

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

Amendments to the Ohio Rules of Evidence (Rules 706 and 803), Ohio Rules of Civil Procedure (30, 47, 53, and 86), Ohio Rules of Criminal Procedure (19, 24, 46, and 59), and Ohio Rules of Juvenile Procedure (Rule 40 and 47) 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, 2006. The history of these amendments is as follows:

October 17, 2005	Initial publication for comment
January 12, 2006	Proposed amendments filed with the General Assembly
January 30, 2006	Publication for second public comment period
April 27, 2006	Revised proposed amendments filed with the General Assembly
July 1, 2006	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 proposed amendments. In addition to the substantive amendments, nonsubstantive grammar and gender-neutral language changes are made throughout any rule that is proposed for amendment.

Evid. R. 706 and 803—Hearsay Exception for Learned Treatises [lines 11-224]

Consistent with the decision of the Supreme Court in *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, Evid. R. 803 is amended to add an exception to the hearsay rule for learned treatises. The proposed amendment is modeled after the exception contained in the Federal Rules of Evidence. As a result of the adoption of this amendment, Evid. R. 706, adopted in 1998, would be repealed.

No revisions have been made to this rule from the version that was published for comment on January 30, 2006. The staff note was revised after the January 30 publication to clarify that publication by peer review may not connote neutrality. (*See* Line 211).

Civ. R. 53, Crim. R. 19, and Juv. R. 40—Magistrates [lines 535-1195, 1217-1890, 2275-3009]

Existing Civ. R. 53, Crim. R. 19, and Juv. R. 40, governing referrals to and proceedings before magistrates, would be replaced entirely by a revised version of each rule. The proposed revisions have two primary purposes: (1) a reorganization of each rule to place the provisions in an order that reflects the manner in which proceedings before magistrates are conducted; and (2) revisions that address and clarify provisions of the existing rules that have been the subject of numerous appellate court opinions since the rule was last revised substantially in 1995.

The primary revisions appear in division (D) of each rule, and the key amendments may be summarized as follows:

- The rules retain the ability of a magistrate to issue, without court approval, certain nondispositive orders “necessary to regulate the proceedings.” The rules clarify that an appropriate challenge to such an order issued by a magistrate is a motion to set aside the order. *See, e.g.,* Civ. R. 53(D)(2), lines 757-773.
- The rules spell out a more definitive procedure for the issuance of and filing of objections to a magistrate’s decision. These provisions address the following matters: (1) situations in which a magistrate’s decision must include findings of fact and conclusions of law; (2) require that the clerk serve the parties with a copy of the magistrate’s decision within three days after the decision is filed; (3) require that the magistrate’s decision contain a conspicuous warning that a party will have waived the right to appeal the court’s adoption of a specific finding of fact or conclusion of law unless the party objected to that finding or conclusion in its objections to the magistrate’s decision; (4) a provision that any objection to a factual finding by a magistrate be accompanied by a transcript of the evidence or a supporting affidavit; and (5) a provision that a transcript or supporting affidavit must be filed within 30 days after the objections are filed. *See, e.g.,* Civ. R. 53(D)(3), lines 775-826.
- The rules address the duty of the referring court in acting on the magistrate’s decision and any objections to that decision. In addition to restating that a magistrate’s decision is not effective until adopted by the court, these provisions include the following: (1) a recognition that the court has a range of options in considering a magistrate’s decision, regardless of whether objections are filed, including adoption, modification, rereferral, or conducting a hearing to take additional evidence; (2) a requirement that the referring court rule on timely objections and conduct “an independent review as to the objected matters;” (3) a requirement that the court enter a judgment or interim order that adopts, rejects, or modifies the magistrate’s decision. *See, e.g.,* Civ. R. 53(D)(4), lines 828-867.

- A new provision that allows a party to seek and receive an extension of time, for good cause shown, to file a motion to set aside a magistrate's order or to file objections to a magistrate's decision. See, *e.g.*, Civ. R. 53(D)(5), lines 869-872.
- A new provision, reflecting holdings of the Chief Justice in ruling on affidavits of disqualification, that a party may seek the disqualification of a magistrate only through motion filed with the referring court. See, *e.g.*, Civ. R. 53(D)(6), lines 874-875.

The staff note accompanying Civ. R. 53 has been modified since the January 30, 2006 publication to clarify what types of orders magistrates may enter without judicial approval. See Civ. R. 53 at lines 956-964. Crim. R. 19 has been modified to reflect a revision to a previously incorrect cross-reference. See Crim. R. 19 at line 1594.

Civ. R. 47 and Crim. R. 24—Examination of and Challenges to Prospective Jurors [lines 426-529 and 1896-2125]

In accordance with a recommendation contained in the February 2004 report of the Supreme Court Task Force on Jury Service, Civ. R. 47(B) and (C) and Crim. R. 24(B) and (E) are modified to allow for the examination of prospective jurors in an array and to have peremptory challenges and challenges for cause exercised outside the hearing of the prospective jurors. In criminal cases, the court must provide the parties with notice, prior to trial, of the means of examination that will be employed.

No revisions have been made to these rules from the versions that were published for comment on January 30, 2006.

Civ. R. 30—Depositions and Court Reporter Notes [lines 247-420]

Civ. R. 30(E) is modified to extend to 30 days the time that a deponent has to review and approve a transcript of his or her deposition. Exceptions to the 30-day rule are provided when a deposition is taken near the date of a trial or hearing.

At the suggestion of the Ohio Court Reporters Association, Civ. R. 30(F) is revised to eliminate the requirement that a court reporter retain paper notes of deposition testimony. The provision of existing Civ. R. 30(F) is removed because many court reporting machines no longer use paper. Added to Civ. R. 30(F) is a requirement that the court reporter retain an archival-quality copy of his or her notes from which a deposition can be transcribed.

No revisions have been made to this rule from the version that was published for comment on January 30, 2006.

Crim. R. 46—Bail [lines 2131-2253]

Crim. R. 46 is revised to reflect available technology and expand the options available to a court in establishing the conditions of bail. The amendments: (1) recognize the use of electronic monitoring as a condition of bail; (2) allow the court, in setting bail, to consider

whether the defendant used a weapon in committing the alleged offense or is the subject of a court protection order; (3) and allow the court to establish a bond schedule that includes certain conditions and factors of bail.

