

## OHIO RULES OF CIVIL PROCEDURE

### TITLE I. SCOPE OF RULES--ONE FORM OF ACTION

#### **RULE 1. Scope of Rules: Applicability; Construction; Exceptions**

(A) **Applicability.** These rules prescribe the procedure to be followed in all courts of this state in the exercise of civil jurisdiction at law or in equity, with the exceptions stated in subdivision (C) of this rule.

(B) **Construction.** These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.

(C) **Exceptions.** These rules, to the extent that they would by their nature be clearly inapplicable, shall not apply to procedure (1) upon appeal to review any judgment, order or ruling, (2) in the appropriation of property, (3) in forcible entry and detainer, (4) in small claims matters under Chapter 1925, Revised Code, (5) in uniform reciprocal support actions, (6) in the commitment of the mentally ill, (7) in all other special statutory proceedings; provided, that where any statute provides for procedure by a general or specific reference to all the statutes governing procedure in civil actions such procedure shall be in accordance with these rules.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1975.]

**RULE 2. One Form of Action**

There shall be only one form of action, and it shall be known as a civil action.

[Effective: July 1, 1970.]

**TITLE II. COMMENCEMENT OF ACTION AND VENUE;  
SERVICE OF PROCESS; SERVICE AND FILING OF  
PLEADINGS AND OTHER PAPERS SUBSEQUENT  
TO THE ORIGINAL COMPLAINT; TIME**

**RULE 3. Commencement of Action; Venue**

**(A) Commencement.** A civil action is commenced by filing a complaint with the court, if service is obtained within one year from such filing upon a named defendant, or upon an incorrectly named defendant whose name is later corrected pursuant to Civ.R. 15(C), or upon a defendant identified by a fictitious name whose name is later corrected pursuant to Civ.R. 15(D).

**(B) 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) In actions for a civil protection order, in the county in which the petitioner currently or temporarily resides;

(11) 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) If there is no available forum in divisions (B)(1) to (B)(10) 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) If there is no available forum in divisions (B)(1) to (B)(11) 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.

**(C) Change of venue.**

(1) When an action has been commenced in a county other than stated to be proper in division (B) of this rule, upon timely assertion of the defense of improper venue as provided in Civ.R. 12, the court shall transfer the action to a county stated to be proper in division (B) of this rule.

(2) When an action is transferred to a county which is proper, the court may assess costs, including reasonable attorney fees, to the time of transfer against the party who commenced the action in a county other than stated to be proper in division (B) of this rule.

(3) Before entering a default judgment in an action in which the defendant has not appeared, the court, if it finds that the action has been commenced in a county other than stated to be proper in division (B) of this rule, may transfer the action to a county that is proper. The clerk of the court to which the action is transferred shall notify the defendant of the transfer, stating in the notice that the defendant shall have twenty-eight days from the receipt of the notice to answer in the transferred action.

(4) Upon motion of any party or upon its own motion the court may transfer any action to an adjoining county within this state when it appears that a fair and impartial trial cannot be had in the county in which the suit is pending.

**(D) Venue: no proper forum in Ohio.** When a court, upon motion of any party or upon its own motion, determines: (1) that the county in which the action is brought is not a proper forum; (2) that there is no other proper forum for trial within this state; and (3) that there exists a proper forum for trial in another jurisdiction outside this state, the court shall stay the action upon condition that all defendants consent to the jurisdiction, waive venue, and agree that the date of commencement of the action in Ohio shall be the date of commencement for the application of the statute of limitations to the action in that forum in another jurisdiction which the court deems to be the proper forum. If all defendants agree to the conditions, the court shall not dismiss the action, but the action shall be stayed until the court receives notice by affidavit that plaintiff has recommenced the action in the out-of-state forum within sixty days after the effective date of the order staying the original action. If the plaintiff fails to recommence the action in the out-of-state forum within the sixty day period, the court shall dismiss the action without prejudice. If all defendants do not agree to or comply with the conditions, the court shall hear the action.

If the court determines that a proper forum does not exist in another jurisdiction, it shall hear the action.

**(E) Venue: multiple defendants and multiple claims for relief.** In any action, brought by one or more plaintiffs against one or more defendants involving one or more claims for relief, the forum shall be deemed a proper forum, and venue in the forum shall be proper, if the venue is proper as to any one party other than a nominal party, or as to any one claim for relief.

Neither the dismissal of any claim nor of any party except an indispensable party shall affect the jurisdiction of the court over the remaining parties.

**(F) Venue: notice of pending litigation; transfer of judgments.**

(1) When an action affecting the title to or possession of real property or tangible personal property is commenced in a county other than the county in which all of the real property or tangible personal property is situated, the plaintiff shall cause a certified copy of the complaint to be filed with the clerk of the court of common pleas in each county or additional county in which the real property or tangible personal property affected by the action is situated. If the plaintiff fails to file a certified copy of the complaint, third persons will not be charged with notice of the pendency of the action.

To the extent authorized by the laws of the United States, division (F)(1) of this rule also applies to actions, other than proceedings in bankruptcy, affecting title to or possession of real property in this state commenced in a United States District Court whenever the real property is situated wholly or partly in a county other than the county in which the permanent records of the court are kept.

(2) After final judgment, or upon dismissal of the action, the clerk of the court that issued the judgment shall transmit a certified copy of the judgment or dismissal to the clerk of the court of common pleas in each county or additional county in which real or tangible personal property affected by the action is situated.

(3) When the clerk has transmitted a certified copy of the judgment to another county in accordance with division (F)(2) of this rule, and the judgment is later appealed, vacated, or modified, the appellant or the party at whose instance the judgment was vacated or modified must cause a certified copy of the notice of appeal or order of vacation or modification to be filed with the clerk of the court of common pleas of each county or additional county in which the real property or tangible personal property is situated. Unless a certified copy of the notice of appeal or order of vacation or modification is so filed, third persons will not be charged with notice of the appeal, vacation, or modification.

(4) The clerk of the court receiving a certified copy filed or transmitted in accordance with the provisions of division (F) of this rule shall number, index, docket, and file it in the records of the receiving court. The clerk shall index the first certified copy received in connection with a particular action in the indices to the records of actions commenced in the clerk's own court, but may number, docket, and file it in either the regular records of the court or in a separate set of records. When the clerk subsequently receives a certified copy in connection with that same action, the clerk need not index it, but shall docket and file it in the same set of records under the same case number previously assigned to the action.

(5) When an action affecting title to registered land is commenced in a county other than the county in which all of such land is situated, any certified copy required or permitted by this division (F) of this rule shall be filed with or transmitted to the county recorder, rather than the clerk of the court of common pleas, of each county or additional county in which the land is situated.

**(G) Venue: collateral attack; appeal.** The provisions of this rule relate to venue and are not jurisdictional. No order, judgment, or decree shall be void or subject to collateral attack solely on the ground that there was improper venue; however, nothing here shall affect the right to appeal an error of court concerning venue.

**(H) Definitions.** As used in division (B)(11) 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.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1986; July 1, 1991; July 1, 1998; July 1, 2005.]

### **Staff Note (July 1, 2005 Amendment)**

Civ. R. 3 is amended in response to requests from the General Assembly contained in Section 3 of Am. Sub. H.B. 342 of the 125<sup>th</sup> General Assembly, effective September 1, 2004, and Section 4 of Am. Sub. H.B. 292 of the 125<sup>th</sup> General Assembly, effective September 2, 2004. These acts contain provisions governing tort claims that allege exposure and injury by persons exposed to asbestos, silica, or mixed dust. Each act includes a request that the Supreme Court amend the Rules of Civil Procedure “to specify procedures for venue and consolidation” of asbestosis, silicosis, and mixed dust disease claims.

#### **Rule 3(B) Venue: where proper**

Civ. R. 3(B) is amended to include an exclusive venue provision that applies to the filing of actions involving asbestos, silicosis, or mixed dust disease claims. Division (B)(11) states that a civil action alleging one or more of these claims may be filed only in either the county in which all exposed plaintiffs reside, a county where all exposed plaintiffs were exposed to asbestos, silica, or mixed dust occurred, or the county in which the defendant has his or her principal place of business.

Existing divisions (B)(11) and (12) have been renumbered to reflect the addition of new division (B)(11).

#### **Rule 3(H) Definitions**

Division (H) is added to reference the statutory definitions of “asbestos claim,” “silicosis claim,” “mixed dust disease claim,” and “tort action” for purposes of Civ. R. 3(B)(11).

### **Staff Note (July 1, 1998 Amendment)**

#### **Rule 3(A) Commencement.**

The style used for rule references was changed. There was no substantive amendment to this division.

#### **Rule 3(B) Venue: where proper.**

The 1998 amendment added a new division (10), and renumbered existing divisions (10) and (11) to (11) and (12), respectively. New division (10) clarifies the

appropriate venue for an action seeking the entry of a civil protection order in domestic or family violence cases. The Supreme Court's Domestic Violence Task Force recommended this change in order to clarify Ohio law on this matter. Report of the Supreme Court of Ohio Domestic Violence Task Force: Increasing Safety for Victims, Increasing Accountability of Offenders 16 (October 18, 1996). The amendment uses criteria similar to other venue provisions. For example, the concept of residence is used in other divisions of Civ.R. 3(B), and the concept of a current or temporary residence is similar to the reference to plaintiff's residence in Civ.R. 3(B)(11) (renumbered from Civ. R. 3(B)(10)). See, e.g., *State, ex rel. Saunders v. Court of Common Pleas of Allen Cty.* (1987), 34 Ohio St. 3d 15, 17, 516 N.E. 2d 232 ("the term, 'resides,' as used in [prior] Civ.R. 3(B)(10) ought to be 'liberally construed and not confused with [the] requirements for domicile.'" (quoting McCormac, Ohio Civil Rules Practice)). The respondent remains free to challenge venue under Civ.R. 3(D).

Nonsubstantive grammatical revisions were also made to this division.

### **Rule 3(C) Change of venue.**

The style used for rule references was changed. There was no substantive amendment to this division.

### **Rule 3(F) Venue: notice of pending litigation; transfer of judgments**

The style used for rule references was changed and the division was made gender-neutral. There was no substantive amendment to this division.



**RULE 4. Process: Summons**

**(A) Summons: issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons for service upon each defendant listed in the caption. Upon request of the plaintiff separate or additional summons shall issue at any time against any defendant.

**(B) Summons: form; copy of complaint.** The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend, and shall notify him that in case of his failure to do so, judgment by default will be rendered against him for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons may contain, in lieu of the names and addresses of all parties, the name of the first party on each side and the name and address of the party to be served.

A copy of the complaint shall be attached to each summons. The plaintiff shall furnish the clerk with sufficient copies.

**(C) Summons: plaintiff and defendant defined.** For the purpose of issuance and service of summons "plaintiff" shall include any party seeking the issuance and service of summons, and "defendant" shall include any party upon whom service of summons is sought.

**(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.

**(E) Summons: time limit for service.** If a service of the summons and complaint is not made upon a defendant within six months after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This division shall not apply to out-of-state service pursuant to Rule 4.3 or to service in a foreign country pursuant to Rule 4.5.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1973; July 1, 1975; July 1, 1984.]

#### **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.

**(A) Service by certified or express mail.** Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

**(B) Personal service.** When the plaintiff files a written request with the clerk for personal service, service of process shall be made by that method.

When process issued from the Supreme Court, a court of appeals, a court of common pleas, or a county court is to be served personally, the clerk of the court shall deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found. When process issues from the municipal court, delivery shall be to the bailiff of the court for service on all defendants who reside or may be found within the county or counties in which that court has territorial jurisdiction and to the sheriff of any other county in this state for service upon a defendant who resides in or may be found in that other county. In the alternative, process issuing from any of these courts may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make service of process. The person serving process shall locate the person to be served and shall tender a copy of the process and accompanying documents to the person to be served. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.

When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process and return the process and copies to the clerk who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A) of this rule. Failure to make service within the twenty-eight day period and failure to make proof of service do not affect the validity of the service.

**(C) Residence service.** When the plaintiff files a written request with the clerk for residence service, service of process shall be made by that method.

Residence service shall be effected by leaving a copy of the process and the complaint, or other document to be served, at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein. The clerk of the court shall issue the process, and the process server shall return it, in the same manner as prescribed in division (B) of this rule. When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process, and return the process and copies to the clerk, who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A) of this rule. Failure to make service within the twenty-eight-day period and failure to make proof of service do not affect the validity of service.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1980; July 1, 1997.]

### **Staff Note (July 1, 1997 Amendment)**

#### **Rule 4.1 Process: Methods of Service**

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification as well as certified mail. The amendment provides for this additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes, including lettering of the divisions (A-C) in place of the previous numbering (1-3).

## **RULE 4.2 Process: Who May be Served**

Service of process, except service by publication as provided in Civ. R. 4.4(A), pursuant to Civ. R. 4 through 4.6 shall be made as follows:

(A) Upon an individual, other than a person under sixteen years of age or an incompetent person, by serving the individual;

(B) Upon a person under sixteen years of age by serving either the person's guardian or any one of the following persons with whom the person to be served lives or resides: father, mother, or the individual having the care of the person; or by serving the person if the person neither has a guardian nor lives or resides with a parent or a person having his or her care;

(C) Upon an incompetent person by serving either the incompetent's guardian or the person designated in division (E) of this rule, but if no guardian has been appointed and the incompetent is not under confinement or commitment, by serving the incompetent;

(D) Upon an individual confined to a penal institution of this state or of a subdivision of this state by serving the individual, except that when the individual to be served is a person under sixteen years of age, the provisions of division (B) of this rule shall be applicable;

(E) Upon an incompetent person who is confined in any institution for the mentally ill or mentally deficient or committed by order of court to the custody of some other institution or person by serving the superintendent or similar official of the institution to which the incompetent is confined or committed or the person to whose custody the incompetent is committed;

(F) Upon a corporation either domestic or foreign: by serving the agent authorized by appointment or by law to receive service of process; or by serving the corporation by certified or express mail at any of its usual places of business; or by serving an officer or a managing or general agent of the corporation;

(G) Upon a partnership, a limited partnership, or a limited partnership association by serving the entity by certified or express mail at any of its usual places of business or by serving a partner, limited partner, manager, or member;

(H) Upon an unincorporated association by serving it in its entity name by certified or express mail at any of its usual places of business or by serving an officer of the unincorporated association;

(I) Upon a professional association by serving the association in its corporate name by certified or express mail at the place where the corporate offices are maintained or by serving a shareholder;

(J) Upon this state or any one of its departments, offices and institutions as defined in division (C) of section 121.01 of the Revised Code, by serving the officer responsible for the administration of the department, office or institution or by serving the attorney general of this state;

(K) Upon a county or upon any of its offices, agencies, districts, departments, institutions or administrative units, by serving the officer responsible for the administration of the office, agency, district, department, institution or unit or by serving the prosecuting attorney of the county;

(L) Upon a township by serving one or more of the township trustees or the township clerk or by serving the prosecuting attorney of the county in which the township is located, unless the township is organized under Chapter 504. of the Revised Code, in which case service may be made upon the township law director;

(M) Upon a municipal corporation or upon any of its offices, departments, agencies, authorities, institutions or administrative units by serving the officer responsible for the administration of the office, department, agency, authority, institution or unit or by serving the city solicitor or comparable legal officer;

(N) Upon any governmental entity not mentioned above by serving the person, officer, group or body responsible for the administration of that entity or by serving the appropriate legal officer, if any, representing the entity. Service upon any person who is a member of the "group" or "body" responsible for the administration of the entity shall be sufficient.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1996; July 1, 1997.]

### **Staff Note (July 1, 1997 Amendment)**

#### **Rule 4.2 Process: Who may be served**

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment provides for this additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes, including lettering of the divisions (A-N) in place of the previous numbering (1-14).

## **Staff Note (July 1, 1996 Amendment)**

### **Rule 4.2 Process: Who May be Served**

In 1991, the General Assembly enacted Chapter 504 of the Ohio Revised Code to give townships an option to organize the “limited self-government form” of government. Townships electing this form of government are required by law to appoint a law director who “shall be the legal advisor to the board of township trustees ... and all other township officers.” R.C. 504.15. Upon attaining Chapter 504 status, then, the prosecuting attorney of the county in which the township is located no longer serves as the “legal advisor” of the township. The amendment recognizes this statutory development and should facilitate service of process in actions against Chapter 504 townships.

### **RULE 4.3 Process: Out-of-State Service**

**(A) When service permitted.** Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state, including, but not limited to, actions arising out of the ownership, operation, or use of a motor vehicle or aircraft in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person to be served might reasonably have expected the person who was injured to use, consume, or be affected by the goods in this state, provided that the person to be served also regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Having an interest in, using, or possessing real property in this state;
- (7) Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (8) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for spousal support, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state;
- (9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably have expected that some person would be injured by the act in this state;
- (10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, that the person to be served commits or in the commission of which the person to be served is guilty of complicity.

**(B) Methods of service.**

**(1) Service by certified or express mail.** Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. If the envelope is returned with an endorsement showing failure of delivery, service is complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

**(2) Personal service.** When ordered by the court, a "person" as defined in division (A) of this rule may be personally served with a copy of the process and complaint or other document to be served. Service under this division may be made by any person not less than eighteen years of age who is not a party and who has been designated by order of the court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person who will make the service.

Proof of service may be made as prescribed by Civ. R. 4.1 (B) or by order of the court.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1980; July 1, 1988; July 1, 1991; July 1, 1997.]



## **Staff Note (July 1, 1997 Amendment)**

### **Rule 4.3 Process: Out-of-state service**

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment provides for this additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

#### **RULE 4.4 Process: Service by Publication**

##### **(A) Residence unknown.**

(1) Except in an action governed by division (A)(2) of this rule, if the residence of a defendant 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 a party or his counsel shall be filed with the court. The affidavit shall aver that service of summons cannot be made because the residence of the defendant is unknown to the affiant, all of the efforts made on behalf of the party to ascertain the residence of the defendant, and that the residence of the defendant 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 complaint 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 complaint and demand for relief, and shall notify the person to be served that he or she is required to answer within twenty-eight days after the publication. 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 shall be 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.

(2) In a divorce, annulment, or legal separation action, if the plaintiff is proceeding in forma pauperis and if the residence of the defendant is unknown, service by publication shall be made by posting and mail. Before service by posting and mail can be made, an affidavit of a party or the 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. 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 in the required locations for six successive weeks.

The clerk shall also cause the complaint and summons to be mailed by ordinary mail, address correction requested, to the defendant's last known address. 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 defendant within the six-week period that notice is posted pursuant to division (A)(2) of this rule, the clerk shall cause the complaint and summons to be mailed to the corrected or forwarding address. The clerk shall note the name, address, and date of each mailing in the docket.

After the last week of posting, the clerk shall note on the docket where and when notice was posted. Service shall be complete upon the entry of posting.

**(B) Residence known.** If the residence of a defendant is known, and the action is one in which service by publication is authorized by law, service of process shall be effected by a method other than by publication as provided by:

- (1) Rule 4.1, if the defendant is a resident of this state,
- (2) Rule 4.3(B) if defendant is not a resident of this state, or
- (3) Rule 4.5, in the alternative, if service on defendant is to be effected in a foreign country.

If service of process cannot be effected under the provisions of this subdivision or Rule 4.6(C) or Rule 4.6(D), service of process shall proceed by publication.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1991.]

**RULE 4.5 Process: Alternative Provisions for Service in a Foreign Country**

**(A) Manner.** When Civ. R. 4.3 or Civ. R. 4.4 or both allow service upon a person outside this state and service is to be effected in a foreign country, service of the summons and complaint may also be made:

(1) In the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction when service is calculated to give actual notice;

(2) As directed by the foreign authority in response to a letter rogatory when service is calculated to give actual notice;

(3) Upon an individual by delivery to him personally;

(4) Upon a corporation or partnership or association by delivery to an officer, a managing or general agent;

(5) By any form of mail requiring a signed receipt, when the clerk of the court addresses and dispatches this mail to the party to be served;

(6) As directed by order of the court.

Service under division (A)(3) or (A)(6) of this rule may be made by any person not less than eighteen years of age who is not a party and who has been designated by order of the court, or by the foreign court. On request the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

**(B) Return.** Proof of service may be made as prescribed by Civ. R. 4.1(B), or by the law of the foreign country, or by order of the court. When mail service is made pursuant to division (A)(5) of this rule, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

[Effective: July 1, 1970; amended effective July 1, 1997.]

**Staff Note (July 1, 1997 Amendment)**

**Rule 4.5 Process: Alternative Provisions for Service in a Foreign Country**

The 1997 amendment changed a cross-reference in division (B) necessitated by the relettering of Civ. R. 4.1, also effective July 1, 1997. Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

**RULE 4.6 Process: Limits; Amendment; Service Refused; Service Unclaimed**

**(A) Limits of effective service.** All process may be served anywhere in this state and, when authorized by law or these rules, may be served outside this state.

**(B) Amendment.** The court within its discretion and upon such terms as are just, may at any time allow the amendment of any process or proof of service thereof, unless the amendment would cause material prejudice to the substantial rights of the party against whom the process was issued.

**(C) Service refused.** If service of process is refused, and the certified or express mail envelope is returned with an endorsement showing such refusal, or the return of the person serving process states that service of process has been refused, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record. Failure to claim certified or express mail service is not refusal of service within the meaning of division (C) of this rule.

**(D) Service unclaimed.** If a certified or express mail envelope is returned with an endorsement showing that the envelope was unclaimed, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued. If the attorney, or serving party, after notification by the clerk, files with the clerk a written request for ordinary mail service, the clerk shall send by ordinary mail a copy of the summons and complaint or other document to be served to the defendant at the address set forth in the caption, or at the address set forth in written instructions furnished to the clerk. The mailing shall be evidenced by a certificate of mailing which shall be completed and filed by the clerk. Answer day shall be twenty-eight days after the date of mailing as evidenced by the certificate of mailing. The clerk shall endorse this answer date upon the summons which is sent by ordinary mail. Service shall be deemed complete when the fact of mailing is entered of record, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery. If the ordinary mail envelope is returned undelivered, the clerk shall forthwith notify the attorney, or serving party, by mail.

**(E) Duty of attorney of record or serving party.** The attorney of record or the serving party shall be responsible for determining if service has been made and shall timely file written instructions with the clerk regarding completion of service notwithstanding the provisions in Civ. R. 4.1 through 4.6 which instruct a clerk to notify the attorney of record or the serving party of failure of service of process.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1978; July 1, 1997.]

### **Staff Note (July 1, 1997 Amendment)**

#### **Rule 4.6 Process: Limits; amendment; service refused; service unclaimed**

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment provides for this additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

**RULE 5. Service and Filing of Pleadings and Other Papers Subsequent to the Original Complaint**

(A) **Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties. Service is not required on parties in default for failure to appear except that pleadings asserting new or additional claims for relief or for additional damages against them shall be served upon them in the manner provided for service of summons in Civ. R. 4 through Civ. R. 4.6.

(B) **Service: how made.** Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or party shall be made by delivering a copy to the person to be served, transmitting it to the office of the person to be served by facsimile transmission, mailing it to the last known address of the person to be served or, if no address is known, leaving it with the clerk of the court. The served copy shall be accompanied by a completed copy of the proof of service required by division (D) of this rule. "Delivering a copy" within this rule means: handing it to the attorney or party; leaving it at the office of the person to be served with a clerk or other person in charge; if there is no one in charge, leaving it in a conspicuous place in the office; or, if the office is closed or the person to be served has no office, leaving it at the dwelling house or usual place of abode of the person to be served with some person of suitable age and discretion then residing in the dwelling house or usual place of abode. Service by mail is complete upon mailing. Service by facsimile transmission is complete upon transmission.

(C) **Service: numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(D) **Filing.** All papers, after the complaint, required to be served upon a party shall be filed with the court within three days after service, but depositions upon oral examination, interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless on order of the court or for use as evidence or for consideration of a motion in the proceeding. Papers filed with the court shall not be considered until proof of service is endorsed thereon or separately filed. The proof of service shall state the date and manner of service and shall be signed in accordance with Civ. R. 11.

