Testimony in Opposition to Amendments to Civil Rule 26

Ohio Rules of Practice and Procedure

Ohio Senate Judiciary Committee

Sean Harris, Past President of the Ohio Association for Justice

May 13, 2020

Chairman Eklund, Ranking Member Thomas, and members of the Senate Judiciary Committee, thank you for the opportunity to testify in opposition to Supreme Court of Ohio’s proposed amendments to the Rules of Practice and Procedure, specifically Civil Rule 26.

My name is Sean Harris. I am an attorney in Columbus, and the Past President of the Ohio Association for Justice. I am here today to ask you to reject the proposed changes to Civ. R. 26, specifically, proportionality.

Ohio’s current rules already manage discovery issues. All trial court judges in Ohio already have the inherent authority to control discovery and potential abuses. If truly abusive discovery occurs, trial courts are well-equipped under the current Rules to deny such discovery or issue sanctions. Under Civ. R. 37, judges can limit or strike discovery, stay proceedings until abuse stops, dismiss the action, enter default judgment, treat as contempt of court, award attorney’s fees, issue a Protective Order, and frivolous conduct statute (R.C. 2323.51). These are all currently available. No additional burdensome regulation is required. Which is why practitioners support the current rules. Ohio State Bar Association is opposed. Of the 84 public comments received, 80 were opposed and just 4 were in favor. Proportionality is simply a solution to a problem that doesn’t exist.
Proportionality invites costly and time-consuming abuse and delay. It provides parties with sweeping power to declare what is proportional and what is not in its view of the case. Inevitably, every request will be met with an objection that it is “not proportional,” raising yet another hurdle to legitimate discovery. Indeed, as one Federal Court noted, “proportionality ‘has become the new black,’ in discovery litigation, with parties invoking the objection with increasing frequency.” Vaigasi v. Solow Mgmt. Corp., 2016 WL 616386, at *13 (S.D.N.Y. Feb. 16, 2016) (internal quotation omitted). This requires a motion to the judge to resolve. Most trial court judges are overwhelmed with criminal cases. They barely have time for civil trials, let alone dealing with civil discovery matters. Proportionality will further burden our already overwhelmed judges, and delay the administration of justice.

Proportionality creates a multi-tiered system of justice. The discovery process is a search for the truth that starts with a level playing field. With proportionality, people with cases perceived to be “small” receive less access to justice and their 7th Amendment rights. People with cases perceived to be “large” get more access to justice, even though the burden of proof remains the same in each case. In our system, it is the jury – not judges or rule-makers – that decides how big or small a given case is.

For these reasons, we ask that you reject these changes to Civ. R. 26.

Thank you for the opportunity to testify. I am happy to address any questions from the committee.