No revisions have been made to this rule from the version that was published for comment on January 30, 2006.

OHIO RULES OF EVIDENCE

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Staff Note (July 1, 2006 Amendment)

Rule 706 Learned Treatises for Impeachment

Evid. R. 706 is repealed, effective July 1, 2006, in light of the adoption of Evid. R. 803(18).

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RULE 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.

(2) **Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then existing, mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) **Statements for purposes of medical diagnosis or treatment.** Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) **Recorded recollection.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately, shown by the testimony of the witness to have been made or adopted when the matter was fresh in his memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Evid. R. 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in record kept in accordance with the provisions of division (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of division (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant, unless the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirement of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Evid. R. 901(B)(10) or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) **Family records.** Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) **Records of documents affecting an interest in property.** The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) **Statements in documents affecting an interest in property.** A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) **Statements in ancient documents.** Statements in a document in existence twenty years or more the authenticity of which is established.

(17) **Market reports, commercial publications.** Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) **Learned Treatises.** To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) **Reputation concerning personal or family history.** Reputation among members of his family by blood, adoption, or marriage or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of his personal or family history.

(20) **Reputation concerning boundaries or general history.** Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) **Reputation as to character.** Reputation of a person's character among his associates or in the community.

(22) **Judgment of previous conviction.** Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of no contest or the equivalent plea from

another jurisdiction), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the Government in a criminal prosecution for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

Staff Note (July 1, 2006 Amendment)

The 2006 amendment adds a new hearsay exception for statements in reliable learned treatises that are relied on by expert witnesses on direct examination or are called to the attention of expert witnesses on cross-examination. The 2006 amendment also renumbers five existing hearsay exceptions to reflect the insertion of Evid. R. 803(18).

Evid. R. 706, adopted in 1998, is repealed in view of the adoption of Evid. R. 803(18).

Rule 803(18) Learned Treatises

Evid. R. 803(18) is modeled on Federal Rule of Evidence 803(18), which has been described as a “carefully drafted rule [that] appears to work well in practice.” Robert F. Magill, Jr., *Issues Under Federal Rule of Evidence 803(18): The “Learned Treatise” Exception to the Hearsay Rule*, 9 St. John’s J. Legal Comment. 49 (1993). Although a departure from the common law and Ohio practice, substantive use of learned treatises is now accepted by the majority of states, Clifford Fishman, *Jones on Evidence* 316 (7th ed., 2003).

There are a number of reasons for creating a hearsay exception for statements in learned treatises under the circumstances in the proposed rule. Every expert brings a certain amount of “background hearsay” to his or her opinion, in the form of the out-of-court statements of textbook authors, colleagues, and others, that forms much of the basis of the expert’s training and education. Paul Gianelli, *Understanding Evidence* 347 (2003). Ohio law now allows experts to rely on that knowledge in establishing their qualifications and in forming opinions. *Worthington City Schools v. ABCO Insulation*, 84 Ohio App. 3d 144, 152 (1992); *State v. Echols*, 128 Ohio App. 3d 677, 698 (Ham.1998). The rule makes explicit the sources of the expert’s opinion, and in doing so both avoids disputes about the level of detail in their testimony and assists the trier of fact in evaluating that testimony. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787. Similarly, while former law permitted the use of learned treatises for impeachment on cross-examination, Ohio Rule of Evidence 706, and on redirect examination after impeachment, *Hinkle v. Cleveland Clinic Foundation*, 159 Ohio App. 3d. 351, 365 (Cuy. 2004), it is often difficult for a jury to understand or maintain the

distinction between impeachment or rehabilitation, on the one hand, and substantive use on the other.

Importantly, commentators agree that statements in learned treatises come within the two major justifications for most hearsay exceptions: reliability and necessity. David H. Kaye, *et. al.*, *The New Wigmore: A Treatise on Evidence: Expert Evidence* 132 (2004). Authors of scholarly works usually have no connection to the litigation and no motive to misrepresent. Their scholarly reputations are at stake when peers review their work for accuracy, enhancing reliability. With respect to necessity, there is often no other way to get the opinions of the most highly qualified researchers and scholars before the court.

Evid. R. 803(18) contains a number of safeguards against unreliability and misuse. Misunderstanding is guarded against by the fact that the statements in learned treatises come to the trier of fact only through the testimony of qualified experts who are on the stand to explain and apply the material in the treatise. The rule provides that the treatise may be read into evidence but not received as an exhibit to prevent the trier from giving it excessive weight or attempting to interpret the treatise by itself. The rule applies only to a learned treatise found by the judge to be a “reliable authority” under Evid. R. 104(A).

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RULE 1102. Effective Date

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(N) Effective date of amendments. The amendment to Evidence Rule 803 and the repeal of Evidence Rule 706 filed by the Supreme Court with the General Assembly on January 12, 2006 shall take effect on July 1, 2006. The amendment and repeal 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

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RULE 30. Depositions upon oral examination

(A) **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The attendance of a witness deponent may be compelled by the use of subpoena as provided by Civ. R. 45. The attendance of a party deponent may be compelled by the use of notice of examination as provided by division (B) of this rule. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(B) **Notice of Examination; General Requirements; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced shall be attached to or included in the notice.

(2) If any party shows that when the party was served with notice the party was unable, through the exercise of diligence, to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

(3) If a party taking a deposition wishes to have the testimony recorded by other than stenographic means, the notice shall specify the manner of recording, preserving, and filing the deposition. The court may require stenographic taking or make any other order to ensure that the recorded testimony will be accurate and trustworthy.

(4) The notice to a party deponent may be accompanied by a request made in compliance with Civ. R. 34 for the production of documents and tangible things at the taking of the deposition.

(5) A party, in the party's notice, may name as the deponent a public or private corporation, a partnership, or an association and designate with reasonable particularity the matters on which examination is requested. The organization so named shall choose one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The persons so designated shall testify as to matters known or available to the organization. Division (B)(5) does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For purposes of this rule, Civ. R. 28, and Civ. R. 45(C), a deposition taken by telephone is taken in the county and at the place where the deponent is to answer questions propounded to the deponent.

