    - Should offer a "easonable time" of at least 28 days after a request to return the waiver, before pursuing other methods of service.
    - If the defendant fails to waive service, the court can:
      - Charge expenses incurred for service to the defendant, and
      - Award attorney's fees for any motion required to collect such service expenses!
    - Signed waiver extends the time for a defendant to answer a complaint to 60 days after the request for waiver is sent.
    - Waiver of service **does not waive any objections to jurisdiction or venue** (Rule 4.7(F)) – but best practice suggests that the waiver language should make that clear!
      - See form language in Rule 4.7

- **RULE 16 – PRETRIAL PROCEDURE**
  - Court is now required to issue pretrial scheduling orders in all cases either 90 days after the defendant served, or 60 days after defendant has responded to complaint, whichever is **earlier** (Rule 16(B)(2)).
  - Some Ohio courts have done this traditionally, but the Rule now seems to suggest all courts "shall" do so!
- **RULE 26 – DISCOVERY**
  - Changes to the Rule are now more in line with federal rules of discovery!
  - More expansive definition of the scope of discovery (Rule 26(B)(1)):
    - Things to consider regarding relevancy:
      - Proportional to the needs of the case
      - Importance of the issues at stake in the action
      - Amount in controversy
      - Parties' relative access to relevant information
      - Parties' resources
      - Importance of discovery in resolving the issues
      - Whether the burden or expense of the proposed discovery outweighs its likely benefit
  - Initial Disclosures (26(B)(3))
    - This is another MAJOR change from traditional practice – the Rule requires prospective disclosure of financial documents, etc., that may be used at trial, **in advance** of any discovery request.
    - A new affirmative duty to disclose all documents or computations of "damages" or claims (Rule 26(B)(3)(a)(iii)).
    - Disclosures must be made by the time of the first pretrial or case management conference unless court alters schedule – other parties joined later must make disclosures 30 days after service or joinder (Rule 26(B)(3)(c)).
    - Rule 26(F) requires parties to confer and discuss plan for discovery at least 21 days before a scheduling conference is to be held.
  - Expert Reports (26(B)(7))

- Another major change – experts must be affirmatively disclosed, and all reports prepared by experts are **required** to be produced and exchanged.
- Party with the burden of proof must prepare the initial expert report!
    - Business valuation?
    - Real estate appraisal?
    - Psychological exam?
- Experts **may not testify** without having first written a report, and cannot testify or opine about matters not disclosed in his or her report. (Rule 26(B)(7)(c)).
    - No more "waiting to review" an expert's report – suggests that there must be an affirmative written report, even if it's a review and response to the proponent!
- Expert reports **must** be exchanged **at least** 30 days in advance of trial!
    - Healthcare expert exceptions for medical records; and
    - Depositions of experts may only be conducted after exchange – party opposing an issue may choose not to hire an expert, and if so, can take the proponent expert's deposition after exchange of that report
- Opinions or reports of non-testifying experts hired for trial prep purposes **may now be discoverable** (Rule 26(B)(7)(h)) – if opposing party can show exceptional circumstances under which it is impractical for the party to obtain facts or opinions on the same subject by other means

- **ADDITIONAL PROPOSED RULE CHANGES**
    - All proposed for public comment until November 5, 2020 – NOT YET EFFECTIVE
    - **RULE 3 – VENUE**
        - Rule 3(C)(10) -- Proper venue for a case involving care, custody, control and support of a child (outside of divorce, annulment or legal separation actions) is the county of the child's residence or where the child was last known to reside.
    - **RULE 4 – SERVICE**

- Small revision to rules regarding service by publication for child support actions

- **RULE 37 – SANCTIONS FOR FAILURE OF DISCOVERY**
  - If electronically stored information that should have been preserved is lost and cannot be restored, if the court finds that the party storing it acted with intent to deprive the other party of such information, the court can presume it was unfavorable to the party and either dismiss the action or enter a default judgment
- **RULE 75 – TEMPORARY ORDERS**
  - Clarifies that the court may issue temporary orders regarding an allocation of parental rights and responsibilities **after consideration of the parties' parenting practices**, but that the court **shall not adopt a parent's proposed shared parenting plan as a temporary order**. Also extends the deadline for submission of affidavits from the other party to 28 days. Explicitly provides that temporary orders create no presumption of law or fact as to court's final judgment.

AMENDMENTS TO THE OHIO RULES OF PRACTICE AND PROCEDURE

The Supreme Court of Ohio filed the following proposed amendments with the General Assembly on March 12, 2020: The Ohio Rules of Civil Procedure (4, 4.1, 4.7, 16, 26, 53, and 73), the Ohio Rules of Criminal Procedure (44 and 46), the Ohio Rules of Evidence (601 and 902), Ohio Rules of Appellate Procedure (3, 19, and 21), and the Ohio Rules of Juvenile Procedure (4 and 42). The Court may file additional amendments to these proposed changes any time before May 1, 2020.

The history of these proposed amendments is as follows:

October 7, 2019	First publication for public comment
December 12, 2019	Second publication for public comment
January 15, 2020	First filing with General Assembly
March 12, 2020	Second filing with General Assembly
April 22, 2020	Third filing with General Assembly
	(Edits since March 12, 2020 filing in **RED**)

Key to Adopted Amendments:

1. Unaltered language appears in regular type. Example: text

2. Language that has been deleted appears in strikethrough. Example: ~~text~~

3. New language that has been added appears in underline. Example: <u>text</u>

OHIO RULES OF CIVIL PROCEDURE

RULE 4. Process: Summons

[Existing language unaffected by the amendments is omitted to conserve space]

(D) Waiver of service of summons. Service of summons may be waived in writing by any person entitled thereto under Rule 4.2 who is at least eighteen years of age and not under disability. For any civil action filed in a Court of Common Pleas, the plaintiff may request that the defendant waive service of a summons pursuant to the provisions of Civ.R. 4.7.

[Existing language unaffected by the amendments is omitted to conserve space]

Proposed Staff Note (July 2020)

Civ.R. 4(D) is amended to include a reference to the specific provisions for waiver of service of summons provided for in Civ.R. 4.7.

RULE 4.1. Process: Methods of Service

All methods of service within this state, except service by publication as provided in Civ.R. 4.4(A), are described in this rule. Methods of out-of-state service and for service in a foreign country are described in Civ.R. 4.3 and 4.5. Provisions for waiver of service are described in Civ.R. 4.7.

[Existing language unaffected by the amendments is omitted to conserve space]

Proposed Staff Note (July 2020)

Civ.R. 4.1 is amended to include a reference to the specific provisions for waiver of service of summons provided for in Civ.R. 4.7.

RULE 4.7 Process: Waiving Service

(A) Requesting a Waiver. An individual, corporation, partnership, or association that is subject to service under Civ.R. 4 through 4.6 has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

(1) be in writing and be addressed as required by Civ.R. 4.2;

(2) name the court where the complaint was filed;

(3) be accompanied by a copy of the complaint, two copies of the waiver form appended to this Rule 4.7, and a prepaid means for returning the form;

(4) inform the defendant, using the form appended to this Rule 4.7, of the consequences of waiving and not waiving service;

(5) state the date when the request is sent;

(6) give the defendant a reasonable time of at least twenty-eight days after the request was sent - or at least sixty days if sent to the defendant outside of the United States - to return the waiver; and

(7) be sent by first-class mail or other reliable means.

(B) Limited to Courts of Common Pleas. The waiver of service provisions in this rule are limited to civil actions filed in the Courts of Common Pleas and does not apply to civil protection orders pursuant to Civ.R. 65.1.

