NEW TRENDS IN CIVIL LITIGATION

Mark M. Abramowitz

Justin J. Hawal

Peter C. Soldato

2020 Amendments to the Ohio Rules of Civil Procedure

GOALS

Prompted by national studies that found the amendments will achieve a just, speedy, and inexpensive resolution to every action in Ohio courts by emphasizing:

1. The need for better case management
2. The role of cooperation among the parties during discovery
3. More effective use of the principle of "proportionality"

Amendments to Rules: 4.7, 16, 26, 37, and 53(C)

Rule 4.7. Waiver of Service

- Adopts the procedures for waiver of service of summon used in federal courts.
- Provides written forms to be used to when requesting waiver.
- The goal is to avoid unnecessary delay and expense in the clerk's offices and with using certified mail.
- In exchange for waiver, litigants automatically receive 60 days to answer from the date a notice is sent rather than the standard 28-day answer time.
- Party agreeing to waive service does not give up any objection to jurisdiction or venue, or any other defense to the lawsuit.
- Failure to waive may result, if without good cause, in an award of expenses later incurred in making service, including reasonable attorney fees.

Rule 16. Pretrial Procedure

- Explicitly states that all parties “shall endeavor in good faith to agree” on all the case schedules contemplated by the rule.
- Rule 15(B) contains a new requirement that a court “shall issue a scheduling order” in every single case “as soon as practicable” after a case is filed and no later than 90 days after a defendant is served or 60 days after any defendant responds to the complaint.
- Rule 16(B)(3)(e) provides that a scheduling order “may direct that before moving for an order relating to discovery, the movant must request a conference with the court.”
- Rule 16(C) emphasizes the responsibility of attorneys “to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference.”

Rule 26. General Provisions Governing Discovery

- Sets out the newly amended scope of discovery: "any nonprivileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case."*
- Rule 26(B)(3) adds provisions for initial disclosures of basic "information then reasonably available."
- Rule 26(F) requires a conference of attorneys and unrepresented parties "as soon as practicable" and no later than 21 days before a scheduling conference is held with the court.
- Rule 26(B)(7) provides that most expert witnesses shall provide reports including their CVs in accordance with the case schedule set by the court.
- There is an exception not found in the federal counterpart that allows treating physicians or other health care providers to testify without writing a formal report when the records are sufficient to put the parties on notice of their opinions.

Rule 37. Failure to Make Discovery: Sanctions

- Rule 37(e) amended to change the framework for when a party can be sanctioned for the failure to preserve electronically stored information.
- Removes the factors courts considered for sanctions when ESI was lost as a result of routine, good faith operation of a electronic information system.
- Provides that if ESI is lost because a party failed to take reasonable steps to preserve it, the court may:
  - Upon a finding of prejudice, order measures no greater than necessary to cure the prejudice
  - Upon a finding of an intent to deprive the other party of the ESI, issue sanctions, including adverse inferences, jury instructions, dismissal, or default judgment.

Rule 53. Magistrates

- Rule 53(C) was amended to streamline the procedure for jury trial with the consent of all parties held before magistrates.
- As soon as all parties stipulate to assignment of a magistrate, the magistrate shall rule on all pretrial (or post-trial) motions including discovery motions and dispositive motions.
- Appeals from rulings by a magistrate go directly to the court of appeals, not to the trial judge.

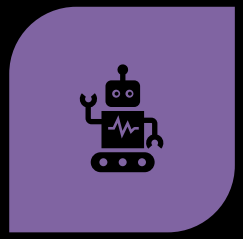
Using Technology to Your Advantage

PRO TIP: Avoid Filters

Virtual Depositions

TIPS ON USING ZOOM

SPECIAL CONSIDERATIONS WHEN USING EXHIBITS



DECIDING BETWEEN VIRTUAL OR IN-PERSON

PSYCHOLOGY OF VIRTUAL DEPOS

USING EXHIBITS: THE 3 OPTIONS

- Sharing Screen with Witness
- Sharing Document with Witness
- Providing Exhibits Before Depo, Either Electronically or on Paper

Zoom Meeting
View
Peter Soldato
Peter Soldato
Unmute
Start Video
Security
Participants
Chat
Share Screen
Record
Breakout Rooms
Reactions
Apps
End
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11/24/2021

Zoom Meeting

View

Chat

Peter Soldato

Peter Soldato

Who can see your messages?

To: Everyone

Type message here...

Unmute | Start Video | Security | Participants 1 | Chat | Share Screen | Record | Breakout Rooms | Reactions | Apps | End

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STIPULATIONS REGARDING EXHIBIT PROTOCOL

- Federal Rule of Civil Procedure 29 allows that "[u]nless the court orders otherwise, the parties may stipulate that a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event it may be used in the same way as any other deposition."

- Ohio Rule 29: "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."

- https://nysd.uscourts.gov/sites/default/files/practice_documents/RWL%20Lehrburger%20Sample%20Remote%20Deposition%20Protocol.pdf

Virtual Depositions

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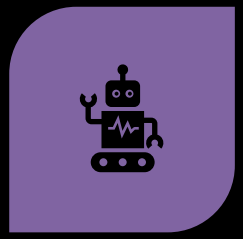

DECIDING BETWEEN VIRTUAL OR IN-PERSON

PSYCHOLOGY OF VIRTUAL DEPOS

PREPARATION FOR VIRTUAL DEPOSITIONS

TEST EVERYTHING NUMEROUS TIMES

GIVE CLEAR INSTRUCTIONS TO OPPOSING COUNSEL ABOUT WHAT THEY AND THEIR WITNESS WILL NEED IN ORDER TO ATTEND AND PARTICIPATE IN THE DEPOSITION

REMEMBER YOU MAY BE DEALING WITH VERY UNSOPHISTICATED WITNESSES OR WITNESSES WHO SIMPLY ARE NOT GOOD WITH TECHNOLOGY. K-I-S-S.