(C) Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and personally, or by someone acting under the officer's direction and in the officer's presence, shall record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means designated in accordance with division (B)(3) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(D) Motion to terminate or limit examinations. At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Civ. R. 26(C). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Civ. R. 37 apply to the award of expenses incurred in relation to the motion.

(E) Submission to witness; changes; signing. When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless examination and reading are waived by the witness and by the parties. Any changes in form or substance that the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the

signing or the witness is ill, cannot be found, or refuses to sign. The witness shall have thirty days from submission of the deposition to the witness to review and sign the deposition. If the deposition is taken within thirty days of a trial or hearing, the witness shall have seven days from submission of the deposition to the witness to review and sign the deposition. If the trial or hearing is scheduled to commence less than seven days before the deposition is submitted to the witness, the court may establish a deadline for the witness to review and sign the deposition. If the deposition is not signed by the witness during the period prescribed in this division, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed, unless on a motion to suppress the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(F) Certification and filing by officer; exhibits; copies; notice of filing.

(1)(a) Upon request of any party or order of the court, the officer shall transcribe the deposition. Provided the officer has retained an archival-quality copy of the officer's notes, the officer shall have no duty to retain paper notes of the deposition testimony. The officer shall certify on the transcribed deposition that the witness was fully sworn or affirmed by the officer and that the transcribed deposition is a true record of the testimony given by the witness. If any of the parties request or the court orders, the officer shall seal the transcribed deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and, upon payment of the officer's fees, promptly shall file it with the court in which the action is pending or send it by certified or express mail to the clerk of the court for filing.

(b) Unless objection is made to their production for inspection during the examination of the witness, documents and things shall be marked for identification and annexed to and returned with the deposition. The materials may be inspected and copied by any party, except that the person producing the materials may substitute copies to be marked for identification, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals. If the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition.

(2) Upon payment, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party requesting the filing of the deposition shall forthwith give notice of its filing to all other parties.

(4) As used in division (F) of this rule, "archival-quality copy" means any format of a permanent or enduring nature, including digital, magnetic, optical, or other medium, that allows an officer to transcribe the deposition.

(G) Failure to attend or to serve subpoena; expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed with the deposition and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of the failure does not attend, and another party attends in person or by attorney because the other party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to the other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney's fees.

Staff Note (July 1, 2006 Amendment)

The 2006 amendments contain two changes pertaining to the time period for reviewing and signing depositions and the retention of deposition notes by the court reporter who transcribed the deposition.

Rule 30(E) Submission to witness; changes; signing

Civ. R. 30(E) is amended to allow a witness thirty days to review and sign a deposition. The former rule allowed the witness only seven days to review and sign a deposition, and the Committee recognized that a careful review of a deposition in that period of time was sometimes practically or logistically difficult. When a deposition is taken close to trial, however, a quick turn-around may be necessary. Consequently, division (E) is amended to expand to thirty days the period in which a witness has to review and sign a deposition. Exceptions are provided for cases where the deposition is taken within thirty days of trial or hearing, in which case the seven-day rule still applies, or less than seven days of trial or hearing, in which case the trial judge may establish a different deadline. This amendment brings the Ohio rule closer to the Federal Rules of Civil Procedure, which give a witness thirty days to review and sign a deposition.

Rule 30(F) Certification and filing by officer; exhibits; copies; notice of filing

The 2006 amendment added division (F)(4). The amendment responds to a concern expressed by individuals charged with taking or keeping notes of depositions in light of changes in technology and the fact that most present-day court reporting machines no longer use paper but record and retain deposition testimony via electronic means. The amendment clarifies that "archival-quality copy" means any format of a permanent or enduring nature that will allow an officer to transcribe the deposition. In light of this definition, division (F)(1)(a) was revised to delete language that required the retention of paper notes of deposition testimony for a minimum of five years following the deposition.

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RULE 47. Jurors

(A) Brief introduction of case. To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case. The brief introduction may include a general description of the legal claims and defenses of the parties.

(B) Examination of prospective jurors. Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror's qualifications. The court may permit the parties or their attorneys to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion to allow the examination of all prospective jurors in the array prior to any challenges for cause or peremptory challenges.

(C) Challenges to prospective jurors. In addition to challenges for cause provided by law, each party peremptorily may challenge three prospective jurors. If the interests of multiple litigants are essentially the same, "each party" shall mean "each side."

Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the plaintiff. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties or sides, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another prospective juror shall be called who shall take the place of the prospective juror excused and be sworn and examined as other prospective jurors. The other party, if the party has peremptory challenges remaining, shall be entitled to challenge any prospective juror then seated on the panel.

Nothing in this rule shall limit the court's discretion to allow challenges to be made outside the hearing of prospective jurors.

(D) Alternate jurors. The court may direct that no more than four 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, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions,

powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed by law if one or two alternate jurors are to be impaneled, and two peremptory challenges if three or four alternate jurors are to be impaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed shall not be used against an alternate juror.

(E) Taking of notes by jurors. The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(F) Juror questions to witnesses. The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

- (1) Require jurors to propose any questions to the court in writing;
- (2) Retain a copy of each proposed question for the record;
- (3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;
- (4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;
- (5) Read the question, either as proposed or rephrased, to the witness;
- (6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;
- (7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

Staff Note (July 1, 2006 Amendment)

Civ. R. 47 is amended to recognize the existence of alternative methods of jury selection and expressly permit the use of these methods in Ohio courts. The amendments are consistent with recommendations contained in the February 2004 *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service*, at pp. 10-11.

The Task Force identified two primary methods of jury selection and encouraged the use of a selection process that is efficient and enhances juror satisfaction. The Rules Advisory Committee learned that some judges and lawyers believe that the pre-2006

version of Civ. R. 47 precluded the use of a selection method, commonly referred to as the “struck” method, whereby prospective jurors are examined as a group and then the trial judge and attorneys meet privately to challenge jurors for cause and exercise peremptory challenges. Two amendments to Civ. R. 47 are added to expressly permit alternative selection methods.

