Testimony of the Ohio State Bar Association in Opposition to the Proposed Amendments to the Rules of Practice and Procedure – Civ. R. 26
Senate Judiciary Committee
Magistrate Kathleen Lenski, Esq.
May 13, 2020

Chair Eklund, Vice Chair Manning, Ranking Member Thomas, and members of the Senate Judiciary Committee. Thank you for the opportunity to submit opponent testimony concerning the proposed amendments to Civ. R. 26 on behalf of the Ohio State Bar Association (OSBA). I am a Magistrate in Montgomery County Juvenile Court and a member of the Board of Governors of the OSBA.

The OSBA opposes the proposed amendments to Civ. R. 26 that seek to adopt the federal rule concept of “proportionality” in our state civil rules. The proposed changes seek to correct a problem that doesn’t exist with a solution that will not accomplish the intended result and may create new problems altogether.

The OSBA greatly appreciates all the work of the Supreme Court of Ohio and the Commission on the Rules of Practice & Procedure have done to ensure that Ohio courts continue to be a place where our professionals can represent their clients to the best of their abilities. Out of respect for their process, we rarely oppose proposed amendments from the Commission and the Court. With regards to the proposed amendment to Civ. R. 26, however, we have concerns because we believe adopting a proportionality standard for discovery may have a detrimental effect on the administration of justice in Ohio.

Prior to the May 1st deadline for the Supreme Court of Ohio to change their proposal, the OSBA asked the Court to withdrawal the proposed amendment to give members of the bar and the judiciary more time to study the following three issues:

1. The differences between cases that are typically brought in state court versus federal court, and how application of proportionality in discovery may impact those cases. In addition, we would like to further review how the federal and state rules of civil procedure, collectively, differ and whether any other rules in the Ohio Rules of Civil Procedure also need to be amended should the proportionality standard be adopted in Ohio. The differences between the types of cases typically brought in federal court versus those that are brought in state court represent our members' primary concern. We would like to take more time to better understand how these cases may be impacted should proportionality become a standard for discovery. Additionally, the OSBA believes that more study is needed to analyze whether there are additional discovery processes and procedures that exist in the federal rules that should be incorporated alongside adoption of the concept of proportionality in our state's rules of procedure.
2. **Whether this change is a fundamental shift in discovery for Ohio courts.** We’ve heard concerns from our members that adding a proportionality standard is a drastic change to our discovery rules. Proportionality forces judges to decide at the outset of every case what the needs of the case are in order to ascertain what discovery is proportional. This is a monumental shift from the goal of discovery being to eliminate surprise by requiring the free flow of information between parties. The OSBA believes that if it is the intention of the Court to make this change, this intention should be clearly communicated to the practicing bar. If this is not the intention of the Court, the OSBA would like to work with the Court on modifications that could safeguard against such a shift.

3. **What should be done to guard against potential unintended consequences, such as varying interpretations of the rule and potential disparate impact.** We are also fearful that the proposal may have some unintended consequences and we would like to further explore the legitimacy of these concerns. For example, it has been suggested that the proposed amendment could create a multi-tiered system of justice where courts would be deciding which cases merit greater and lesser discovery by objectively comparing the monetary damages sought without regard to what the money subjectively means to the litigants. This could lead to so-called “small” cases receiving less access to justice than “larger” cases. Such an outcome is antithetical to OSBA’s mission to promote justice and advance the legal profession.

While the Court ultimately decided to move forward with including the proportionality rule in the changes to the rules before you, we are now asking you to exercise your powers under the Ohio Constitution by adopting a concurrent resolution of disapproval, so the bench and bar may continue to study and iron out these issues.

Thank you for the opportunity to testify and I am available to answer questions.