

LITIGATION ALERT

JULY 13, 2020

TRACY FRANCIS

216.443.2542

tfrancis@porterwright.com

ABIGAIL WILLIAMS

216.443.2538

awilliams@porterwright.com

This law alert is intended to provide general information for clients or interested individuals and should not be relied upon as legal advice. It does not necessarily reflect the views of the firm as to any particular matter or those of its clients. Please consult an attorney for specific advice regarding your particular situation.

Please see our other publications at www.porterwright.com/media.

The rules, they are a changin' - Amendments to the Ohio Rules of Civil Procedure

Coronavirus. Murder Hornets. Dust Storms. Tiger King. Civil Rule Amendments. That's right, as if 2020 hasn't been exciting enough, the Ohio Supreme Court shook up the civil rules by issuing amendments effective July 1, 2020. The last thing we need these days are different rules to remember, but there is some good news. Many of the changes are similar to procedures already in place in federal court, seek to cut down on expenses, and hope to make the litigation process more transparent and efficient.

Here is a quick look at the changes:

Waive service and get more time

Want to binge Netflix but have a pesky answer date looming? Good news! The service provisions have been amended to include Rule 4.7, which now provides for waiver of service of process. Under this new provision, a plaintiff may request that the defendant waive service in exchange for additional time to respond to the complaint. Time that most definitely will not be squandered watching TikTok videos.

With respect to the mechanics of obtaining a waiver, Rule 4.7 provides that such request must:

- Be in writing addressed pursuant to Rule 4.2;
- Identify the court where filed;
- Include a copy of the complaint and two copies of the waiver form, which is conveniently attached to the Rule and includes the consequences of waiving/not waiving service;

- State the date the request was sent;
- Give the defendant at least 28 days after the request was sent - or at least 60 days if sent to the defendant outside of the U.S. - to return the waiver; and
- Be sent via first class mail or other reliable means – which according to the Staff Notes, can include “electronic communications.”

If the defendant agrees to waive service of process, it gets 60 days from the date the request was sent to respond to the complaint. If, however, a defendant subject to the court’s jurisdiction fails to waive service, the court may impose expenses related to obtaining service, including attorneys’ fees incurred in filing motions to collect the service expenses. Of note, unlike the related federal rule, the imposition of fees is not mandatory. If the defendant elects not to waive service, the plaintiff must obtain service pursuant to the applicable provisions of Civ. R. 4 through Civ. R. 4.6 as was done prior to the amendment and the defendant has 28 days after service to respond.

In addition to extra time, waiving service can also potentially decrease the costs of litigation because, instead of rushing to respond to a complaint, defendants have an opportunity to slow down and evaluate the claims and defenses, obtain the appropriate counsel, and possibly resolve the case during the early stages of the litigation.

You can’t hide behind that face mask – Scheduling orders to promote greater consistency, predictability and transparency across Ohio

Miss interacting with opposing counsel during quarantine? Amendments to both Rule 16 governing pretrial procedure and Rule 26 requiring that the parties confer and develop a discovery plan gives you the chance to interact. Because of the interaction with opposing counsel, this is another opportunity to obtain information for an early assessment of the case.

Specifically, Rule 26(F) requires the parties to confer “as soon as practicable,” but no later than 21 days in advance of a scheduling conference, to discuss “the nature and basis of their claims and defenses[,]” the “possibilities for promptly settling or resolving the case;” initial disclosures; and “a proposed discovery plan.”

This discovery plan must be filed within 14 days after the conference of the parties outlining the parties’ views and proposals on several matters including: initial disclosures, discovery deadlines, subjects of discovery, ESI preservation and production, privilege issues, public record disclosures, protective orders, and modifications of any scheduling order.

While a scheduling conference is not mandatory under Rule 16, courts are nevertheless required to issue a scheduling order addressing case-management items as soon as practicable, “within the earlier of 90 days after any defendant has been served with the complaint or 60 days after any defendant has responded to the complaint.” If no report is submitted or the court does not hold a scheduling conference, the court must issue

the scheduling order sua sponte.

Civ. R. 16(B) describes the contents of a scheduling order and includes things like limiting the time to join parties or amend pleading, modifying the scope of discovery, items related to electronic discovery and setting dates, among other things. Early, purposeful consideration of discovery and other litigation issues will lead to greater efficiencies and avoid disputes down the road.

Goodbye middleman – Eliminating trial court review following magistrate jury trials

New Civ.R. 53(C)(2) streamlines the procedure following magistrate-conducted jury trials and potentially allows for cases to be expedited. Magistrate jury trials require the parties' unanimous written consent. While the trial judge must still enter judgment, he or she is no longer required to review the factual findings of the jury or the magistrate's interlocutory rulings made during the trial – such are conclusive. Instead of being reviewed by the trial judge, all objections to the jury's factual findings or to the magistrate's legal rulings must be asserted via appeal to the appropriate appellate court after the entry of a final judgment or final appealable order.

Proportionality is the new reality

Several significant amendments were made to Civ.R. 26 governing discovery, including limiting the scope of discovery to add the "proportionality" considerations found in the federal rules. This change is important because it seeks to prevent expense not justified by the needs of the case. The discovery amendment also requires initial disclosure of certain information and that the parties file a discovery plan. An in-depth-look at the changes to Rule 26 and their implications will follow in a discovery-specific law alert next week.

For more information please contact [Tracy Francis](#), [Abigail Williams](#) or any member of Porter Wright's [Litigation group](#).