Rule 47(B) Examination of prospective jurors

The last sentence of Civ. R. 47(B) is added to expressly permit the examination of prospective jurors in an array.

Rule 47(C) Challenges to prospective jury

The last sentence of Civ. R. 47(C) is added to expressly afford the trial court the discretion to allow the exercise of challenges for cause and peremptory challenges outside the hearing of the jury.

* * *

RULE 53. Magistrates.

(A) Appointment. A court of record may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio.

(B) Compensation. The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs under Civ. R. 54(D).

(C) Authority.

(1) *Scope.* To assist courts of record and pursuant to reference under Civ. R. 53(D)(1), magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

- (a) Determine any motion in any case;
- (b) Conduct the trial of any case that will not be tried to a jury;
- (c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury;
- (d) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law;
- (e) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Regulation of proceedings.* In performing the responsibilities described in Civ. R. 53(C)(1), magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

- (a) Issuing subpoenas for the attendance of witnesses and the production of evidence;
- (b) Ruling upon the admissibility of evidence;
- (c) Putting witnesses under oath and examining them;
- (d) Calling the parties to the action and examining them under oath;
- (e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to Crim. R. 46;
- (f) Imposing, subject to Civ. R. 53(D)(8), appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) Proceedings in Matters Referred to Magistrates.

(1) *Reference by court of record.*

(a) *Purpose and method.* A court of record may, for one or more of the purposes described in Civ. R. 53(C)(1), refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

(b) *Limitation.* A court of record may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) *Magistrate's order; motion to set aside magistrate's order.*

(a) *Magistrate's order.*

(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's decision; objections to magistrate's decision.*

(a) *Magistrate's decision.*

(i) *When required.* Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Civ. R. 53(D)(1).

(ii) *Findings of fact and conclusions of law.* Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing, and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ. R. 53(D)(3)(b).

(b) *Objections to magistrate's decision.*

(i) *Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ. R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) *Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b).

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by Civ. R. 53(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Civ. R. 53(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) *Interim order.* The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. An interim order shall comply with Civ. R. 54(A), be journalized pursuant to Civ. R. 58(A), and be served pursuant to Civ. R. 58(B).

(5) *Extension of time.* For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) *Contempt in the presence of a magistrate.*

(a) *Contempt order.* Contempt sanctions under Civ. R. 53(C)(2)(f) may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) *Filing and provision of copies of contempt order.* A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) *Review of contempt order by court; bail.* The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

Staff Note (July 1, 2006 Amendment)

Civ. R. 53 has been reorganized in an effort to make it more helpful to bench and bar and reflective of developments since the rule was last substantially revised effective July 1, 1995. The relatively-few significant changes included in the reorganization are noted below.

Rule 53(A) Appointment

Civ. R. 53(A) is taken verbatim from sentence one of former Civ. R. 53(A). Sup. R. 19 requires that all municipal courts having more than two judges appoint one or more magistrates to hear specified matters. See also Crim. R. 19 and Traf. R. 14.

Rule 53(B) Compensation

Civ. R. 53(B) refers to Civ. R. 54(D) so as to more clearly harmonize Civ. R. 53 with statutory provisions that authorize courts to collect funds from litigants generally and to use the collected funds for purposes that include employment of magistrates. See, e.g., R.C. 1901.26(B)(1), 1907.24(B)(1), 2303.201(E)(1), and 2501.16(B).

Rule 53(C) Authority

Civ. R. 53(C) is drawn largely from former Civ. R. 53(C)(1) and (2) and reflects the admonition of the Supreme Court that “a [magistrate’s] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them.” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 615 N.E.2d 617 (emphases added). Civ. R. 53(C)(1)(d) is added to parallel Crim. R. 19(C)(1)(g) and recognize that magistrates have authority to conduct temporary protection order proceedings in accordance with law. Consistent with the admonition in *Hartt*, however, any temporary protection order issued as a result of such proceedings must be signed by a judge.

Rule 53(D) Proceedings in Matters Referred to Magistrates

Civ. R. 53(D)(1) through (4) treat each of the steps that potentially occur if a magistrate participates: (1) reference to a magistrate; (2) magistrate’s orders and motions to set aside magistrate’s orders; (3) magistrate’s decisions and objections to magistrate’s decisions; and (4) action of the court on magistrate’s decisions and on any objections to magistrate’s decisions and entry of judgment or interim order by the court. Civ. R. 53(D)(5) through (8) deal with good cause extensions of time, disqualification of a magistrate, recording of proceedings before a magistrate, and contempt in the presence of a magistrate.

Reference by court of record

Civ. R. 53(D)(1), unlike former Civ. R. 53(C)(1)(b), specifically authorizes reference of types of matters by rule as well as by a specific or general order of reference. In so doing, it recognizes existing practice in some courts. See, e.g., Loc. R. 99.02, Franklin Cty. Ct. of Common Pleas; Loc. R. 23(B), Hamilton Cty. Ct. of Common Pleas; *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 412-13, 2002-Ohio-4907 at ¶¶ 20-24, 775 N.E.2d 522; *Davis v. Reed* (Aug. 31, 2000), 8th Dist. App. No. 76712, 2000 WL 1231462 at *2 (citing *White v. White* (1977), 50 Ohio App.2d 263, 266-268, 362 N.E.2d 1013), and *Partridge v. Partridge* (Aug. 27, 1999), 2nd Dist. App. No. 98 CA 38, 1999 WL 945046 at *2, (treating a local rule of the Greene Cty. Ct. of Common Pleas, Dom. Rel. Div., as a standing order of reference).

