

**AMENDMENTS TO THE
OHIO RULES OF APPELLATE PROCEDURE, OHIO RULES OF
CRIMINAL PROCEDURE AND OHIO RULES OF CIVIL PROCEDURE**

The Supreme Court of Ohio has adopted the following amendments to the Ohio Rules of Appellate Procedure (22 and 43), Ohio Rules of Criminal Procedure (10, 24, 43, and 59) and Ohio Rules of Civil Procedure (4, 16, 26, 33, 34, 36, 37, 45, and 86). These amendments were filed by the Supreme Court of Ohio with the General Assembly pursuant to Article IV, Section 5(B) of the Ohio Constitution and became effective July 1, 2008. The history of these amendments is as follows:

October 15, 2007	Initial publication for comment
January 14, 2008	Proposed amendments filed with the General Assembly
February 4, 2008	Publication for second public comment period
April 28, 2008	Revised proposed amendments filed with the General Assembly
July 1, 2008	Effective date of revised proposed amendments

A Staff Note prepared by the Commission on Rules of Practice and Procedure follows each amendment. Although the Supreme Court uses the Staff Notes during its consideration of proposed amendments, the Staff Notes are not adopted by the Court and are not a part of the rule. As such, the Staff Notes represent the views of the Commission on Rules of Practice and Procedure and not necessarily those of the Supreme Court. The Staff Notes are not filed with the General Assembly but are included when the proposed amendments are published for comment and are made available to the public and to legislative committees.

Following is a summary of the amendments. In addition to the substantive amendments, nonsubstantive grammar and gender-neutral language changes are made throughout any rule that is proposed for amendment.

Entry of Judgment – App. R. 22

App. R. 22 is amended to clarify that judgments can be signed by more than one judge on the appellate panel and that notice should be given to parties when a judgment is filed. The prior rule required notice to the parties when the decision was announced. The amendments also remove language from App. R. 22 which had the parties preparing the judgment entry and places that responsibility with the court.

Use of video conferencing – Crim. R. 10 and Crim. R. 43

Crim. R. 10 and 43 are amended giving courts more flexibility to utilize modern technology, specifically video conferencing, if certain criteria are met.

Crim. R. 43(A)(2)(a) through (e) sets forth criteria that must be met prior to a court allowing the defendant to appear by video conference. These criteria include: (1) the defendant must be able to see and hear the judge; (2) the judge must be able to see and hear the defendant; and (3) the defendant must have the ability to communicate confidentially with his or her attorney. The amendments are revised from those considered in 2006 in that they specifically allow counsel to appear with the defendant at the remote location and they allow video conferencing in proceedings that require sworn testimony if counsel is present and consents to the use of video conferencing.

The amendment to Crim. R. 10 codifies *State v. Phillips*, 1995 Ohio 171, which authorized video conferencing for arraignments as long as it was “functionally equivalent to live, in-person arraignment.” After the second comment period the Supreme Court revised the proposed amendments to specify that the requirements of proposed Crim. R. 24(A)(2) apply in misdemeanor cases and in felony cases where the defendant has waived presence. In addition, the revisions specify that a waiver may be written or “on the record”.

Alternate jurors – Crim. R. 24

Crim. R. 24 is amended to give trial judges the option of retaining alternate jurors during the deliberation process in non-capital cases. The alternate jurors would be sequestered from the regular jurors during deliberations but could be substituted if a regular juror is not able to continue. The amendments do not change the current requirement in capital cases that alternate jurors be retained during the guilt phase of deliberations. The amendments do, however, allow judges the option of retaining alternates during the penalty phase and substituting the alternates in the middle of deliberation.

Revivor of judgment – Civ. R. 4

Civ. R. 4 is amended to clarify the procedure and manner of service for a motion to revive a dormant judgment. Consistent with statutes that existed prior to the adoption of the Rules of Civil Procedure in 1970, the amendments require that a motion to revive a dormant judgment be served upon the judgment debtor in the same manner as service of summons with complaint attached.

Electronic Discovery – Civ. R. 16, 26, 33, 34, 36, 37, and 45

The Supreme Court recommends amendments to several Rules of Civil Procedure to accommodate discovery of electronically stored information. The United States Judicial Conference, after extensive work and public comment finalized and the U.S. Supreme Court approved amendments to the Federal Rules of Civil Procedure that were effective in December 2006. Although based upon the federal rules, the amendments differ from them in order to accommodate differences in practical application in Ohio. For example, under the federal rules parties take part in a meeting prior to the first pretrial conference and jointly produce an extensive case management plan. The current Ohio rules do not require this process.