**(E) Filing with the court defined.** The filing of documents with the court, as required by these rules, shall be made by filing them with the clerk of court, except that the judge may permit the documents to be filed with the judge, in which event the judge shall note the filing date on the documents and transmit them to the clerk. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

(1) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.

(2) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.

(3) Any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1984; July 1, 1991; July 1, 1994; July 1, 2001.]

#### **Staff Note (July 1, 2001 Amendment)**

**Civil Rule 5            Service and Filing of Pleadings and Other Papers  
                                 Subsequent to the Original Complaint  
Civil Rule 5(E)        Filing with the court defined**

The amendments to this rule were part of a group of amendments that were submitted by the Ohio Courts Digital Signatures Task Force to establish minimum standards for the use of information systems, electronic signatures, and electronic filing. The substantive amendment to this rule was the amendment of the second sentence and the addition of the last sentence of division (E), and the addition of divisions (E)(2) and (E)(3). Comparable amendments were made to Civil Rule 73 (for probate courts), Criminal Rule 12, Juvenile Rule 8, and Appellate Rule 13.

As part of this electronic filing and signature project, the following rules were amended effective July 1, 2001: Civil Rules 5, 11, and 73; Criminal Rule 12; Juvenile Rule 8; and Appellate Rules 13 and 18. In addition, Rule 26 of the Rules of Superintendence for Courts of Ohio was amended and Rule of Superintendence 27 was added to complement the rules of procedure. Superintendence Rule 27 establishes a process by which minimum standards for information technology are promulgated, and requires that courts submit any local rule involving the use of information technology to a technology standards committee designated by the Supreme Court for approval.



## **RULE 6. Time**

**(A) Time: computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. When a public office in which an act, required by law, rule, or order of court, is to be performed is closed to the public for the entire day which constitutes the last day for doing such an act, or before its usual closing time on such day, then such act may be performed on the next succeeding day which is not a Saturday, a Sunday, or a legal holiday.

**(B) Time: extension.** When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 50(B), Rule 59(B), Rule 59(D), and Rule 60(B), except to the extent and under the conditions stated in them.

**(C) Time: unaffected by expiration of term.** The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action consistent with these rules.

**(D) Time: motions.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than seven days before the time fixed for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(C), opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

**(E) Time: additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, three days shall be added to the prescribed period. This subdivision does not apply to responses to service of summons under Rule 4 through Rule 4.6.

[Effective: July 1, 1970; amended effective July 1, 1978.]

### TITLE III. PLEADINGS AND MOTIONS

#### **RULE 7. Pleadings and Motions**

(A) **Pleadings.** There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

#### **(B) Motions.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or a trial, shall be made in writing. A motion, whether written or oral, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

(3) The rules applicable to captions, signing, and other matters of form of pleading apply to all motions and other papers provided for by these rules.

(4) All motions shall be signed in accordance with Rule 11.

(C) **Demurrers abolished.** Demurrers shall not be used.

[Effective: July 1, 1970; amended effective July 1, 1984.]

## **RULE 8. General Rules of Pleading**

**(A) Claims for relief.** A pleading that sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party claims to be entitled. If the party seeks more than twenty-five thousand dollars, the party shall so state in the pleading but shall not specify in the demand for judgment the amount of recovery sought, unless the claim is based upon an instrument required to be attached pursuant to Civ. R. 10. At any time after the pleading is filed and served, any party from whom monetary recovery is sought may request in writing that the party seeking recovery provide the requesting party a written statement of the amount of recovery sought. Upon motion, the court shall require the party to respond to the request. Relief in the alternative or of several different types may be demanded.

**(B) Defenses; Form of denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make the denials as specific denials or designated averments or paragraphs, or the pleader may generally deny all the averments except the designated averments or paragraphs as the pleader expressly admits; but, when the pleader does intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Civ. R. 11.

**(C) Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, want of consideration for a negotiable instrument, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation.

**(D) Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

**(E) Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds. All statements shall be made subject to the obligations set forth in Rule 11.

**(F) Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

**(G) Pleadings shall not be read or submitted.** Pleadings shall not be read or submitted to the jury, except insofar as a pleading or portion thereof is used in evidence.

**(H) Disclosure of minority or incompetency.** Every pleading or motion made by or on behalf of a minor or an incompetent shall set forth such fact unless the fact of minority or incompetency has been disclosed in a prior pleading or motion in the same action or proceeding.

[Effective: July 1, 1970; amended effective July 1, 1994.]

## **RULE 9. Pleading Special Matters**

**(A) Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

**(B) Fraud, mistake, condition of the mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

**(C) Conditions precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

**(D) Official document or act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

**(E) Judgment.** In pleading a judgment or decision of a court of this state or a foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

**(F) Time and place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

**(G) Special damage.** When items of special damage are claimed, they shall be specifically stated.

[Effective: July 1, 1970.]

## **RULE 10. Form of Pleadings**

**(A) Caption; names of parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the case number, and a designation as in Rule 7(A). In the complaint the title of the action shall include the names and addresses of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

**(B) Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

**(C) Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument attached to a pleading is a part of the pleading for all purposes.

### **(D) Attachments to pleadings.**

(1) *Account or written instrument.* When any claim or defense is founded on an account or other written instrument, a copy of the account or written instrument must be attached to the pleading. If the account or written instrument is not attached, the reason for the omission must be stated in the pleading.

#### (2) *Affidavit of merit; medical liability claim.*

(a) Except as provided in division (D)(2)(b) of this rule, a complaint that contains a medical claim, dental claim, optometric claim, or chiropractic claim, as defined in section 2305.113 of the Revised Code, shall include an affidavit of merit relative to each defendant named in the complaint for whom expert testimony is necessary to establish liability. The affidavit of merit shall be provided by an expert witness pursuant to Rules 601(D) and 702 of the Ohio Rules of Evidence. The affidavit of merit shall include all of the following:

(i) A statement that the affiant has reviewed all medical records reasonably available to the plaintiff concerning the allegations contained in the complaint;

(ii) A statement that the affiant is familiar with the applicable standard of care;

(iii) The opinion of the affiant that the standard of care was breached by one or more of the defendants to the action and that the breach caused injury to the plaintiff.

(b) The plaintiff may file a motion to extend the period of time to file an affidavit of merit. The motion shall be filed by the plaintiff with the complaint. For good cause shown, the court shall grant the plaintiff a reasonable period of time to file an affidavit of merit.

(c) An affidavit of merit is required solely to establish the adequacy of the complaint and shall not otherwise be admissible as evidence or used for purposes of impeachment.

**(E) Size of paper filed.** All pleadings, motions, briefs, and other papers filed with the clerk, including those filed by electronic means, shall be on paper not exceeding 8 1/2 x 11 inches in size without backing or cover.

[Effective: July 1, 1970; amended effective July 1, 1985; July 1, 1991; July 1, 2005.]

### **Staff Note (July 1, 2005 Amendment)**

Civ. R. 10 is amended in response to a request from the General Assembly contained in Section 3 of Sub. H.B. 215 of the 125<sup>th</sup> General Assembly, effective September 13, 2004. The act amends and enacts provisions relative to medical, dental, optometric, and chiropractic malpractice actions, and Section 3 contains a request that the Supreme Court adopt a rule that “require[s] a plaintiff filing a medical liability claim to include a certificate of expert review as to each defendant.”

#### **Rule 10(D) Attachments to pleadings**

Civ. R. 10(D) is retitled and reorganized to reflect the inclusion of a requirement in division (D)(2) that a medical liability complaint include an affidavit of merit concerning the alleged breach of the standard of care by each defendant to the action. Division (D)(2)(a) specifies three items that must be included in the affidavit and sets forth the qualifications of the person providing the affidavit of merit.

There may be instances in which multiple affidavits of merit are required as to a particular plaintiff. For example, the plaintiff may find it necessary to provide one affidavit that addresses only the issue of “standard of care” and a separate affidavit that addresses only the issue of injury caused by the breach of the standard of care.

Because there may be circumstances in which the plaintiff is unable to provide an affidavit of merit when the complaint is filed, division (D)(2)(b) of the rule requires the trial court, when good cause is shown, to provide a reasonable period of time for the plaintiff to obtain and file the affidavit. For example, “good cause” may exist in a circumstance where the plaintiff obtains counsel near the expiration of the statute of limitations, and counsel does not have sufficient time to identify a qualified health care provider to conduct the necessary review of applicable medical records and prepare an affidavit. Similarly, the relevant medical records may not have been provided to the plaintiff in a timely fashion. Further, there may be situations where the medical records do not reveal the names of all of the potential defendants and so until discovery reveals those names, it may be necessary to name a “John Doe” defendant. Once discovery has revealed the name of a previously unknown defendant and that person is added as a party, the affidavit of merit would then be required as to that newly named defendant. Under these or similar

circumstances, the court must afford the plaintiff a reasonable period of time, once a qualified health care provider is identified, to have the records reviewed and submit an affidavit that satisfies the requirements set forth in the rule.

Division (D)(2)(c) provides that an affidavit of merit is intended to establish the sufficiency of the complaint filed in a medical liability action and specifies that an affidavit of merit is not otherwise admissible as evidence or for purposes of impeachment.

The amendments to Rule 10 also include nonsubstantive changes.



## **RULE 11. Signing of Pleadings, Motions, or Other Documents**

Every pleading, motion, or other document of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address, attorney registration number, telephone number, telefax number, if any, and business e-mail address, if any, shall be stated. A party who is not represented by an attorney shall sign the pleading, motion, or other document and state the party's address. Except when otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the document had not been served. For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule. Similar action may be taken if scandalous or indecent matter is inserted.

[Effective: July 1, 1970; amended effective July 1, 1994, July 1, 1995; July 1, 2001.]

### **Staff Note (July 1, 2001 Amendment)**

#### **Civil Rule 11 Signing of Pleadings, Motions, or Other Documents**

The amendments to this rule were part of a group of amendments that were submitted by the Ohio Courts Digital Signatures Task Force to establish minimum standards for the use of information systems, electronic signatures, and electronic filing. The substantive amendment to this rule was the addition of the requirement that an attorney's telefax number and e-mail address, if any, be on all documents. Also, "document" was substituted for "paper" in the title and in two places in the text, for consistency with other Rules of Civil Procedure.

As part of this electronic filing and signature project, the following rules were amended effective July 1, 2001: Civil Rules 5, 11, and 73; Criminal Rule 12; Juvenile Rule 8; and Appellate Rules 13 and 18. In addition, Rule 26 of the Rules of Superintendence for Courts of Ohio was amended and Rule of Superintendence 27 was added to complement the rules of procedure. Superintendence Rule 27 establishes a process by which minimum standards for information technology are promulgated, and requires that courts submit any local rule involving the use of information technology to a technology standards committee designated by the Supreme Court for approval.

## **Staff Note (July 1, 1995 Amendment)**

### **Rule 11. Signing of Pleadings, Motions, or Other Papers**

The amendment of this rule that took effect July 1, 1994 contained two errors that the 1995 amendment corrects. First, in the next-to-last sentence, the word “a” was erroneously omitted and is reinserted as the second word of the sentence by this amendment. Second, the last sentence, which was contained in the original version of this rule, was erroneously omitted from the 1994 amendment and is restored with this amendment.

**RULE 12. Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment on the Pleadings**

**(A) When answer presented.**

**(1) Generally.** The defendant shall serve his answer within twenty-eight days after service of the summons and complaint upon him; if service of notice has been made by publication, he shall serve his answer within twenty-eight days after the completion of service by publication.

**(2) Other responses and motions.** A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty-eight days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty-eight days after service of the answer or, if a reply is ordered by the court, within twenty-eight days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (a) if the court denies the motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after notice of the court's action; (b) if the court grants a motion, a responsive pleading, delayed because of service of the motion, shall be served within fourteen days after service of the pleading which complies with the court's order.

**(B) How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19 or Rule 19.1. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. Provided however, that the court shall consider only such matters outside the pleadings as are specifically enumerated in Rule 56. All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.

**(C) Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.

**(D) Preliminary hearings.** The defenses specifically enumerated (1) to (7) in subdivision (B) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (C) of this rule shall be heard and determined before trial on application of any party.

**(E) Motion for definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fourteen days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

**(F) Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

**(G) Consolidation of defenses and objections.** A party who makes a motion under this rule must join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule and does not include therein all defenses and objections then available to him which this rule permits to be raised by motion, he shall not thereafter assert by motion or responsive pleading, any of the defenses or objections so omitted, except as provided in subdivision (H) of this rule.

**(H) Waiver of defenses and objections.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (a) if omitted from a motion in the circumstances described in subdivision (G), or (b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(A) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(A), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action.

[Effective: July 1, 1970; amended effective July 1, 1983.]

### **RULE 13. Counterclaim and Cross-Claim**

**(A) Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

**(B) Permissive counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

**(C) Counterclaim exceeding opposing claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

**(D) Counterclaim against this state.** These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against this state, a political subdivision or an officer in his representative capacity or agent of either.

**(E) Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleadings.

**(F) Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

**(G) Cross-claim against co-party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

**(H) Joinder of additional parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rule 19, Rule 19.1, and Rule 20. Such persons shall be served pursuant to Rule 4 through Rule 4.6.

**(I) Separate trials; separate judgments.** If the court orders separate trials as provided in Rule 42(B), judgment on a counterclaim or cross-claim may be rendered in

accordance with the terms of Rule 54(B) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

**(J) Certification of proceedings.** In the event that a counterclaim, cross-claim, or third-party claim exceeds the jurisdiction of the court, the court shall certify the proceedings in the case to the court of common pleas.

[Effective: July 1, 1970; amended effective July 1, 1971.]

#### **RULE 14. Third Party Practice**

**(A) When defendant may bring in third party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than fourteen days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. If the third-party defendant is an employee, agent, or servant of the third-party plaintiff, the court shall order a separate trial upon the motion of any plaintiff. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

**(B) When plaintiff may bring in third party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

[Effective: July 1, 1970.]

## **RULE 15. Amended and Supplemental Pleadings**

**(A) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within twenty-eight days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party. Leave of court shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fourteen days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

**(B) Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

**(C) Relation back of amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The delivery or mailing of process to this state, a municipal corporation or other governmental agency, or the responsible officer of any of the foregoing, subject to service of process under Rule 4 through Rule 4.6, satisfies the requirements of clauses (1) and (2) of the preceding paragraph if the above entities or officers thereof would have been proper defendants upon the original pleading. Such entities or officers thereof or both may be brought into the action as defendants.



**(D) Amendments where name of party unknown.** When the plaintiff does not know the name of a defendant, that defendant may be designated in a pleading or proceeding by any name and description. When the name is discovered, the pleading or proceeding must be amended accordingly. The plaintiff, in such case, must aver in the complaint the fact that he could not discover the name. The summons must contain the words "name unknown," and a copy thereof must be served personally upon the defendant.

**(E) Supplemental pleadings.** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

[Effective: July 1, 1970.]

## **RULE 16. Pretrial Procedure**

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 limitation of the number of expert witnesses;
- (8) The imposition of sanctions as authorized by Civ. R. 37;
- (9) The possibility of obtaining:
  - (a) Admissions of fact;
  - (b) Admissions into evidence of documents and other exhibits that will avoid unnecessary proof;
- (10) Other matters as may aid in the disposition of the action.

The producing 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 the action.

The court may require that parties, or their representatives or insurers, attend a conference or otherwise participate in pretrial proceedings, in which case the court shall give reasonable advance notice to the parties of the conference or proceedings.

[Effective: July 1, 1970; amended effective July 1, 1993.]

## TITLE IV. PARTIES

### **RULE 17. Parties Plaintiff and Defendant; Capacity**

**(A) Real party in interest.** Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

**(B) Minors or incompetent persons.** Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.

[Effective: July 1, 1970; amended effective July 1, 1975; July 1, 1985.]

**RULE 18. Joinder of Claims and Remedies**

**(A) Joinder of claims.** A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, as he has against an opposing party.

**(B) Joinder of remedies; fraudulent conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

[Effective: July 1, 1970.]

## **RULE 19. Joinder of Persons Needed for Just Adjudication**

**(A) Persons to be joined if feasible.** A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (a) as a practical matter impair or impede his ability to protect that interest or (b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest, or (3) he has an interest relating to the subject of the action as an assignor, assignee, subrogor, or subrogee. If he has not been so joined, the court shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H). If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. In the event that such joinder causes the relief sought to exceed the jurisdiction of the court, the court shall certify the proceedings in the action to the court of common pleas.

**(B) Determination by court whenever joinder not feasible.** If a person as described in subdivision (A)(1), (2), or (3) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

**(C) Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (A)(1), (2), or (3) hereof who are not joined, and the reasons why they are not joined.

**(D) Exception of class actions.** This rule is subject to the provisions of Rule 23.

[Effective: July 1, 1970.]

## **RULE 19.1 Compulsory Joinder**

**(A) Persons to be joined.** A person who is subject to service of process shall be joined as a party in the action, except as provided in subdivision (B) of this rule, if the person has an interest in or a claim arising out of the following situations:

(1) Personal injury or property damage to the person or property of the decedent which survives the decedent's death and a claim for wrongful death to the same decedent if caused by the same wrongful act;

(2) Personal injury or property damage to a husband or wife and a claim of the spouse for loss of consortium or expenses or property damage if caused by the same wrongful act;

(3) Personal injury or property damage to a minor and a claim of the parent or guardian of the minor for loss of consortium or expenses or property damage if caused by the same wrongful act;

(4) Personal injury or property damage to an employee or agent and a claim of the employer or principal for property damage if caused by the same wrongful act.

If he has not been so joined, the court, subject to subdivision (B) hereof, shall order that he be made a party upon timely assertion of the defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H). If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. In the event that such joinder causes the relief sought to exceed the jurisdiction of the court, the court shall certify the proceedings in the action to the court of common pleas.

**(B) Exception to compulsory joinder.** If a party to the action or a person described in subdivision (A) shows good cause why that person should not be joined, the court shall proceed without requiring joinder.

**(C) Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (A)(1), (2), (3), or (4) hereof who are not joined, and the reasons why they are not joined.

**(D) Exception of class actions.** This rule is subject to the provisions of Rule 23.

[Effective: July 1, 1970; amended effective July 1, 1996.]

## Staff Note (July 1, 1996 Amendment)

### Rule 19.1(A), Persons to be Joined

The amendment conforms the rule to a clarification of law in the Supreme Court's decision in *Gallimore v. Children's Hosp. Med. Ctr.* (1993), 67 Ohio St.3d 244, 617 N.E.2d 1052. There, the Court stated in both syllabi that "Consortium includes society, companionship, affection, comfort, guidance and counsel." Since the word "consortium" is more inclusive than the word "services," it is more appropriate to use the former term. The amendment should avoid confusion between the rule and the substantive law in this regard.

**RULE 20. Permissive Joinder of Parties**

**(A) Permissive joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or succession or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

**(B) Separate trials.** The court may make such orders as will prevent a party from being prejudiced, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent prejudice or delay.

[Effective: July 1, 1970.]



**RULE 21. Misjoinder and Nonjoinder of Parties**

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

[Effective: July 1, 1970.]

## **RULE 22. Interpleader**

Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

In such an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party may deposit all or any part of such sum or thing with the court upon notice to every other party and leave of court. The court may make an order for the safekeeping, payment or disposition of such sum or thing.

[Effective: July 1, 1970.]

## **RULE 23. Class Actions**

**(A) Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

**(B) Class actions maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (A) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

**(C) Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (B)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude him from the class if he so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (B)(1) or (B)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (B)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (C)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

**(D) Orders in conduct of actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

**(E) Dismissal or compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

**(F) Aggregation of claims.** The claims of the class shall be aggregated in determining the jurisdiction of the court.

[Effective: July 1, 1970.]

### **RULE 23.1. Derivative Actions by Shareholders**

In a derivative action brought by one or more legal or equitable owners of shares to enforce a right of a corporation, the corporation having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors and, if necessary, from the shareholders and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders similarly situated in enforcing the right of the corporation. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders in such manner as the court directs.

[Effective: July 1, 1970.]

## **RULE 24. Intervention**

**(A) Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

**(B) Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

**(C) Procedure.** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.

[Effective: July 1, 1970; Amended July 1, 1999.]

### **Staff Note (July 1, 1999 Amendment)**

#### **Rule 24(A) Intervention of right**

Masculine references were made gender-neutral; there were no substantive amendments to this division.

#### **Rule 24(C) Procedure**

The 1999 amendment was intended to clarify that the "pleading" to be filed with a motion to intervene requires more than just a memorandum in support of the motion to intervene. The Note following Form 17 in the Appendix of Forms was amended accordingly.

## **RULE 25. Substitution of Parties**

### **(A) Death.**

(1) If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 through Rule 4.6 for the service of summons. Unless the motion for substitution is made not later than ninety days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

**(B) Incompetency.** If a party is adjudged incompetent, the court upon motion served as provided in subdivision (A) of this rule shall allow the action to be continued by or against his representative.

**(C) Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (A) of this rule.

### **(D) Public officers; death or separation from office.**

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name. The court however may require the addition of his name.

**(E) Suggestion of death or incompetency** Upon the death or incompetency of a party it shall be the duty of the attorney of record for that party to suggest such fact upon the record within fourteen days after he acquires actual knowledge of the death or incompetency of that party. The suggestion of death or incompetency shall be served on all other parties as provided in Rule 5.

[Effective: July 1, 1970.]



## TITLE V. DISCOVERY

### **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 his 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 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, 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.

**(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) Trial preparation: materials.** Subject to the provisions of subdivision (B)(4) of this rule, a party may obtain discovery of documents 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.

**(4) Trial preparation: experts.**

(a) Subject to the provisions of subdivision (B)(4)(b) of this rule and Rule 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 subdivision (B)(4)(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.

(c) The court may require that the party seeking discovery under subdivision (B)(4)(b) of this rule pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (B)(4)(a) of this rule, 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.

**(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; (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 persons having knowledge of discoverable matters, and (b) the identity of each person expected to be called as an expert witness at 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.

[Effective: July 1, 1970; amended effective July 1, 1994.]

**RULE 27. Perpetuation of Testimony--Depositions Before Action or Pending Appeal**

**(A) Before action.**

**(1) Petition.** A person who desires to perpetuate his own testimony or the testimony of another person regarding any matter that may be cognizable in any court may file a petition in the court of common pleas in the county of the residence of any expected adverse party. The petitioner shall verify that he believes the facts stated in the petition are true. The petition shall be entitled in the name of the petitioner and shall show:

(a) That the petitioner or his personal representatives, heirs, beneficiaries, successors, or assigns may be parties to an action or proceeding cognizable in a court but is presently unable to bring or defend it;

(b) The subject matter of the expected action or proceeding and his interest therein (if the validity or construction of any written instrument connected with the subject matter of the deposition may be called in question a copy shall be attached to the petition);

(c) The facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it;

(d) The names or, if the names are unknown, a description of the persons he expects will be adverse parties and their addresses so far as known;

(e) The names and addresses of the persons to be examined and the subject matter of the testimony which he expects to elicit from each.

The petition shall then ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

**(2) Notice and service.** The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty-eight days before the date of hearing, unless the court upon application and showing of extraordinary circumstances prescribes a hearing on shorter notice, the notice shall be served either within or outside of this state by a method provided in Rule 4 through Rule 4.6 for service of summons, or in any other manner affording actual notice, as directed by order of the court. But if it appears to the court that an expected adverse party cannot be given actual notice, the court shall appoint a competent attorney to cross-examine the deponent; such attorney shall be allowed reasonable fees therefor which shall be taxed as costs. If any expected adverse party is a minor or incompetent the provisions of Rule 17(B) apply.

**(3) Order and examination.** If the court is satisfied that the allowance of the petition may prevent a failure or delay of justice, and that the petitioner is unable to bring or

defend the contemplated action, the court shall order the testimony perpetuated, designating the deponents, the subject matter of the examination, when, where, and before whom their deposition shall be taken, and whether orally or upon written questions. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rule 34, Rule 35 and Rule 37. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

**(4) Use of deposition.** Subject to the same limitations and objections as though the deponent were testifying at the trial in person, and to the provisions of Rule 26 and Rule 32(A) a deposition taken in accordance with this rule may be used as evidence in any action subsequently brought in any court, where the deposition is that of a party to the action, or where the issue is such that an interested party in the proceedings in which the deposition was taken had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the deposition is offered. But, except where the deposition is that of a party to the action and is offered against the party, the deposition may not be used as evidence unless the deponent is unavailable as a witness at the trial.