Magistrate's order; motion to set aside magistrate's order

Civ. R. 53(D)(2)(a)(i) generally authorizes a magistrate to enter orders without judicial approval if necessary to regulate the proceedings and, adapting language from Crim. R. 19(B)(5)(a), if “not dispositive of a claim or defense of a party.” The new language removes the arguably limiting title of former Civ. R. 53(C)(3)(a) [“Pretrial orders”] and is intended to more accurately reflect proper and existing practice. This language is not intended to narrow the power of a magistrate to enter pretrial orders without judicial approval on matters related to (1) pretrial management under Civ. R. 16; (2) discovery conducted pursuant to Civ. R. 26-37; (3) temporary orders issued pursuant to Civ. R. 75(N); (4) temporary restraining order governing marital property under Civ. R. 75(I) (2); or (5) any other orders necessary to the regulation of proceedings before a magistrate. All temporary protection orders, however, including orders issued to avoid bodily harm pursuant to Civ. R. 75(I)(2), must be signed by a judge and comply fully with the procedures set forth in R.C. 3113.31 and related sections. Civ. R. 53(D)(2)(b) replaces language in former Civ. R. 53(C)(3)(b), which purported to authorize “[a]ny person” to “appeal to the court” from any order of a magistrate “by filing a motion to set the order aside.” The new language refers to the appropriate challenge to a magistrate’s order as solely a “motion to set aside” the order. Civ. R. 53(D)(2)(b) likewise limits the authorization to file a motion to “any party,” though an occasional nonparty may be entitled to file a motion to set aside a magistrate’s order. Sentence two of Civ. R. 53(D)(2)(b) changes the trigger for the ten days permitted to file a motion to set aside a magistrate’s order from entry of the order to filing of the order, as the latter date is definite and more easily available to counsel.

Magistrate's decision; objections to magistrate's decision

Civ. R. 53(D)(3) prescribes procedures for preparation of a magistrate’s decision and for any objections to a magistrate’s decision.

Civ. R. 53(D)(3)(a)(ii), unlike former Civ. R. 53(E)(2), adapts language from Civ. R. 52 rather than simply referring to Civ. R. 52. The change is intended to make clear that, e.g., a request for findings of fact and conclusions of law in a referred matter should be directed to the magistrate rather than to the court. Civ. R. 53(D)(3)(a)(ii) explicitly authorizes a magistrate's decision, subject to the terms of the relevant reference, to be general absent a timely request for findings of fact and conclusions of law or a provision of law that provides otherwise. Occasional decisions under former Civ. R. 53 said as much. See, e.g., *In re Chapman* (Apr. 21, 1997), 12th Dist. App. No. CA96-07-127, 1997 WL 194879 at *2; *Burke v. Brown*, 4th Dist. App. No. 01CA731, 2002-Ohio-6164 at ¶ 21; and *Rush v. Schlagetter* (Apr. 15, 1997), 4th Dist. App. No. 96CA2215, 1997 WL 193169 at *3. For a table of sections of the Ohio Revised Code that purport to make findings of fact by judicial officers mandatory in specified circumstances, see 2 Klein-Darling, Ohio Civil Practice § 52-4, 2002 Pocket Part at 136 (West Group 1997).

Civ. R. 53(D)(3)(a)(iii) now requires that the magistrate's decision be served on the parties or their attorneys no later than three days after the decision was filed. The former rule contained no specific time requirement. The provision further requires that a magistrate's decision include a conspicuous warning of the waiver rule prescribed by amended Civ. R. 53(D)(3)(b)(iv). The latter rule now provides that a party shall not assign as error on appeal a court's adoption of any factual finding or legal conclusion of a magistrate, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii), unless that party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b). While the prior waiver rule, prescribed by former Civ. R. 53(E)(3)(b) (effective July 1, 1995) and former Civ. R. 53(E)(3)(d) (effective July 1, 2003), arguably applied only to findings of fact or conclusions of law specifically designated as such, the amended waiver rule applies to any factual finding or legal conclusion in a magistrate's decision and the required warning is broadened accordingly.

Civ. R. 53(D)(3)(b)(i) retains the fourteen-day time for filing written objections to a magistrate's decision. While the rule continues to authorize filing of objections by a "party," it has been held that a non-party attorney can properly object to a magistrate's decision imposing sanctions on the attorney. *All Climate Heating & Cooling, Inc. v. Zee Properties, Inc.* (May 17, 2001), 10th Dist. App. No. 00AP-1141, 2001 WL 521408 at *3.

Sentence one of Civ. R. 53(D)(3)(b)(iii) requires that an objection to a factual finding in a magistrate's decision, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or by an affidavit of that evidence if a transcript is not available. The Supreme Court has prescribed the consequences on appeal of failure to supply the requisite transcript or affidavit as follows: (1) "appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision]" and (2) "the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254.

Sentence two of Civ. R. 53(D)(3)(b)(iii) adds a new requirement, adapted from Loc. R. 99.05, Franklin Cty. Ct. of Common Pleas, that the requisite transcript or affidavit be filed within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. The last sentence of Civ. R. 53(D)(3)(b)(iii) allows an objecting party to seek leave of court to supplement previously filed objections where the additional objections become apparent after a transcript has been prepared.

Civ. R. 53(D)(3)(b)(iv), as noted above, expands the “waiver rule” prescribed by former Civ. R. 53(E)(3)(b) (effective July 1, 1995) and former Civ. R. 53(E)(3)(d) (effective July 1, 2003) to include any factual finding or legal conclusion in a magistrate’s decision, whether or not specifically designated as a finding of fact or conclusion of law under Civ. R. 53(D)(3)(a)(ii). The Rules Advisory Committee was unable to discern a principled reason to apply different requirements to, e.g., a factual finding depending on whether or not that finding is specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii). An exception to the “waiver rule” exists for plain error, which cannot be waived based on a party’s failure to object to a magistrate’s decision.

Action of court on magistrate’s decision and on any objections to magistrate’s decision; entry of judgment or interim order by the court

Civ. R. 53(D)(4)(a), like sentence one of former Civ. R. 53(E)(4)(a), confirms that a magistrate’s decision is not effective unless adopted by the court.

Civ. R. 53(D)(4)(b) provides that a court may properly choose among a wide range of options in response to a magistrate’s decision, whether or not objections are timely filed. See, e.g., *Johnson v. Brown* 2nd Dist. App. No. 2002 CA 76, 2003-Ohio-1257 at ¶ 12 (apparently concluding that former Civ. R. 53(E)(4)(b) permitted the trial court to modify an aspect of the magistrate’s decision to which no objection had been made).