The key amendments recommended are as follows:

- Civ. R. 16 (pretrial procedure) is amended to clarify that issues related to electronically stored information are appropriate topics for resolution during pretrial conferences.
- Civ. R. 26 (general provisions governing discovery) is amended to clarify that discovery of electronically stored information is permitted. The amendments establish that a party is not required to produce electronically stored information if the production is too burdensome or costly as is the case with traditional discovery. The amendments establish a procedure that must be followed when a party withholds documents, including electronically stored information, based upon privilege and provide a mechanism for retrieving inadvertently produced documents from an opponent.
- Civ. R. 33 (interrogatories to parties) is amended only to restructure the rule. Earlier amendments withdrawn by the Commission would have clarified that the time for responding to requests for admission does not begin to run until the party from whom discovery is sought receives both an electronic and paper copy of the requests. However, in light of comments received the Commission recommended withdrawing those amendments from the Court's consideration.
- Civ. R. 34 (production of documents) is amended to expressly state that discovery of electronically stored information is governed by this rule. Amendments to the rule also allow a requesting party to specify the form or forms in which electronically stored information should be produced and allow a party responding to a request to articulate its objection to the requested form or forms requested.
- Civ. R. 36 (requests for admission) is amended much like Civ. R. 33 above.
- Civ. R. 37 (failure to make discovery; sanctions) is amended to provide factors a judge should consider in determining sanctions when a party has destroyed potentially relevant electronically stored information.

- Civ. R. 45 (subpoena) is amended to specify that a subpoena may be used to obtain electronically stored information from nonparties. The proposed amendments are similar to those discussed in Civ. R. 34 regarding discovery of electronically stored information from parties. If the nonparty believes the form specified in the subpoena is unduly burdensome or costly they can seek relief under the Civ. R. 45(D)(3). This division also outlines the procedures and standards when a person moves to quash or otherwise objects to a subpoena.

AMENDMENTS TO THE RULES OF PRACTICE AND PROCEDURE
FILED BY THE SUPREME COURT OF OHIO
PURSUANT TO ARTICLE IV, SECTION 5 OF THE OHIO CONSTITUTION

OHIO RULES OF APPELLATE PROCEDURE

RULE 22. Entry of Judgment.

(A) Form. All judgments shall be in the form of a judgment signed by a judge or judges of the court which shall be prepared by the court and filed with the clerk for journalization. The clerk shall enter the judgment on the journal the day it is filed. A judgment is effective only when entered by the clerk upon the journal.

(B) Notice. Notice of the filing of judgment and its date of entry on the journal shall be made pursuant to App. R. 30.

(C) Filing. The filing of a judgment by the court with the clerk for journalization constitutes entry of the judgment.

RULE 43. Effective Date.

(T) The amendments to Appellate Rule 5 filed by the Supreme Court with the General Assembly on January 9, 2003 and refiled on April 28, 2003, shall take effect on July 1, 2003. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(U) The amendments to Appellate 22 filed by the Supreme Court with the General Assembly on January 14, 2008 and refiled on April 28, 2008 shall take effect on July 1, 2008. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

OHIO RULES OF CRIMINAL PROCEDURE

RULE 10. Arraignment.

(A) Arraignment procedure

Arraignment shall be conducted in open court, and shall consist of reading the indictment, information or complaint to the defendant, or stating to the defendant the substance of the charge, and calling on the defendant to plead thereto. The defendant may in open court waive the reading of the indictment, information, or complaint. The defendant shall be given a copy of the indictment, information, or complaint, or shall acknowledge receipt thereof, before being called upon to plead.

(B) Presence of defendant

(1) The defendant must be present, except that the court, with the written consent of the defendant and the approval of the prosecuting attorney, may permit arraignment without the presence of the defendant, if a plea of not guilty is entered.

(2) In a felony or misdemeanor arraignment or a felony initial appearance, a court may permit the presence and participation of a defendant by remote contemporaneous video provided the use of video complies with the requirements set out in Rule 43(A)(2) of these rules. This division shall not apply to any other felony proceeding.

(C) Explanation of rights

When a defendant not represented by counsel is brought before a court and called upon to plead, the judge or magistrate shall cause the defendant to be informed and shall determine that the defendant understands all of the following:

(1) The defendant has a right to retain counsel even if the defendant intends to plead guilty, and has a right to a reasonable continuance in the proceedings to secure counsel.