**(B) Pending appeal.** If an appeal has been taken from a judgment of any court, a party who desires to perpetuate testimony may make a motion in the court where the action was tried, for leave to take depositions upon the same notice and service thereof as provided in (A)(2) of this rule. The motion shall show the names and addresses of the persons to be examined, the subject matter of the testimony which he expects to elicit from each, and the reasons for perpetuating their testimony. If the court is satisfied that the motion is proper to avoid a failure or delay of justice, it may make an order allowing the deposition to be taken and may make orders of the character provided for by Rule 34, Rule 35, and Rule 37. The depositions may be taken and used in the same manner and under the same conditions as are prescribed for depositions in Rule 26 and Rule 32(A).

**(C) Perpetuation by actions.** This rule does not limit the inherent power of a court to entertain an action to perpetuate testimony.

**(D) Filing of depositions.** Depositions taken under this rule shall be filed with the court in which the petition is filed or the motion is made.

**(E) Costs of deposition.** The party taking any deposition under this rule shall pay the costs thereof and of all proceedings hereunder, unless otherwise ordered by the court.

**(F) Depositions taken in other states.** A deposition taken under similar procedure of another jurisdiction is admissible in this state to the same extent as a deposition taken under this rule.

**(G) Construction of rule.** This rule shall be so construed as to effectuate the general purpose to make uniform the law of those states which have similar rules or statutes.

[Effective: July 1, 1970; amended effective July 1, 1972.]

**RULE 28. Persons Before Whom Depositions May be Taken**

**(A) Depositions within state.** Depositions may be taken in this state before: a person authorized to administer any oath by the laws of this state, a person appointed by the court in which the action is pending, or a person agreed upon by written stipulation of all the parties.

**(B) Depositions outside state.** Depositions may be taken outside this state before: a person authorized to administer oaths in the place where the deposition is taken, a person appointed by the court in which the action is pending, a person agreed upon by written stipulation of all the parties, or, in any foreign country, by any consular officer of the United States within his consular district.

**(C) Disqualification for interest.**

Unless the parties agree otherwise as provided in Civ. R. 29, depositions shall not be taken before a person who:

- (1) is a relative or employee of or attorney for any of the parties, or
- (2) is a relative or employee of an attorney for any of the parties, or
- (3) is financially interested in the action.

**(D) Prohibited contracts.**

(1) Any blanket contract for private court reporting services, not related to a particular case or reporting incident, shall be prohibited between a private court reporter or any other person with whom a private court reporter has a principal and agency relationship, and any attorney, party to an action, party having a financial interest in an action, or any entity providing the services of a shorthand reporter.

(2) “Blanket contract” means a contract under which a court reporter, court recorder, or court reporting firm agrees to perform all court reporting or court recording services for a client for two or more cases at a rate of compensation fixed in the contract.

(3) Negotiating or bidding reasonable fees, equal to all parties, on a case-by-case basis is not prohibited.

(4) Division (D) of this rule does not apply to the courts or the administrative tribunals of this state.

[Effective: July 1, 1970; July 1, 2001.]

## Staff Note (July 1, 2001 Amendment)

### Civil Rule 28 Persons Before Whom Depositions May Be Taken Civil Rule 28(D) Prohibited contracts

The amendment effective July 1, 2001 added division (D), Prohibited contracts. This rule was amended in response to communications from members of the bench and bar indicating that certain types of long-term financial arrangements between court reporters, court reporting firms, or other firms and litigants or other entities have given rise to concerns about the appearance of or potential for differential treatment of parties to an action. The appearance of impartiality and the existence of impartiality are no less important for those officers who take depositions than for judicial officers and other persons whose responsibilities are integral to the administration of justice.

The general prohibition of division (D) does not apply to situations where lower fees may be negotiated, provided the fees are the same for all parties and are negotiated on a case-by-case basis [division (D)(3)]. Also, the prohibition does not extend to governmental entities, which may be required by law to obtain court reporting services on a long-term basis through competitive bidding. See, e.g., sections 125.05(B) and 125.07 of the Revised Code.

The prohibition in division (D), like the pre-existing prohibitions in division (C), is enforceable by the court in which the underlying action is pending. Enforceability is implicitly recognized by Civ. R. 32(D)(2), which requires reasonable diligence of a party in raising a disqualification issue. See *Berwald v. Ford Motor Co.*, 1982 WL 5337, No. 44064 (8<sup>th</sup> Dist. Ct. App., Cuyahoga, May 6, 1982) (objection held waived); J. McCormac, *Ohio Civil Rules Practice*, section 10.37 at 268 (2d ed. 1992) (noting that “[c]onceivably, this objection could be made at trial if it were not discovered until that time that the officer taking the deposition was disqualified for interest under Civil Rule 28(C) and there had been no previous waiver or stipulation”). Trial courts also have extensive inherent power to control discovery. See, e.g., *State ex rel. Abner v. Elliott*, 85 Ohio St.3d 11, 16 (1999); *State ex rel. Grandview Hosp. & Med. Ctr.*, 51 Ohio St. 3d 94, 95 (1990) (citing Staff Note to Civ. R. 26(C) and Civ. R. 37); *State ex rel. Pfeiffer v. Common Pleas Ct. of Lorain Cty.*, 13 Ohio St. 2d 133, 136-37 (1968) (noting “the inherent power of courts to do all things necessary to the administration of justice and to protect its own powers and processes and the rights of those who invoke its processes” which “inheres in the constitutional grant of judicial power to the courts”).

Pursuant to the effective date provisions of Civ. R. 86(Y), Civ. R. 28(D) will apply only to (1) depositions taken in actions brought after July 1, 2001, and (2) in actions pending on July 1, 2001, to depositions taken on and after July 1, 2001.

In division (C), grammatical and structural revisions were made. No substantive amendment to division (C) was intended.

**RULE 29. Stipulations Regarding Discovery Procedure**

Unless the court orders otherwise, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and (2) modify the procedures provided by these rules for other methods of discovery.

[Effective: July 1, 1970.]



**RULE 30. Depositions upon oral examination**

**(A) When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of a witness deponent may be compelled by the use of subpoena as provided by Civ. R. 45. The attendance of a party deponent may be compelled by the use of notice of examination as provided by division (B) of this rule. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

**(B) Notice of Examination; General Requirements; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced shall be attached to or included in the notice.

(2) If any party shows that when the party was served with notice the party was unable, through the exercise of diligence, to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) If a party taking a deposition wishes to have the testimony recorded by other than stenographic means, the notice shall specify the manner of recording, preserving, and filing the deposition. The court may require stenographic taking or make any other order to ensure that the recorded testimony will be accurate and trustworthy.

(4) The notice to a party deponent may be accompanied by a request made in compliance with Civ. R. 34 for the production of documents and tangible things at the taking of the deposition.

(5) A party, in the party's notice, may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. Division (B)(5) does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For purposes of this rule, Civ. R. 28, and Civ. R. 45(C), a deposition taken by telephone is taken in the county and at the place where the deponent is to answer questions propounded to the deponent.

**(C) Examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and personally, or by someone acting under the officer's direction and in the officer's presence, shall record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means designated in accordance with division (B)(3) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

**(D) Motion to terminate or limit examinations.** At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Civ. R. 26(C). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Civ. R. 37 apply to the award of expenses incurred in relation to the motion.

**(E) Submission to witness; changes; signing.** When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the

signing or the witness is ill, cannot be found, or refuses to sign. The witness shall have thirty days from submission of the deposition to the witness to review and sign the deposition. If the deposition is taken within thirty days of a trial or hearing, the witness shall have seven days from submission of the deposition to the witness to review and sign the deposition. If the trial or hearing is scheduled to commence less than seven days before the deposition is submitted to the witness, the court may establish a deadline for the witness to review and sign the deposition. If the deposition is not signed by the witness during the period prescribed in this division, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

**(F) Certification and filing by officer; exhibits; copies; notice of filing.**

(1)(a) Upon request of any party or order of the court, the officer shall transcribe the deposition. Provided the officer has retained an archival-quality copy of the officer's notes, the officer shall have no duty to retain paper notes of the deposition testimony. The officer shall certify on the transcribed deposition that the witness was fully sworn or affirmed by the officer and that the transcribed deposition is a true record of the testimony given by the witness. If any of the parties request or the court orders, the officer shall seal the transcribed deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and, upon payment of the officer's fees, promptly shall file it with the court in which the action is pending or send it by certified or express mail to the clerk of the court for filing.

(b) Unless objection is made to their production for inspection during the examination of the witness, documents and things shall be marked for identification and annexed to and returned with the deposition. The materials may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals. If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition.

(2) Upon payment, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party requesting the filing of the deposition shall forthwith give notice of its filing to all other parties.

(4) As used in division (F) of this rule, "archival-quality copy" means any format of a permanent or enduring nature, including digital, magnetic, optical, or other medium, that allows an officer to transcribe the deposition.

**(G) Failure to attend or to serve subpoena; expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed with the deposition and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of the failure does not attend, and another party attends in person or by attorney because the other party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney's fees.

[Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1985; July 1, 1992; July 1, 1994; July 1, 1997; July 1, 2006.]

**Staff Note (July 1, 2006 Amendment)**

The 2006 amendments contain two changes pertaining to the time period for reviewing and signing depositions and the retention of deposition notes by the court reporter who transcribed the deposition.

**Rule 30(E) Submission to witness; changes; signing**

Civ. R. 30(E) is amended to allow a witness thirty days to review and sign a deposition. The former rule allowed the witness only seven days to review and sign a deposition, and the Committee recognized that a careful review of a deposition in that period of time was sometimes practically or logistically difficult. When a deposition is taken close to trial, however, a quick turn-around may be necessary. Consequently, division (E) is amended to expand to thirty days the period in which a witness has to review and sign a deposition. Exceptions are provided for cases where the deposition is taken within thirty days of trial or hearing, in which case the seven-day rule still applies, or less than seven days of trial or hearing, in which case the trial judge may establish a different deadline. This amendment brings the Ohio rule closer to the Federal Rules of Civil Procedure, which give a witness thirty days to review and sign a deposition.

**Rule 30(F) Certification and filing by officer; exhibits; copies; notice of filing**

The 2006 amendment added division (F)(4). The amendment responds to a concern expressed by individuals charged with taking or keeping notes of depositions in light of changes in technology and the fact that most present-day court reporting machines no longer use paper but record and retain deposition testimony via electronic means. The amendment clarifies that "archival-quality copy" means any format of a

permanent or enduring nature that will allow an officer to transcribe the deposition. In light of this definition, division (F)(1)(a) was revised to delete language that required the retention of paper notes of deposition testimony for a minimum of five years following the deposition.

### **Staff Note (July 1, 1997 Amendment)**

#### **Rule 30(F) Certification and filing by officer; exhibits; copies; notice of filing.**

The 1997 amendment added the second sentence to division (F)(1). The amendment responds to a concern frequently expressed by individuals charged with taking or keeping notes of depositions, namely, what duty there is (if at all) to retain such notes. Present practice in Ohio on this matter appears to vary widely, and space and expense concerns come into play if such notes are kept in perpetuity. The amendment permits the officer to discard notes of a deposition, five years after it has taken place (whether or not the deposition has been transcribed), as long as the officer retains an archival quality copy of the notes. Archival quality would include notes maintained in magnetic, optical, or other equivalent medium. The original notes must be retained for at least five years, to provide a backup source should the archival-quality copy in any particular case not produce a usable deposition. It is anticipated that any such instances should be rare; however, in the unlikely event that such problems arise, most requests to transcribe depositions would take place within about five years of the original taking of the deposition. By that point, presumably, in most cases the litigation that gave rise to the deposition will have come to an end, as would the need for a transcribed copy of the deposition. For those few instances when a transcribed deposition is needed more than five years later, under the amendment the original notes or an archival-quality copy thereof will still be available.

Prior to the 1997 amendment, service under this rule was permitted only by certified mail. It appears that service by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment to division (F)(1) provides for this additional option for service.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

## **RULE 31. Depositions of Witnesses Upon Written Questions**

**(A) Serving questions; notice.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided by Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association in accordance with the provisions of Rule 30(B)(5).

Within twenty-one days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within fourteen days after being served with cross questions, a party may serve redirect questions upon all other parties. Within fourteen days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

**(B) Officer to take responses and prepare record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(C), (E), and (F), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

**(C) Notice of filing.** The party requesting the filing of the deposition shall forthwith give notice of its filing to all other parties.

[Effective: July 1, 1970.]

## **RULE 32. Use of Depositions in Court Proceedings**

**(A) Use of depositions.** Every deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing.

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any one of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a public or private corporation, partnership or association which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (a) that the witness is dead; or (b) that the witness is beyond the subpoena power of the court in which the action is pending or resides outside of the county in which the action is pending unless it appears that the absence of the witness was procured by the party offering the deposition; or (c) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or (d) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or (e) that the witness is an attending physician or medical expert, although residing within the county in which the action is heard; or (f) that the oral examination of a witness is not required; or (g) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce all of it which is relevant to the party introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken. When another action involving the same subject matter is or has been brought between the same parties or their representatives or successors in interest, all depositions lawfully taken in the one action may be used in the other as if originally taken therefor.

**(B) Objections to admissibility.** Subject to the provisions of subdivision (D)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. Upon the motion of a party, or upon its own initiative, the court shall decide such objections before the deposition is read in evidence.

**(C) Effect of taking or using depositions.** A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition as described in subdivision (A)(2) of this rule. The use of subdivision (A)(3)(e) of this rule does not preclude any party from calling such a witness to appear personally at the trial nor does it preclude the taking and use of any deposition otherwise provided by law. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

**(D) Effect of errors and irregularities in depositions:**

**(1) As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection stating the grounds therefor, is promptly served upon the party giving the notice.

**(2) As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

**(3) As to taking of deposition.**

(a) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition.

(c) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within seven days after service of the last questions authorized.

**(4) As to completion and return of deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified,



sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rule 30 and Rule 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

[Effective: July 1, 1970; amended effective July 1, 1972.]

### **RULE 33. Interrogatories to Parties**

**(A) Availability; procedures for use.** Any party, without leave of court, may serve upon any other party up to forty written interrogatories to be answered by the party served. A party serving interrogatories shall provide the party served with both a printed and an electronic copy of the interrogatories. The electronic copy shall be provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of the interrogatories may seek leave of court to be relieved of this requirement. A party shall not propound more than forty interrogatories to any other party without leave of court. Upon motion, and for good cause shown, the court may extend the number of interrogatories that a party may serve upon another party. For purposes of this rule, any subpart propounded under an interrogatory shall be considered a separate interrogatory.

If the party served is a public or private corporation or a partnership or association, the organization shall choose one or more of its proper employees, officers, or agents to answer the interrogatories, and the employee, officer, or agent shall furnish information as is known or available to the organization.

Interrogatories, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon the party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The party upon whom the interrogatories have been served shall quote each interrogatory immediately preceding the corresponding answer or objection. When the number of interrogatories exceeds forty without leave of court, the party upon whom the interrogatories have been served need only answer or object to the first forty interrogatories. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a period designated by the party submitting the interrogatories, not less than twenty-eight days after the service of the interrogatories or within such shorter or longer time as the court may allow. The party submitting the interrogatories may move for an order under Civ. R. 37 with respect to any objection to or other failure to answer an interrogatory.

**(B) Scope and use at trial.** Interrogatories may relate to any matters that can be inquired into under Civ. R. 26(B), and the answers may be used to the extent permitted by the rules of evidence.

The party calling for such examination shall not thereby be concluded but may rebut it by evidence.

An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory involves an opinion, contention, or legal conclusion, but the court may order that such an interrogatory be answered at a later time, or after designated discovery has been completed, or at a pretrial conference.

**(C) Option to produce business records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of the business records, or from a compilation, abstract, or summary based on the business records, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect the records and to make copies of the records or compilations, abstracts, or summaries from the records.

[Effective: July 1, 1970; amended effective July 1, 1972; July 1, 1989; July 1, 1999; July 1, 2004.]

#### **Staff Note (July 1, 2004 Amendment)**

#### **Rule 33(A) Availability; procedures for use**

The 2004 amendment added two provisions governing the service of and response to interrogatories. New language was added to the fourth paragraph of division (A) that requires a responding party to quote the interrogatory immediately preceding the party's answer or objection. This provision ensures that the court and parties are not required to consult two documents or different parts of the same document in order to review the full text of an interrogatory and the corresponding answer or objection. The provision is similar to the second sentence of S.D. Ohio Civ. R. 26.1.

To facilitate the responding party's obligation to include the interrogatories and answers or objections in the same document, the first paragraph of division (A) was modified to require the party submitting interrogatories to provide the responding party with both a printed and an electronic copy of the interrogatories. The electronic version must be provided in a format that will enable the responding party to readily include the interrogatories and corresponding answers and objections in the same document without having to retype each interrogatory. A party who is unable to provide an electronic copy of interrogatories may seek leave of court to be relieved of the requirement.

Corresponding amendments were made to Civ. R. 36(A) relative to requests for admission.

### **Rule 33(D) Form of answers and objections to interrogatories.**

The 2004 amendment deleted language that required a party submitting interrogatories to allow sufficient space, not less than one inch, following each interrogatory in which the answering party could type an answer or objection. New language was added to division (A) governing the service of and response to interrogatories.

### **Staff Note (July 1, 1999 Amendment)**

#### **Rule 33(A) Availability, procedures for use**

The 1999 amendment was to clarify that any party may file up to forty interrogatories without leave of court. Several non-substantive grammatical changes also were made.

#### **Rule 33(B) Scope and use at trial**

The 1999 amendment made grammatical changes only; no substantive change was made.

#### **Rule 33(C) Option to produce business records**

The 1999 amendment made grammatical changes only; no substantive change was made.

**RULE 34. Production of Documents and Things for Inspection, Copying, Testing and Entry Upon Land for Inspection and Other Purposes**

**(A) Scope.** Subject to the scope of discovery provisions of Civ. R. 26(B), any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the requesting party's behalf (1) to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which intelligence can be perceived, with or without the use of detection devices) that are in the possession, custody, or control of the party upon whom the request is served; (2) to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; (3) to enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property.

**(B) Procedure.** Without leave of court, the request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within a period designated in the request that is not less than twenty-eight days after the service of the request or within a shorter or longer time as the court may allow. With respect to each item or category, the response shall state that inspection and related activities will be permitted as requested, unless it is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Civ. R. 37 with respect to any objection to or other failure to respond to the request or any part of the request, or any failure to permit inspection as requested.

A party who produces documents for inspection shall, at its option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request.

**(C) Persons not parties.** Subject to the scope of discovery provisions of Civ. R. 26(B) and 45(F), a person not a party to the action may be compelled to produce documents or tangible things or to submit to an inspection as provided in Civ. R. 45.

**(D) Prior to filing of action.**

(1) Subject to the scope of discovery provisions of Civ. R. 26(B) and 45(F), a person who claims to have a potential cause of action may file a petition to obtain discovery as provided in this rule. Prior to filing a petition for discovery, the person seeking discovery shall make reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought. The petition shall be captioned in the name of the person seeking discovery

and be filed in the court of common pleas in the county in which the person from whom the discovery is sought resides, the person's principal place of business is located, or the potential action may be filed. The petition shall include all of the following:

(a) A statement of the subject matter of the petitioner's potential cause of action and the petitioner's interest in the potential cause of action;

(b) A statement of the efforts made by the petitioner to obtain voluntarily the information from the person from whom the discovery is sought;

(c) A statement or description of the information sought to be discovered with reasonable particularity;

(d) The names and addresses, if known, of any person the petitioner expects will be an adverse party in the potential action;

(e) A request that the court issue an order authorizing the petitioner to obtain the discovery.

(2) The petition shall be served upon the person from whom discovery is sought and, if known, any person the petitioner expects will be an adverse party in the potential action, by one of the methods provided in these rules for service of summons.

(3) The court shall issue an order authorizing the petitioner to obtain the requested discovery if the court finds all of the following:

(a) The discovery is necessary to ascertain the identity of a potential adverse party;

(b) The petitioner is otherwise unable to bring the contemplated action;

(c) The petitioner made reasonable efforts to obtain voluntarily the information from the person from whom the discovery is sought.

[Effective: July 1, 1970; amended effective July 1, 1993; July 1, 1994; July 1, 2005.]

#### **Staff Note (July 1, 2005 Amendment)**

#### **Rule 34(C) Persons not parties**

Civ. R. 34(C) is amended to move a reference to notice of issuance of a subpoena directed to a nonparty to Civ. R. 45(A)(3). The amendments to Civ. R. 34 and 45 place all provisions requiring notice of issuance of most types of subpoena directed to nonparties appear in Civ. R. 45(A)(3) rather than being split between Civ. R. 34(C) and Civ. R. 45(A)(3). The prior arrangement made it easy to overlook the notice provisions of Civ. R. 34(C). See, e.g., *Neftzer v. Neftzer*, 140 Ohio App.3d 618, 621 (2000).



**RULE 35. Physical and Mental Examination of Persons**

**(A) Order for examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit himself to a physical or mental examination or to produce for such examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

**(B) Examiner's report.**

(1) If requested by the party against whom an order is made under Rule 35(A) or the person examined, the party causing the examination to be made shall deliver to such party or person a copy of the detailed written report submitted by the examiner to the party causing the examination to be made. The report shall set out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery, the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or, thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party to require delivery of a report on such terms as are just. If an examiner fails or refuses to make a report, the court on motion may order, at the expense of the party causing the examination, the taking of the deposition of the examiner if his testimony is to be offered at trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege he may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine him in respect of the same mental or physical condition.

(3) This subdivision, 35(B), applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

[Effective: July 1, 1970.]



## **RULE 36. Requests for Admission**

**(A) Availability; procedures for use.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Civ. R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A party serving a request for admission shall provide the party served with both a printed and an electronic copy of the request for admission. The electronic copy shall be provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of a request for admission may seek leave of court to be relieved of this requirement.

Each matter of which an admission is requested shall be separately set forth. The party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer, or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Civ. R. 37(C), deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Civ. R. 37(A)(4) apply to the award of expenses incurred in relation to the motion.

**(B) Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Civ. R. 16 governing modification of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice the party in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by the party for any other purpose nor may it be used against the party in any other proceeding.

**(C) Document containing request for admission.** If a party includes a request for admission in a document containing any other form of discovery, the party shall include a caption on the document that indicates the document contains a request for admission. A party is not required to respond to requests for admission that are not made in compliance with this division.

[Effective: July 1, 1970; amended effective July 1, 1972; July 1, 1976; July 1, 2004; July 1, 2005.]

#### **Staff Note (July 1, 2005 Amendment)**

#### **Rule 36(C) Document containing request for admission.**

Civ. R. 36 is amended to require that a party include a specific caption on any document that includes one or more requests for admission. The amended rule recognizes that, unlike Civ. R. 33 (written interrogatories) and Civ. R. 34 (requests for production), Civ. R. 36 imposes a virtually self-executing sanction, *i.e.*, admission by default, on a party that fails timely to respond. See generally *Cleveland Trust Co. v. Willis*, 20 Ohio St.3d 66 (1985).

The Rules Advisory Committee is aware that parties intermix requests for admission with Civ. R. 33 interrogatories and Civ. R. 34 requests for production. See, e.g., *Seecharan v. Macy*, 1999 WL 980579, No. 75130 (8th Dist. Ct. App., Cuyahoga, 10-28-99) (no abuse of discretion to deny motion to deem matters admitted; “the trial court refused to countenance the obscuring of requests for admissions in the midst of other discovery requests”). The Committee believes that although there often are good reasons for combining requests for admission with other discovery requests, the nature of some discovery documents can cause requests for admission to be overlooked and result in inadvertent admissions by default. The amendment is intended to minimize this risk by requiring the propounding party to include, in the caption of the document, a clear notice that the document contains requests for admission. A party is not required to respond to requests for admission that are not made in compliance with division (C).