Civ. R. 53(D)(4)(c) provides that if no timely objections are filed, the court may adopt a magistrate’s decision unless the court determines that there is an error of law or other defect evident on the face of the decision. A similar result was reached under sentence two of former Civ. R. 53(E)(4)(a). See, e.g., *Perrine v. Perrine*, 9th Dist. App. No. 20923, 2002-Ohio-4351 at ¶ 9; *City of Ravenna Police Dept. v. Sicuro* (Apr. 30, 2002), 11th Dist. App. No. 2001-P-0037; and *In re Weingart* (Jan. 17, 2002), 8th Dist. App. No. 79489, 2002 WL 68204 at *4. The language of Civ. R. 53(D)(4)(c) has been modified in an attempt to make clear that the obligation of the court does not extend to any “error of law” whatever but is limited to errors of law that are evident on the face of the decision. To the extent that decisions such as *In re Kelley*, 11th Dist. App. No. 2002-A-0088, 2003-Ohio-194 at ¶ 8 suggest otherwise, they are rejected. The “evident on the face” standard does not require that the court conduct an independent analysis of the magistrate’s decision. The amended rule does not speak to the effect, if any, on the waiver rule prescribed by amended Civ. R. 53(D)(3)(b)(iv) of the “evident on the face” requirement. At least two courts have explicitly held that the “evident on the face” standard generates an exception to the waiver rule. *Dean-Kitts v. Dean*, 2nd Dist. App. No. 2002CA18, 2002-Ohio-5590 at ¶

13 and *Hennessy v. Hennessy* (Mar. 24, 2000), 6th Dist. App. No. L-99-1170, 2000 WL 299450 at *1. Other decisions have indicated that the standard may generate an exception to the waiver rule. *Ohlin v. Ohlin* (Nov. 12, 1999), 11th Dist. App. No. 98-PA-87, 1999 WL 1580977 at *2; *Group One Realty, Inc. v. Dixie Intl. Co.* (1998), 125 Ohio App.3d 767, 769, 709 N.E.2d 589; *In re Williams* (Feb. 25, 1997), 10th Dist. App. No. 96APF06-778, 1997 WL 84659 at *1. However, the Supreme Court applied the waiver rule three times without so much as referring to the “evident on the face” standard as a possible exception. *State ex rel. Wilson v. Industrial Common.* (2003), 100 Ohio St. 3d 23, 24, 2003-Ohio-4832 at ¶ 4, 795 N.E.2d 662; *State ex rel. Abate v. Industrial Comm’n.* (2002), 96 Ohio St.3d 343, 2002-Ohio-4796, 774 N.E.2d 1212; *State ex rel. Booher v. Honda of America Mfg. Co., Inc.* (2000), 88 Ohio St.3d 52, 2000-Ohio-269, 723 N.E.2d 571.

As noted above, even if no timely objection is made, a court may, pursuant to Civ. R. 53(D)(4)(b), properly choose a course of action other than adopting a magistrate’s decision even if there is no error of law or other defect evident on the face of the magistrate’s decision.

Sentence one of Civ. R. 53(D)(4)(d), like sentence one of former Civ.R. 53(E)(4)(b), requires that the court rule on timely objections. Sentence two of Civ. R. 53(D)(4)(d) requires that, if timely objection is made to a magistrate’s decision, the court give greater scrutiny than if no objections are made. The “independent review as to the objected matters” standard that applies if timely objection is made should be distinguished from the lesser scrutiny permitted if no objections to a magistrate’s decision are timely filed, the latter standard having been first adopted by former Civ.R. 53(E)(4)(a), effective July 1, 1995, and retained by new Civ. R. 53(D)(4)(c), discussed above.

The “independent review as to the objected matters” standard is intended to exclude the more limited appellate standards of review and codify the practice approved by most courts of appeals. The Second District Court of Appeals has most clearly and consistently endorsed and explained that standard. *See, e.g., Crosby v. McWilliam*, 2nd Dist. App. No. 19856, 2003-Ohio-6063; *Quick v. Kwiatkowski* (Aug. 3, 2001), 2nd Dist. App. No. 18620, 2001 WL 871406 (acknowledging that “Magistrates truly do the ‘heavy lifting’ on which we all depend”); *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 758 N.E.2d 1234. Other district courts of appeal have followed suit. *Reese v. Reese*, 3rd Dist. App. No. 14-03-42, 2004-Ohio-1395; *Palenshus v. Smile Dental Group, Inc.*, 3rd Dist. App. No. 3-02-46, 2003-Ohio-3095; *Huffer v. Chafin*, 5th Dist. App. No. 01 CA 74, 2002-Ohio-356; *Rhoads v. Arthur* (June 30, 1999), 5th Dist. App. No. 98CAF10050, 1999 WL 547574; *Barker v. Barker* (May 4, 2001), 6th Dist. App. No. L-00-1346, 2001 WL 477267; *In re Day*, 7th Dist. App. No. 01 BA 28, 2003-Ohio-1215; *State ex rel. Ricart Auto. Personnel, Inc. v. Industrial Comm’n. of Ohio*, 10th Dist. App. No. 03AP-246, 2003-Ohio-7030; *Holland v. Holland* (Jan. 20, 1998), 10th Dist. App. No. 97APF08-974, 1998 WL 30179; *In re Gibbs* (Mar. 13, 1998), 11th Dist. App. No. 97-L-067, 1998 WL 257317.

Only one court of appeals appears consistently and knowingly to have taken a different approach. *Lowery v. Keystone Bd. of Ed.* (May 9, 2001), 9th Dist. App. No. 99CA007407, 2001 WL 490017; *Weber v. Weber* (June 30, 1999), 9th Dist. App. No. 2846-M, 1999 WL 459359; *Meadows v. Meadows* (Feb. 11, 1998), 9th Dist. App. No. 18382, 1998 WL 78686; *Rogers v. Rogers* (Dec. 17, 1997), 9th Dist. App. No. 18280, 1997 WL 795820.