(C) Failure to Waive. If a defendant over which the court has personal jurisdiction fails, without good cause, to sign and return a waiver requested by a plaintiff, then the court may impose on the defendant:

(1) the expenses later incurred in making service; and

(2) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(D) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until sixty days after the request was sent—or until ninety days after it was sent to the defendant in a foreign country.

(E) Results of Filing a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of filing the waiver.

(F) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to jurisdiction or to venue.

[Form] RULE 4.7 NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF SUMMONS.

(Caption)

To *(name the defendant or — if the defendant is a corporation, partnership, or association — name an officer or agent authorized to receive service)*:

WHY ARE YOU GETTING THIS?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these possible expenses, you must return the signed waiver within (give at least 28 days or at least 60 days if the defendant is outside the United States) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

WHAT HAPPENS NEXT?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: _____

(Signature of the attorney or unrepresented party)

_____

(Printed name)

_____

(Address)

_____

(E-mail address)

_____

(Telephone number)

_____

[Form] RULE 4.7 WAIVER OF THE SERVICE OF SUMMONS.

(Caption)

To *(name the plaintiff's attorney or the unrepresented plaintiff)*:

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment could be entered against me or the entity I represent.

Date: _____

(Signature of the attorney or unrepresented party)

_____

(Printed name)

_____

(Address)

_____

(E-mail address)

_____

(Telephone number)

_____

(Attach the following)

DUTY TO AVOID UNNECESSARY EXPENSES OF SERVING A SUMMONS

Rule 4.7 of the Ohio Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is subject to the court's personal jurisdiction and who fails to return a signed waiver of service requested by a plaintiff may be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

Proposed Staff Notes (July 2020)

Rule 4.7 is based on the federal rule permitting waiver of service. Paragraph (A) states what the present rule implies: the defendant has a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action. The text of the rule also sets forth the requirements for a Notice and Request for Waiver sufficient to put the cost-shifting provision in place. These requirements are illustrated in the forms appended to the rule. Pursuant to Rule 4(D), only those persons who are identified in Rule 4.2 and who are eighteen years of age or older and not under a disability may waive service.

Paragraph (A)(7) permits the use of alternatives to the United States mails in sending the Notice and Request. While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission or electronic mail are the most efficient and economical means of communication. If electronic means such as facsimile transmission or electronic mail are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt.

A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, which is the case under paragraph (B), but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request or was insufficiently literate in English to understand it. It should be noted that the provisions for shifting the cost of service apply only if the defendant is subject to the court's personal jurisdiction.

Paragraph (C) is a cost-shifting provision. The costs that may be imposed on the defendant could include, for example, the cost of the time of a process server required to make contact with a defendant residing in a guarded apartment house or residential development. The paragraph is explicit that the costs of enforcing the cost-shifting provision are themselves recoverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff.

Paragraph (D) extends the time for answer if, before being served with process, the defendant waives formal service. The extension is intended to serve as an inducement to waive service and to assure that a defendant will not gain any delay by declining to waive service and thereby causing the additional time needed to effect service. By waiving service, a defendant is not called upon to respond to the complaint until 60 days from the date the notice was sent to it—90 days if the notice was sent to a foreign country—rather than within the 28-day period from date of service specified in Rule 12.

Paragraph (E) clarifies the effective date of service when service is waived. The device of requested waiver of service is not suitable if a limitations period which is about to expire is not tolled by filing the action. Unless there is ample time, the plaintiff should proceed directly to the formal methods for service identified in Rules 4-4.6.

The procedure of requesting waiver of service should also not be used if the time for service under Rule 4(E) will expire before the date on which the waiver must be returned. The court could refuse a request for additional time unless the plaintiff can demonstrate good cause as to why service was not made within that period. It may be noted that the presumptive time limit for service under Rule 4(E) does not apply to out-of-state service or service in a foreign country.

Paragraph (F) of Rule 4.7 is explicit that a timely waiver of service of a summons does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(B) to the absence of jurisdiction, or to assert improper venue under Rule 12(B)(3). The only issues eliminated are those involving the sufficiency of the summons or the sufficiency of the method by which it is served.

RULE 16. Pretrial Procedure

(A) Purposes of a Pretrial Conference. In any action, the court may order the attorneys and any unrepresented parties to appear for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating settlement.

Attorneys, their clients, and unrepresented parties shall endeavor in good faith to agree on all the schedules contemplated by this rule and courts shall consider such agreements in the establishment of any such schedule.

(B) Scheduling.

(1) *Scheduling Order*. Except for matters listed in Civ. R. 1(C), the court shall issue a scheduling order:

(a) after receiving the parties' report under Civ. R. 26(F);

(b) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference; or

(c) sua sponte by the court.

(2) *Time to Issue.* The court shall issue the scheduling order as soon as practicable, but unless the court finds good cause for delay, the court shall issue it within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has responded to the complaint.

(3) *Contents*. The scheduling order may:

(a) limit the time to join other parties, amend the pleadings, complete discovery, and file motions;

(b) modify the timing of disclosures under Civ. R. 26(A);

(c) modify the extent of discovery;

(d) provide for disclosure, discovery, or preservation of electronically stored information;

(e) direct that before moving for an order relating to discovery, the movant must request a conference with the court;

(f) set dates for pretrial conferences and for trial; and

(g) include other appropriate matters.

(4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the court's consent.

(C) Attendance and Matters for Consideration at a Pretrial Conference.

(1) *Attendance.* A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider possible settlement.

(2) *Matters for Consideration.* At any pretrial conference, the court shall consider and take appropriate action on the following matters:

(a) The possibility of settlement of the action;

(b) The simplification of the issues;

(c) Itemizations of expenses and special damages;

(d) The necessity of amendments to the pleadings;

(e) The exchange of medical reports and hospital records (The production by any party of medical reports, medical records, hospital records does not constitute a waiver of the privilege granted under section 2317.02 of the Revised Code.);

(f) The number of expert witnesses;

(g) The preservation of electronically stored information and other information held by the parties or third parties;

(h) The timing, methods of search and production, and the limitations, if any, to be applied to the discovery of documents and electronically stored information;

(i) Disclosure and the exchange of documents obtained through public records requests;

(j) Any agreements or decisions on the sharing or shifting of costs pursuant to Rule 26(C)(2);

(k) The adoption of any agreements by the parties for asserting claims of privilege or for protecting designated materials after production;

(l) The imposition of sanctions as authorized by Civ. R. 37;

(m) The possibility of obtaining:

(i) Admissions of fact;

(ii) Agreements on admissibility of documents and other evidence to avoid unnecessary testimony or other proof during trial.

(n) Disposing of pending motions;

(o) Determination of the applicable deadline for disposition of the case pursuant to Sup. R. 39 and 42, and a timetable for:

(i) initial disclosures of known and reasonably available non-privileged, non-work product documents and things that support or contradict the specifically pleaded claims and defenses;

(ii) joining parties;

(iii) amending the pleadings;

(iv) mediation or other alternative dispute resolution requested by parties;

(v) exchanging lists of lay witnesses, expert witnesses and reports, and exhibits for trial;

(vi) completing discovery;

(vii) filing of motions, responses, replies and decisions;

(viii) further case management conferences; and

(ix) a trial date, preferably one agreed-upon by the parties.

(p) Facilitating in other ways, the just, speedy, and inexpensive disposition of the action.