## **Staff Note (July 1, 2004 Amendment)**

### **Rule 36(A) Availability; procedures for use.**

The 2004 amendment added two provisions governing the service of and response to requests for admissions. New language was added to the second paragraph of division (A) that requires a responding party to quote the request for admission immediately preceding the party's answer or objection. This provision ensures that the court and parties are not required to consult two documents or different parts of the same document in order to review the full text of a request for admission and the corresponding answer or objection. The provision is similar to the second sentence of S.D. Ohio Civ. R. 26.1.

To facilitate the responding party's obligation to include the request for admission and answer or objection in the same document, the first paragraph of division (A) was modified to require the party submitting requests for admissions to provide the responding party with both a printed and an electronic copy of the requests for admissions. The electronic version must be provided in a format that will enable the responding party to readily include the requests for admissions and corresponding answers and objections in the same document without having to retype each request for admission. A party who is unable to provide an electronic copy of requests for admission may seek leave of court to be relieved of the requirement.

Corresponding amendments were made to Civ. R. 33(A) relative to interrogatories.

### **Rule 36(C) Form of answers and objections to requests for admissions.**

The 2004 amendment deleted language that required a party submitting requests for admissions to allow sufficient space, not less than one inch, following each request for admission, in which the answering party could type an answer or objection. New language was added to division (A) governing the service of and response to requests for admissions.

**RULE 37. Failure to Make Discovery: Sanctions**

**(A) Motion for order compelling discovery.** Upon reasonable notice to other parties and all persons affected thereby, a party may move for an order compelling discovery as follows:

**(1) Appropriate court.** A motion for an order to a party or a deponent shall be made to the court in which the action is pending.

**(2) Motion.** If a deponent fails to answer a question propounded or submitted under Rule 30 or Rule 31, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer or an order compelling inspection in accordance with the request. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

**(3) Evasive or incomplete answer.** For purposes of this subdivision an evasive or incomplete answer is a failure to answer.

**(4) Award of expenses of motion.** If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent who opposed the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**(B) Failure to comply with order.**

**(1)** If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of that court.

(2) If any party or an officer, director, or managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule and Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) Where a party has failed to comply with an order under Rule 35(A) requiring him to produce another for examination, such orders as are listed in subsections (a), (b), and (c) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**(C) Expenses on failure to admit.** If a party, after being served with a request for admission under Rule 36, fails to admit the genuineness of any documents or the truth of any matter as requested, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Unless the request had been held objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made.

**(D) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(B)(5) or Rule 31(A) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a

request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion and notice may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (a), (b), and (c) of subdivision (B)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court expressly finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(C).

(E) Before filing a motion authorized by this rule, the party shall make a reasonable effort to resolve the matter through discussion with the attorney, unrepresented party, or person from whom discovery is sought. The motion shall be accompanied by a statement reciting the efforts made to resolve the matter in accordance with this section.

[Effective: July 1, 1970; amended effective July 1, 1994.]

## TITLE VI. TRIALS

### **RULE 38. Jury Trial of Right**

(A) **Right preserved.** The right to trial by jury shall be preserved to the parties inviolate.

(B) **Demand.** Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party. If the demand is indorsed upon a pleading the caption of the pleading shall state "jury demand endorsed hereon." In an action for appropriation of a right of way brought by a corporation pursuant to Article XIII, Section 5, of the Ohio Constitution, the jury shall be composed of twelve members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such action the jury shall be composed of the greater number not to exceed twelve. In all other civil actions the jury shall be composed of eight members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such actions the jury shall be composed of the greater number not to exceed eight.

(C) **Specification of issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within fourteen days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(D) **Waiver.** The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

[Effective: July 1, 1970; amended effective July 1, 1972; July 1, 1976.]

**RULE 39. Trial by Jury or by the Court**

**(A) By jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist. The failure of a party or his attorney of record either to answer or appear for trial constitutes a waiver of trial by jury by such party and authorizes submission of all issues to the court.

**(B) By the court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

**(C) Advisory jury and trial by consent.** In all actions not triable of right by a jury (1) the court upon motion or on its own initiative may try any issue with an advisory jury or (2) the court, with the consent of both parties, may order a trial of any issue with a jury, whose verdict has the same effect as if trial by jury had been a matter of right.

[Effective: July 1, 1970; amended effective July 1, 1971.]



**RULE 40. Pre-Recorded Testimony**

All of the testimony and such other evidence as may be appropriate may be presented at a trial by videotape, subject to the provisions of the Rules of Superintendence.

[Effective: July 1, 1972.]

**RULE 41. Dismissal of Actions**

**(A) Voluntary dismissal: effect thereof.**

**(1) By plaintiff; by stipulation.** Subject to the provisions of Civ. R. 23(E), Civ. R. 23.1, and Civ. R. 66, a plaintiff, without order of court, may dismiss all claims asserted by that plaintiff against a defendant by doing either of the following:

(a) filing a notice of dismissal at any time before the commencement of trial unless a counterclaim which cannot remain pending for independent adjudication by the court has been served by that defendant;

(b) filing a stipulation of dismissal signed by all parties who have appeared in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits of any claim that the plaintiff has once dismissed in any court.

**(2) By order of court.** Except as provided in division (A)(1) of this rule, a claim shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon that defendant of the plaintiff's motion to dismiss, a claim shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under division (A)(2) of this rule is without prejudice.

**(B) Involuntary dismissal: effect thereof.**

**(1) Failure to prosecute.** Where the plaintiff fails to prosecute, or comply with these rules or any court order, the court upon motion of a defendant or on its own motion may, after notice to the plaintiff's counsel, dismiss an action or claim.

**(2) Dismissal; non-jury action.** After the plaintiff, in an action tried by the court without a jury, has completed the presentation of the plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Civ. R. 52 if requested to do so by any party.

**(3) Adjudication on the merits; exception.** A dismissal under division (B) of this rule and any dismissal not provided for in this rule, except as provided in division (B)(4) of this rule, operates as an adjudication upon the merits unless the court, in its order for dismissal, otherwise specifies.

**(4) Failure other than on the merits.** A dismissal for either of the following reasons shall operate as a failure otherwise than on the merits:

- (a) lack of jurisdiction over the person or the subject matter;
- (b) failure to join a party under Civ. R. 19 or Civ. R. 19.1.

**(C) Dismissal of counterclaim, cross-claim, or third-party claim.** The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to division (A)(1) of this rule shall be made before the commencement of trial.

**(D) Costs of previously dismissed action.** If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972; July 1, 2001.]

### **Staff Note (July 1, 2001 Amendment)**

#### **Civil Rule 41 Dismissal of Actions**

This rule was amended (1) to reflect more precisely its interpretation by the Supreme Court in *Denham v. City of New Carlisle*, 86 Ohio St. 3d 594 (1999); (2) to conform Civ. R. 41(D) with Civ. R. 41(A) as amended; and (3) to reflect that Civ. R. 23.1 provides that a shareholder derivative action “shall not be dismissed or compromised without the approval of the court.”

In divisions (B) and (C), masculine references were changed to gender-neutral language, the style used for rule references was changed, and other grammatical changes were made. No substantive amendment to divisions (B) and (C) was intended.

## **RULE 42. Consolidation; Separate Trials**

### **(A) Consolidation.**

(1) *Generally.* When actions involving a common question of law or fact are pending before a court, that court after a hearing may order a joint hearing or trial of any or all the matters in issue in the actions; it may order some or all of the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

(2) *Asbestos, silicosis, or mixed dust disease actions.* In tort actions involving an asbestos claim, a silicosis claim, or a mixed dust disease claim, the court may consolidate pending actions for case management purposes. For purposes of trial, the court may consolidate pending actions only with the consent of all parties. Absent the consent of all parties, the court may consolidate, for purposes of trial, only those pending actions relating to the same exposed person and members of the exposed person's household.

(3) As used in division (A)(2) of this rule:

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

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

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

(d) 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.

**(B) Separate trials.** The court, after a hearing, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues, always preserving inviolate the right to trial by jury.

[Effective: July 1, 1970; amended effective July 1, 2005.]

### **Staff Note (July 1, 2005 Amendment)**

Civ. R. 42 is amended in response to requests from the General Assembly contained in Section 3 of Am. Sub. H.B. 342 of the 125<sup>th</sup> General Assembly, effective September 1, 2004, and Section 4 of Am. Sub. H.B. 292 of the 125<sup>th</sup> General Assembly, effective September 2, 2004. These acts contain provisions governing tort claims that

allege exposure and injury by persons exposed to asbestos, silica, or mixed dust. Each act includes a request that the Supreme Court amend the Rules of Civil Procedure “to specify procedures for venue and consolidation” of asbestosis, silicosis, and mixed dust disease claims.

### **Rule 42(A) Consolidation**

Civ. R. 42(A)(2) provides that a trial court must have the consent of the parties before consolidating actions for trial that involve an asbestos claim, a silicosis claim, or a mixed dust disease claim. Absent the consent of the parties, the court may consolidate for trial only those claims that involve the same exposed person and members of the exposed person’s household. The rule expressly permits the consolidation of pending actions for case management purposes. Division (A)(3) incorporates the statutory definitions of “asbestos claim,” “silicosis claim,” “mixed dust disease claim,” and “tort action” for purposes of Civ. R. 42(A)(2).

**RULE 43. [RESERVED]**

**RULE 44. Proof of Official Record**

**(A) Authentication.**

**(1) Domestic.** An official record, or an entry therein, kept within a state or within the United States or within a territory or other jurisdiction of the United States, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record in which the record is kept or may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office.

**(2) Foreign.** A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (a) of the attesting person or (b) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (a) admit an attested copy without final certification or (b) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

**(B) Lack of record.** A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (A)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (A)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

**(C) Other proof.** This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

[Effective: July 1, 1970.]

**RULE 44.1. Judicial Notice of Certain Law; Determination of Foreign Law**

**(A) Judicial notice of certain law.**

(1) Judicial notice shall be taken of the rules of the supreme court of this state and of the decisional, constitutional, and public statutory law of this state.

(2) A party who intends to rely on a municipal ordinance, a local rule of court, or an administrative regulation within this state shall give notice in his pleading or other reasonable written notice. The court in taking judicial notice of a municipal ordinance, a local rule of court, or an administrative regulation within this state may inform itself in such manner as it deems proper, and may call upon counsel to aid in obtaining such information. The court's determination shall be treated as a ruling on a question of law and shall be made by the court and not the jury. A court may, however, take judicial notice of its own rules or of a municipal ordinance within the territorial jurisdiction of the court without advance notice in the pleading of a party or other written notice.

(3) A party who intends to rely on the decisional, constitutional, public statutory law, rules of court, municipal ordinances, or administrative regulations of any other state, territory, and jurisdiction of the United States shall give notice in his pleading or other reasonable notice. The court in taking judicial notice of the decisional, constitutional, public statutory law, rules of court, municipal ordinances, or administrative regulations of any other state, territory, and jurisdiction of the United States may inform itself in such manner as it deems proper, and may call upon counsel to aid in obtaining such information. The court's determination shall be treated as a ruling on a question of law, and shall be made by the court and not the jury.

**(B) Determination of foreign law.** A party who intends to rely on the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court in determining the law of a foreign country may consider any relevant material or source, including testimony, whether or not submitted by a party. The court's determination shall be treated as a ruling on a question of law and shall be made by the court and not the jury.

[Effective: July 1, 1970.]



**RULE 45. Subpoena**

**(A) Form; Issuance; Notice.**

(1) Every subpoena shall do all of the following:

(a) state the name of the court from which it is issued, the title of the action, and the case number;

(b) command each person to whom it is directed, at a time and place specified in the subpoena, to:

(i) attend and give testimony at a trial, hearing, or deposition;

(ii) produce documents or tangible things at a trial, hearing, or deposition;

(iii) produce and permit inspection and copying of any designated documents that are in the possession, custody, or control of the person;

(iv) produce and permit inspection and copying, testing, or sampling of any tangible things that are in the possession, custody, or control of the person; or

(v) permit entry upon designated land or other property that is in the possession or control of the person for the purposes described in Civ. R. 34(A)(3).

(c) set forth the text of divisions (C) and (D) of this rule.

A command to produce and permit inspection may be joined with a command to attend and give testimony, or may be issued separately.

A subpoena may not be used to obtain the attendance of a party or the production of documents by a party in discovery. Rather, a party's attendance at a deposition may be obtained only by notice under Civ. R. 30, and documents may be obtained from a party in discovery only pursuant to Civ. R. 34.

(2) The clerk shall issue a subpoena, signed, but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney who has filed an appearance on behalf of a party in an action may also sign and issue a subpoena on behalf of the court in which the action is pending.

(3) A party on whose behalf a subpoena is issued under division (A)(1)(b)(ii), (iii), (iv), or (v) of this rule shall serve prompt written notice, including a copy of the subpoena, on all other parties as provided in Civ. R. 5. If the issuing attorney modifies a subpoena issued under division (A)(1)(b)(ii), (iii), (iv), or (v) of this rule in any way, the issuing attorney shall give prompt written notice of the modification, including a copy of the subpoena as modified, to all other parties.

**(B) Service.** A subpoena may be served by a sheriff, bailiff, coroner, clerk of court, constable, or a deputy of any, by an attorney at law, or by any other person designated by order of court who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to the person, by reading it to him or her in person, or by leaving it at the person's usual place of residence, and by tendering to the person upon demand the fees for one day's attendance and the mileage allowed by law. The person serving the subpoena shall file a return of the subpoena with the clerk. If the witness being subpoenaed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand. The return may be forwarded through the postal service or otherwise.

**(C) Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena.

(2)(a) A person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule need not appear in person at the place of production or inspection unless commanded to attend and give testimony at a deposition, hearing, or trial.

(b) Subject to division (D)(2) of this rule, a person commanded to produce under divisions (A)(1)(b)(ii), (iii), (iv), or (v) of this rule may, within fourteen days after service of the subpoena or before the time specified for compliance if such time is less than fourteen days after service, serve upon the party or attorney designated in the subpoena written objections to production. If objection is made, the party serving the subpoena shall not be entitled to production except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena, upon notice to the person commanded to produce, may move at any time for an order to compel the production. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the production commanded.

(3) On timely motion, the court from which the subpoena was issued shall quash or modify the subpoena, or order appearance or production only under specified conditions, if the subpoena does any of the following:

(a) Fails to allow reasonable time to comply;

(b) Requires disclosure of privileged or otherwise protected matter and no exception or waiver applies;

(c) Requires disclosure of a fact known or opinion held by an expert not retained or specially employed by any party in anticipation of litigation or preparation for trial as described by Civ. R. 26(B)(4), if the fact or opinion does not describe specific events or occurrences in dispute and results from study by that expert that was not made at the request of any party;

(d) Subjects a person to undue burden.

(4) Before filing a motion pursuant to division (C)(3)(d) of this rule, a person resisting discovery under this rule shall attempt to resolve any claim of undue burden through discussions with the issuing attorney. A motion filed pursuant to division (C)(3)(d) of this rule shall be supported by an affidavit of the subpoenaed person or a certificate of that person's attorney of the efforts made to resolve any claim of undue burden.

(5) If a motion is made under division (C)(3)(c) or (C)(3)(d) of this rule, the court shall quash or modify the subpoena unless the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated.

**(D) Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials under Civ. R. 26(B)(3) or (4), 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.

**(E) Sanctions.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. A subpoenaed person or that person's attorney who frivolously resists discovery under this rule may be required by the court to pay the reasonable expenses, including reasonable attorney's fees, of the party seeking the discovery. The court from which a subpoena was issued may impose upon a party or attorney in breach of the duty imposed by division (C)(1) of this rule an appropriate sanction, which may include, but is not limited to, lost earnings and reasonable attorney's fees.

**(F) Privileges.** Nothing in this rule shall be construed to authorize a party to obtain information protected by any privilege recognized by law, or to authorize any person to disclose such information.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972; July 1, 1993; July 1, 1994; July 1, 2005.]

### **Staff Note (July 1, 2005 Amendment)**

#### **Rule 45(A) Form; Issuance; Notice**

Civ. R. 45(A)(3) is amended so that provisions requiring notice of issuance of most types of subpoena directed to nonparties appear in Civ. R. 45(A)(3) rather than being split between Civ. R. 45(A)(3) and Civ. R. 34(C). Civ. R. 34(C) is concurrently amended to eliminate any reference to notice of issuance of a subpoena directed to a nonparty. The prior arrangement made it easy to overlook the notice provisions of Civ. R. 34(C). See, e.g., *Neftzer v. Neftzer*, 140 Ohio App.3d 618, 621 (2000).

The amendment adds a new first sentence to Civ. R. 45(A)(3) to require service as provided in Civ. R. 5 on all other parties of prompt written notice of any subpoena issued under Civ. R. 45(A)(1)(b)(ii), (iii), (iv), or (v). Unlike former Civ. R. 34(C), amended Civ. R. 45(a)(3) requires that notice include a copy of the subpoena.

Notice of the taking of a deposition upon oral examination, whether of a party or nonparty, is required by Civ. R. 30(B)(1) and service of questions for a deposition upon written questions, whether of a party or nonparty, is required by Civ. R. 31(B). See, e.g., *Standring v. Xerox Corp.*, 1992 WL 90726 at \*3-4, No. 60426 (8th Dist. Ct. App., Cuyahoga, 4-30-92). Subpoenas issued under Civ. R. 45(A)(1)(b)(i) for trial or hearing are excluded from the notice requirement of amended Civ. R. 45(A)(3) to permit a trial court to decide, pursuant to local rule, customary practice, or otherwise, whether to require prior disclosure by parties of the identity of witnesses to be called during a trial or hearing.

The notice requirement of amended Civ. R. 45(A)(3), like its counterpart in Rule 45(b)(1), Federal Rules of Civil Procedure, is intended “to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things.” Advisory Committee’s Note to 1991 Amendments to the Federal Rules of Civil Procedure; see, e.g., *Spencer v. Steinman*, 179 F.R.D. 484, 488 (E.D. Pa. 1998).

The title of Civ. R. 45(A) is amended to call attention to the fact that it deals with notice of issuance of subpoenas as well as with the form and issuance of subpoenas.

**RULE 46. Exceptions Unnecessary**

An exception at any stage or step of the case or matter is unnecessary to lay a foundation for review whenever a matter has been called to the attention of the court by objection, motion, or otherwise and the court has ruled thereon.

[Effective: July 1, 1970; amended effective July 1, 1975.]

## **RULE 47. Jurors**

**(A) Brief introduction of case.** To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case. The brief introduction may include a general description of the legal claims and defenses of the parties.

**(B) Examination of prospective jurors.** Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion to allow the examination of all prospective jurors in the array prior to any challenges for cause or peremptory challenges.

**(C) Challenges to prospective jurors.** In addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."

Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the plaintiff. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties or sides, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another prospective juror shall be called who shall take the place of the prospective juror excused and be sworn and examined as other prospective jurors. The other party, if the party has peremptory challenges remaining, shall be entitled to challenge any prospective juror then seated on the panel.

Nothing in this rule shall limit the court's discretion to allow challenges to be made outside the hearing of prospective jurors.

**(D) Alternate jurors.** The court may direct that no more than four jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, and two peremptory challenges if three or four alternate

jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed shall not be used against an alternate juror.

**(E) Taking of notes by jurors.** The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

**(F) Juror questions to witnesses.** The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

- (1) Require jurors to propose any questions to the court in writing;
- (2) Retain a copy of each proposed question for the record;
- (3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;
- (4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;
- (5) Read the question, either as proposed or rephrased, to the witness;
- (6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;
- (7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972; July 1, 1975; July 1, 2005; July 1, 2006.]

### **Staff Note (July 1, 2006 Amendment)**

Civ. R. 47 is amended to recognize the existence of alternative methods of jury selection and expressly permit the use of these methods in Ohio courts. The amendments are consistent with recommendations contained in the February 2004 *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service*, at pp. 10-11.

The Task Force identified two primary methods of jury selection and encouraged the use of a selection process that is efficient and enhances juror satisfaction. The Rules Advisory Committee learned that some judges and lawyers believe that the pre-2006 version of Civ. R. 47 precluded the use of a selection method, commonly referred to as the "struck" method, whereby prospective jurors are examined as a group and then the trial

judge and attorneys meet privately to challenge jurors for cause and exercise peremptory challenges. Two amendments to Civ. R. 47 are added to expressly permit alternative selection methods.

#### **Rule 47(B) Examination of prospective jurors**

The last sentence of Civ. R. 47(B) is added to expressly permit the examination of prospective jurors in an array.

#### **Rule 47(C) Challenges to prospective jury**

The last sentence of Civ. R. 47(C) is added to expressly afford the trial court the discretion to allow the exercise of challenges for cause and peremptory challenges outside the hearing of the jury.

### **Staff Note (July 1, 2005 Amendment)**

Civ. R. 47 is amended to reflect four recommendations of the Task Force on Jury Service. See *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service* (February 2004).

#### **Rule 47(A) Preliminary statement of case**

A new Civ. R. 47(A) is added to permit the trial judge, prior to jury selection, to provide a brief introduction to the case to persons called as prospective jurors. See *Report and Recommendations, supra*, at 1 (recommending “a brief statement of the case by the court or counsel prior to the beginning of voir dire” and inclusion of “the legal claims and defenses of the parties’ in the list of instructions the court may give at the commencement of trial”). The Rules Advisory Committee shares the views of the Task Force that the preliminary statement may “help the jury selection process run smoothly” and “increase the satisfaction of jurors.” *Report and Recommendations, supra*, at 9. The preliminary statement is intended to help prospective jurors to understand why certain questions are asked during voir dire, recognize personal bias, and give candid responses to questions during voir dire.

The Committee recognizes that there may be instances in which the brief introduction is unnecessary; thus the rule vests discretion with the trial judge as to whether an introduction will be provided in a particular case. The rule also requires the trial judge to consult with the parties as to whether to provide the introduction and the content of the introduction. The consultation is required in recognition that the parties can aid the trial judge in determining whether a statement is necessary, developing the content of the statement, and ascertaining the claims and defenses the parties will put forth during trial.

Former divisions (A), (B), and (C) of Civ. R. 47 are relettered as divisions (B), (C), and (D), respectively.



## **Rule 47(C) Challenges to prospective jurors**

New Civ. R. 47(C) (formerly Civ. R. 47(B)) is amended to make two related principles regarding peremptory challenges more clear. One principle is that failure of a party to exercise a given peremptory challenge waives that challenge but does not waive any other peremptory challenges to which the party may otherwise be entitled. As the 1972 Staff Notes to Civ. R. 47 explained:

Thus, assume that plaintiff waives [plaintiff's] first opportunity to exercise a peremptory challenge. Defendant exercises [defendant's] first peremptory challenge. If plaintiff, in turn, now exercises a peremptory challenge, the challenge will be [plaintiff's] second challenge because [plaintiff] has waived [plaintiff's] first challenge.

The other principle is that consecutive passes by all parties or sides waives all remaining peremptory challenges. As the 1972 Staff Notes likewise pointed out, "a double pass' ends the procedure even though peremptory challenges might remain." The Task Force concluded that, contrary to the language and intent of former Civ. R. 47(B), "often courts and attorneys will assume that once a peremptory challenge is waived all remaining peremptory challenges are waived." *Report and Recommendations, supra*, at 22. The amended language is designed to deter the incorrect assumption perceived by the Task Force.

## Rule 47(E) Taking of notes by jurors

A new Civ. R. 47(E) is added to explicitly authorize trial courts, after providing appropriate cautionary instructions, to permit jurors who wish to do so to take notes during trial and to take notes into deliberations. The Rules Advisory Committee agrees with the Task Force that allowing jurors to take notes potentially promotes the fact-finding process and aids juror comprehension and recollection.