(2) The defendant has a right to counsel, and the right to a reasonable continuance in the proceeding to secure counsel, and, pursuant to Crim. R. 44, the right to have counsel assigned without cost if the defendant is unable to employ counsel.

(3) The defendant has a right to bail, if the offense is bailable.

(4) The defendant need make no statement at any point in the proceeding, but any statement made can and may be used against the defendant.

Staff Note (July 1, 2008 amendments)

In 1995 the Ohio Supreme Court authorized video teleconferencing for arraignments as long as it was “functionally equivalent to live, in-person arraignment” (*State v. Phillips*, 1995 Ohio 171). This amendment will codify *Phillips* by explicitly giving a court the option of using video teleconferencing at arraignments, and will clarify that if video teleconferencing is used, the procedure must conform to the requirements of Rule 43.

RULE 24. Trial Jurors.

(G) Alternate jurors.

(1) Non-capital cases. The court may direct that not more than six jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impaneled, two peremptory challenges if three or four alternate jurors are to be impaneled, and three peremptory challenges if five or six alternative jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(2) Capital cases. The procedure designated in division (G)(1) of this rule shall be the same in capital cases, except that any alternate juror shall continue to serve if more than one deliberation is required. If an alternate juror replaces a regular juror after a guilty verdict, the court shall instruct the alternate juror that the juror is bound by that verdict.

Staff Note (July 1, 2008 Amendment)

Criminal Rule 24 is amended in order to give trial judges the option of retaining alternate jurors during the deliberation process in non-capital cases. The judge would have the option of retaining the alternate or alternates who would be sequestered from the rest of the jurors during deliberation, and if one of the regular jurors is unable to continue deliberations, to replace the juror with the alternate and instruct the jury to begin its deliberations anew.

The proposed amendments do not change the requirement in the current rule that alternate jurors be retained during the guilt phase of capital case deliberations. Under former Crim. R. 24, however, an alternate juror could not substitute for a juror unable to continue during deliberations. The proposed amendments allow trial judges in capital cases, as well as non-capital cases, the option of retaining alternates during any deliberations and substituting an alternate in the middle of deliberation.

RULE 43. Presence of the defendant.

(A) Defendant's presence

(1) Except as provided in Rule 10 of these rules and division (A)(2) of this rule, the defendant must be physically present at every stage of the criminal proceeding and trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in the defendant's presence shall not prevent continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

(2) Notwithstanding the provisions of division (A)(1) of this rule, in misdemeanor cases or in felony cases where a waiver has been obtained in accordance with division (A)(3) of this rule, the court may permit the presence and participation of a defendant by remote contemporaneous video for any proceeding if all of the following apply:

- (a) The court gives appropriate notice to all the parties;
- (b) The video arrangements allow the defendant to hear and see the proceeding;
- (c) The video arrangements allow the defendant to speak, and to be seen and heard by the court and all parties;
- (d) The court makes provision to allow for private communication between the defendant and counsel. The court shall inform the defendant on the

record how to, at any time, communicate privately with counsel. Counsel shall be afforded the opportunity to speak to defendant privately and in person. Counsel shall be permitted to appear with defendant at the remote location if requested.

(e) The proceeding may involve sworn testimony that is subject to cross examination, if counsel is present, participates and consents.

(3) The defendant may waive, in writing or on the record, the defendant's right to be physically present under these rules with leave of court.

(B) Defendant excluded because of disruptive conduct

Where a defendant's conduct in the courtroom is so disruptive that the hearing or trial cannot reasonably be conducted with the defendant's continued physical presence, the hearing or trial may proceed in the defendant's absence or by remote contemporaneous video, and judgment and sentence may be pronounced as if the defendant were present. Where the court determines that it may be essential to the preservation of the constitutional rights of the defendant, it may take such steps as are required for the communication of the courtroom proceedings to the defendant.

Staff Note (July 1, 2008 amendments)

Rule 43 is amended so that in misdemeanor cases and in felony cases where the defendant has waived the right to be present, the "presence" requirement can be satisfied either by physical presence or presence by video teleconferencing. Advances in video teleconferencing technology have enabled courts to save considerable expense by conducting proceedings by video teleconferencing while still preserving the rights of the defendant.