(D) **Pretrial Orders**. After any conference under this rule, the court should issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(E) **Final Pretrial Conference and Orders**. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

~~In any action, the court may schedule one or more conferences before trial to accomplish the following objectives:~~

~~(1) The possibility of settlement of the action;~~

~~(2) The simplification of the issues;~~

~~(3) Itemizations of expenses and special damages;~~

~~(4) The necessity of amendments to the pleadings;~~

~~(5) The exchange of reports of expert witnesses expected to be called by each party;~~

~~(6) The exchange of medical reports and hospital records;~~

~~(7) The number of expert witnesses;~~

~~(8) The timing, methods of search and production, and the limitations, if any, to be applied to the discovery of documents and electronically stored information;~~

~~(9) The adoption of any agreements by the parties for asserting claims of privilege or for protecting designated materials after production;~~

~~(10) The imposition of sanctions as authorized by Civ. R. 37;~~

~~(11) The possibility of obtaining:~~

~~(a) Admissions of fact;~~

~~(b) Agreements on admissibility of documents and other evidence to avoid unnecessary testimony or other proof during trial.~~

~~(12) Other matters which may aid in the disposition of the action.~~

~~The production by any party of medical reports or hospital records does not constitute a~~

~~waiver of the privilege granted under section 2317.02 of the Revised Code.~~

~~The court may, and on the request of either party shall, make a written order that recites the action taken at the conference. The court shall enter the order and submit copies to the parties. Unless modified, the order shall control the subsequent course of action.~~

~~Upon reasonable notice to the parties, the court may require that parties, or their representatives or insurers, attend a conference or participate in other pretrial proceedings.~~

Proposed Staff Note (2020 Amendment)

Civ. R. 16 has been amended to bring the Ohio rule closer to the federal rule, while still allowing for Ohio courts to decide whether to hold a scheduling conference. Civ. R. 16(A) lists several purposes for why a scheduling conference may be held. In addition, the last paragraph of Civ. R. 16(A) provides that parties will attempt to agree on the schedules contemplated by Civ. R. 16, and courts will endeavor to respect the agreements of the parties. This paragraph is consistent with the concept of shared responsibility among parties and courts in Civ. R. 1.

Similar to the prior version of Civ. R. 16, Civ. R. 16(A) still provides that holding a scheduling conference is permissive, not mandatory. However, Civ. R. 16(B) requires that in all cases, except those set forth in Civ. R. 1(C), a scheduling order must be issued by the court. The purpose of this requirement is to promote greater consistency, predictability, and transparency for attorneys, parties, and unrepresented parties in courts across Ohio.

Civ. R. 16(B)(1) clarifies that a scheduling order must be issued after the court receives the parties' Civ. R. 26(F) report or after the court holds a scheduling conference. If no report is submitted or the court does not hold a scheduling conference, the court must issue the scheduling order sua sponte.

Civ. R. 16(B)(2) specifies the timing requirements by which a scheduling order must be issued, based on the date that any defendant has been served with the complaint or that any defendant has responded to the complaint. This subsection does not require a court to wait for all defendants to be served with the complaint or respond to the complaint before entering a scheduling order.

Civ. R. 16(B)(3) lists potential content that a court may include in a scheduling order.

Civ. R. 16(C) describes a variety of items that a court may address at a scheduling conference, including a timetable to address deadlines for discovery and various disclosures, dispositive motions, and trial. Many of the items now listed in Civ. R. 16(C) were included in the prior version of Civ. R. 16.

Civ. R. 16(E) and (F) are identical to these same subsections in the federal rule.

RULE 26. General Provisions Governing Discovery

(A) Policy; discovery methods. It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of an adversary's industry or efforts.

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(B) Scope of discovery. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. ~~Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~ Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' ~~access to~~ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure subject to comment or admissible in evidence at trial.

(3) Initial Disclosure by a Party.

(a) Without awaiting a discovery request, a party must provide to the other parties, except as exempted by Civ. R. 26(B)(3)(b) or as otherwise stipulated, or ordered by the court:

(i) the name and, if known, the address and telephone number of each

individual likely to have discoverable information - along with the subjects of that information - that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy - or a description by category and location - of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party - who must also make available for inspection and copying as under Civ. R. 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Civ. R. 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(b) The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(iii) an action to enforce or quash an administrative summons or subpoena;

(iv) a proceeding ancillary to a proceeding in another court; and

(v) an action to enforce an arbitration award.

(c) A party must make the initial disclosures no later than the parties' first pre-trial or case management conference, unless a different time is set by stipulation or court order, or unless a party objects. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(d) A party that is first served or otherwise joined after the first pre-trial or case management conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(e) A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it

has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

~~(3)~~(4) Trial preparation: materials. Subject to the provisions of subdivision (B)(6) of this rule, a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded.

(5) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(B)(6). The court may specify conditions for the discovery.

(6) Limitations on Frequency and Extent.

(a) When Permitted. By order, the court may limit the number of depositions, requests under Rule 36, and interrogatories or the length of depositions.

(b) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(B)(1).

~~(4) Electronically stored information. A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless~~

~~order production of electronically stored information if the requesting party shows good cause. The court shall consider the following factors when determining if good cause exists:~~

~~(a) whether the discovery sought is unreasonably cumulative or duplicative;~~

~~(b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;~~

~~(c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and~~

~~(d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.~~

(c) In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

~~(5)~~(7) ~~Trial preparation: experts.~~ Disclosure of Expert Testimony.

~~(a) Subject to the provisions of division (B)(5)(b) of this rule and Civ.R. 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.~~

~~(b) As an alternative or in addition to obtaining discovery under division (B)(5)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given to the other party or those to be given on direct examination at trial.~~

(a) A party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Ohio Rule of Evidence 702, 703, or 705.

(b) The reports of expert witnesses expected to be called by each party shall be exchanged with all other parties. The parties shall submit expert reports and curricula vitae in accordance with the time schedule established by the Court. The party with the burden of proof as to a particular issue shall be required to first submit expert reports as to that issue. Thereafter, the responding party shall submit opposing expert reports within the

schedule established by the Court.

(c) Other than under subsection (d), a party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. The report of an expert must disclose a complete statement of all opinions and the basis and reasons for them as to each matter on which the expert will testify. It must also state the compensation for the expert's study or testimony. Unless good cause is shown, all reports and, if applicable, supplemental reports must be supplied no later than thirty (30) days prior to trial. An expert will not be permitted to testify or provide opinions on matters not disclosed in his or her report.

(d) Healthcare Providers. A witness who has provided medical, dental, optometric, chiropractic, or mental health care may testify as an expert and offer opinions as to matters addressed in the healthcare provider's records. Healthcare providers' records relevant to the case shall be provided to opposing counsel in lieu of an expert report in accordance with the time schedule established by the Court.

(e) A party may take a discovery deposition of their opponent's expert witness only after the mutual exchange of reports has occurred unless the expert is a healthcare provider permitted to testify as an expert under subsection (d). Upon good cause shown, additional time after submission of both sides' expert reports will be provided for these discovery depositions if requested by a party. If a party chooses not to hire an expert in opposition to an issue, that party will be permitted to take the discovery deposition of the proponent's expert.

~~(c)~~(f) Drafts of any report provided by any expert, regardless of the form in which the draft is recorded, are protected by division (B)(4) of this rule.

~~(d)~~(g) Communications between a party's attorney and any witness identified as an expert witness under division ~~(B)(5)(b)~~ (B)(7) of this rule regardless of the form of the communications, are protected by division ~~(B)(3)~~ (B)(4) of this rule except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(h) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which, it is impracticable for the party to obtain facts or opinions on the same subject by other means.

~~(e)~~(iii) The ~~court may require that the~~ party seeking discovery under division (B)(7) of this rule shall pay the expert a reasonable fee for time spent in deposition ~~responding to discovery, and, with respect to discovery permitted under division (B)(5)(a) of this rule, the court may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert~~.

~~(6)~~(8) Claims of Privilege or Protection of Trial-Preparation Materials.

(a) Information Withheld. When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(b) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(C) Protective orders. Upon motion by any party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or the allocation of expenses; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court, on terms and conditions as are just, may order that any party or person provide or permit discovery. The provisions of Civ. R. 37(A)(4) apply to the award of expenses incurred in relation to the motion.