The Rules Advisory Committee believes that the view adopted by the majority of courts of appeals is correct and that no change was made by the 1995 amendments to Civ. R. 53 in the review required of a trial judge upon the filing of timely objections to a magistrate's decision.

The phrase "as to the objected matters" permits a court to choose to limit its independent review to those matters raised by proper objections. If a court need apply only the "defect evident on the face" standard if no objections are filed at all, then, if one or more objections *are* filed, a court logically need apply the more stringent independent review only to those aspects of the magistrate's decision that are challenged by that objection or those objections.

Sentence three of Civ. R. 53(D)(4)(d) provides that, before ruling on objections, a court may hear additional evidence and that it may refuse to hear additional evidence unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

Civ. R. 53(D)(4)(e) requires that a court that adopts, rejects, or modifies a magistrate's decision also enter a judgment or interim order. Civ. R. 53(D)(4)(e)(i) permits the court to enter a judgment during the fourteen days permitted for the filing of objections to a magistrate's decision but provides that the timely filing of objections operates as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered. Civ. R. 53(D)(4)(e)(ii) permits the court, if immediate relief is justified, to enter an interim order based on the magistrate's decision without waiting for or ruling on timely objections. The timely filing of objections does not stay such an interim order, but the order may not properly extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. New sentence three of Civ. R. 53(D)(4)(e)(ii) provides that an interim order shall comply with Civ. R. 54(A), be journalized pursuant to Civ. R. 58(A), and be served pursuant to Civ. R. 58(B). See *Hall v. Darr*, 6th Dist. App. No. OT-03-001, 2003-Ohio-1035.

Extension of time

Civ. R. 53(D)(5) is new and requires the court, for good cause shown, to provide an objecting party with a reasonable extension of time to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" would include the failure of a party to receive timely service of the magistrate's order or decision.

Disqualification of a magistrate

Civ. R. 53(D)(6) has no counterpart in former Civ. R. 53. The statutory procedures for affidavits of disqualification apply to judges rather than magistrates. Rev. Code §§ 2101.39, 2501.13, 2701.03, 2701.131; *In re Disqualification of Light* (1988), 36 Ohio St.3d 604, 522 N.E.2d 458. The new provision is based on the observation of the Chief Justice of the Supreme Court that “[t]he removal of a magistrate is within the discretion of the judge who referred the matter to the magistrate and should be brought by a motion filed with the trial court.” *In re Disqualification of Wilson* (1996), 77 Ohio St. 3d 1250, 1251, 674 N.E.2d 260; see also *Mascorro v. Mascorro* (June 9, 2000), 2nd Dist. App. No. 17945, 2000 WL 731751 at *3 (citing *In re Disqualification of Wilson*); *Reece v. Reece* (June 22, 1994), 2nd Dist. App. No. 93-CA-45, 1994 WL 286282 at *2 (“Appointment of a referee is no different from any other process in which the trial court exercises discretion it is granted by statute or rule. * * * If the defect concerns possible bias or prejudice on the part of the referee, that may be brought to the attention of the court by motion.”); *Moton v. Ford Motor Credit Co.*, 5th Dist. App. No. 01CA74, 2002-Ohio-2857, appeal not allowed (2002), 95 Ohio St.3d 1422, 2002-Ohio-1734, 766 N.E.2d 163, reconsideration denied (2002), 95 Ohio St.3d 1476, 2002-Ohio-244, 768 N.E.2d 1183; *Walser v. Dominion Homes, Inc.* (June 11, 2001), 5th Dist. App. No. 00-CA-G-11-035, 2001 WL 704408 at *5; *Unger v. Unger* (Dec. 29, 2000), 12th Dist. App. No. CA2000-04-009, 2000 WL 1902196 at *2 (citing *In re Disqualification of Wilson, supra*); *Jordan v. Jordan* (Nov. 15, 1996), 4th Dist. App. No. 1427, 1990 WL 178162 at *5 (“Although referees are not judges and arguably, are not bound by Canon 3(C)(1) of the Code of Judicial Conduct, it would appear axiomatic that a party should be able to petition the court to have a referee removed from the case if the referee is unable to render a fair and impartial decision.”); *In re Reiner* (1991), 74 Ohio App.3d 213, 220, 598 N.E.2d 768 (“where a referee affirmatively states that he is biased on the matter before him, it is an abuse of the court’s discretion to fail to recuse the referee”). Particularly because “a [magistrate’s] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them,” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphases added), Civ. R. 53(D)(6) contemplates that disqualification on a ground other than bias may sometimes be appropriate.

Recording of proceedings before a magistrate

Civ. R. 53(D)(7), generally requiring recording of proceedings before a magistrate, is taken verbatim from former Civ. R. 53(D)(2).

Contempt in the presence of a magistrate

Civ. R. 53(D)(8) is adapted from sentences two, three, and four of former Civ. R. 53(C)(3)(c). Civ. R. 53(D)(8)(b), unlike its predecessor, explicitly requires that the clerk provide a copy of a contempt order to the subject of the order.

* * *

RULE 86. Effective Date

* * *

(CC) Effective date of amendments. The amendments to Civil Rules 30, 47, and 53 filed by the Supreme Court with the General Assembly on January 12, 2006 shall take effect on July 1, 2006. 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 19. Magistrates

(A) Appointment

A court other than a mayor's court may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio.

(B) Compensation

The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs.

(C) Authority

(1) *Scope.* To assist courts of record and pursuant to reference under Crim. R. 19(D)(1), magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

- (a) Conduct initial appearances and preliminary hearings pursuant to Crim. R. 5.
- (b) Conduct arraignments pursuant to Crim. R. 10.
- (c) Receive pleas, in accordance with Crim R. 11, only as follows:
 - (i) In felony and misdemeanor cases, accept and enter not guilty pleas.

(ii) In misdemeanor cases, accept and enter guilty and no contest pleas, determine guilt or innocence, receive statements in explanation and in mitigation of sentence, and recommend a penalty to be imposed. If imprisonment is a possible penalty for the offense charged, the matter may be referred only with the unanimous consent of the parties, in writing or on the record in open court.