In order to ensure that the defendant's rights are protected, any proceeding conducted through video teleconferencing must meet certain requirements: the defendant must be able to see and hear the judge, the judge must be able to see and hear the defendant, and the defendant must have the ability to communicate confidentially with his or her attorney. Furthermore, presence by video teleconferencing is permitted under limited circumstances involving sworn testimony. Counsel must be present and must consent to the use of video teleconferencing. Contemplated in this type of hearing is a miscellaneous criminal proceeding such as probation revocation, protection order hearing or bond motion.

RULE 59. Effective Date.

(W) Effective date of amendments. The amendments to Criminal Rules 10, 24, and 43 filed by the Supreme Court with the General Assembly on January 14, 2008 and refiled on April 28, 2008 shall take effect on July 1, 2008. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

OHIO RULES OF CIVIL PROCEDURE

RULE 4. Process: Summons.

(B) Summons: form; copy of complaint. The summons shall be signed by the clerk, contain the name and address of the court and the names and addresses of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the times within which these rules or any statutory provision require the defendant to appear and defend, and shall notify the defendant that in case of failure to do so, judgment by default will be rendered against the defendant for the relief demanded in the complaint. Where there are multiple plaintiffs or multiple defendants, or both, the summons may contain, in lieu of the names and addresses of all parties, the name of the first party on each side and the name and address of the party to be served.

A copy of the complaint shall be attached to each summons. The plaintiff shall furnish the clerk with sufficient copies.

(F) Summons: revivor of dormant judgment

Upon the filing of a motion to revive a dormant judgment the clerk shall forthwith issue a summons for service upon each judgment debtor. The summons, with a copy of the motion attached, shall be in the same form and served in the same manner as provided in these rules for service of summons with complaint attached, shall command the judgment debtor to serve and file a response to the motion within the same time as provided by these rules for service and filing of an answer to a complaint, and shall notify the judgment debtor that in case of failure to respond the judgment will be revived.

Staff Note (July 1, 2008 Amendments)

The adoption of the Ohio Rules of Civil Procedure in 1970 left unclear the procedure and manner of service for a motion to revive a dormant judgment, formerly governed by R.C. 2325.15 and R.C. 2325.16 which referred to statutes superseded by the Rules. Division (F) of Rule 4 has been adopted to make clear that R.C. 2325.15 and R.C. 2325.16 are superseded by this new Rule. It requires, consistent with the practice under the prior statutes, that a motion to revive a dormant judgment be served upon the judgment debtor in the same

manner as service of summons with complaint attached, affording the debtor an opportunity to show cause against the revivor.

RULE 16. Pretrial Procedure.

In any action, the court may schedule one or more conferences before trial to accomplish the following objectives:

- (1) The possibility of settlement of the action;
- (2) The simplification of the issues;
- (3) Itemizations of expenses and special damages;
- (4) The necessity of amendments to the pleadings;
- (5) The exchange of reports of expert witnesses expected to be called by each party;
- (6) The exchange of medical reports and hospital records;
- (7) The number of expert witnesses;
- (8) The timing, methods of search and production, and the limitations, if any, to be applied to the discovery of documents and electronically stored information;
- (9) The adoption of any agreements by the parties for asserting claims of privilege or for protecting designated materials after production;
- (10) The imposition of sanctions as authorized by Civ. R. 37;
- (11) The possibility of obtaining:
 - (a) Admissions of fact;
 - (b) Agreements on admissibility of documents and other evidence to avoid unnecessary testimony or other proof during trial.
- (12) Other matters which may aid in the disposition of the action.

The production by any party of medical reports or hospital records does not constitute a waiver of the privilege granted under section 2317.02 of the Revised Code.

The court may, and on the request of either party shall, make a written order that recites the action taken at the conference. The court shall enter the order and submit copies to the parties. Unless modified, the order shall control the subsequent course of action.

Upon reasonable notice to the parties, the court may require that parties, or their representatives or insurers, attend a conference or participate in other pretrial proceedings.

Staff Note (July 1, 2008 amendments)

New subsections (8) and (9) are added to clarify that issues relating to discovery of documents and electronically stored information are appropriate topics for discussion and resolution during pretrial conferences. Other linguistic changes, including those made to the subsections (7), (11) and (12) and to the final paragraph of Rule 16, are stylistic rather than substantive.

RULE 26. General Provisions Governing Discovery.

(A) Policy; discovery methods

It is the policy of these rules (1) to preserve the right of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (2) to prevent an attorney from taking undue advantage of an adversary's industry or efforts.