Before any person moves for a protective order under this rule, that person shall make a reasonable effort to resolve the matter through discussion with the attorney or unrepresented party seeking discovery. A motion for a protective order shall be accompanied by a statement reciting the effort made to resolve the matter in accordance with this paragraph.

(D) Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(E) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (a) the identity and location of person having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness as trial and the subject matter on which he is expected to testify.

(2) A party who knows or later learns that his response is incorrect is under a duty seasonably to correct the response.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through requests for supplementation of prior responses.

(F) Conference of the Parties; Planning for Discovery.

(1) *Conference Timing.* Except those matters excepted under Civ. R. 1(C), or when the court orders otherwise, the attorneys and unrepresented parties shall confer as soon as practicable - and in any event no later than 21 days before a scheduling conference is to be held.

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Civ. R. 26(A)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for filing with the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) *Discovery Plan.* A discovery plan shall state the parties' views and proposals on:

(a) what changes should be made in the timing, form, or requirement for disclosures under Civ. R. 26(B), including a statement of when initial disclosures were made or will be made;

(b) agreed-upon deadlines for discovery and other items that may be included in a case schedule to be issued under Rule 16, any proposed modifications to a schedule already issued under Civ. R. 16, and compliance with Sup. R 39 and 42.

(c) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(d) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(e) disclosure and the exchange of documents obtained through public records requests;

(f) any issues about claims of privilege or of protection as trial-preparation materials;

(g) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed;

(h) any other orders that the court should issue under Civ. R. 26(C) or under Civ. R. 16(B) and (C); and

(i) any modifications required or to be requested under any scheduling order issued under Civ. R. 16.

Proposed Staff Notes (2020 Amendment)

Civ. R. 26 has been amended to bring the Ohio rule closer to the federal rule in many respects.

Rule 26(B)(1)

Civ. R. 26(B)(1) incorporates nearly identical language as the federal rule in Fed. R. Civ. P. 26(b)(1), as amended in 2015. Civ. R. 26(B)(1) now includes language bearing on proportionality, which contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis. The scope of available information, including the increase and pervasiveness of electronically stored information, has greatly increased both the potential cost of wide- ranging discovery and the potential for discovery to be used as an instrument for delay or oppression. The present amendment reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve

important differences and when the parties fall short of effective, cooperative management on their own.

This change does not place on the party seeking discovery the burden of addressing all proportionality considerations. Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Civ. R. 26(F) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

With regard to the parties' relative access to relevant information, some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(B)(3)

This provision has been added to include a requirement that parties, in most cases, exchange initial disclosures without awaiting discovery requests. The language of Civ. R. 26(B)(3) closely follows the federal rule. The purpose of the initial disclosure obligation is to accelerate the exchange of information about the case, consistent with Civ. R. 1 and 26(B)(1).

Rule 26(B)(5)

This subsection is revised to preserve the limitation on production of electronically stored information (“ESI”) if it is from a source not reasonably accessible due to undue burden or cost. The court may still order production upon a showing of good cause. The amended rule eliminates the prior factors to be considered when determining if good cause exists and relies instead on the general concepts of proportionality contained in Rule 26.

Rule 26(B)(6)

Civ. R. 26(B)(6) has been added to clarify that courts have authority to modify the frequency and extent of discovery, including consideration that bear on proportionality to Civ. R. 26(B)(1). This language in Civ. R. 26(B)(6) is similar to the language in Fed. R. Civ. P. 26(b)(2)(A) and (C).

Rule 26(B)(7)

The Ohio Civil Rules had not previously required experts to provide a written report. The Local Rules of some counties required a written report while many others did not. Interrogatories directed to the subject matter on which an expert may testify have in practice shown to be an insufficient means to ascertain an opposing expert's opinions and the grounds upon which they are based. The absence of a written report frequently puts counsel in the position of having to bear the substantial time and expense of a deposition in order to learn the opinions of an opposing party's expert. Requiring a written report from experts setting forth all opinions and the basis and reasons for such opinions may, in many cases, obviate the need for a deposition, and will lessen the time and significant expense associated with expert discovery. So will permitting the deposition of experts only after the mutual exchange of expert reports. Further expense can be lessened by permitting healthcare providers to testify as an expert as to matters addressed in medical records, without the necessity of writing a separate medical report, if such records are timely provided to opposing counsel. Subsection (B)(7)(h) is the same as Fed. R. Civ. P. 26(b)(4)(D) and protects facts and opinions held by an expert who is not expected to be called as a witness at trial.

Rule 26(F)

The changes in the proposed rules are best highlighted and understood in contrast to the Federal Rules. The differences between proposed Ohio's Civ.R. 26(F) and Fed. Civ.R. 26(F) are as follows:

1. Civ.R. 26(F)(1) – The Ohio Rule reads, "Except those matters excepted under Civ.R. 1(C)[…][.]" The Federal Rule reads, "Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)[…][.]"

2. Civ.R. 26(F)(1) – The Ohio Rule states that "attorneys and unrepresented parties shall confer as soon as practicable[…][.]" The Federal Rule states that "the parties must confer as soon as practicable[…][.]"

3. Civ. R. 26(F)(1) – The Ohio Rule reads, at the end, "21 days before a scheduling conference is to be held." The intent with this language of the proposed Ohio Rule is to simplify the setting of the scheduling conference and to give the court greater flexibility in setting that conference. The Federal Rule reads, at the end, "21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)."

4. Civ.R. 26(F)(2) – The Ohio Rule reads, at the end of the second to last sentence, "and for filing with the court[…][.]" The Federal Rule reads, at the end of the second of the second to last sentence, "and for submitting with the court[…][.]"

5. Civ.R. 26(F)(3) – The Ohio Rule uses the word "shall" and the Federal Rule uses the word"must."

6. Civ.R. 26(F)(3)(e) – The Ohio Rule addresses public records disclosure as part of the discovery plan whereas the Federal Rule does not.

7. Civ.R. 26(F)(3)(f) – The Ohio Rule ends with "of protection as trial-preparation materials[…][.]" The Federal Rule (Fed. Civ.R. 26(F)(3)(D)) ends with "as trial-preparation materials, including – if the parties agree on a procedure to assert these claims after production – whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502[…][.]"

8. Civ.R. 26(F)(3)(b) and (i) – these subsections are not included in Fed. Civ.R. 26(F)(3).

9. Civ.R. 26(F)(4) – This subsection was removed from the proposed Ohio Rules, but it is included in the Federal Rules.

10. This amendment introduces to Ohio's civil rules the concept of an early, mandatory conference among the attorneys and any unrepresented party, and requires the filing of a written report outlining the results of that conference. This amendment also requires that the discovery plan, to which counsel and the parties agree, be in compliance with the time limitations of Sup.R. 39 and 42.

RULE 53. Magistrates.

[Existing language unaffected by the amendments is omitted to conserve space]

(C) Authority.

(1) *Scope*. To assist courts of record and pursuant to reference under Civ. R. 53(D)(1), magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

(a) Determine any motion in any case;

(b) Conduct the trial of any case that will not be tried to a jury;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;

(d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;

(e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Jury trials before magistrates*. Notwithstanding any other provision of these rules, in jury trials presided over by magistrates, the factual findings of the jury shall be conclusive as in any trial before a judge. All motions presented following the unanimous written consent of the parties, including those under Civ.R. 26, 37, 50, 51, 56, 59, 60, and 62, shall be heard and decided by the magistrate. No objections shall be entertained to the factual findings of a jury, or to the motion or legal rulings made by the magistrate except on appeal to the appropriate appellate court after entry of a final judgment or final appealable order. The trial judge to whom the matter was originally assigned before the parties consented to trial before a magistrate shall enter judgment consistent with the magistrate's journalized entry pursuant to Civ.R. 58, but shall not otherwise review the magistrate's rulings or a jury's factual findings in a jury trial before a magistrate.