The reference in sentence one of new division (E) to “appropriate cautionary instructions” reflects the apparent requirements of *State v. Waddell*, 75 Ohio St.3d 163 (1996), which held that “[a] trial court has the discretion to permit or prohibit note-taking by jurors,” *Waddell*, 75 Ohio St.3d at 163 (syl. 1), and explained that “[i]f a trial court determines that a particular case warrants note-taking, the court can, *sua sponte*, furnish jurors with materials for taking notes and instruct the jurors that they are permitted to take notes during the trial.” *Id.* at 170. The *Waddell* opinion appears to condition the permitting of note-taking on the giving of instructions to jurors that (1) “they are not required to take notes;” *id.* (syl. 2), (2) “their notes are to be confidential;” (3) “note-taking should not divert their attention from hearing the evidence in the case;” (4) “a juror who has not taken notes should not be influenced by those jurors who decided to take notes;” and (5) “notes taken by jurors are to be used solely as memory aids and should not be allowed to take precedence over their independent memory of facts.” *Id.* (syl. 3); see also *State v. Blackburn*, 1996 WL 570869 at \*3 and n.1, No. 93 CA 10 (5th Dist. Ct. App., Fairfield, 9-26-96) (finding no plain error in the trial court’s decision to permit juror note-taking despite lack of instruction on items (3) through (5) but noting that “in the future, it would be better practice for trial courts to instruct and caution the jury as suggested by the Ohio Supreme Court in *Waddell*”); *cf.* 1 Ohio Jury Instructions 2.52, § 1 (“Note-taking Prohibited”) and § 2 (“Note-taking Permitted”) (2002). The Task Force noted that many of the judges who participated in the pilot project that it sponsored “instructed jurors to make notes only when there was a break in the testimony (e.g., while judge and attorneys are busy at sidebar).” *Report and Recommendations, supra*, at 14.

Sentence two of new division (E) explicitly authorizes a practice perhaps only implicitly approved in *Waddell*, i.e., the carrying into deliberations by a juror of any notes taken pursuant to permission of the court. See Markus, *Trial Handbook for Ohio Lawyers* § 37:6 (2003) (citing *Waddell* for the proposition that “[w]hen the court permits the jurors to take notes during the trial, it may allow the jurors to retain those notes during their deliberations”).

The requirement of sentence three of new division (E) that the court require that all juror notes be collected and destroyed promptly after verdict reflects in part the *Waddell* prescription that “notes are to be confidential.” See also *State v. Williams*, 80 Ohio App.3d 648, 654 (1992) (cited with apparent approval by the Court in *Waddell* and rejecting the argument that notes taken by jurors should have been preserved for review rather than destroyed).

## **Rule 47(F) Juror questions to witnesses**

A new Civ. R. 47(F) is added to set forth a procedure to be followed if the trial court permits jurors to propose questions to be asked of witnesses during trial. See *Report and Recommendations, supra*, at 15-16 and *State v. Fisher* 99 Ohio St.3d 127, 2003-Ohio-2761. The rule incorporates the holding of the Supreme Court in *State v. Fisher, supra*, by stating that the practice of allowing jurors to propose questions to witnesses is discretionary with the trial judge, and codifies procedures that have been sanctioned by the Supreme Court. See *State v. Fisher* 99 Ohio St.3d at 135. In addition to the procedures outlined in *Fisher*, the rule provides that the court must retain a copy of all written questions proposed by the jury for the record and that the court may rephrase any question proposed by the jury before posing it to a witness. These added procedures ensure the existence of a proper record, should an issue regarding juror questions be raised on appeal, and recognize that a question proposed by a juror may need to be rephrased for clarity, to address an objection from a party, or for some other reason appropriate under the circumstances.

The amendments to Civ. R. 47 also include nonsubstantive changes that include gender-neutral language and uniform usage of the term “prospective juror.”

**RULE 48. Juries: Majority Verdict; Stipulation of Number of Jurors**

In all civil actions, a jury shall render a verdict upon the concurrence of three-fourths or more of their number. The verdict shall be in writing and signed by each of the jurors concurring therein. All jurors shall then return to court where the judge shall cause the verdict to be read and inquiry made to determine if the verdict is that of three-fourths or more of the jurors. Upon request of either party, the jury shall be polled by asking each juror if the verdict is that of the juror; if more than one-fourth of the jurors answer in the negative, or if the verdict in substance is defective, the jurors must be sent out again for further deliberation. If three-fourths or more of the jurors answer affirmatively, the verdict is complete and the jury shall be discharged from the case. If the verdict is defective in form only, with the assent of the jurors and before their discharge, the court may correct it.

The parties may stipulate that the jury shall consist of any number less than the maximum number provided by Rule 38(B). For the purpose of rendering a verdict, whenever three-fourths of the jury does not consist of an integral number, the next higher number shall be construed to represent three-fourths of the jury. For juries with less than four members, the verdict must be unanimous.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972.]

**RULE 49. Verdicts; Interrogatories**

**(A) General verdict.** A general verdict, by which the jury finds generally in favor of the prevailing party, shall be used.

**(B) General verdict accompanied by answer to interrogatories.** The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial.

**(C) Special verdicts abolished.** Special verdicts shall not be used.

[Effective: July 1, 1970; amended effective July 1, 1980.]

**RULE 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict**

**(A) Motion for directed verdict.**

**(1) When made.** A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence.

**(2) When not granted.** A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

**(3) Grounds.** A motion for a directed verdict shall state the specific grounds therefor.

**(4) When granted on the evidence.** When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

**(5) Jury assent unnecessary.** The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

**(B) Motion for judgment notwithstanding the verdict.** Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

**(C) Conditional rulings on motion for judgment notwithstanding verdict.**

**(1)** If the motion for judgment notwithstanding the verdict, provided for in subdivision (B) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for a new trial is thus conditionally granted, the order thereon does not

affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than fourteen days after entry of the judgment notwithstanding the verdict.

**(D) Denial of motion for judgment notwithstanding verdict.** If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

**(E) Statement of basis of decision.** When in a jury trial a court directs a verdict or grants judgment without or contrary to the verdict of the jury, the court shall state the basis for its decision in writing prior to or simultaneous with the entry of judgment. Such statement may be dictated into the record or included in the entry of judgment.

[Effective: July 1, 1970.]

## **RULE 51. Instructions to the Jury; Objection**

**(A) Instructions; error; record.** At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to all other parties at the time of making the requests. The court shall inform counsel of its proposed action on the requests prior to counsel's arguments to the jury and shall give the jury complete instructions after the arguments are completed. The court also may give some or all of its instructions to the jury prior to counsel's arguments. The court shall reduce its final instructions to writing or make an audio, electronic, or other recording of those instructions, provide at least one written copy or recording of those instructions to the jury for use during deliberations, and preserve those instructions for the record.

On appeal, a party may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

**(B) Cautionary instructions.** At the commencement and during the course of the trial, the court may give the jury cautionary and other instructions of law relating to trial procedure, credibility and weight of the evidence, and the duty and function of the jury and may acquaint the jury generally with the nature of the case.

[Effective: July 1, 1970; amended effective July 1, 1972; July 1, 1975; July 1, 1992; July 1, 2005.]

### **Staff Notes (July 1, 2005 Amendments)**

#### **Rule 51(A) Instructions; error; record**

Civ. R. 51 is amended to reflect a recommendation of the Task Force on Jury Service. See *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service* at 1 and 12-13 (February 2004). The amendment mandates practices that trial courts have frequently chosen to adopt in particular civil actions: (1) reducing final jury instructions to writing or making an audio, electronic, or other recording of those instructions; (2) providing at least one written copy or recording of those instructions to the jury for use during deliberations; and (3) preserving those instructions for the record.

R.C. 2315.01(G) provides that (1) "[a]ny charge shall be reduced to writing by the court if either party, before the argument to the jury is commenced, requests it;" (2) "[a]ll written charges and instructions shall be taken by the jurors in their retirement;" and (3) "[a]ll written charges and instructions ... shall remain on file with the papers of the case." The Modern Courts Amendment, art. IV, § 5(B), of the Ohio Constitution, provides that "[a]ll laws in conflict with [valid Civil Rules] shall be of no further force or effect after such rules



have taken effect.” Some aspects of R.C. 2315.01 appear to have survived promulgation of the Civil Rules. *Phung v. Waste Mgt., Inc.*, 71 Ohio St.3d 408, 410 (1994) (R.C. 2315.01(C)); *State v. Jenkins*, 15 Ohio St.3d 164, 214 and n.43 (1984) (R.C. 2315.01(C), 2315.01(F)). However, to the extent that any of the provisions of R.C. 2315.01(G) quoted above are interpreted as conflicting with amended Civ. R. 51, the rule presumably supersedes the code section by virtue of art. IV, § 5(B). See generally 1 Klein and Darling, *Baldwin’s Ohio Practice, Civil Practice* § 1:96 (2d ed. 2004) and Harper and Solimine, 4 *Anderson’s Ohio Civil Practice* § 147.01 (1996); cf. *Kinzer v. Wilson*, 1986 WL 8182 at \*2, No. 1247 (4th Dist. Ct. App., Ross, 7-22-86) (“appellants admit that R.C. 2315.01(G) has been superseded by Civ. R. 51;” “The staff note of 7-1-72 under Civ. R. 51 clearly states that Civ. R. 51(A) supersedes R.C. 2315.01(G)”); *Cole v. Bollinger*, 1983 WL 6936 at \*3-4, No C.A. WD-83-26 (6th Dist. Ct. App., Wood, 9-2-83).

The practices mandated by the amendment are intended to increase juror comprehension of jury instructions, reduce juror questions of the court during deliberations, and help juries structure their deliberations. The Task Force recommended that “each individual juror be given a copy of written instructions but, in the event of budgetary constraints, one copy of written instructions be provided to the jury to use during the deliberation process.” *Report and Recommendations, supra*, at 13.

**RULE 52. Findings by the Court**

When questions of fact are tried by the court without a jury, judgment may be general for the prevailing party unless one of the parties in writing requests otherwise before the entry of judgment pursuant to Civ. R. 58, or not later than seven days after the party filing the request has been given notice of the court's announcement of its decision, whichever is later, in which case, the court shall state in writing the conclusions of fact found separately from the conclusions of law.

When a request for findings of fact and conclusions of law is made, the court, in its discretion, may require any or all of the parties to submit proposed findings of fact and conclusions of law; however, only those findings of fact and conclusions of law made by the court shall form part of the record.

Findings of fact and conclusions of law required by this rule and by Rule 41(B)(2) are unnecessary upon all other motions including those pursuant to Rule 12, Rule 55 and Rule 56.

An opinion or memorandum of decision filed in the action prior to judgment entry and containing findings of fact and conclusions of law stated separately shall be sufficient to satisfy the requirements of this rule and Rule 41(B)(2).

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1989.]

**RULE 53. Magistrates.**

(A) **Appointment.** A court of record may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio.

(B) **Compensation.** The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs under Civ. R. 54(D).

(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) *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.

**(D) Proceedings in Matters Referred to Magistrates.**

(1) *Reference by court of record.*

(a) *Purpose and method.* A court of record may, for one or more of the purposes described in Civ. R. 53(C)(1), refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

(b) *Limitation.* A court of record may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) *Magistrate's order; motion to set aside magistrate's order.*

(a) *Magistrate's order.*

(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's decision; objections to magistrate's decision.*

(a) *Magistrate's decision.*

(i) *When required.* Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Civ. R. 53(D)(1).

(ii) *Findings of fact and conclusions of law.* Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing, and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

(b) *Objections to magistrate's decision.*

(i) *Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ. R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) *Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b).

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by Civ. R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Civ. R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) *Interim order.* The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. An interim order shall comply with Civ. R. 54(A), be journalized pursuant to Civ. R. 58(A), and be served pursuant to Civ. R. 58(B).

(5) *Extension of time.* For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) *Contempt in the presence of a magistrate.*

(a) *Contempt order.* Contempt sanctions under Civ. R. 53(C)(2)(f) may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) *Filing and provision of copies of contempt order.* A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) *Review of contempt order by court; bail.* The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

[Effective: July 1, 1970; amended effective July 1, 1975; July 1, 1985; July 1, 1992; July 1, 1993; July 1, 1995; July 1, 1996; July 1, 1998; July 1, 2003; July 1, 2006.]

## Staff Note (July 1, 2006 Amendment)

Civ. R. 53 has been reorganized in an effort to make it more helpful to bench and bar and reflective of developments since the rule was last substantially revised effective July 1, 1995. The relatively-few significant changes included in the reorganization are noted below.

### Rule 53(A) Appointment

Civ. R. 53(A) is taken verbatim from sentence one of former Civ. R. 53(A). Sup. R. 19 requires that all municipal courts having more than two judges appoint one or more magistrates to hear specified matters. See also Crim. R. 19 and Traf. R. 14.

### Rule 53(B) Compensation

Civ. R. 53(B) refers to Civ. R. 54(D) so as to more clearly harmonize Civ. R. 53 with statutory provisions that authorize courts to collect funds from litigants generally and to use the collected funds for purposes that include employment of magistrates. See, e.g., R.C. 1901.26(B)(1), 1907.24(B)(1), 2303.201(E)(1), and 2501.16(B).

### Rule 53(C) Authority

Civ. R. 53(C) is drawn largely from former Civ. R. 53(C)(1) and (2) and reflects the admonition of the Supreme Court that “a [magistrate’s] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them.” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 615 N.E.2d 617 (emphases added). Civ. R. 53(C)(1)(d) is added to parallel Crim. R. 19(C)(1)(g) and recognize that magistrates have authority to conduct temporary protection order proceedings in accordance with law. Consistent with the admonition in *Hartt*, however, any temporary protection order issued as a result of such proceedings must be signed by a judge.

### Rule 53(D) Proceedings in Matters Referred to Magistrates

Civ. R. 53(D)(1) through (4) treat each of the steps that potentially occur if a magistrate participates: (1) reference to a magistrate; (2) magistrate’s orders and motions to set aside magistrate’s orders; (3) magistrate’s decisions and objections to magistrate’s decisions; and (4) action of the court on magistrate’s decisions and on any objections to magistrate’s decisions and entry of judgment or interim order by the court. Civ. R. 53(D)(5) through (8) deal with good cause extensions of time, disqualification of a magistrate, recording of proceedings before a magistrate, and contempt in the presence of a magistrate.



### Reference by court of record

Civ. R. 53(D)(1), unlike former Civ. R. 53(C)(1)(b), specifically authorizes reference of types of matters by rule as well as by a specific or general order of reference. In so doing, it recognizes existing practice in some courts. See, e.g., Loc. R. 99.02, Franklin Cty. Ct. of Common Pleas; Loc. R. 23(B), Hamilton Cty. Ct. of Common Pleas; *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 412-13, 2002-Ohio-4907 at ¶¶ 20-24, 775 N.E.2d 522; *Davis v. Reed* (Aug. 31, 2000), 8<sup>th</sup> Dist. App. No. 76712, 2000 WL 1231462 at \*2 (citing *White v. White* (1977), 50 Ohio App.2d 263, 266-268, 362 N.E.2d 1013), and *Partridge v. Partridge* (Aug. 27, 1999), 2<sup>nd</sup> Dist. App. No. 98 CA 38, 1999 WL 945046 at \*2, (treating a local rule of the Greene Cty. Ct. of Common Pleas, Dom. Rel. Div., as a standing order of reference).

### Magistrate's order; motion to set aside magistrate's order

Civ. R. 53(D)(2)(a)(i) generally authorizes a magistrate to enter orders without judicial approval if necessary to regulate the proceedings and, adapting language from Crim. R. 19(B)(5)(a), if “not dispositive of a claim or defense of a party.” The new language removes the arguably limiting title of former Civ. R. 53(C)(3)(a) [“Pretrial orders”] and is intended to more accurately reflect proper and existing practice. This language is not intended to narrow the power of a magistrate to enter pretrial orders without judicial approval on matters related to (1) pretrial management under Civ. R. 16; (2) discovery conducted pursuant to Civ. R. 26-37; (3) temporary orders issued pursuant to Civ. R. 75(N); (4) temporary restraining order governing marital property under Civ. R. 75(I) (2); or (5) any other orders necessary to the regulation of proceedings before a magistrate. All temporary protection orders, however, including orders issued to avoid bodily harm pursuant to Civ. R. 75(I)(2), must be signed by a judge and comply fully with the procedures set forth in R.C. 3113.31 and related sections. Civ. R. 53(D)(2)(b) replaces language in former Civ. R. 53(C)(3)(b), which purported to authorize “[a]ny person” to “appeal to the court” from any order of a magistrate “by filing a motion to set the order aside.” The new language refers to the appropriate challenge to a magistrate’s order as solely a “motion to set aside” the order. Civ. R. 53(D)(2)(b) likewise limits the authorization to file a motion to “any party,” though an occasional nonparty may be entitled to file a motion to set aside a magistrate’s order. Sentence two of Civ. R. 53(D)(2)(b) changes the trigger for the ten days permitted to file a motion to set aside a magistrate’s order from entry of the order to filing of the order, as the latter date is definite and more easily available to counsel.

### Magistrate's decision; objections to magistrate's decision

Civ. R. 53(D)(3) prescribes procedures for preparation of a magistrate’s decision and for any objections to a magistrate’s decision.

Civ. R. 53(D)(3)(a)(ii), unlike former Civ. R. 53(E)(2), adapts language from Civ. R. 52 rather than simply referring to Civ. R. 52. The change is intended to make clear that, e.g., a request for findings of fact and conclusions of law in a referred matter should be directed to the magistrate rather than to the court. Civ. R. 53(D)(3)(a)(ii) explicitly authorizes a magistrate's decision, subject to the terms of the relevant reference, to be general absent a timely request for findings of fact and conclusions of law or a provision of law that provides otherwise. Occasional decisions under former Civ. R. 53 said as much. See, e.g., *In re Chapman* (Apr. 21, 1997), 12<sup>th</sup> Dist. App. No. CA96-07-127, 1997 WL 194879 at \*2; *Burke v. Brown*, 4<sup>th</sup> Dist. App. No. 01CA731, 2002-Ohio-6164 at ¶ 21; and *Rush v. Schlagetter* (Apr. 15, 1997), 4<sup>th</sup> Dist. App. No. 96CA2215, 1997 WL 193169 at \*3. For a table of sections of the Ohio Revised Code that purport to make findings of fact by judicial officers mandatory in specified circumstances, see 2 Klein-Darling, Ohio Civil Practice § 52-4, 2002 Pocket Part at 136 (West Group 1997).

Civ. R. 53(D)(3)(a)(iii) now requires that the magistrate's decision be served on the parties or their attorneys no later than three days after the decision was filed. The former rule contained no specific time requirement. The provision further requires that a magistrate's decision include a conspicuous warning of the waiver rule prescribed by amended Civ. R. 53(D)(3)(b)(iv). The latter rule now provides that a party shall not assign as error on appeal a court's adoption of any factual finding or legal conclusion of a magistrate, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless that party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b). While the prior waiver rule, prescribed by former Civ. R. 53(E)(3)(b) (effective July 1, 1995) and former Civ. R. 53(E)(3)(d) (effective July 1, 2003), arguably applied only to findings of fact or conclusions of law specifically designated as such, the amended waiver rule applies to any factual finding or legal conclusion in a magistrate's decision and the required warning is broadened accordingly.

Civ. R. 53(D)(3)(b)(i) retains the fourteen-day time for filing written objections to a magistrate's decision. While the rule continues to authorize filing of objections by a "party," it has been held that a non-party attorney can properly object to a magistrate's decision imposing sanctions on the attorney. *All Climate Heating & Cooling, Inc. v. Zee Properties, Inc.* (May 17, 2001), 10<sup>th</sup> Dist. App. No. 00AP-1141, 2001 WL 521408 at \*3.

Sentence one of Civ. R. 53(D)(3)(b)(iii) requires that an objection to a factual finding in a magistrate's decision, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or by an affidavit of that evidence if a transcript is not available. The Supreme Court has prescribed the consequences on appeal of failure to supply the requisite transcript or affidavit as follows: (1) "appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision]" and (2) "the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254.

Sentence two of Civ. R. 53(D)(3)(b)(iii) adds a new requirement, adapted from Loc. R. 99.05, Franklin Cty. Ct. of Common Pleas, that the requisite transcript or affidavit be filed within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. The last sentence of Civ. R. 53(D)(3)(b)(iii) allows an objecting party to seek leave of court to supplement previously filed objections where the additional objections become apparent after a transcript has been prepared.

Civ. R. 53(D)(3)(b)(iv), as noted above, expands the “waiver rule” prescribed by former Civ. R. 53(E)(3)(b) (effective July 1, 1995) and former Civ. R. 53(E)(3)(d) (effective July 1, 2003) to include any factual finding or legal conclusion in a magistrate’s decision, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii). The Rules Advisory Committee was unable to discern a principled reason to apply different requirements to, e.g., a factual finding depending on whether or not that finding is specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii). An exception to the “waiver rule” exists for plain error, which cannot be waived based on a party’s failure to object to a magistrate’s decision.

Action of court on magistrate’s decision and on any objections to magistrate’s decision; entry of judgment or interim order by the court

Civ. R. 53(D)(4)(a), like sentence one of former Civ. R. 53(E)(4)(a), confirms that a magistrate’s decision is not effective unless adopted by the court.

Civ. R. 53(D)(4)(b) provides that a court may properly choose among a wide range of options in response to a magistrate’s decision, whether or not objections are timely filed. See, e.g., *Johnson v. Brown* 2<sup>nd</sup> Dist. App. No. 2002 CA 76, 2003-Ohio-1257 at ¶ 12 (apparently concluding that former Civ. R. 53(E)(4)(b) permitted the trial court to modify an aspect of the magistrate’s decision to which no objection had been made).

Civ. R. 53(D)(4)(c) provides that if no timely objections are filed, the court may adopt a magistrate’s decision unless the court determines that there is an error of law or other defect evident on the face of the decision. A similar result was reached under sentence two of former Civ. R. 53(E)(4)(a). See, e.g., *Perrine v. Perrine*, 9<sup>th</sup> Dist. App. No. 20923, 2002-Ohio-4351 at ¶ 9; *City of Ravenna Police Dept. v. Sicuro* (Apr. 30, 2002), 11<sup>th</sup> Dist. App. No. 2001-P-0037; and *In re Weingart* (Jan. 17, 2002), 8<sup>th</sup> Dist. App. No. 79489, 2002 WL 68204 at \*4. The language of Civ. R. 53(D)(4)(c) has been modified in an attempt to make clear that the obligation of the court does not extend to any “error of law” whatever but is limited to errors of law that are evident on the face of the decision. To the extent that decisions such as *In re Kelley*, 11<sup>th</sup> Dist. App. No. 2002-A-0088, 2003-Ohio-194 at ¶ 8 suggest otherwise, they are rejected. The “evident on the face” standard does not require that the court conduct an independent analysis of the magistrate’s decision. The amended rule does not speak to the effect, if any, on the waiver rule prescribed by amended Civ. R. 53(D)(3)(b)(iv) of the “evident on the face” requirement. At least two courts have explicitly held that the “evident on the face” standard generates an exception to the waiver rule. *Dean-Kitts v. Dean*, 2<sup>nd</sup> Dist. App. No. 2002CA18, 2002-Ohio-5590 at ¶ 13 and *Hennessy*

*v. Hennessy* (Mar. 24, 2000), 6<sup>th</sup> Dist. App. No. L-99-1170, 2000 WL 299450 at \*1. Other decisions have indicated that the standard may generate an exception to the waiver rule. *Ohlin v. Ohlin* (Nov. 12, 1999), 11<sup>th</sup> Dist. App. No. 98-PA-87, 1999 WL 1580977 at \*2; *Group One Realty, Inc. v. Dixie Intl. Co.* (1998), 125 Ohio App.3d 767, 769, 709 N.E.2d 589; *In re Williams* (Feb. 25, 1997), 10<sup>th</sup> Dist. App. No. 96APF06-778, 1997 WL 84659 at \*1. However, the Supreme Court applied the waiver rule three times without so much as referring to the “evident on the face” standard as a possible exception. *State ex rel. Wilson v. Industrial Common.* (2003), 100 Ohio St. 3d 23, 24, 2003-Ohio-4832 at ¶ 4, 795 N.E.2d 662; *State ex rel. Abate v. Industrial Comm’n.* (2002), 96 Ohio St.3d 343, 2002-Ohio-4796, 774 N.E.2d 1212; *State ex rel. Booher v. Honda of America Mfg. Co., Inc.* (2000), 88 Ohio St.3d 52, 2000-Ohio-269, 723 N.E.2d 571.

As noted above, even if no timely objection is made, a court may, pursuant to Civ. R. 53(D)(4)(b), properly choose a course of action other than adopting a magistrate’s decision even if there is no error of law or other defect evident on the face of the magistrate’s decision.