Parties may obtain discovery by one or more of the following methods: deposition upon oral examination or written questions; written interrogatories; production of documents, electronically stored information, or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, the frequency of use of these methods is not limited.

(B) Scope of discovery

Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure subject to comment or admissible in evidence at trial.

(3) Trial preparation: materials. Subject to the provisions of subdivision (B)(5) of this rule, a party may obtain discovery of documents, electronically stored information and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing of good cause therefor. A statement concerning the action or its subject matter previously given by the party seeking the statement may be obtained without showing good cause. A statement of a party is (a) a written statement signed or otherwise adopted or approved by the party, or (b) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement which was made by the party and contemporaneously recorded.

(4) Electronically stored information. A party need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the party from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the following factors when determining if good cause exists:

- (a) whether the discovery sought is unreasonably cumulative or duplicative;
- (b) whether the information sought can be obtained from some other source that is less burdensome, or less expensive;
- (c) whether the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; and
- (d) whether the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the relative importance in the case of the issues on which electronic discovery is sought, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues.

In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

(5) Trial preparation: experts.

(a) Subject to the provisions of subdivision (B)(5)(b) of this rule and Rule 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party in anticipation of litigation or preparation for trial only upon a showing that the party seeking discovery is unable without undue hardship to obtain facts and opinions on the same subject by other means or upon a showing of other exceptional circumstances indicating that denial of discovery would cause manifest injustice.

(b) As an alternative or in addition to obtaining discovery under subdivision (B)(5)(a) of this rule, a party by means of interrogatories may require any other party (i) to identify each person whom the other party expects to call as an expert witness at trial, and (ii) to state the subject matter on which the expert is expected to testify. Thereafter, any party may discover from the expert or the other party facts known or opinions held by the expert which are relevant to the stated subject matter. Discovery of the expert's opinions and the grounds therefor is restricted to those previously given to the other party or those to be given on direct examination at trial.

(c) The court may require that the party seeking discovery under subdivision (B)(5)(b) of this rule pay the expert a reasonable fee for time spent in responding to discovery, and, with respect to discovery permitted under subdivision (B)(5)(a) of this rule, may require a party to pay another party a fair portion of the fees and expenses incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of Privilege or Protection of Trial-Preparation Materials.

(a) Information Withheld. When information subject to discovery is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(b) Information Produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

Staff Notes (July 1, 2008 amendments)

Several provisions of the rule are amended to clarify that discovery of electronically stored information is permitted.

Civ. R. 26(A), (B)(1) and (B)(3) include explicit references to discovery of electronically stored information, a type of discovery that was arguably covered in the broad definition of discoverable materials previously articulated in the rule.

Civ. R. 26(B)(4) is new language that tempers the virtually unlimited discovery traditionally authorized by Rule 26(B)(1) by providing that, as is the case with all discovery, a party is not required to produce electronically stored information if production is too burdensome or expensive compared to the potential value of the discovery. These provisions also provide guidance to trial courts for resolving disputes over claims of excessive burdensomeness and expense. The last sentence of this section reiterates the power that trial judges inherently possess to regulate discovery of electronically stored information, including allocating costs and other details related to production of electronically stored information.

Existing Rule 26(B)(4) is renumbered as 26(B)(5) but no other changes are made.

Civ. R. 26(B)(6)(a) and (b) apply to all discovery not just electronically stored information. Rule 26(B)(6)(a) establishes procedures parties must follow when withholding documents (including electronically stored information) based on privilege.

Civ. R. 26(B)(6)(b) provides a mechanism for a party to retrieve inadvertently produced documents from an opponent. This is often called a “clawback” provision. A similar provision is included in the federal rules and the rules of other states that have modified their civil rules to accommodate e-discovery. It applies to all materials produced by a party, not just electronically stored information.

The rule directs a party that has inadvertently provided privileged documents to an opponent to notify the opponent. Once notification is received, the recipient must “return, sequester, or destroy” the inadvertently proceeded information and not use the information in any way. A procedure is also provided for the court to resolve the claim of privilege relating to the materials. The amendments to Rule 26(B)(6)(b) do not conflict with the new Ohio Rule Prof. Conduct 4.4(b) requirement that an attorney who “knows or reasonably should know that the document was inadvertently sent” must “promptly notify the sender.” Rather, the two rules work in concert: Rule 26(B)(6)(b) is triggered when actual notification is

received from the sender that the material was inadvertently sent, and Ohio Rule Prof. Conduct 4.4(b) is animated when the recipient realizes that the material provided by an opponent is likely privileged.