~~(2)~~(3) *Regulation of proceedings*. In performing the responsibilities described in Civ. R. 53(C)(1), magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;

(b) Ruling upon the admissibility of evidence;

(c) Putting witnesses under oath and examining them;

(d) Calling the parties to the action and examining them under oath;

(e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to Crim. R. 46;

(f) Imposing, subject to Civ. R. 53(D)(8), appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

[Existing language unaffected by the amendments is omitted to conserve space]

Proposed Staff Notes (July 2020)

Division (C)(2)

A major improvement to federal practice in the last half century was the authorization given magistrate judges to conduct civil jury trials. F.R.C.P. 73. Following the lead of the federal courts, Ohio magistrates also now conduct civil jury trials with written consent of all parties as authorized by Civ.R. 53(C)(1)(c). Yet, as demonstrated in *Gilson v. American Institute of Alternative Medicine*, 10th Dist. Case No. 15AP-548, 2016-Ohio-1324, ¶¶ 28-29, 103, Ohio procedure remains cumbersome after jury trials conducted by magistrates, and may require the trial court to unnecessarily review factual findings of the jury and certain interlocutory rulings of a magistrate. This is unnecessarily time consuming and costly.

The amendment adds a new Division (C)(2) and renumbers the existing Division (C)(2) as Division (C)(3). New Civ.R. 53(C)(2) streamlines the procedure following jury trials conducted by magistrates upon unanimous consent of the parties, although still requiring the entry of judgment by the trial court. Factual findings of the jury and the magistrate's interlocutory rulings preceding the entry of judgment, are no longer required to undergo a cumbersome and expensive procedure for which essentially the first line of appeal has been to the trial court, rather than directly to a court of appeals.

RULE 73. Probate Division of the Court of Common Pleas

(A) Applicability. These Rules of Civil Procedure shall apply to proceedings in the probate division of the court of common pleas as indicated in this rule. Additionally, all of the Rules of Civil Procedure, though not specifically mentioned in this rule, shall apply except to the extent that by their nature they would be clearly inapplicable.

(B) Venue. Civ. R. ~~3(B)~~ 3(C) shall not apply to proceedings in the probate division of the court of common pleas, which shall be venued as provided by law. Proceedings under Chapters 2101. through 2131. of the Revised Code, which may be venued in the general division or the probate division of the court of common pleas, shall be venued in the probate division of the appropriate court of common pleas.

Proceedings that are improperly venued shall be transferred to a proper venue provided by law and division (B) of this rule, and the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in an improper venue.

[Existing language unaffected by the amendments is omitted to conserve space]

AMENDMENTS TO THE OHIO RULES OF PRACTICE AND PROCEDURE

The following amendments to the Ohio Rules of Civil Procedure (3, 4.4, 37, 75, and Amended Civil Forms), the Ohio Rules of Criminal Procedure (1, 3, 7, 11, 13, 31, 33, and 41), the Ohio Rules of Appellate Procedure (4 and 21), and the Ohio Traffic Rules (2, 3, and 13). The history of these amendments is as follows:

September 21, 2020 First publication for public comment (ENDING Nov. 5, 2020)

Key to Adopted Amendments:

1. Unaltered language appears in regular type. Example: text

2. Language that has been deleted appears in strikethrough. Example: ~~text~~

3. New language that has been added appears in underline. Example: <u>text</u>

PROPOSED AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE IN OHIO COURTS

Comments requested: The Supreme Court of Ohio will accept public comments until November 6, 2020 on the following proposed amendments to the Ohio Rules of Civil Procedure (3, 4.4, 37, 75, and Amended Civil Forms), the Ohio Rules of Criminal Procedure (1, 3, 7, 11, 13, 31, 33, and 41), the Ohio Rules of Appellate Procedure (4 and 21), and the Ohio Traffic Rules (2, 3, and 13). The amended civil forms were enacted as effective on September 21, 2020; however, the Court will still accept public comment on the forms as they can be amended further.

Authority: The proposed amendments are being considered by the Supreme Court pursuant to Article IV, Section 5(B) of the Ohio Constitution, as proposed by the Commission on the Rules of Practice and Procedure in Ohio Courts and pursuant to the document styled "Process for Amending the Rules of Practice and Procedure in Ohio Courts" as set forth on the following page.

Purpose of Publication: The Supreme Court has authorized the publication of the proposed amendments for public comment. The authorization for publication by the Court is neither an endorsement of, nor a declaration of intent to approve the proposed amendments. The purpose of the publication is to invite the judiciary, the practicing bar, and the public at large to provide thoughtful and meaningful feedback on the legal and practical effect of the proposed amendments.

Comment Contact: Comments on the proposed amendments must be submitted in writing to Jesse Mosser, Legislative Counsel, Supreme Court of Ohio, 65 South Front Street, 7th Floor, Columbus, Ohio 43215-3431 or ruleamendments@sc.ohio.gov and received no later than November 5, 2020. Please include your full name and regular mailing address in any comment submitted by e-mail. Copies of all comments submitted will be provided to each member of the Commission on the Rules of Practice and Procedure and each Justice of the Supreme Court.

Comment Deadline: Comments must be submitted no later than November 5, 2020.

Staff Notes: A Staff Note may follow a proposed amendment. Staff Notes are prepared by the Commission on the Rules of Practice and Procedure. Although the Supreme Court uses the Staff Notes during its consideration of proposed amendments, the Staff Notes are not adopted by the Supreme Court and are not a part of the rule. As such, the Staff Notes represent the views of the Commission on the Rules of Practice and Procedure and not necessarily those of the Supreme Court. The Staff Notes are not filed with the General Assembly, but are included when the proposed amendments are published for public comment and are made available to the appropriate committees of the General Assembly.

PROCESS FOR AMENDING THE RULES OF PRACTICE AND PROCEDURE IN OHIO COURTS

In 1968 the citizens of Ohio approved proposed amendments to Article IV of the Ohio Constitution granting the Supreme Court, among other duties, rule-making authority for the judicial branch of Ohio government. These amendments are widely known as the Modern Courts Amendment.

Pursuant to this rule-making authority, the Supreme Court has created the Commission on the Rules of Practice and Procedure ("Commission"). The Commission consists of nineteen members, including judges as nominated by the six judges' associations, and members of the practicing bar appointed by the Supreme Court. The Commission reviews and recommends amendments to the Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Appellate Procedure, Rules of Juvenile Procedure, and Rules of Evidence.

In the fall of each year, the Commission submits to the Supreme Court proposed amendments to the rules of practice and procedure that it recommends take effect the following July 1. The Supreme Court then authorizes the publication of the rules for public comment. The authorization by the Court of the publication of the proposed amendments is neither an endorsement of, nor a declaration of, intent to approve the proposed amendments. It is an invitation to the judiciary, the practicing bar, and the public at large to provide thoughtful and meaningful feedback on the legal and practical effect of the proposed amendments. The public comments are reviewed by the Commission which may withdraw, amend, or resubmit all or any provision of the proposed amendments to the Supreme Court. Pursuant to Article IV, Section 5(B) of the Ohio Constitution, if the proposed amendments are to take effect by July 1, the Supreme Court is required to file the proposed amendments with the General Assembly by January 15.

Once the proposed amendments are filed with the General Assembly they are published by the Supreme Court for a second round of public comment. The Court's authorization of a second round of publication for public comment is neither an endorsement of, nor a declaration of intent to approve the proposed amendments. As with the first round of publication, it is an approval inviting the judiciary, the practicing bar, and the public at large to provide thoughtful and meaningful feedback on the legal and practical effects of the proposed amendments. Once the second round of public comments is ended, the comments are reviewed by the Commission which may withdraw, amend, or resubmit all or any provision of the proposed amendments to the Supreme Court for final consideration.