Sentence one of Civ. R. 53(D)(4)(d), like sentence one of former Civ.R. 53(E)(4)(b), requires that the court rule on timely objections. Sentence two of Civ. R. 53(D)(4)(d) requires that, if timely objection is made to a magistrate’s decision, the court give greater scrutiny than if no objections are made. The “independent review as to the objected matters” standard that applies if timely objection is made should be distinguished from the lesser scrutiny permitted if no objections to a magistrate’s decision are timely filed, the latter standard having been first adopted by former Civ.R. 53(E)(4)(a), effective July 1, 1995, and retained by new Civ. R. 53(D)(4)(c), discussed above.

The “independent review as to the objected matters” standard is intended to exclude the more limited appellate standards of review and codify the practice approved by most courts of appeals. The Second District Court of Appeals has most clearly and consistently endorsed and explained that standard. See, e.g., *Crosby v. McWilliam*, 2<sup>nd</sup> Dist. App. No. 19856, 2003-Ohio-6063; *Quick v. Kwiatkowski* (Aug. 3, 2001), 2<sup>nd</sup> Dist. App. No. 18620, 2001 WL 871406 (acknowledging that “Magistrates truly do the ‘heavy lifting’ on which we all depend”); *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 758 N.E.2d 1234. Other district courts of appeal have followed suit. *Reese v. Reese*, 3<sup>rd</sup> Dist. App. No. 14-03-42, 2004-Ohio-1395; *Palenshus v. Smile Dental Group, Inc.*, 3<sup>rd</sup> Dist. App. No. 3-02-46, 2003-Ohio-3095; *Huffer v. Chafin*, 5<sup>th</sup> Dist. App. No. 01 CA 74, 2002-Ohio-356; *Rhoads v. Arthur* (June 30, 1999), 5<sup>th</sup> Dist. App. No. 98CAF10050, 1999 WL 547574; *Barker v. Barker* (May 4, 2001), 6<sup>th</sup> Dist. App. No. L-00-1346, 2001 WL 477267; *In re Day*, 7<sup>th</sup> Dist. App. No. 01 BA 28, 2003-Ohio-1215; *State ex rel. Ricart Auto. Personnel, Inc. v. Industrial Comm’n. of Ohio*, 10<sup>th</sup> Dist. App. No. 03AP-246, 2003-Ohio-7030; *Holland v. Holland* (Jan. 20, 1998), 10<sup>th</sup> Dist. App. No. 97APF08-974, 1998 WL 30179; *In re Gibbs* (Mar. 13, 1998), 11<sup>th</sup> Dist. App. No. 97-L-067, 1998 WL 257317.

Only one court of appeals appears consistently and knowingly to have taken a different approach. *Lowery v. Keystone Bd. of Ed.* (May 9, 2001), 9<sup>th</sup> Dist. App. No. 99CA007407, 2001 WL 490017; *Weber v. Weber* (June 30, 1999), 9<sup>th</sup> Dist. App. No. 2846-M, 1999 WL 459359; *Meadows v. Meadows* (Feb. 11, 1998), 9<sup>th</sup> Dist. App. No. 18382, 1998 WL 78686; *Rogers v. Rogers* (Dec. 17, 1997), 9<sup>th</sup> Dist. App. No. 18280, 1997 WL 795820.

The Rules Advisory Committee believes that the view adopted by the majority of courts of appeals is correct and that no change was made by the 1995 amendments to Civ. R. 53 in the review required of a trial judge upon the filing of timely objections to a magistrate's decision.

The phrase "as to the objected matters" permits a court to choose to limit its independent review to those matters raised by proper objections. If a court need apply only the "defect evident on the face" standard if no objections are filed at all, then, if one or more objections *are* filed, a court logically need apply the more stringent independent review only to those aspects of the magistrate's decision that are challenged by that objection or those objections.

Sentence three of Civ. R. 53(D)(4)(d) provides that, before ruling on objections, a court may hear additional evidence and that it may refuse to hear additional evidence unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

Civ. R. 53(D)(4)(e) requires that a court that adopts, rejects, or modifies a magistrate's decision also enter a judgment or interim order. Civ. R. 53(D)(4)(e)(i) permits the court to enter a judgment during the fourteen days permitted for the filing of objections to a magistrate's decision but provides that the timely filing of objections operates as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered. Civ. R. 53(D)(4)(e)(ii) permits the court, if immediate relief is justified, to enter an interim order based on the magistrate's decision without waiting for or ruling on timely objections. The timely filing of objections does not stay such an interim order, but the order may not properly extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. New sentence three of Civ. R. 53(D)(4)(e)(ii) provides that an interim order shall comply with Civ. R. 54(A), be journalized pursuant to Civ. R. 58(A), and be served pursuant to Civ. R. 58(B). See *Hall v. Darr*, 6<sup>th</sup> Dist. App. No. OT-03-001, 2003-Ohio-1035.

#### Extension of time

Civ. R. 53(D)(5) is new and requires the court, for good cause shown, to provide an objecting party with a reasonable extension of time to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" would include the failure of a party to receive timely service of the magistrate's order or decision.

### Disqualification of a magistrate

Civ. R. 53(D)(6) has no counterpart in former Civ. R. 53. The statutory procedures for affidavits of disqualification apply to judges rather than magistrates. Rev. Code §§ 2101.39, 2501.13, 2701.03, 2701.131; *In re Disqualification of Light* (1988), 36 Ohio St.3d 604, 522 N.E.2d 458. The new provision is based on the observation of the Chief Justice of the Supreme Court that “[t]he removal of a magistrate is within the discretion of the judge who referred the matter to the magistrate and should be brought by a motion filed with the trial court.” *In re Disqualification of Wilson* (1996), 77 Ohio St. 3d 1250, 1251, 674 N.E.2d 260; see also *Mascorro v. Mascorro* (June 9, 2000), 2<sup>nd</sup> Dist. App. No. 17945, 2000 WL 731751 at \*3 (citing *In re Disqualification of Wilson*); *Reece v. Reece* (June 22, 1994), 2<sup>nd</sup> Dist. App. No. 93-CA-45, 1994 WL 286282 at \*2 (“Appointment of a referee is no different from any other process in which the trial court exercises discretion it is granted by statute or rule. \* \* \* If the defect concerns possible bias or prejudice on the part of the referee, that may be brought to the attention of the court by motion.”); *Moton v. Ford Motor Credit Co.*, 5<sup>th</sup> Dist. App. No. 01CA74, 2002-Ohio-2857, appeal not allowed (2002), 95 Ohio St.3d 1422, 2002-Ohio-1734, 766 N.E.2d 163, reconsideration denied (2002), 95 Ohio St.3d 1476, 2002-Ohio-244, 768 N.E.2d 1183; *Walser v. Dominion Homes, Inc.* (June 11, 2001), 5<sup>th</sup> Dist. App. No. 00-CA-G-11-035, 2001 WL 704408 at \*5; *Unger v. Unger* (Dec. 29, 2000), 12<sup>th</sup> Dist. App. No. CA2000-04-009, 2000 WL 1902196 at \*2 (citing *In re Disqualification of Wilson, supra*); *Jordan v. Jordan* (Nov. 15, 1996), 4<sup>th</sup> Dist. App. No. 1427, 1990 WL 178162 at \*5 (“Although referees are not judges and arguably, are not bound by Canon 3(C)(1) of the Code of Judicial Conduct, it would appear axiomatic that a party should be able to petition the court to have a referee removed from the case if the referee is unable to render a fair and impartial decision.”); *In re Reiner* (1991), 74 Ohio App.3d 213, 220, 598 N.E.2d 768 (“where a referee affirmatively states that he is biased on the matter before him, it is an abuse of the court’s discretion to fail to recuse the referee”). Particularly because “a [magistrate’s] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them,” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphases added), Civ. R. 53(D)(6) contemplates that disqualification on a ground other than bias may sometimes be appropriate.

### Recording of proceedings before a magistrate

Civ. R. 53(D)(7), generally requiring recording of proceedings before a magistrate, is taken verbatim from former Civ. R. 53(D)(2).

### Contempt in the presence of a magistrate

Civ. R. 53(D)(8) is adapted from sentences two, three, and four of former Civ. R. 53(C)(3)(c). Civ. R. 53(D)(8)(b), unlike its predecessor, explicitly requires that the clerk provide a copy of a contempt order to the subject of the order.

**Staff Note (July 1, 2003 amendment)**

**Rule 53      Magistrates**

## Rule 53(E) Decisions in referred matters

The amendment to this rule is identical to an amendment to Juv. R. 40(E), also effective July 1, 2003.

It was suggested to the Rules Advisory Committee that the waiver rule prescribed by sentence four of former Civ. R. 53(E)(3)(b) [now division (E)(3)(d)] sometimes surprised counsel and *pro se* litigants because they did not expect to be required to object to a finding of fact or conclusion of law in a magistrate's decision in order to assign its adoption by the trial court as error on appeal. A review of relevant appellate decisions seemed to confirm that suggestion.

It was further suggested that counsel or a *pro se* litigant was particularly likely to be surprised by the waiver rule of sentence four of former Civ. R. 53(E)(3)(b) if a trial court, as authorized by sentence two of Civ. R. 53(E)(4)(a), adopted a magistrate's decision prior to expiration of the fourteen days permitted for the filing of objections. See, e.g., *Riolo v. Navin*, 2002 WL 502408, 2002-Ohio-1551 (8th Dist. Ct. App., 4-19-2002).

Since 1995, the potential for surprise posed by the waiver rule may have been exacerbated by the fact that, under the original version of Civ. R. 53, a party did not, by failing to file an objection, waive the right to assign as error on appeal the adoption by a trial court of a finding of fact or conclusion of law of a referee. *Normandy Place Associates v. Beyer*, 2 Ohio St.3d 102, 103 (1982) (syl. 1). As of July 1, 1985, sentence one of Civ. R. 53(E)(6) was amended to read "[a] party may not assign as error the court's adoption of a referee's *finding of fact* unless an objection to that finding is contained in that party's written objections to the referee's report" (emphasis added). See *State ex rel. Donah v. Windham Exempted Village Sch. Dist. Bd. of Ed.*, 69 Ohio St.3d 114, 118 (1994)(confirming that the waiver rule of sentence one of the 1985 version of Civ. R. 53 applied only to findings of fact by a magistrate). The present waiver rule, which applies to both findings of fact and conclusions of law, took effect July 1, 1995, and represents a complete reversal of the no waiver position of the original Civ. R. 53. See *State ex rel. Booher v. Honda of America Mfg., Inc.*, 88 Ohio St.3d 52 (2000)(confirming that the waiver rule now applies to conclusions of law as well as to findings of fact by a magistrate).

The amendment thus makes three changes in Civ. R. 53(E), none of which are intended to modify the substantive scope or effect of the waiver rule contained in sentence four of former Civ. R. 53(E)(3)(b) [now division (E)(3)(d)]. First, the amendment retains, but breaks into three appropriately-titled subdivisions, the four sentences which comprised former Civ. R. 53(E)(3)(b). Sentences two and three of former Civ. R. 53(E)(3)(b) are included in a new subdivision (c) entitled "Objections to magistrate's findings of fact." Sentence four of former Civ. R. 53(E)(3)(b), which prescribes the waiver rule, is a new subdivision (d) entitled "Waiver of right to assign adoption by court as error on appeal."

Second, new language is inserted at the beginning of Civ. R. 53(E)(3)(a) to make it more evident that a party may properly file timely objections to a magistrate's decision even if the trial court has previously adopted that decision as permitted by Civ. R. 53(E)(4)(c).



Third, the amendment adds a new sentence to Civ. R. 53(E)(2), which sentence requires that a magistrate who files a decision which includes findings of fact and conclusions of law also provide a conspicuous warning that timely and specific objection as required by Civ. R. 53(E)(3) is necessary to assign as error on appeal adoption by the trial court of any finding of fact or conclusion of law. It is ordinarily assumed that rule language that prescribes a procedural requirement (see, e.g., sentence six of Civ. R. 51(A), which is analogous to the waiver rule of Civ. R. 53(E)(3)) constitutes sufficient notice to counsel and to *pro se* litigants of that requirement. The Committee nonetheless concluded that the additional provision requiring that a magistrate's decision which includes findings of fact and conclusions of law call attention of counsel and *pro se* litigants to the waiver rule is justified because, as noted above, the original version of Civ. R. 53 imposed no waiver at all and even the 1985 version imposed waiver only as to findings of fact by referees.

### **Staff Note (July 1, 1998 Amendment)**

#### **Rule 53(A) Appointment.**

The 1998 amendment to this division changed "traffic referee" to "traffic magistrate" to conform to the 1996 amendment of Rule 14 of the Ohio Traffic Rules. No substantive change is intended.

#### **Rule 53(C) Reference and powers.**

The 1998 amendment to division (C)(3)(a) was to change cross-references to Civ. R. 75 necessitated by 1998 amendments to that rule. Division (C)(3)(d) was amended to change "referee" to "magistrate" to conform to the 1996 amendment of Rule 14 of the Ohio Traffic Rules. No substantive change is intended.

#### **Rule 53(E) Decisions in referred matters.**

The 1998 amendment was to division (E)(4)(b) of this rule. The amendment was made because some trial judges apparently had avoided ruling upon objections to magistrates' reports since the previous rule appeared to require only "consideration" of the objections. The amendment should clarify that the judge is to rule upon, not just consider, any objections.

An identical amendment was made to division (E)(4)(b) of Juv.R. 40, also effective July 1, 1998.

### **Staff Note (July 1, 1996 Amendment)**

#### **Rule 53(E) Decisions in referred matters**

The 1996 amendment corrected the first sentence of division (E)(2), which erroneously stated that a magistrate's decision was to include "proposed" findings of fact and conclusions of law. The amendment deleted the word "proposed". The amendment is technical only and no substantive change is intended

### **Staff Note (July 1, 1995 Amendment)**

#### **Rule 53(A) Appointment**

Changes the title of "referee" to "magistrate" and makes clear that the same person may exercise magisterial authority under the Civil and Criminal Rules. By limiting the power of appointment to courts of record, the rule eliminates any authority implicit in the prior rule for appointment of referees by mayor's courts.

#### **Rule 53(B) Compensation**

Eliminates the prior authority to tax the compensation of a referee appointed on an interim basis as part of court costs. The Supreme Court Rules Advisory Committee is of the opinion that the salaries of judicial officers should be borne by the taxpayers generally, rather than by the parties to cases.

#### **Rule 53(C) Reference and Powers**

(C)(1) Order of Reference. This division replaces language previously found in Rule 53(A). It makes clear that magistrates have authority to act only on matters referred to them by a judge in an order of reference, but permits that order of reference to be categorical or specific to a particular case or motion in a case. Rule 53(C)(1)(a)(iii) codifies in part the result in *Hartt v. Munobe* (1993), 67 Ohio St. 3d 3, but requires that consent to a magistrate's presiding at a jury trial must be written. Division (C)(1)(c) largely tracks prior language, which makes it clear that a particular judge in a given order of reference may limit the powers generally provided in this rule for magistrates.

(C)(2) General Powers. Only stylistic changes are made, except that the provision for recording proceedings before magistrates is moved to Rule 53(D) and changed. (See Staff Note for Rule 53(D) below)

(C)(3) Power to Enter Orders. Division (C)(3)(a) clarifies the authority of magistrates to enter orders that are effective without being approved by a judge. It codifies existing practice in some courts in the state. Division (C)(3)(b) provides that any party may move to set the order aside, but the order remains effective unless a stay is granted.

(C)(3)(b) Contempt in the Magistrate's Presence. This division codifies the inherent power of magistrates, as judicial officers, to deal with contempt of court which occurs in their actual presence. The core purpose of the contempt power is to permit courts to deal with disruptions of proceedings and to maintain order. This power is as much needed in proceedings before magistrates as before other judicial officers. The rule follows Fed. R. Crim. P. 42 in requiring that the magistrate certify in writing what he or she perceived that constitutes contempt. The clerk is to provide an immediate copy of any magistrate contempt order to an appropriate judge so that there can be prompt judicial review of any contempt order.

(C)(3)(d) Other Orders. The General Assembly has recognized the existence of the referee system and from time to time conferred authority directly on referees, particularly in juvenile matters. This rule is necessary to prevent any inference of intent to override those statutes by adoption of this revised rule.

(C)(3)(e) Form of Magistrate's Orders. This division clarifies the form in which magistrate's orders are to be prepared so that they will be easily identified as such by parties and on the dockets.

### **Rule 53(D) Proceedings**

Prior language largely drawn from Federal Civil Rule 53 relative to special masters and largely applicable to situations where special masters were appointed for individual cases and were not court employees is eliminated. To prevent any implication that proceedings before magistrates are to follow any different procedure from other civil proceedings, division (D)(1) is added. Division (D)(2) requires that proceedings before magistrates be recorded by whatever method a particular court deems appropriate. The rule is not meant to limit courts to particular recording means, but to emphasize that, as judicial officers of courts of record, magistrates should conduct proceedings before them on the record.

### **Rule 53(E) Decisions in Referred Matters**

New division (E) entirely replaces the prior language which required preparation of reports by referees. Experience throughout the state demonstrated that often the report writing requirement substantially slowed the decision of cases without adding anything of value to the decision-making process. The new rule preserves the authority of judges to require reports by so specifying in orders of reference. In the absence of such a requirement, however, magistrates will now prepare a magistrate's decision [division (E)(1)]. If a party desires that the magistrate's decision embody the detail

characteristic of a referee's report, the party may make a request for findings of fact and conclusions of law under Civ. R. 52, either before or after the magistrate's decision is filed [division (E)(2)]. The fourteen-day time period for objections is preserved and it begins to run only when a magistrate's decision embodying findings and conclusions is filed, if they have been appropriately requested [division(E)(3)(a)].

Division (E)(3)(b) prescribes the form of objections and requires that they be specific; a general objection is insufficient to preserve an issue for judicial consideration. The rule permits the parties to tailor the objection process by providing that a magistrate's findings of fact will be final. The rule reinforces the finality of trial court proceedings by providing that failure to object constitutes a waiver on appeal of a matter which could have been raised by objection. Compare *United States v. Walters*, 638 F.2d 947 (6<sup>th</sup> Cir. 1981); *Thomas v. Arn*, 474 U.S. 140(1985).

Division (E)(4) prescribes the procedure to be followed by the court with respect to a magistrate's decision. Proposed decisions are effective only when adopted by the court. However, a magistrate's decision to which no objection is made may be adopted unless there is apparent error; the judge is no longer required to conduct an independent review and make a determination himself or herself. The last sentence of division (E)(4)(b), paralleling Civ. R. 59, permits a court to refuse to hear new evidence on objections unless the evidence would not have been obtained in time to present it to the magistrate.

Division (E)(4)(c) conforms existing law on interim orders to the new style of "magistrate's decision" as opposed to reports. No substantive change is intended.

## TITLE VII. JUDGMENT

### **RULE 54. Judgments; Costs**

(A) **Definition; Form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code. A judgment shall not contain a recital of pleadings, the magistrate's decision in a referred matter, or the record of prior proceedings.

(B) **Judgment upon multiple claims or involving multiple parties.** When more than one claim for relief is presented in an action whether as a claim, counterclaim, cross-claim, or third-party claim, and whether arising out of the same or separate transactions, or when multiple parties are involved, the court may enter final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay. In the absence of a determination that there is no just reason for delay, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties, shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(C) **Demand for judgment.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded the relief in the pleadings.

(D) **Costs.** Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs.

[Effective: July 1, 1970; amended effective July 1, 1989; July 1, 1992; July 1, 1994; July 1, 1996.]

### **Staff Note (July 1, 1996 Amendment)**

#### **Rule 54(A) Definition; Form**

The amendment changed the rule's reference from "report of a referee" to "magistrate's decision" in division (A) in order to harmonize the rule with the language adopted in the 1995 amendments to Civ. R. 53. The amendment is technical only and no substantive change is intended.

**RULE 55. Default**

**(A) Entry of judgment.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefor; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall when applicable accord a right of trial by jury to the parties.

**(B) Setting aside default judgment.** If a judgment by default has been entered, the court may set it aside in accordance with Rule 60(B).

**(C) Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(C).

**(D) Judgment against this state.** No judgment by default shall be entered against this state, a political subdivision, or officer in his representative capacity or agency of either unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

[Effective: July 1, 1970; amended effective July 1, 1971.]

## **RULE 56. Summary Judgment**

**(A) For party seeking affirmative relief.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

**(B) For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

**(C) Motion and proceedings.** The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party, prior to the day of hearing, may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(D) Case not fully adjudicated upon motion.** If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(E) Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit

affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

**(F) When affidavits unavailable.** Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

**(G) Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

[Effective: July 1, 1970; amended effective July 1, 1976; July 1, 1997; July 1, 1999.]

#### **Staff Note (July 1, 1999 Amendment)**

#### **Rule 56(C) Motion and proceedings thereon**

The prior rule provided that "transcripts of evidence in the pending case" was one of the items that could be considered in deciding a motion for summary judgment. The 1999 amendment deleted "in the pending case" so that transcripts of evidence from another case can be filed and considered in deciding the motion.

#### **Staff Note (July 1, 1997 Amendment)**

#### **Rule 56(A) For party seeking affirmative relief.**

The 1997 amendment to division (A) divided the previous first sentence into two separate sentences for clarity and ease of reading, and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

#### **Rule 56(B) For defending party.**

The 1997 amendment to division (B) added a comma after the "may" in the first sentence and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.



**Rule 56(C) Motion and proceedings thereon.**

The 1997 amendment to division (C) changed the word “pleading” to “pleadings” and replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(E) Form of affidavits; further testimony; defense required.**

The 1997 amendment to division (E) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(F) When affidavits unavailable.**

The 1997 amendment to division (F) replaced several masculine references with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**Rule 56(G) Affidavits made in bad faith.**

The 1997 amendment to division (G) replaced a masculine reference with gender-neutral language. The amendment is grammatical only and no substantive change is intended.

**RULE 57. Declaratory Judgments**

The procedure for obtaining a declaratory judgment pursuant to Sections 2721.01 to 2721.15, inclusive, of the Revised Code, shall be in accordance with these rules. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may advance on the trial list the hearing of an action for a declaratory judgment.

[Effective: July 1, 1970.]

**RULE 58. Entry of Judgment**

**(A) Preparation; entry; effect.** Subject to the provisions of Rule 54(B), upon a general verdict of a jury, upon a decision announced, or upon the determination of a periodic payment plan, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it upon the journal. A judgment is effective only when entered by the clerk upon the journal.

**(B) Notice of filing.** When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ.R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App.R. 4(A).

**(C) Costs.** Entry of the judgment shall not be delayed for the taxing of costs.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1989.]

**RULE 59. New Trials**

**(A) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law;

(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

**(B) Time for motion.** A motion for a new trial shall be served not later than fourteen days after the entry of the judgment.

**(C) Time for serving affidavits.** When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty-one days either by the court for good cause shown or by the parties by written stipulation. The court may permit supplemental and reply affidavits.

**(D) On initiative of court.** Not later than fourteen days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.

The court may also grant a motion for a new trial, timely served by a party, for a reason not stated in the party's motion. In such case the court shall give the parties notice and an opportunity to be heard on the matter. The court shall specify the grounds for new trial in the order.

[Effective: July 1, 1970; amended effective July 1, 1996.]

### **Staff Note (July 1, 1996 Amendment)**

#### **Rule 59(A) Grounds**

The amendment changed the rule's reference from "referee" to "magistrate" in division (A)(1) in order to harmonize the rule with the language adopted in the 1995 amendments to Civ. R. 53. The amendment is technical only and no substantive change is intended.

**RULE 60. Relief From Judgment or Order**

**(A) Clerical mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

**(B) Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation.

The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.

[Effective: July 1, 1970.]

**RULE 61. Harmless Error**

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

[Effective: July 1, 1970.]

**RULE 62. Stay of Proceedings to Enforce a Judgment**

**(A) Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of any judgment or stay any proceedings to enforce judgment pending the disposition of a motion for a new trial, or a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment notwithstanding the verdict made pursuant to Rule 50.