Rule 33. Interrogatories to Parties.

(A) Availability; procedures for use

Any party, without leave of court, may serve upon any other party up to forty written interrogatories to be answered by the party served. A party serving interrogatories shall provide the party served with both a printed and an electronic copy of the interrogatories. The electronic copy shall be provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of the interrogatories may seek leave of court to be relieved of this requirement. A party shall not propound more than forty interrogatories to any other party without leave of court. Upon motion, and for good cause shown, the court may extend the number of interrogatories that a party may serve upon another party. For purposes of this rule, any subpart propounded under an interrogatory shall be considered a separate interrogatory.

(1) If the party served is a public or private corporation or a partnership or association, the organization shall choose one or more of its proper employees, officers, or agents to answer the interrogatories, and the employee, officer, or agent shall furnish information as is known or available to the organization.

(2) Interrogatories, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon the party.

(3) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The party upon whom the interrogatories have been served shall quote each interrogatory immediately preceding the corresponding answer or objection. When the number of interrogatories exceeds forty without leave of court, the party upon whom the interrogatories have been served need only answer or object to the first forty interrogatories. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections within a period designated by the party submitting the interrogatories, not less than twenty-eight days after the service of the interrogatories or within such shorter or longer time as the court may allow. The party submitting the interrogatories may move for an order under Civ. R. 37 with respect to any objection to or other failure to answer an interrogatory.

(C) Option to produce business records

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of the business records, or from a compilation, abstract, or summary based on the business records, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect the records and to make copies of the records or compilations, abstracts, or summaries from the records.

Staff Note (July 1, 2008 amendments)

The text of Civ. R. 33(A) is broken into three subparts. This is intended as a stylistic change only to make the material more accessible.

Amendments to Civ. R. 33(C) clarify that the responding party's option to produce business records in which the information sought in interrogatories may be found includes the option of producing electronically stored information.

Rule 34. Producing documents, electronically stored information, and tangible things, or entering onto land, for inspection and other purposes.

(A) Scope

Subject to the scope of discovery provisions of Civ. R. 26(B), any party may serve on any other party a request to produce and permit the party making the request, or someone acting on the requesting party's behalf (1) to inspect and copy any designated documents or electronically stored information, including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained that are in the possession, custody, or control of the party upon whom the request is served; (2) to inspect and copy, test, or sample any tangible things that are in the possession, custody, or control of the party upon whom the request is served; (3) to enter upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property.

(B) Procedure

Without leave of court, the request may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced, but may not require the production of the same information in more than one form.

(1) The party upon whom the request is served shall serve a written response within a period designated in the request that is not less than twenty-eight days after the service of the request or within a shorter or longer time as the court may allow. With respect to each item or category, the response shall state that inspection and related activities will be permitted as requested, unless it is objected to, including an objection to the requested form or forms for producing electronically stored information, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Civ. R. 37 with respect to any objection to or other failure to respond to the request or any part of the request, or any failure to permit inspection as requested.

(2) A party who produces documents for inspection shall, at its option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request.

(3) If a request does not specify the form or forms for producing electronically stored information, a responding party may produce the information in a form or forms in which the information is ordinarily maintained if that form is reasonably useable, or in any form that is reasonably useable. Unless ordered by the court or agreed to by the parties, a party need not produce the same electronically stored information in more than one form.

(C) Persons not parties

Subject to the scope of discovery provisions of Civ. R. 26(B) and 45(F), a person not a party to the action may be compelled to produce documents, electronically stored information or tangible things or to submit to an inspection as provided in Civ. R. 45.

Staff Notes (July 1, 2008 amendments)

The title of this rule is changed to reflect its coverage of electronically stored information discovery.

The amendment to Civ. R. 34(A) clarifies that discovery of electronically stored information is expressly authorized and regulated by this rule.

Amendments to the first paragraph of Civ. R. 34(B) allow the requesting party to specify the form of forms in which electronically stored information should be produced. For example, the party propounding discovery seeking electronically stored information could request that a party's internal memorandums on a particular subject be produced in Word™ format, while financial records be provided in an Excel™ spreadsheet format or other commonly used format for financial information. This provision also specifies that the requesting party cannot demand that the respondent provide the same information in more than one electronic format. If a party believes that the form or forms specified by an opponent is unduly burdensome or expensive, the party can object to the discovery under Rule 34(B)(1) and then negotiate a different, mutually acceptable form with the opponent or seek relief from the court under Rule 26(B)(4).