Pursuant to Article IV, Section 5(B) of the Ohio Constitution, the Supreme Court has until April 30 of each year to accept all or any provision of the proposed amendments, and file with the General Assembly the amendments which the Court approves. The General Assembly has until June 30 to issue a concurrent resolution of disapproval for all or any portion of a proposed amendment the Supreme Court has proposed. If a concurrent resolution of disapproval is not issued by that date, the proposed amendments become effective July 1.

Below is a summary of the proposed amendments. In addition to the substantive amendments, non-substantive grammar and gender-neutral language changes are made throughout any rule that is proposed for amendment.

Summary

1. OHIO RULES OF CIVIL PROCEDURE

- Domestic Relations Cases
(Civ.R. 3, 4.4, and 75)

The Commission recommends this series of amendments which would conform the Civil Rules with recently-enacted statutory changes. In March 2019, statutory jurisdiction for custody cases was modified for juvenile courts and domestic relations courts. These amendments conform the rule to those changes.

Additionally, some changes were proposed to Civ.R. 75 to update and streamline the rule. These changes include provisions to ensure parties are served notice of hearings and to remove the ability to delay a decree until child support is secured.

- Destruction of Electronic Discovery
(Civ.R. 37)

The Commission recommends this amendment to conform Rule 37(E) to match the corresponding federal rule. The current rule requires a trial court to issue a sanction against a party for destruction of electronic discovery, and then inquire into the culpability of the party which destroyed the material. The proposed amendment would require such an inquiry first, then allow the trial court to proscribe an appropriate remedy.

2. OHIO RULES OF CRIMINAL PROCEDURE AND OHIO TRAFFIC RULES

- Transferring OVI charges to Common Pleas Court
(Crim.R. 1, 3, 7, and 13; Traf.R. 2, 3, and 13)

The Commission proposes this series of amendments on the suggestion of the Ohio Judicial Conference. The scenario this is meant to address is one where a criminal defendant is charged with felonies along with an OVI charge. While the felonies can be easily bound over to common pleas court, some courts have expressed concern that the Multi-Count Uniform Traffic Ticket ("MUTT") does not meet the definition of "complaint" under Crim.R. 3.

Accordingly, this amendment is intended to make it clear that a charge filed using the MUTT can be accepted by the Common Pleas court should it be bound over. This would eliminate the need to create a separate charging document for the OVI.

- Video Appearance for Pleas and Search Warrants
(Crim.R. 11 and 41)

The Commission proposes these amendments to make clear that defendants and affiants may appear before the court electronically for plea hearings and search warrant applications, respectively. These proposals came about after the Commission reviewed the criminal rules for possible changes in light of the COVID-19 pandemic.

The Commission found that some jurisdictions were uncertain if plea hearings and search warrant applications could be handled by way of video or other electronic means. This amendment would provide clarity in that regard.

- Motion for New Trial
(Crim.R. 33)

The Commission proposes amendments to Crim.R. 33 following the Supreme Court of Ohio's decision in *State v. Ramirez*, 2020-Ohio-602. In *Ramirez*, the Court held that while Crim.R. 33 implies the defendant would receive a new trial, a finding of insufficient evidence for a conviction would mean double jeopardy should attach and bar any new trial. As such, the Commission has proposed removing the option to grant a new trial if the evidence is not sufficient to sustain a conviction. The defendant could still raise that same argument by way of Crim.R. 29, and Crim.R. 33 would then follow current case law.

3. OHIO RULES OF APPELLATE PROCEDURE

- "Judgment" Language
(App.R. 4)

The Commission recommends amendments to this rule which would bring it in compliance with recent change to Civ.R. 58 in regards to the use of the term "judgment."

- Audio Recording of Oral Arguments
(App.R. 21)

The Commission proposes this amendment which would require an appellate court to maintain an audio recording or video recording of any oral argument on a case. This proposal was made by a member of the public, and the Commission learned that it is common practice in some appellate districts but not all. Under this proposal, the recording would be made available to the public on request.

6. UNIFORM DOMESTIC RELATIONS AND JUVENILE FORMS

- *Redesign*

The Commission recommended, and the Court enacted, the amendment of several form in the Uniform Domestic Relations and Juvenile Forms.

OHIO RULES OF CIVIL PROCEDURE

RULE 3. Commencement of Action; Venue

[Existing language unaffected by the amendments is omitted to conserve space]

(C) Venue: where proper. Any action may be venued, commenced, and decided in any court in any county. When applied to county and municipal courts, "county," as used in this rule, shall be construed, where appropriate, as the territorial limits of those courts. Proper venue lies in any one or more of the following counties:

(1) The county in which the defendant resides;

(2) The county in which the defendant has his or her principal place of business;

(3) A county in which the defendant conducted activity that gave rise to the claim for relief;

(4) A county in which a public officer maintains his or her principal office if suit is brought against the officer in the officer's official capacity;

(5) A county in which the property, or any part of the property, is situated if the subject of the action is real property or tangible personal property;

(6) The county in which all or part of the claim for relief arose; or, if the claim for relief arose upon a river, other watercourse, or a road, that is the boundary of the state, or of two or more counties, in any county bordering on the river, watercourse, or road, and opposite to the place where the claim for relief arose;

(7) In actions described in Civ.R. 4.3, in the county where plaintiff resides;

(8) In an action against an executor, administrator, guardian, or trustee, in the county in which the executor, administrator, guardian, or trustee was appointed;

(9) In actions for divorce, annulment, or legal separation, in the county in which the plaintiff is and has been a resident for at least ninety days immediately preceding the filing of the complaint;

(10) <u>In domestic relations actions pertaining to the care, custody, control, and support of a child not otherwise described in (C)(9), in the county of the child's residence or where the child was last known to reside;</u>

<u>(11)</u> In actions for a civil protection order, in the county in which the petitioner currently or temporarily resides;

~~(11)~~(12) In tort actions involving asbestos claims, silicosis claims, or mixed dust disease claims, only in the county in which all of the exposed plaintiffs reside, a county where all of the exposed plaintiffs were exposed to asbestos, silica, or mixed dust, or the county in which the defendant has his or her principal place of business.

~~(12)~~(13) If there is no available forum in divisions (C)(1) to (C)~~(10)~~(11) of this rule, in the county in which plaintiff resides, has his or her principal place of business, or regularly and systematically conducts business activity;

~~(13)~~(14) If there is no available forum in divisions (C)(1) to (C)~~(11)~~(12) of this rule:

(a) In a county in which defendant has property or debts owing to the defendant subject to attachment or garnishment;

(b) In a county in which defendant has appointed an agent to receive service of process or in which an agent has been appointed by operation of law.

[Existing language unaffected by the amendments is omitted to conserve space]

(I) Definitions. As used in division (C)~~(11)~~(12) of this rule:

(1) "Asbestos claim" has the same meaning as in section 2307.91 of the Revised Code;

(2) "Silicosis claim" and "mixed dust disease claim" have the same meaning as in section 2307.84 of the Revised Code;

(3) In reference to an asbestos claim, "tort action" has the same meaning as in section 2307.91 of the Revised Code;

(4) In reference to a silicosis claim or a mixed dust disease claim, "tort action" has the same meaning as in section 2307.84 of the Revised Code.

[Existing language unaffected by the amendments is omitted to conserve space]

RULE 4.4. Process: Service by Publication

(A) Residence unknown.

(1) Service by Publication in a Newspaper. Except in an action or proceeding governed by division (A)(2) of this rule, when service of process is required upon a party whose residence is unknown, service shall be made by publication in actions where such service is authorized by law. Before service by publication can be made, an affidavit of the party requesting service or that party's counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the party to be served is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the party to be served, and that the residence of the party to be served cannot be ascertained with reasonable diligence.

