May 6, 2020

OHIO SENATE JUDICIARY COMMITTEE

To Whom It May Concern:

My name is John D. Holschuh, Jr., and I am a trial lawyer in Cincinnati, Ohio, and the current Chair of the Civil Rules Committee of the Ohio Supreme Court Commission on Rules and Practice. In 2015-2016, I was President of the Ohio State Bar Association, and during my term, I became aware of proposed revisions to State Court Rules of Civil Procedure as recommended by the American College of Trial Lawyers. I met with Chief Justice O’Connor, who encouraged further evaluation of the proposed changes. Accordingly, I asked Marty Foos, who was Chair of the Litigation section of the Ohio State Bar Association, to form a task force to consider the recommended changes. He appointed a 24-person blue-ribbon Task Force made up of both plaintiff and defense trial lawyers, along with some of the best trial judges in the State. After much hard work and consideration, the task force issued its Report in June of 2017. One of the recommendations in the Report was to amend the Civil Rule 26 to provide for “proportionality” in discovery, which is addressed by Judge Richard Frye (one of the members of the Task Force) in his accompanying memorandum. The Task Force Report was then considered by the Civil Rules Committee, and after a thorough vetting, recommended amending Civil Rules 26 to the Commission. The Commission, after much discussion, voted to approve the amendment to Civil Rule 26 for consideration by the Ohio Supreme Court. After two public comment periods, the Justices of the Supreme Court agreed with the Commission’s recommendations to so amend Civil Rule 26 to provide “proportionality” in discovery.

Sincerely yours,

JDH/sla

John D. Holschuh, Jr.
PROPOSED CIVIL RULE 26(B) AMENDMENT

Introduction.

In January 2020 the Ohio Supreme Court transmitted proposed Amendments to a number of court rules to the General Assembly, pursuant to Art. IV, Section 5(B) of the Ohio Constitution. One proposed amendment has been criticized by some attorneys who primarily represent plaintiffs. We believe members of the General Assembly should understand that years of intensive study preceded adoption of this Rule in federal courts in 2015. Extensive study in Ohio followed before this amendment was proposed. In again considering the matter in April, the Supreme Court continued to support the amendment; but asked Ohio’s Rules Commission to evaluate how new Civ. R. 26 is operating after 18 months. As in the federal system where similar review of “proportionality” has started, post-adoption studies offer additional assurance that sensible alteration of R. 26 can occur if judges and lawyers find the changes are not helpful.

The Change Proposed.

The amendment to Civil Rule 26(B) sets forth the “Scope of Discovery.” The proposed amendment adds a concept called “proportionality” in defining what lawyers are entitled to obtain from opposing parties in civil cases. The new language tracks the comparable provision in Federal Rule 26, and reads: Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ access to resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.
**Reasons for the Proposal.**

Users of civil courts across the United States have voiced concern for decades over apparent abuse of the broad pretrial discovery process authorized in federal and most state courts. So-called “RAMBO” lawyers were said to seek “over-discovery” indiscriminately and/or simply to make cases so costly and time-consuming that parties would offer unjustified settlements. Simultaneously, a large drop in civil trials was seen across the country and, more recently, a huge drop in civil case filings in Ohio state courts.

Leaders in the legal community recognized these issues. Under the leadership of Sixth Circuit Judge Jeffrey Sutton (Chair of the Judicial Conference of the United States Standing Committee on Rules of Practice and Procedure) a conference was organized at Duke Law School in 2010 to explore better means to achieve the just, speedy and inexpensive determination of every civil case. 200 participants were hand-picked to attend, to ensure diverse views and expertise; they included lawyers who primarily represent plaintiffs. 40 papers, 80 presentations and 25 compilations of empirical research were presented. Key conclusions reached were that the system needed more cooperation and “proportionality,” overseen by active case management from trial judges. More work followed. Hearings by the federal rules committee before “proportionality” was added to Civil Rule 26 involved review of 2,300 written comments, and 120 live witnesses at 3 public hearings. There was, in short, exhaustive study before federal courts adopted “proportionality” in December 2015.

State courts were also encouraged to study their civil justice systems. A Conference of Chief Justices 2016 report entitled “Call to Action: Achieving Civil Justice for All,” a 2015 joint report by the Institute for the Advancement of the American Legal System (IAALS) [at the University of Denver law school] and the American College of Trial Lawyers, along with similar work by others raised important questions about procedures used in civil cases. A Civil Justice Reform Task Force was created, consisting of 24 trial judges and lawyers from across Ohio hand-picked by the OSBA to assure members had diverse backgrounds and experience. Ohio’s Task Force met over several years to study proposals, including “proportionality.” The Task Force gained input from Ohio lawyers and federal judges who were, by 2017, actually using “proportionality.” The Task Force
issued a lengthy report in June 2017 recommending Ohio adopt the current “proportionality” amendment to Civ. R. 26(B).

It merits mention that, as a result of similar studies, Michigan (2020), Idaho, Maine and Missouri (all 2019) recently embraced civil justice reform including “proportionality.” The Institute for the Advancement of the American Legal System [IAALS] report “The Road to Civil Justice Reform” published in April 2020 reviews work in other states comparable to that here in Ohio.¹ We are aware of no jurisdiction that has dropped “proportionality” after adoption.

Ohio Task Force recommendations became the basis for formal study by the Ohio Supreme Court’s Commission on Rules of Practice & Procedure. During comment periods in 2019 and 2020, some lawyers filed letters – largely encouraged by the Ohio Association for Justice - voicing concern that “proportionality” would inhibit development of facts needed by plaintiffs to fairly investigate and prepare their cases. We turn to that concern.

“Proportionality” will not unfairly impact any group.

Several years ago, the Texas Supreme Court addressed their “proportionality” rule, pointing out that it “acts as a governor to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. *** [T]he amendment is directed to *** restoring proportionality as the ‘collective responsibility’ of the parties and the court.” That Court recognized that such an explicit rule is, in some ways, needed because of the advent of e-discovery and the burden that electronic recordkeeping presents in civil cases. Electronic discovery was never imagined when the current version of Rule 26(B) was adopted in Ohio in 1970. Proportionality is, in short, simply a reasoned effort to sensibly regulate modern discovery, not to eliminate it for anyone.

Given the consensus reviewed above, concern that “proportionality” will be one-sided simply has not been seen as well taken by the OJC or the Supreme Court’s Commission on Rules. Unreasonable discovery demands can be made by either side in any court case; this Rule (and others in the 2020 package) discourage bad practices by lawyers and re-confirm the responsibility of Ohio trial judges to not let them occur.

¹ Available at https://iaals.du.edu/sites/default/files/documents/publications/transforming_our_civil_justice_system_for_the_21st_century_road_to_civil_justice_reform.pdf