The remaining text of existing Civ. R. 34(B) is broken into subparts (1) and (2). This is solely a stylistic change intended to make the material more accessible.

Civ. R. 34(B)(1) requires the party responding to a request to specifically articulate its objection to the form of production of electronically stored information that the opponent has requested. It also requires a responding party to identify the form in which electronically stored information will be produced if the requesting party has not specified the format.

Civ. R. 34(B)(3) applies when a party does not specify the form in which electronically stored information should be produced; in that situation the responding party has the option of producing the materials in the form in which the information is ordinarily maintained or another form provided that the form produced is reasonable. This section also clarifies that the respondent only has to provide electronically stored information in one format unless the court orders or the parties agree to a different arrangement. Civ. R. 34(B)(3) is added to allow production of electronically stored information in more than one format if agreed to by the parties or ordered by the court.

Civ. R. 34(C) clarifies that discovery of electronically stored information from nonparties is governed by Rule 45.

Rule 36. Requests for Admission.

(A) Availability; procedures for use

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Civ. R. 26(B) set forth in the request, that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A party serving a request for admission shall provide the party served with both a printed and an electronic copy of the request for admission. The electronic copy shall be provided on computer disk, by electronic mail, or by other means agreed to by the parties. A party who is unable to provide an electronic copy of a request for admission may seek leave of court to be relieved of this requirement.

(1) Each matter of which an admission is requested shall be separately set forth. The party to whom the requests for admissions have been directed shall quote each request for admission immediately preceding the corresponding answer or objection. The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.

(2) If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his or her answer, or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that the party has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Civ. R. 37(C), deny the matter or set forth reasons why the party cannot admit or deny it.

(3) The party who has requested the admissions may move for an order with respect to the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a

designated time prior to trial. The provisions of Civ. R. 37(A)(4) apply to the award of expenses incurred in relation to the motion.

Staff Notes (July 1, 2008 amendments)

The text of Civ. R. 36(A) is broken into three subparts. This is intended as a stylistic change only to make the material more accessible.

Rule 37. Failure to Make Discovery: Sanctions.

(F) Electronically Stored Information

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system. The court may consider the following factors in determining whether to impose sanctions under this division:

- (1) Whether and when any obligation to preserve the information was triggered;
- (2) Whether the information was lost as a result of the routine alteration or deletion of information that attends the ordinary use of the system in issue;
- (3) Whether the party intervened in a timely fashion to prevent the loss of information;
- (4) Any steps taken to comply with any court order or party agreement requiring preservation of specific information;
- (5) Any other facts relevant to its determination under this division.

Staff Notes (July 1, 2008 amendments)

Civ. R. 37(F) provides factors for judges to consider when a party seeks sanctions against an opponent who has lost potentially relevant electronically stored information. This rule does not attempt to address the larger question of when the duty to preserve electronically stored information is triggered. That matter is addressed by case law and is generally left to the discretion of the trial judge.

Rule 45. Subpoena.

(A) Form; Issuance; Notice.

(1) Every subpoena shall do all of the following:

(a) state the name of the court from which it is issued, the title of the action, and the case number;

(b) command each person to whom it is directed, at a time and place specified in the subpoena, to:

(i) attend and give testimony at a trial, hearing, or deposition;

(ii) produce documents, electronically stored information, or tangible things at a trial, hearing, or deposition;

(iii) produce and permit inspection and copying of any designated documents or electronically stored information that are in the possession, custody, or control of the person;

(iv) produce and permit inspection and copying, testing, or sampling of any tangible things that are in the possession, custody, or control of the person; or

(v) permit entry upon designated land or other property that is in the possession or control of the person for the purposes described in Civ. R. 34(A)(3).

(c) set forth the text of divisions (C) and (D) of this rule.

A command to produce and permit inspection may be joined with a command to attend and give testimony, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced, but may not require the production of the same information in more than one form.

A subpoena may not be used to obtain the attendance of a party or the production of documents by a party in discovery. Rather, a party's attendance at a deposition may be obtained only by notice under Civ. R. 30, and documents or electronically stored information may be obtained from a party in discovery only pursuant to Civ. R. 34.