Upon the filing of the affidavit, the clerk shall cause service of notice to be made by publication in a newspaper of general circulation in the county in which the action or proceeding is filed. If no newspaper is published in that county, then publication shall be in a newspaper published in an adjoining county. The publication shall contain the name and address of the court, the case number, the name of the first party on each side, and the name and last known address, if any, of the person or persons whose residence is unknown. The publication also shall contain a summary statement of the object of the pleading or other document seeking relief against a party whose residence is unknown, and a summary statement of the demand for relief, and shall notify the party to be served that such party is required to answer or respond either within twenty-eight days after the publication or at such other time after the publication that is set as the time to appear or within which to respond after service of such pleading or other document. The publication shall be published at least once a week for six successive weeks unless publication for a lesser number of weeks is specifically provided by law. Service of process shall be deemed complete at the date of the last publication.

After the last publication, the publisher or its agent shall file with the court an affidavit showing the fact of publication together with a copy of the notice of publication. The affidavit and copy of the notice shall constitute proof of service of process.

(2) Service by Publication by Posting and Mail.

(a) **Actions and Proceedings other than Civil Protection Order Proceedings.** In divorce, annulment, or legal separation actions, and in actions pertaining to the care, custody, ~~and~~ control, and support of children ~~whose parents are not married~~, and in all post-decree proceedings:

(i) if the residence of the party upon whom service is sought is unknown; and,

(ii) if the matter is not governed by Civ. R. 65.1; and,

(iii) if the party requesting service upon another party is proceeding with a poverty affidavit;

service by publication shall be made by posting and mail. Before service by posting and mail can be made under this division (A)(2)(a), an affidavit of the party requesting service or that party's counsel shall be filed with the court. The affidavit shall contain the same averments required by division (A)(1) of this rule and, in addition, shall set forth the defendant's last known address.

Upon the filing of the affidavit, the clerk shall cause service of notice to be made by posting in a conspicuous place in the courthouse or courthouses in which the general and domestic relations divisions of the court of common pleas for the county are located and in two additional public places in the county that have been designated by local rule for the posting of notices pursuant to this rule. Alternatively, the postings, except for protection orders issued pursuant to Civ.R. 65.1, under this division (A)(2)(a), may be made on the website of the clerk of courts, if available, in a section designated for such purpose. The notice shall contain the same information required by division (A)(1) of this rule to be contained in a newspaper publication. The notice shall be posted for six successive weeks.

(b) Civil Protection Order Proceedings. In civil protection order proceedings where the party's residence upon whom service is sought is unknown, service may be made by posting and mail without the necessity of a poverty affidavit. Before service by posting and mail can be made under this division (A)(2)(b), an affidavit of the party requesting service or that party's counsel shall be filed with the court. The affidavit shall contain the same averments required by division (A)(1) of this rule and, in addition, shall set forth the last known address of the party to be served.

Upon the filing of the affidavit, the clerk shall cause service of notice to be made by posting in a conspicuous place in the courthouse or courthouses within the county where Civ.R. 65.1 civil protection order proceedings may be filed and in two additional public places in the county that have been designated by local rule for the posting of notices pursuant to this rule. The postings under this division (A)(2)(b) shall not be made on the website of the clerk of courts. The notice shall contain the same information required by division (A)(1) of this rule to be contained in a newspaper publication. The notice shall be posted for six successive weeks.

(c) Additional Requirement for Mailing. When service by publication is sought by posting and mail under either division (A)(2)(a) or division (A)(2)(b) of this rule, the clerk shall also cause the documents for service to be mailed by United States ordinary mail, address correction requested, to the last known address of the party to be served. The clerk shall obtain a certificate of mailing from the United States Postal Service. If the clerk is notified of a corrected or forwarding address of the party to be served within the six-week period that notice is posted pursuant to division (A)(2)(a) or division (A)(2)(b) of this rule, the clerk shall cause the documents for service to be mailed to the corrected or forwarding address. The clerk shall note the name, address, and date of each mailing on the docket.

(d) Docket Entry of Posting; Completion of Service. After the last week of posting under either division (A)(2)(a) or division (A)(2)(b) of this rule, the clerk shall note on the docket where and when notice was posted. Service shall be complete upon the entry of posting.

[Existing language unaffected by the amendments is omitted to conserve space]

RULE 37. Failure to Make Discovery: Sanctions

[Existing language unaffected by the amendments is omitted to conserve space]

(E) Failure to provide electronically stored information.

~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. The court may consider the following factors in determining whether to impose sanctions under this division:~~

~~(1) Whether and when any obligation to preserve the information was triggered;~~

~~(2) Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;~~

~~(3) Whether the party intervened in a timely fashion to prevent the loss of information;~~

~~(4) Any steps taken to comply with any court order or party agreement requiring preservation of specific information;~~

~~(5) Any other facts relevant to its determination under this division.~~

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(a) presume that the lost information was unfavorable to the party;

(b) instruct the jury that it may or must presume the information was unfavorable to the party; or

(c) dismiss the action or enter a default judgment.

[Existing language unaffected by the amendments is omitted to conserve space]

RULE 75. ~~Divorce, Annulment, and Legal Separation~~ Actions in Domestic Relations Court

(A) Applicability. The Rules of Civil Procedure shall apply in domestic relations court actions for divorce, annulment, or legal separation~~,~~; actions pertaining to the care, custody, control, and support of a child; and related proceedings, with the modifications or exceptions set forth in this rule.

(B) Joinder of parties. Civ.R. 14, 19, 19.1, and 24 shall not apply in ~~divorce, annulment, or legal separation actions,~~ proceedings described in section (A) of this rule, however:

(1) A person or corporation having possession of, control of, or claiming an interest in property, whether real, personal, or mixed, out of which a party seeks a division of marital property, a distributive award, or an award of spousal support or other support, may be made a party defendant;

(2) When it is essential to protect the interests of a child, the court may join the child of the parties as a party defendant and appoint a guardian ad litem ~~and~~ and/or legal counsel, if necessary, for the child and tax the costs;

(3) The court may make any person or agency claiming to have an interest in or rights to a child by rule or statute, including but not limited to R.C. 3109.04 and R.C. 3109.051, a party defendant;

(4) When child support is ordered, the court, on its own motion or that of an interested person, after notice to the party ordered to pay child support and to his or her employer, may make the employer a party defendant.

(C) ~~Trial by court~~ Judge or magistrate. ~~In proceedings under this rule there shall be no right to trial by jury.~~ All issues may be heard either by the ~~court~~ judge or by a magistrate as the court on the request of any party or on its own motion, may direct. Civ. R. 53 shall apply to all cases or issues directed to be heard by a magistrate. In proceedings under this rule there shall be no right to trial by jury.

(D) Investigation. ~~On~~ Upon the filing of a complaint or motion ~~for divorce, annulment, or legal separation,~~ where a minor child is ~~minor children are~~ involved, ~~or on the filing of a motion for the modification of a decree allocating parental rights and responsibilities for the care of children,~~ the court may cause an investigation to be made as to the character, family relations, past conduct, earning ability, and ~~financial worth~~ finances of the parties to the action. The report of the investigation shall be made available to either party or their counsel of record ~~upon written request~~ not less than seven days before trial. The report shall be signed by the investigator and the investigator shall be subject to cross-examination by either party concerning the contents of the report. The court may tax as costs all or any part of the expenses for each investigation.

(E) Subpoena where custody involved. In any case involving the allocation of parental rights and responsibilities for the care of ~~children~~ a child, the court, on its own motion, may cite a party to the action from any point within the state to appear in court and testify.