**(B) Stay upon appeal.** When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.

**(C) Stay in favor of the government.** When an appeal is taken by this state or political subdivision, or administrative agency of either, or by any officer thereof acting in his representative capacity and the operation or enforcement of the judgment is stayed, no bond, obligation or other security shall be required from the appellant.

**(D) Power of appellate court not limited.** The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

**(E) Stay of judgment as to multiple claims or multiple parties.** When a court has ordered a final judgment under the conditions stated in Rule 54(B), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

[Effective: July 1, 1970.]



**RULE 63. Disability of a Judge**

(A) **During trial.** If for any reason the judge before whom a jury trial has commenced is unable to proceed with the trial, another judge designated by the administrative judge, or in the case of a single-judge division by the chief justice of the supreme court, may proceed with and finish the trial upon certifying in the record that he has familiarized himself with the record of the trial; but if such other judge is satisfied that he cannot adequately familiarize himself with the record, he may in his discretion grant a new trial.

(B) If for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned or findings of fact and conclusions of law are filed, another judge designated by the administrative judge, or in the case of a single-judge division by the Chief Justice of the Supreme Court, may perform those duties; but if such other judge is satisfied that he cannot perform those duties, he may in his discretion grant a new trial.

[Effective: July 1, 1970; amended effective July 1, 1972; July 1, 1973; July 1, 1994.]

## **TITLE VIII. PROVISIONAL AND FINAL REMEDIES**

### **RULE 64. Seizure of Person or Property**

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by independent action.

[Effective: July 1, 1970.]

## **RULE 65. Injunctions**

**(A) Temporary restraining order; notice; hearing; duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required. The verification of such affidavit or verified complaint shall be upon the affiant's own knowledge, information or belief; and so far as upon information and belief, shall state that he believes this information to be true. Every temporary restraining order granted without notice shall be filed forthwith in the clerk's office; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed fourteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for one like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be set forth in the order of extension. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. When the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

### **(B) Preliminary injunction.**

**(1) Notice.** No preliminary injunction shall be issued without reasonable notice to the adverse party. The application for preliminary injunction may be included in the complaint or may be made by motion.

**(2) Consolidation of hearing with trial on merits.** Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision (B)(2) shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

**(C) Security.** No temporary restraining order or preliminary injunction is operative until the party obtaining it gives a bond executed by sufficient surety, approved by the clerk of the court granting the order or injunction, in an amount fixed by the court or judge allowing it, to secure to the party enjoined the damages he may sustain, if it is finally decided that the order or injunction should not have been granted.

The party obtaining the order or injunction may deposit, in lieu of such bond, with the clerk of the court granting the order or injunction, currency, cashier's check, certified check or negotiable government bonds in the amount fixed by the court.

Before judgment, upon reasonable notice to the party who obtained an injunction, a party enjoined may move the court for additional security. If the original security is found to be insufficient, the court may vacate the injunction unless, in reasonable time, sufficient security is provided.

No security shall be required of this state or political subdivision, or agency of either, or of any officer thereof acting in his representative capacity.

A surety upon a bond or undertaking under this rule submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability as well as the liability of the party obtaining the order or injunction may be enforced by the court without jury on motion without the necessity for an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the persons giving the security if their addresses are known.

**(D) Form and scope of restraining order or injunction.** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them who receive actual notice of the order whether by personal service or otherwise.

**(E) Service of temporary restraining orders and injunctions.** Restraining orders which are granted ex parte shall be served in the manner provided for service of process under Rule 4 through Rule 4.3 and Rule 4.6; or in manner directed by order of the court. If the restraining order is granted upon a pleading or motion accompanying a pleading the order may be served with the process and pleading. When service is made pursuant to Rule 4 through Rule 4.3 and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.

Restraining orders or injunctions which are granted with notice may be served in the manner provided under Rule 4 through Rule 4.3 and Rule 4.6, in the manner provided in Rule 5 or in the manner designated by order of the court. When service is made pursuant to Rule 4 through Rule 4.3 and Rule 4.6 the sheriff or the person designated by order of the court shall forthwith make his return.

[Effective: July 1, 1970.]

**RULE 66. Receivers**

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. Receiverships shall be administered in the manner provided by law and as provided by rules of court.

[Effective: July 1, 1970.]

**RULE 67. [RESERVED]**

**RULE 68. Offer of Judgment**

An offer of judgment by any party, if refused by an opposite party, may not be filed with the court by the offering party for purposes of a proceeding to determine costs.

This rule shall not be construed as limiting voluntary offers of settlement made by any party.

[Effective: July 1, 1970.]



**RULE 69. Execution**

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be as provided by law. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may also obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

[Effective: July 1, 1970.]

**RULE 70. Judgment for Specific Acts; Vesting Title**

If a judgment directs a party to execute a conveyance of land, to transfer title or possession of personal property, to deliver deeds or other documents, or to perform any other specific act, and the party fails to comply within the time specified, the court may, where necessary, direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within this state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others, and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution upon application to the clerk.

[Effective: July 1, 1970.]

**RULE 71. Process in Behalf of and Against Persons Not Parties**

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

[Effective: July 1, 1970.]

**RULE 72. [RESERVED]**

**TITLE IX. PROBATE, JUVENILE, AND  
DOMESTIC RELATIONS PROCEEDINGS**

**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) 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.

(C) **Service of summons.** Civ. R. 4 through 4.6 shall apply in any proceeding in the probate division of the court of common pleas requiring service of summons.

(D) **Service and filing of pleadings and papers subsequent to original pleading.** In proceedings requiring service of summons, Civ. R. 5 shall apply to the service and filing of pleadings and papers subsequent to the original pleading.

(E) **Service of notice.** In any proceeding where any type of notice other than service of summons is required by law or deemed necessary by the court, and the statute providing for notice neither directs nor authorizes the court to direct the manner of its service, notice shall be given in writing and may be served by or on behalf of any interested party without court intervention by one of the following methods:

- (1) By delivering a copy to the person to be served;
- (2) By leaving a copy at the usual place of residence of the person to be served;
- (3) By certified or express mail, addressed to the person to be served at the person's usual place of residence with instructions to forward, return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered, provided that the certified or express mail envelope is not returned with an endorsement showing failure of delivery;
- (4) By ordinary mail after a certified or express mail envelope is returned with an endorsement showing that it was refused;

(5) By ordinary mail after a certified or express mail envelope is returned with an endorsement showing that it was unclaimed, provided that the ordinary mail envelope is not returned by the postal authorities with an endorsement showing failure of delivery;

(6) By publication once each week for three consecutive weeks in some newspaper of general circulation in the county when the name, usual place of residence, or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained; provided that before publication may be utilized, the person giving notice shall file an affidavit which states that the name, usual place of residence, or existence of the person to be served is unknown and cannot with reasonable diligence be ascertained;

(7) By other method as the court may direct.

Civ. R. 4.2 shall apply in determining who may be served and how particular persons or entities must be served.

**(F) Proof of service of notice; when service of notice complete.** When service is made through the court, proof of service of notice shall be in the same manner as proof of service of summons.

When service is made without court intervention, proof of service of notice shall be made by affidavit. When service is made by certified or express mail, the certified or express mail return receipt which shows delivery shall be attached to the affidavit. When service is made by ordinary mail, the prior returned certified or express mail envelope which shows that the mail was refused or unclaimed shall be attached to the affidavit.

Service of notice by ordinary mail shall be complete when the fact of mailing is entered of record except as stated in division (E)(5) of this rule. Service by publication shall be complete at the date of the last publication.

**(G) Waiver of service of notice.** Civ. R. 4(D) shall apply in determining who may waive service of notice.

**(H) Forms used in probate practice.** Forms used in proceedings in the probate division of the courts of common pleas shall be those prescribed in the rule applicable to standard probate forms in the Rules of Superintendence. Forms not prescribed in such rule may be used as permitted in that rule.

Blank forms reproduced for use in probate practice for any filing to which the rule applicable to specifications for printing probate forms of the Rules of Superintendence applies shall conform to the specifications set forth in that rule.

No pleading, application, acknowledgment, certification, account, report, statement, allegation, or other matter filed in the probate division of the courts of common pleas shall be

required to be executed under oath, and it is sufficient if it is made upon the signature alone of the person making it.

**(I) Notice of Filing of Judgments.** Civ. R. 58(B) shall apply to all judgments entered in the probate division of the court of common pleas in any action or proceeding in which any party other than a plaintiff, applicant, or movant has filed a responsive pleading or exceptions. Notice of the judgment shall be given to each plaintiff, applicant, or movant, to each party filing a responsive pleading or exceptions, and to other parties as the court directs.

**(J) Filing with the court defined.** The filing of documents with the court, as required by these rules, shall be made by filing them with the probate judge as the *ex officio* clerk of the court. A court may provide, by local rules adopted pursuant to the Rules of Superintendence, for the filing of documents by electronic means. If the court adopts such local rules, they shall include all of the following:

(1) Any signature on electronically transmitted documents shall be considered that of the attorney or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court shall order the filing stricken.

(2) A provision shall specify the days and hours during which electronically transmitted documents will be received by the court, and a provision shall specify when documents received electronically will be considered to have been filed.

(3) Any document filed electronically that requires a filing fee may be rejected by the clerk of court unless the filer has complied with the mechanism established by the court for the payment of filing fees.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1975; July 1, 1977; July 1, 1980; July 1, 1996; July 1, 1997; July 1, 2001.]

### **Staff Note (July 1, 2001 Amendment)**

#### **Civil Rule 73 Probate Division of the Court of Common Pleas**

The amendments to this rule were part of a group of amendments that were submitted by the Ohio Courts Digital Signatures Task Force to establish minimum standards for the use of information systems, electronic signatures, and electronic filing. The substantive amendment to this rule was the addition of division (J). Comparable amendments were made to Civil Rule 5, Criminal Rule 12, Juvenile Rule 8, and Appellate Rule 13.

As part of this electronic filing and signature project, the following rules were amended effective July 1, 2001: Civil Rules 5, 11, and 73; Criminal Rule 12; Juvenile Rule 8; and Appellate Rules 13 and 18. In addition, Rule 26 of the Rules of Superintendence for Courts of Ohio was amended and Rule of Superintendence 27 was added to complement the rules of procedure. Superintendence Rule 27 establishes a process by which minimum standards for information technology are promulgated, and requires that courts submit any local rule involving the use of information technology to a technology standards committee designated by the Supreme Court for approval.

### **Staff Note (July 1, 1997 Amendment)**

#### **Rule 73 Probate division of the court of common pleas**

Prior to the 1997 amendment, service of process under this rule was permitted only by certified mail. It appears that service of process by express mail, i.e. as that sort of mail is delivered by the United States Postal Service, can always be obtained return receipt requested, and thus could accomplish the purpose of notification equally well as certified mail. Therefore, the amendment provides for this additional option for service.

Division (H) was amended to delete the specific reference to Rule 16 of the Rules of Superintendence for Courts of Common Pleas, and instead a generic reference is made to the applicable rule. This amendment was made because the rules of superintendence were being revised and renumbered in 1997, and the rule number that will apply to probate forms was not known at the time of this amendment.

Other amendments to this rule are nonsubstantive grammatical or stylistic changes.

### **Staff Note (July 1, 1996 Amendment)**

#### **Rule 73(I), Notice of Filing of Judgments**

In 1989, Civ. R. 58 was amended to, among other things, make clear that a clerk of courts shall serve signed judgments upon parties. After that amendment, there apparently has been some confusion as to the effect of that amendment upon probate proceedings. The amendment to division (I) makes clear that Civ. R. 58(B) does apply to probate proceedings, in the manner indicated.



**RULE 74. [RESERVED]**

[Former Rule 74, adopted effective July 1, 1970 and amended effective July 1, 1971 and July 1, 1972, was repealed effective July 1, 1977.]

**RULE 75. Divorce, Annulment, and Legal Separation Actions**

**(A) Applicability.** The Rules of Civil Procedure shall apply in actions for divorce, annulment, legal separation, 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, 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 legal counsel, if necessary, for the child and tax the costs;

(3) 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 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 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.

**(D) Investigation.** On the filing of a complaint for divorce, annulment, or legal separation, where 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 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, 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, or 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 minor children;

(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.

**(H) Relief pending appeal.** A motion to modify, pending appeal, either a decree allocating parental rights and responsibilities for the care of children, a spousal or 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 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.

**(2) Restraining order: grounds, procedure.** When it is made to appear to the court by affidavit of a party sworn to absolutely 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, the court may allow a temporary restraining order, with or without bond, to prevent that action. 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 notice of the trial upon the merits. The notice shall be made by regular mail to the party's last known address, and shall be mailed at least seven days prior to the commencement of trial.

**(M) Testimony.** Judgment for divorce, annulment, or legal separation shall not be granted upon the testimony or admission of a party not 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) Allowance of spousal support, child support, and custody pendente lite.**

(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 spousal support pendente lite 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) Counter affidavits may be filed by the other party within fourteen days from the service of the complaint, 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.

**(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.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1972; July 1, 1977; July 1, 1978; July 1, 1991; July 1, 1996; July 1, 1997; July 1, 1998; July 1, 2001.]

### **Staff Note (July 1, 2001 Amendment)**

#### **Civil Rule 75 Divorce, annulment, and legal separation actions**

Civil Rule 75(B) Joinder of parties

Civ. R. 75(B) provides that Civ. R. 14 (third-party practice), Civ. R. 19 (joinder of parties needed for just adjudication), Civ. R. 19.1 (compulsory joinder), and Civ. R. 24 (intervention) are generally inapplicable in divorce, annulment, or legal separation actions. Division (1) of Rule 75(B), however, permits a corporation or person to be made a party defendant to such an action if that corporation or person has possession or control of or claims an interest in property out of which another seeks an award. Civ. R. 75(B)(1) thus permits the court to protect both the person seeking an award and the corporation or person who has possession or control of or claims an interest in property. See *Huener v. Huener*, 110 Ohio App. 3d 322, 327, 674 N.E. 2d 389, 393 (1996) (trial court abused its discretion by attempting to divest parents of party of legal title to property without joining them as parties; purpose of Civ. R. 75(B)(1) joinder “is to allow individuals to join whose interests need to be protected”).

Division (B)(1) was amended effective July 1, 2001 to track more precisely the language of R.C. 3105.171, which provides for division of marital property and, in appropriate circumstances, a distributive award, and R.C. 3105.18, which provides for spousal support. The amendment is intended to make clear that the joinder of a corporation or person is proper whether a division of marital property, a distributive award, or an award of spousal support is the underlying issue. The reference to “other support” is retained in order to avoid foreclosing the use of Civ. R. 75(B)(1) when, e.g., child support is the underlying issue.

## **Rule 75(I) Temporary restraining orders**

Civ. R. 75(I)(1) provides that Civ. R. 65(A), which prescribes general conditions for the issuance of a temporary restraining order, is inapplicable to divorce, annulment, or legal separation actions. Civ. R. 75(I)(2), however, permits a court to issue a temporary restraining order in such an action without notice, which order may remain in effect during the pendency of the action, so as to protect a party from action by another party who is about to dispose of or encumber property so as to defeat the other party in obtaining a fair award. See *Addy v. Addy*, 97 Ohio App. 3d 204, 210, 646 N.E. 2d 513, 517 (1994) (“Rule 75(H) [now 75(I)] is intended to protect the interests of the parties and preserve the authority of the court to make meaningful final orders for support”); see also Civ. R. 53(C)(3) (power of magistrate to enter orders; Civ. R. 75(I) incorporated by reference).

Civ. R. 75(I)(2) was amended effective July 1, 2001 to track more precisely the language of R.C. 3105.171, which provides for division of marital property and, in appropriate circumstances, a distributive award, and R.C. 3105.18, which provides for spousal support. Though courts appear properly to have rejected an overly-literal reading of Civ. R. 75(I)(2), see *Sherban v. Sherban*, 1985 WL 4710, Nos. CA-6688, CA-6695, CA-6696, and CA-6683 (5<sup>th</sup> Dist. Ct. App., Stark, 12-23-85) (restraining order under Civ. R. 75(H) [now 75(I)] proper in support of division of property), the amendment is intended to make clear that a temporary restraining order may properly be entered if necessary to prevent a party from defeating another party’s right to an equitable division of marital property, a distributive award, or an award of spousal support. The reference to “other support” is retained in order to avoid foreclosing the use of Civ. R. 75(I)(2) to prevent a party from defeating the right of another party to, e.g., child support.

### **Staff Note (July 1, 1998 Amendment)**

## **Rule 75(F) Judgment**

Division (F) was amended to require that the final judgment in a domestic relations case include all relevant claims except the domestic violence protection order: divorce, property settlement, and parental rights and responsibilities. The amendment was suggested by the Ohio State Bar Association Family Law Committee and the Ohio Gender Fairness Task Force. The amendment also changed the title of this division from “Default.” Division (G) was added and the remainder of the divisions were relettered accordingly.

### **Staff Note (July 1, 1997 Amendment)**

#### **Rule 75(G) Relief pending appeal.**

The amendment clarifies the procedure to be followed when parental rights, spousal support, and similar issues are sought to be modified while an appeal is pending. The rule prior to the amendment was unclear on which court or courts had authority to entertain motions to modify such orders, leading to a split of authority among Ohio courts. Compare *Rahm v. Rahm* (1974), 39 Ohio App.2d 74, 315 N.E. 2d 495 (trial court could only grant such relief prior to the filing of an appeal) with *Buckles v. Buckles* (1988), 46 Ohio App.3d 118, 546 N.E.2d 950 (declines to follow *Rahm*, holds that trial court retains jurisdiction to grant relief pending appeal as long as the exercise of that jurisdiction did not interfere with appellate review).

The amendment follows the *Buckles* case by requiring a motion to modify to be made in the first instance to the trial court, with that court's decision subject to review and modification, if appropriate, in the appellate court. The trial court is the most appropriate forum to consider such a motion in the first instance, given that the trial judge is already familiar with the issues, and the likelihood that further factual presentations and inquiry will be necessary for the court to dispose of the motion.

### **Staff Note (July 1, 1996 Amendment)**

#### **Rule 75 Divorce, Annulment, and Legal Separation Actions**

The amendment changed the rule's reference from "referee" to "magistrate" in divisions (C), (H)(2), and (M) in order to harmonize the rule with the language adopted in the 1995 amendments to Civ. R. 53. Also, in divisions (B), (C), (F), (H)(1), and (I) the style used for citations to other rules was amended. The amendment is technical only and no substantive change is intended.

**RULE 76. [RESERVED]**

[Former Rule 76, adopted effective July 1, 1970 and amended effective July 1, 1971, was repealed effective July 1, 1972.]



**RULE 77 TO 80. [RESERVED]**

**RULE 81. References to Ohio Revised Code**

A reference in these Rules to a section of the Revised Code shall mean the section as amended from time to time including the enactment of additional sections the numbers of which are subsequent to the section referred to in the rules.

[Effective: July 1, 1970.]

## **TITLE X. GENERAL PROVISIONS**

### **RULE 82. Jurisdiction Unaffected**

These rules shall not be construed to extend or limit the jurisdiction of the courts of this state.

[Effective: July 1, 1970.]

**RULE 83. Rule of Court**

(A) A court may adopt local rules of practice which shall not be inconsistent with these rules or with other rules promulgated by the Supreme Court and shall file its local rules of practice with the Clerk of the Supreme Court.

(B) Local rules of practice shall be adopted only after the court gives appropriate notice and an opportunity for comment. If a court determines that there is an immediate need for a rule, it may adopt the rule without prior notice and opportunity for comment, but promptly shall afford notice and opportunity for comment.

[Effective: July 1, 1970; amended effective July 1, 1994; July 1, 2000.]

**Staff Note (July 1, 2000 Amendment)**

**Rule 83 Local Rules of Practice**

The title of Civ. R. 83 and the text of division (A) were amended to more accurately reflect the intent of the original Civ. R. 83, which was to (1) restate the rule-making power of local courts as granted by sentence five of Section 5(B), Art. IV, Ohio Constitution and (2) require that rules adopted by local courts be filed with the Supreme Court. Civ. R. 83 was previously entitled Rule of Court. Although the previous rule did not reflect that intent as accurately as it might have, courts had generally accorded it treatment consistent with that intent. See 2 J. Klein & S. Darling, *Baldwin's Ohio Practice: Civil Practice*, Section 83-1 through 83-4 at 786-92 (West Group 1997).

The amendment was intended to (1) remove any doubt about the intent of the rule, (2) serve as a reminder that local rules of practice must be consistent with the Civil Rules and with other rules promulgated by the Supreme Court, and (3) make Civ. R. 83(A) more clearly consistent with Sup. R. 5(A).

Division (B) was amended in technical respects only; no substantive change was intended.

**RULE 84. Forms**

The forms contained in the Appendix of Forms which the supreme court from time to time may approve are sufficient under these rules and are intended to indicate the simplicity and brevity of statement which these rules contemplate.

[Effective: July 1, 1970.]

**RULE 85. Title**

These rules shall be known as the Ohio Rules of Civil Procedure and may be cited as "Civil Rules" or "Civ.R. \_."

[Effective: July 1, 1970; amended effective July 1, 1971.]

## **RULE 86. Effective Date**

**(A) Effective date of rules.** These rules shall take effect on the first day of July, 1970. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(B) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 15, 1971, on April 14, 1971, and on April 30, 1971, shall take effect on the first day of July, 1971. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(C) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 15, 1972, and on May 1, 1972, shall take effect on the first day of July, 1972. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(D) Effective date of amendments.** The amendments submitted by the supreme court to the general assembly on January 12, 1973, shall take effect on the first day of July 1973. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(E) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 10, 1975 and on April 29, 1975, shall take effect on July 1, 1975. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(F) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 9, 1976, shall take effect on July 1, 1976. They govern all proceeding in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible, or would work injustice, in which event the former procedure applies.

**(G) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 12, 1978, and on April 28, 1978, shall take effect on

July 1, 1978. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(H) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 14, 1980 shall take effect on July 1, 1980. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(I) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 12, 1983 shall take effect on July 1, 1983. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(J) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 12, 1984 shall take effect on July 1, 1984. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(K) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on December 24, 1984 and January 8, 1985 shall take effect on July 1, 1985. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(L) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 9, 1986 shall take effect on July 1, 1986. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.



**(M) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 14, 1988 shall take effect on July 1, 1988. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(N) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 6, 1989 shall take effect on July 1, 1989. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(O) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 10, 1991 and further revised and submitted on April 29, 1991, shall take effect on July 1, 1991. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(P) Effective date of amendments.** The amendments filed by the Supreme Court with the General Assembly on January 14, 1992 and further revised and filed on April 30, 1992, shall take effect on July 1, 1992. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(Q) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 8, 1993 and further revised and filed on April 30, 1993 shall take effect on July 1, 1993. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(R) Effective date of amendments.** The amendments submitted by the Supreme Court to the General Assembly on January 14, 1994 and further revised and filed on April 29, 1994 shall take effect on July 1, 1994. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(S) Effective date of amendments.** The amendments to Rules 11 and 53 filed by the Supreme Court with the General Assembly on January 11, 1995 shall take effect on July 1, 1995. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(T) Effective Date of Amendments.** The amendments to Rules 4.2, 19.1, 53, 54, 59, 73, and 75 filed by the Supreme Court with the General Assembly on January 5, 1996 and refiled on April 26, 1996 shall take effect on July 1, 1996. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(U) Effective date of amendments.** The amendments to Rules 4.1, 4.2, 4.3, 4.5, 4.6, 30, 56, 73, and 75 filed by the Supreme Court with the General Assembly on January 10, 1997 and refiled on April 24, 1997 shall take effect on July 1, 1997. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(V) Effective date of amendments.** The amendments to Rules 3, 53, and 75 filed by the Supreme Court with the General Assembly on January 15, 1998 and further revised and refiled on April 30, 1998 shall take effect on July 1, 1998. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(W) Effective date of amendments.** The amendments to Rules 24, 33, and 56 filed by the Supreme Court with the General Assembly on January 13, 1999 shall take effect on July 1, 1999. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(X) Effective date of amendments.** The amendments to Civil Rule 83 filed by the Supreme Court with the General Assembly on January 13, 2000 and refiled on April 27, 2000 shall take effect on July 1, 2000. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(Y) Effective date of amendments.** The amendments to Civil Rules 5, 11, 28, 41, 73, and 75 filed by the Supreme Court with the General Assembly on January 12, 2001, and revised

and refiled on April 26, 2001, shall take effect on July 1, 2001. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(Z) Effective date of amendments.** The amendments to Civil Rule 53 filed by the Supreme Court with the General Assembly on January 9, 2003 and refiled on April 28, 2003, shall take effect on July 1, 2003. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(AA) Effective date of amendments.** The amendments to Civil Rule 33 and 36 filed by the Supreme Court with the General Assembly on January 7, 2004 and refiled on April 28, 2004 shall take effect on July 1, 2004. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(BB) Effective date of amendments.** The amendments to Civil Rules 3, 10, 34, 36, 42, 45, 47, and 51 filed by the Supreme Court with the General Assembly on January 14, 2005 and revised and refiled on April 20, 2005 shall take effect on July 1, 2005. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**(CC) Effective date of amendments.** The amendments to Civil Rules 30, 47, and 53 filed by the Supreme Court with the General Assembly on January 12, 2006 shall take effect on July 1, 2006. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

**APPENDIX OF FORMS**  
**(See Rule 84)**

**INTRODUCTORY STATEMENT**

The forms which follow are intended for illustration only. They are limited in number inasmuch as no attempt is made to furnish a manual of forms.