(2) The clerk shall issue a subpoena, signed, but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney who has filed an appearance on behalf of a party in an action may also sign and issue a subpoena on behalf of the court in which the action is pending.

(3) A party on whose behalf a subpoena is issued under division (A)(1)(b)(ii), (iii), (iv), or (v) of this rule shall serve prompt written notice, including a copy of the subpoena, on all other parties as provided in Civ. R. 5. If the issuing attorney modifies a subpoena issued under division (A)(1)(b)(ii), (iii), (iv), or (v) of this rule in any way, the issuing attorney shall give prompt written notice of the modification, including a copy of the subpoena as modified, to all other parties.

(B) Service

A subpoena may be served by a sheriff, bailiff, coroner, clerk of court, constable, or a deputy of any, by an attorney at law, or by any other person designated by order of court who is not a party and is not less than eighteen years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy of the subpoena to the person, by reading it to him or her in person, by leaving it at the person's usual place of residence, or by placing a sealed envelope containing the subpoena in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal authority to show to whom delivered, date of delivery and address where delivered, and by tendering to the person upon demand the fees for one day's attendance and the mileage allowed by law. The person responsible for serving the subpoena shall file a return of the subpoena with the clerk. When the subpoena is served by mail delivery, the person filing the return shall attach the signed receipt to the return. If the witness being subpoenaed resides outside the county in which the court is located, the fees for one day's attendance and mileage shall be tendered without demand. The return may be forwarded through the postal service or otherwise.

(D) Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall, at the person's option, produce them as they are kept in the usual course of business or organized and labeled to correspond with the categories in the subpoena. A person producing documents or electronically stored information pursuant to a subpoena for them shall permit their inspection and copying by all parties present at the time and place set in the subpoena for inspection and copying.

(2) If a request does not specify the form or forms for producing electronically stored information, a person responding to a subpoena may produce the information in a form or forms in which the information is ordinarily maintained if that form is reasonably useable, or in any form that is reasonably useable. Unless ordered by the court or agreed to by the person subpoenaed, a person responding to a subpoena need not produce the same electronically stored information in more than one form.

(3) A person need not provide discovery of electronically stored information when the production imposes undue burden or expense. On motion to compel discovery or for a protective order, the person from whom electronically stored information is sought must show that the information is not reasonably accessible because of undue burden or expense. If a showing of undue burden or expense is made, the court may nonetheless order production of electronically stored information if the requesting party shows good cause. The court shall consider the factors in Civ. R. 26(B)(4) when determining if good cause exists. In ordering production of electronically stored information, the court may specify the format, extent, timing, allocation of expenses and other conditions for the discovery of the electronically stored information.

(4) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(5) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies within the party's possession, custody or control. A party may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim of privilege or of protection as trial-preparation material. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

Staff Notes (July 1, 2008 Amendments)

Rule 45 allows discovery to be obtained from nonparties in a manner that closely parallels Rule 34 discovery of parties. Civ. R. 45(A) and 45(D)(2) clarify that a party may use subpoenas to obtain electronically stored information from nonparties. It allows the party issuing the subpoena to specify the form or forms of production for electronically stored information while prohibiting the requesting

party from demanding that the subpoenaed person provide the same information in more than one electronic format. For example, the party issuing the subpoena may request that a party's internal memorandums on a particular subject be produced in a Word™ file, while financial records be provided in an Excel™ spreadsheet format or other format commonly used for financial matters.

Civ. R. 45(B) is amended in light of court decisions holding that service of a subpoena by a mail carrier was not authorized under the prior language of the Rule. Consistent with Civ. R. 4.1(A) relating to service of process for a complaint and summons, the amendment allows a person, otherwise authorized by the Rule to perform service of a subpoena, to do so by means of United States certified or United States express mail.

Civ. R. 45(D)(2) parallels Rule 34(B) and applies when a party serving the subpoena does not specify the form in which electronically stored information should be produced; in that situation the person subpoenaed has the option of producing the materials in the form in which the information is ordinarily maintained or another form provided that the form produced is reasonable. This section also clarifies that the respondent only has to provide electronically stored information in one format unless the court orders or the parties agree to a different arrangement.

RULE 86. Effective date.

(EE) The amendments to Civil Rules 4, 16, 26, 33, 34, 36, 37, and 45 filed by the Supreme Court with the General Assembly on January 14, 2008 and refiled on April 28, 2008 shall take effect on July 1, 2008. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.