(F) Judgment. The provisions of Civ.R. 55 shall not apply in ~~actions for divorce, annulment, legal separation,~~ proceedings described in section (A) of this rule or actions for civil protection orders. For purposes of Civ.R. 54(B), the court shall not enter final judgment as to a claim for divorce, dissolution of marriage, annulment, or legal separation unless one of the following applies:

(1) The judgment also divides the property of the parties, determines the appropriateness of an order of spousal support, and, where applicable, either allocates parental rights and responsibilities, including payment of child support, between the parties or orders shared parenting of a minor ~~children~~ child;

(2) Issues of property division, spousal support, and allocation of parental rights and responsibilities or shared parenting have been finally determined in orders, previously entered by the court, that are incorporated into the judgment;

(3) The court includes in the judgment the express determination required by Civ.R. 54(B) and a final determination that either of the following applies:

(a) The court lacks jurisdiction to determine such issues;

(b) In a legal separation action, the division of the property of the parties would be inappropriate at that time.

(G) Civil protection order. A claim for a civil protection order based upon an allegation of domestic violence shall be a separate claim from a claim ~~for divorce, dissolution of marriage, annulment, or legal separation~~ in any proceeding described in section (A) of this rule or a dissolution of marriage.

(H) Relief pending appeal.

(1) Civ.R. 62(B) does not apply to orders allocating parental rights and responsibilities or to orders of support.

(2) During the time that a notice of appeal may be or has been filed in a proceeding described in section (A) of this rule, a ~~A~~ motion to modify~~, pending appeal, either a decree~~ a final order allocating parental rights and responsibilities ~~for the care of children, a spousal~~ or an order of ~~other~~ support ~~order,~~ shall be made to the trial court ~~in the first instance, whether made before or after a notice of appeal is filed~~. The trial court may grant relief upon terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party and in the best interests of the ~~children~~ child involved. ~~Civ. R. 62(B) does not apply to orders allocating parental rights and responsibilities for the care of children or a spousal or other support order.~~ An order entered upon motion under this rule may be vacated or modified by the appellate court. The appellate court has

authority to enter like orders pending appeal, but an application to the appellate court for relief shall disclose what has occurred in the trial court regarding the relief.

(I) Temporary restraining orders.

(1) **~~Restraining order: exclusion.~~** The provisions of Civ. R. 65(A) shall not apply in ~~divorce, annulment, or legal separation actions~~ proceedings described in section (A) of this rule.

(2) **~~Restraining order: grounds, procedure.~~** The court, on its own motion or pursuant to local court rule, may issue a restraining order without notice, and the order shall remain in force during the pendency of the action unless the court otherwise orders.

(3) ~~When it is made to appear to the court by affidavit of a party sworn to absolutely~~ Upon sworn affidavit that a party is about to dispose of or encumber property, or any part thereof of property, so as to defeat another party in obtaining an equitable division of marital property, a distributive award, or spousal or other support, or that a party to the action or a child of any party is about to suffer physical abuse, annoyance, or bodily injury by the other party, or if a party is about to remove a child from the jurisdiction of the court, the court may allow a temporary restraining order, with or without bond, to prevent that action or to otherwise prevent injury, loss, or damage. ~~A temporary restraining order may be issued without notice and shall remain in force during the pendency of the action unless the court or magistrate otherwise orders.~~

(J) Continuing jurisdiction. The continuing jurisdiction of the court shall be invoked by motion filed in the original action, notice of which shall be served in the manner provided for the service of process under Civ. R. 4 to 4.6. When the continuing jurisdiction of the court is invoked pursuant to this division, the discovery procedures set forth in Civ. R. 26 to 37 shall apply.

(K) Hearing. No action for divorce, annulment, or legal separation may be heard and decided until the expiration of forty-two days after the service of process or twenty-eight days after the last publication of notice of the complaint, and no action for divorce, annulment, or legal separation shall be heard and decided earlier than twenty-eight days after the service of a counterclaim, which under this rule may be designated a cross-complaint, unless the plaintiff files a written waiver of the twenty-eight day period.

(L) Notice of trial. In all cases ~~where there is no counsel of record for the adverse party~~, the court shall give the ~~adverse party~~ all parties notice of the trial upon the merits. The notice shall be made either by ~~regular~~ ordinary mail to the party's last known address or hand-delivered to the party by the court, ~~and shall be mailed~~ at least seven days prior to the commencement of trial.

(M) ~~Testimony~~ Grounds. ~~Judgment~~ Testimony of a party in support of grounds for divorce, annulment, or legal separation ~~shall not be granted upon the testimony or admission of a party not~~ must be supported by other credible evidence. No admission shall be received that the court has reason to believe was obtained by fraud, connivance, coercion, or other improper means. The parties, notwithstanding their marital relations, shall be competent to testify in the proceeding to the same extent as other witnesses.

(N) Temporary Orders of spousal support, child support, and custody.

(1) When requested in the complaint, answer, or counterclaim, or by motion ~~served with the pleading,~~ upon satisfactory proof by affidavit duly filed with the clerk of the court, the court ~~or magistrate~~, without oral hearing and for good cause shown, may ~~grant a~~ issue temporary ~~order~~ orders ~~regarding spousal support to either of the parties for the party's sustenance and expenses during the suit and may make a temporary order regarding the support, maintenance, and allocation of parental rights and responsibilities for the care of children of the marriage, whether natural or adopted,~~ during the pendency of the action ~~for divorce, annulment, or legal separation~~.

(2) The court may issue orders allocating parental rights and responsibilities after consideration of the parties' parenting practices provided that such practices are within the best interest of the child. The court may allocate such rights and responsibilities to either or both parents and issue related orders regarding parenting time. The court shall not adopt a parent's proposed shared parenting plan as a temporary order.

(3) The court may issue orders for child support, expenses, or for other such matters as the court determines to be equitable to the parties and in the best interest of the child.

(4) The court may issue orders for spousal support for either of the parties for the party's sustenance and expenses or for other such orders as the court deems reasonable during the pendency of an action for divorce, annulment, or legal separation.

(5) Counter affidavits may be filed by the other party:

(a) within ~~fourteen~~ twenty-eight days from the service of the request for temporary orders served with the complaint; or,

(b) within fourteen days from the service of such request, whichever is later. ~~answer, counterclaim, or motion, all affidavits to be used by the court or magistrate in making a temporary spousal support order, child support order, and order allocating parental rights and responsibilities for the care of children. Upon request, in writing, after any temporary spousal support, child support, or order allocating parental rights and responsibilities for the care of children is journalized, the court shall grant the party so requesting an oral hearing within twenty-eight days to modify the temporary order. A request for oral hearing shall not suspend or delay the commencement of spousal support or other support payments previously ordered or change the allocation of parental rights and responsibilities until the order is modified by journal entry after the oral hearing.~~

(6) Courts may request and consider supplemental affidavits from both parties concerning any temporary orders to be made. Courts may require supplemental affidavits prior to

considering any initial request for temporary orders or to supplement the record prior to an oral hearing.

(7) If a temporary order is issued upon affidavits, upon written request of either party the court shall hold an oral hearing within twenty-eight days. A request for oral hearing shall not suspend or delay the commencement of support payments or change the allocation of parental rights and responsibilities until further order of the court.

(8) A temporary order creates no presumption of law or fact that constrains the court's determination of its final judgment.

~~**(O) Delay of decree.** When a party who is entitled to a decree of divorce or annulment is ordered to pay spousal support or child support for a child not in his or her custody, or to deliver a child to the party to whom parental rights and responsibilities for the care of the child are allocated, the court may delay entering a decree for divorce or annulment until the party, to the satisfaction of the court, secures the payment of the spousal support or the child support for the child, or delivers custody of the child to the party to whom parental rights and responsibilities are allocated.~~