The forms are expressly declared by Rule 84 to be sufficient under the rules.

Departures from the forms shall not void papers which are otherwise sufficient, and the forms may be varied when necessary to meet the facts of a particular case.

Where appropriate, the forms assume that the action has been brought in the Court of Common Pleas, Franklin County, Ohio.

**FORM 1. CAPTION AND SUMMONS**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B. )  
221 E. West Street )  
Columbus, Ohio 43215 )  
Plaintiff ) No. \_\_\_\_\_  
v. ) SUMMONS  
C.D. )  
122 W. East Street )  
Columbus, Ohio 43214 )  
Defendant )

To the following named defendants:

Name	Address
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

You have been named defendant(s) in a complaint filed in \_\_\_\_\_ County  
Court of Common Pleas, \_\_\_\_\_ County Court House, \_\_\_\_\_ Ohio 43215, by

Name	Address
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

plaintiff(s). A copy of the complaint is attached hereto. The name and address of the plaintiff's  
attorney is \_\_\_\_\_

\_\_\_\_\_

You are hereby summoned and required to serve upon the plaintiff's attorney, or upon the plaintiff, if he has no attorney of record, a copy of an answer to the complaint within twenty-eight days after service of this summons on you, exclusive of the day of service. Your answer must be filed with the Court within three days after the service of a copy of the answer on the plaintiff's attorney.

If you fail to appear and defend, judgment by default will be rendered against you for the relief demanded in the complaint.

\_\_\_\_\_  
Clerk, Court of Common Pleas,  
\_\_\_\_\_ County, Ohio

Date: \_\_\_\_\_

By \_\_\_\_\_  
Deputy

**Note**

The caption above designates the particular paper as a "SUMMONS." The particular pleading or paper should contain an appropriate designation, thus: "COMPLAINT," "ANSWER," etc. A more specific designation in a caption is also appropriate, thus: "MOTION TO INTERVENE AS A DEFENDANT."

\*\*\*\*\*

INSTRUCTIONS FOR PERSONAL OR RESIDENCE SERVICE

To: \_\_\_\_\_

You are instructed to make personal--residence [cross out one] service upon defendant(s)

\_\_\_\_\_  
(name)

at \_\_\_\_\_

(address for service if different from body of summons).

\_\_\_\_\_  
Special instructions for server: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

\* \* \* \* \*

RETURN OF SERVICE OF SUMMONS  
(PERSONAL)

	<u>Fees</u>
Service	\$ _____
Mileage	\$ _____
Copy	\$ _____
Docket	\$ _____
Return	\$ _____
Total	\$ _____

I received this summons on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock, \_\_.m., and made personal service of it upon \_\_\_\_\_ by locating him -- them (cross out one) and tendering a copy of the summons and accompanying documents, on \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Sheriff -- Bailiff -- Process Server  
By \_\_\_\_\_  
Deputy

\*\*\*\*\*



RETURN OF SERVICE OF SUMMONS  
(RESIDENCE)

	<u>Fees</u>
Service	\$ _____
Mileage	\$ _____
Copy	\$ _____
Docket	\$ _____
Return	\$ _____
Total	\$ _____

I received this summons on \_\_\_\_\_, 20\_\_\_\_, at \_\_\_\_\_ o'clock, \_\_.m., and made residence service of it upon \_\_\_\_\_ by leaving it at his -- their (cross out one) usual place of residence with \_\_\_\_\_, a person of suitable age and discretion then residing therein, a copy of the summons, a copy of the complaint and accompanying documents, on \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
 Sheriff -- Bailiff -- Process Server  
 By \_\_\_\_\_  
 Deputy

\*\*\*\*\*

RETURN OF SERVICE OF SUMMONS  
(FAILURE OF SERVICE)

	Fees
Service	\$ _____
Mileage	\$ _____
Copy	\$ _____
Docket	\$ _____
Return	\$ _____
Total	\$ _____

I received this summons on \_\_\_\_\_, 20\_\_\_\_,  
at \_\_\_\_\_ o'clock, \_\_.m., with instructions to make  
personal -- residence (cross out one) service upon \_\_\_\_\_  
and I was unable to serve a copy of the summons upon him--  
them (cross out one) for the following reasons:

\_\_\_\_\_  
\_\_\_\_\_

Date: \_\_\_\_\_

\_\_\_\_\_  
Sheriff -- Bailiff -- Process Server

By \_\_\_\_\_  
Deputy

\*\*\*\*\*

**Note**

Returns shall be made pursuant to Rule 4 through Rule 4.6 and pertinent sections of the Ohio Revised Code which are not in conflict with the Rules of Civil Procedure and which establish particular duties for the serving officer, i.e., Sections 311.08, 311.17 and 2335.31, Revised Code.

[Effective: July 1, 1970.]

**FORM 2. COMPLAINT ON A PROMISSORY NOTE**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B., Plaintiff )  
(address) )  
  
v. ) No. \_\_\_\_\_  
  
C.D., Defendant )  
(address) ) COMPLAINT

1. Defendant on or about \_\_\_\_\_, 20\_\_\_\_, executed and delivered to plaintiff a promissory note, a copy of which is hereto attached as Exhibit A.

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of \_\_\_\_\_ dollars, interest, and costs.

\_\_\_\_\_  
(Attorney for Plaintiff)

\_\_\_\_\_  
(Address)  
\_\_\_\_\_

**Note**

1. The pleader should follow the form above if he has possession of a copy of the note. The pleader should attach a copy of the note to the pleading. See Rule 10(D).

2. Under the rules free joinder of claims is permitted. See Rule 8(E) and Rule 18. Consequently the claims set forth in each and all of the following forms may be joined with this complaint or with each other. Ordinarily each claim should be stated in a separate division of the complaint, and the divisions should be designated as counts successively numbered (i.e., COUNT ONE, COUNT TWO, etc.). See Rule 10(B). In particular the rules permit alternative and inconsistent pleading. See Rule 8(E)(2).

3. The attorney must sign the pleading. See Rule 11. The pleading need not be verified. See Rule 11.

[Effective: July 1, 1970.]

**FORM 2A. COMPLAINT ON A PROMISSORY NOTE  
(REASON FOR OMISSION OF COPY STATED)**

1. Defendant on or about \_\_\_\_\_, 20\_\_\_\_, executed and delivered to plaintiff a promissory note

[in the following words and figures: (here set out the note verbatim)]

or

[whereby defendant promised to pay plaintiff or order on \_\_\_\_\_, 20 \_\_\_\_\_, the sum of \_\_\_\_\_ dollars with interest thereon at the rate of \_\_\_\_\_ percent per annum].

2. Plaintiff is unable to attach a copy of the said note because (here set out the reason for failure to attach the note).

3. Defendant owes to plaintiff the amount of said note and interest.

Wherefore (etc. as in Form 2).

**Note**

1. The pleader states why, under Rule 10(D), he is unable to attach a copy of the note.
2. If pleader can set forth the note verbatim from information at hand, he may do so.
3. Or pleader may plead the legal effect of the note, he being unable to attach a copy of the note.
4. This type form may be used in other situations whenever pleader is required to attach a copy of an instrument, but a copy of the instrument is not available to him.

[Effective: July 1, 1970.]

**FORM 3. COMPLAINT ON AN ACCOUNT**

Defendant owes plaintiff \_\_\_\_\_ dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 2).

[Effective: July 1, 1970.]

**FORM 4. COMPLAINT FOR GOODS SOLD AND DELIVERED**

Defendant owes plaintiff \_\_\_\_\_ dollars for goods sold and delivered by plaintiff to defendant between \_\_\_\_\_, 20\_\_\_\_\_, and \_\_\_\_\_, 20\_\_\_\_\_.

Wherefore (etc. as in Form 2).

**Note**

This form may be used where the action is for an agreed price or for the reasonable value of the goods.

[Effective: July 1, 1970.]

**FORM 5. COMPLAINT FOR MONEY LENT**

Defendant owes plaintiff \_\_\_\_\_ dollars for money lent by plaintiff to defendant  
on \_\_\_\_\_, 20\_\_\_\_\_.

Wherefore (etc. as in Form 2).

[Effective: July 1, 1970.]

**FORM 6. COMPLAINT FOR MONEY PAID BY MISTAKE**

Defendant owes plaintiff \_\_\_\_\_ dollars for money paid by plaintiff to defendant by mistake on \_\_\_\_\_, 20\_\_\_\_, under the following circumstances: [here state the circumstances with particularity--see Rule 9(B) ].

Wherefore (etc. as in Form 2).

[Effective: July 1, 1970.]



**FORM 7. COMPLAINT FOR MONEY HAD AND RECEIVED**

Defendant owes plaintiff \_\_\_\_\_ dollars for money had and received from one G.H. on \_\_\_\_\_, 20\_\_\_\_, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 2).

[Effective: July 1, 1970.]

## FORM 8. COMPLAINT FOR NEGLIGENCE

1. On \_\_\_\_\_, 20\_\_\_\_, in a public highway called \_\_\_\_\_Street in \_\_\_\_\_, Ohio, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against defendant in the sum of \_\_\_\_\_ dollars and costs.

### Note

Since contributory negligence is an affirmative defense, the complaint need contain no allegation of due care of plaintiff.

[Effective: July 1, 1970.]

**FORM 9. COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF  
IS UNABLE TO DETERMINE DEFINITELY WHETHER  
THE PERSON RESPONSIBLE IS C.D. OR E.F.  
OR WHETHER BOTH ARE RESPONSIBLE AND  
WHERE HIS EVIDENCE MAY JUSTIFY A FINDING  
OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE**

A.B., Plaintiff (address)	)	
	)	No. _____
v.	)	
C.D. and E.F., Defendants (addresses)	)	COMPLAINT
	)	

1. On \_\_\_\_, 19\_\_, in a public highway called \_\_\_\_Street in \_\_\_\_, Ohio, defendant C.D. or defendant E.F., or both defendants C.D. and E.F. wilfully or recklessly or negligently drove or caused to be driven a motor vehicle against plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.

Wherefore plaintiff demands judgment against C.D. or against E.F. or against both in the sum of \_\_\_\_\_ dollars and costs.

[Effective: July 1, 1970.]

**FORM 10. COMPLAINT FOR CONVERSION**

On or about \_\_\_\_, 19\_\_, defendant converted to his own use ten bonds of the \_\_\_\_ Company (here insert brief identification as by number and issue) of the value of \_\_\_\_ dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of \_\_\_\_ dollars, interest, and costs.

[Effective: July 1, 1970.]

**FORM 11. COMPLAINT FOR SPECIFIC PERFORMANCE  
OF CONTRACT TO CONVEY LAND**

1. On our about \_\_\_\_, 19\_\_, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of \_\_\_\_ dollars.

**Note**

The demand for relief seeks specific performance as well as ancillary damages resulting from the delay. In addition the demand for relief seeks damages in a certain sum if the court finds it impossible to grant specific performance as where, in the interim, defendant has conveyed the property to a purchaser for value without notice.

[Effective: July 1, 1970.]

**FORM 12. COMPLAINT ON CLAIM FOR DEBT  
AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(B)**

A.B., Plaintiff )  
(address) ) No. \_\_\_\_\_  
  
v. )  
  
C.D. and E.F., Defendants ) COMPLAINT  
(addresses) )

1. Defendant C.D. on or about \_\_\_\_ executed and delivered to plaintiff a promissory note, a copy of which is hereto annexed as Exhibit A.

2. Defendant C.D. owes to plaintiff the amount of said note and interest.

3. Defendant C.D. on or about \_\_\_\_ conveyed all his property, real and personal [or specify and describe] to defendant E.F. for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C.D. for \_\_\_\_ dollars and interest; (2) that the aforesaid conveyance to defendant E.F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

[Effective: July 1, 1970.]

### FORM 13. COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

1. On or about \_\_\_\_, 19\_\_, plaintiff issued to G.H. a policy of life insurance, a copy of which is attached as Exhibit A, whereby plaintiff promised to pay to K.L. as beneficiary the sum of \_\_\_\_ dollars upon the death of G.H. The policy required the payment by G.H. of a stipulated premium on \_\_\_\_, 19\_\_, and annually thereafter as a condition precedent to its continuance in force.

2. No part of the premium due \_\_\_\_, 19\_\_, was ever paid and the policy ceased to have any force or effect on \_\_\_\_, 19\_\_.

3. Thereafter, on \_\_\_\_, 19\_\_, G.H. and K.L. died as the result of a collision between a locomotive and the automobile in which G.H. and K.L. were riding.

4. Defendant C.D. is the duly appointed and acting executor of the will of G.H.; defendant E.F. is the duly appointed and acting executor of the will of K.L.; defendant X.Y. claims to have been duly designated as beneficiary of said policy in place of K.L.

5. Each of defendants, C.D., E.F., and X.Y. is claiming that the abovementioned policy was in full force and effect at the time of the death of G.H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G.H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G.H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

[Effective: July 1, 1970.]

**FORM 14. MOTION TO DISMISS, PRESENTING DEFENSES OF  
FAILURE TO STATE A CLAIM, OF LACK OF SERVICE  
OF PROCESS, AND OF LACK OF JURISDICTION UNDER RULE 12(B)**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B., Plaintiff )  
(address) ) No. \_\_\_\_\_

v. )

C.D. Corporation, Defendant ) MOTION TO DISMISS  
(address) )

The defendant moves the court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2. To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within this state, and (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M.N. and X.Y. hereto attached as Exhibit A and Exhibit B, respectively.

3. To dismiss the action on the ground that the court lacks jurisdiction because [here state the reasons why the court lacks jurisdiction].

\_\_\_\_\_  
(Attorney for Defendant)

\_\_\_\_\_  
(Address)  
\_\_\_\_\_



## SERVICE OF COPY

A copy hereof was served upon X.Y., attorney for plaintiff, by mailing it to him on June 1, 19 [or set forth other method of service upon X.Y.].

---

(Attorney for Defendant)

### **Note**

1. The form gives various examples of defenses which may be raised by motion under Rule 12(B).
2. Whether the motion should be accompanied by a notice of hearing on the motion or whether the motion should be accompanied by a memorandum brief depends upon the rules of a particular local court. See Rule 7(B) and the rules of the local court regarding motion practice.
3. All papers after the original pleading required to be served upon an opposite party shall have endorsed thereon, when filed with the court, a statement setting forth the date and method of service. See Rule 5.

[Effective: July 1, 1970; amended effective July 1, 1971.]

**FORM 15. ANSWER PRESENTING DEFENSES UNDER RULE 12(B)**

A.B., Plaintiff )  
(address) ) No. \_\_\_\_\_  
  
v. )  
  
C.D. and E.F., Defendants ) ANSWER, COUNTERCLAIM,  
(addresses) ) AND CROSS-CLAIM

**FIRST DEFENSE**

The complaint fails to state a claim against defendant C.D. upon which relief can be granted.

**SECOND DEFENSE**

If defendant C.D. is indebted to plaintiff for the goods mentioned in the complaint, he is indebted to him jointly with G.H. G.H. is alive, is a resident of this state, is subject to the jurisdiction of this court and can be made a party but has not been made one.

**THIRD DEFENSE**

Defendant C.D. admits the allegation contained in paragraphs 1 and 4 of the complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint; and denies each and every other allegation contained in the complaint.

**FOURTH DEFENSE**

The right of action set forth in the complaint did not accrue within \_\_\_\_ years next before the commencement of this action.

**COUNTERCLAIM**

[Here set forth any claim as a counterclaim in the manner in which a claim is pleaded in a complaint.]

CROSS-CLAIM AGAINST DEFENDANT M.N.

[Here set forth the claim constituting a cross-claim against defendant M.N. in the manner in which a claim is pleaded in a complaint.]

---

(Attorney for Defendant, C.D.)

---

(Address)

---

(Service of Copy as in Form 14)

**Note**

1. The above form contains examples of certain defenses provided for in Rule 12(B). The first defense challenges the legal sufficiency of the complaint. It is a substitute for a motion to dismiss; that is, under former practice the issue raised by the first defense would have been raised by demurrer, and under present practice the same issue might have been raised by motion at the option of the defendant. See Rule 12(B).

2. The second defense embodies the old plea in abatement. The decision thereon, however, may, for example, well provide under Rule 19(A) or Rule 21 for the citing in of the party rather than an abatement of the action.

3. The third defense is an answer on the merits.

4. The fourth defense is one of the affirmative defenses provided for in Rule 8(C).

5. The answer also includes a counterclaim and a cross-claim. See Rule 12(B).

[Effective: July 1, 1970.]

**FORM 16. SUMMONS AGAINST THIRD-PARTY DEFENDANT**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B., Plaintiff	)	
(address)	)	
v.	)	
C.D., Defendant and Third-Party	)	No. _____
Plaintiff	)	
(address)	)	SUMMONS
v.	)	
E.F., Third-Party Defendant	)	
(address)	)	

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon \_\_\_\_, plaintiff's attorney whose address is \_\_\_\_ and upon \_\_\_\_, who is attorney for C.D., defendant and third-party plaintiff, and whose address is \_\_\_\_, an answer to the third-party complaint which is herewith served upon you within twenty-eight days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer. Your answer to the third-party complaint and your answer to the plaintiff's complaint must also be filed with the court.

	_____	
	(Clerk of Court)	
Clerk	By _____	Deputy
Dated _____		

**Note**

It may be necessary, depending upon when the third-party complaint is served, to seek leave of court by motion to bring in a third-party defendant. See Rule 14(A).

[Effective: July 1, 1970.]

**FORM 16A. COMPLAINT AGAINST THIRD-PARTY DEFENDANT**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B., Plaintiff )  
(address) )  
v. )  
C.D., Defendant and Third-Party ) No. \_\_\_\_\_  
Plaintiff )  
(address) ) **THIRD-PARTY COMPLAINT**  
v. )  
E.F., Third-Party Defendant )  
(address) )

1. Plaintiff A.B. has filed against defendant C.D. a complaint, a copy of which is hereto attached as Exhibit A.

2. [Here state the grounds upon which C.D. is entitled to recover from E.F., all or part of what A.B. may recover from C.D. The statement should be framed as in an original complaint.]

Wherefore C.D. demands judgment against third-party defendant E.F. for all sums [make appropriate change where C.D. is entitled to only partial recovery over against E.F.] that may be adjudged against defendant C.D. in favor of plaintiff A.B.

\_\_\_\_\_  
(Attorney for C.D.,  
Third-Party Plaintiff)

\_\_\_\_\_  
(Address)  
\_\_\_\_\_

**Note**

It is necessary to comply with Rule 5 regarding service of third-party papers on plaintiff.

[Effective: July 1, 1970.]

**FORM 17. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B., Plaintiff )  
(address) ) No. \_\_\_\_  
v. )  
C.D., Defendant ) MOTION TO INTERVENE  
(address) ) AS A DEFENDANT  
E.F., Applicant for Intervention )  
(address) )

E.F. moves for leave to intervene as a defendant in this action in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the ground that [here insert the appropriate grounds of intervention].

\_\_\_\_\_  
(Attorney for E.F.,  
Applicant for Intervention)

\_\_\_\_\_  
(Address)

(Adopted eff. 7-1-70)

**Note (Amended Effective July 1, 1999)**

It is necessary that a motion to intervene be accompanied by a pleading as required in Civ.R. 24(C). It is also necessary to comply with Civ.R. 5 regarding service of the motion on the parties to the action.

**FORM 18. JUDGMENT ON JURY VERDICT**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY OHIO

A.B., Plaintiff )  
(address) ) No. \_\_\_\_\_  
v. )  
C.D., Defendant ) JUDGMENT  
(address) )

This action came on for trial before the Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict,

It is ordered and adjudged [that the plaintiff A.B. recover of the defendant C.D. the sum of \_\_\_\_, with interest thereon at the rate of \_\_\_\_ percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C.D. recover of the plaintiff A.B. his costs of action.]

Dated at \_\_\_\_, Ohio, this \_\_\_\_ day of \_\_\_\_, 19\_\_

\_\_\_\_\_  
Judge, Court of Common Pleas

Journalized this \_\_\_\_ day of \_\_\_\_, 19\_\_

\_\_\_\_\_  
Clerk of Court

By \_\_\_\_\_ Deputy Clerk

**Note**

This form is illustrative of the judgment to be entered upon the general verdict of a jury. It deals with the cases where there is a general jury verdict awarding the plaintiff money damages or finding for the defendant, but is adaptable to other situations of jury verdict.

[Effective: July 1, 1970.]

**FORM 19. JUDGMENT ON DECISION BY THE COURT**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B., Plaintiff )  
(address) ) No. \_\_\_\_\_  
v. )  
C.D., Defendant ) JUDGMENT  
(address) )

This action came on for [trial] [hearing] before the Court, and the issues having been duly [tried] [heard] and a decision having been duly rendered,

It is ordered and adjudged [that the plaintiff A.B. recover of the defendant C.D. the sum of \_\_\_\_, with interest thereon at the rate of \_\_\_\_ percent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C.D. recover of the plaintiff A.B. his costs of action.]

Dated at \_\_\_\_, Ohio, this \_\_\_\_ day of \_\_\_\_, 19\_\_

\_\_\_\_\_  
Judge, Court of Common Pleas

Journalized this \_\_\_\_ day of \_\_\_\_, 19\_\_

\_\_\_\_\_  
Clerk of Court

By \_\_\_\_\_ Deputy Clerk

**Note**

This form is illustrative of the judgment to be entered upon a decision of the court. It deals with the cases of decisions by the court awarding a party only money damages or costs, but is adaptable to other decisions by the court.

[Effective: July 1, 1970.]



**FORM 20. COMPLAINT FOR DIVORCE, ALIMONY  
AND CUSTODY OF CHILDREN**

COURT OF COMMON PLEAS  
FRANKLIN COUNTY, OHIO

A.B., Plaintiff	)	
(address)	)	No. _____
v.	)	
C.D., Defendant	)	COMPLAINT
(address)	)	

1. Plaintiff has been a resident of Ohio for at least six months immediately preceding the filing of this complaint.

2. Plaintiff and defendant were married at \_\_\_\_, in the state of \_\_\_\_, on the \_\_\_\_ day of \_\_\_\_, 19\_\_, and there are [no] \_\_\_\_ children, the issue of such marriage [whose names and ages are, respectively (stating them, and as to who has custody) ].

3. Plaintiff says that defendant [here set forth one or more of the statutory grounds for divorce as provided for by law].

Wherefore, plaintiff demands that she [he] be granted a divorce from defendant and awarded custody of their minor children; that she [he] be granted reasonable alimony and support for their minor children; [that she be restored to her former name of \_\_\_\_]; and for her costs herein, including a reasonable sum for her expenses and attorney's fees in this action, and for such other relief as shall be proper and necessary.

\_\_\_\_\_  
(Attorney for Plaintiff)

\_\_\_\_\_  
(Address)

\_\_\_\_\_

[Effective: July 1, 1970.]