- (d) Conduct pretrial conferences pursuant to Crim. R. 17.1.
- (e) Conduct proceedings to establish bail pursuant to Crim. R. 46.
- (f) Hear and decide the following motions:

(i) Any pretrial or post-judgment motion in any misdemeanor case for which imprisonment is not a possible penalty.

(ii) Upon the unanimous consent of the parties in writing or on the record in open court, any pretrial or post-judgment motion in any misdemeanor case for which imprisonment is a possibility.

(g) Conduct proceedings upon application for the issuance of a temporary protection order as authorized by law.

(h) Conduct the trial of any misdemeanor case that will not be tried to a jury. If the offense charged is an offense for which imprisonment is a possible penalty, the matter may be referred only with unanimous consent of the parties in writing or on the record in open court.

(i) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Regulation of proceedings.* In performing the responsibilities described in Crim. R. 19(C)(1), magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;

(b) Ruling upon the admissibility of evidence in misdemeanor cases in accordance with division (C)(1)(f) of this rule;

(c) Putting witnesses under oath and examining them;

(d) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to Crim. R. 46;

(e) Imposing, subject to Crim. R. 19(D)(8), appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) Proceedings in Matters Referred to Magistrates

(1) *Reference by court of record.*

(a) *Purpose and method.* A court of record may, for one or more of the purposes described in Crim. R. 19(C)(1), refer a particular case or matter of a category of cases or matters to a magistrate by a specific or general order of reference or by a rule.

(b) *Limitation.* A court of record may limit a reference by specifying or limiting the magistrate's powers, including, but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and

closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) *Magistrate's order; motion to set aside magistrate's order.*

(a) *Magistrate's order.*

(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter pretrial orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys.

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's decision; objections to magistrate's decision.*

(a) *Magistrate's decision.*

(i) *When required.* Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Crim. R. 19(D)(1).

(ii) *Findings of fact and conclusions of law.* Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing; and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Crim. R.19(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Crim. R.19(D)(3)(b).

(b) *Objections to magistrate's decision.*

(i) *Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Crim. R. 19(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) *Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Crim. R. 19(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Crim. R. 19(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Crim. R. 19(D)(3)(b).

(4) *Action of court on magistrate's decision and on any objection to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate. No sentence recommended by a magistrate shall be enforced until the court has entered judgment.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of Judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by Crim. R. 19(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Crim. R. 19(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) *Interim order.* The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. An interim order shall comply with Civ. R. 54(A), be journalized pursuant to Civ. R. 58(A), and be served pursuant to Civ. R. 58(B).

(5) *Extension of time.* For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) *Contempt in the presence of a magistrate.*

(a) *Contempt Order.* Contempt sanctions under Crim. R. 19 (C)(2)(e) may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) *Filing and provision of copies of contempt order.* A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) *Review of contempt order by court; bail.* The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

Staff Note (July 1, 2006 Amendment)

Crim. R. 19 has been reorganized in an effort to make it more helpful to bench and bar and reflective of developments since the rule was last substantially revised effective July 1, 1995. The relatively-few significant changes included in the reorganization are noted below.

Rule 19(A) Appointment

Crim. R. 19(A) is taken verbatim from the first two sentences of former Crim. R. 19(A). Sup. R. 19 requires that all municipal courts having more than two judges appoint one or more magistrates to hear specified matters. See also Traf. R. 14.

Rule 19(B) Compensation

Crim. R. 19(B) is taken verbatim from former Crim. R. 19(B).

Rule 19(C) Authority

Crim. R. 19 (C) is drawn largely from former Crim. R. 19(C)(1), (2), and (4) and reflects the admonition of the Supreme Court that “a [magistrate’s] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them.” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphases added). Crim. R. 19(C)(1)(g) corresponds to existing authority for a magistrate to conduct temporary protection order proceedings in accordance with law, although consistent with the admonition in *Hartt*, any temporary protection order issued as a result of such proceedings must be signed by a judge.

Rule 19(D) Proceedings in Matters Referred to Magistrates

Crim. R. 19(D)(1) through (4) treat each of the steps that potentially occur if a magistrate participates: (1) reference to a magistrate; (2) magistrate’s orders and motions to set aside magistrate’s orders; (3) magistrate’s decisions and objections to magistrate’s decisions; and (4) action of the court on magistrate’s decisions and on any objections to magistrate’s decisions and entry of judgment or interim order by the court. Crim. R. 19(D)(5) through (8) deal with good cause extensions of time, disqualification of a magistrate, recording of proceedings before a magistrate, and contempt in the presence of a magistrate.

Reference by court of record

Crim. R. 19(D)(1), unlike former Crim. R. 19(C)(2) and (3), specifically authorizes reference of types of matters by rule as well as by a specific or general order of reference. In so doing, it recognizes existing practice in some courts. See, e.g., Loc. R. 99.02, Franklin Cty. Ct. of Common Pleas; Loc. R. 23(B), Hamilton Cty. Ct. of Common Pleas; *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 412-13, 2002-Ohio-4907 at ¶¶ 20-24, 775 N.E.2d 522; *Davis v. Reed* (Aug. 31, 2000), 8th Dist. App. No. 76712, 2000 WL 1231462 at *2 (citing *White v. White* (1977), 50 Ohio App.2d 263, 266-268, 362 N.E.2d 1013), and *Partridge v. Partridge* (Aug. 27, 1999), 2nd Dist. App. No. 98 CA 38, 1999 WL 945046 at *2, (treating a local rule of the Greene Cty. Ct. of Common Pleas, Dom. Rel. Div., as a standing order of reference).

Magistrate's order; motion to set aside magistrate's order

Crim. R. 19(D)(2)(a)(i) generally authorizes a magistrate to enter orders without judicial approval if necessary to regulate the proceedings and, adapting language from Crim. R. 19(C)(5)(a), if “not dispositive of a claim or defense of a party.” The language is intended to more accurately reflect proper and existing practice and is not intended to narrow the power of a magistrate to enter orders without judicial approval. Crim. R. 19(D)(2)(b) replaces language in former Crim. R. 19(C)(5)(b), which purported to authorize “[a]ny person” to “appeal to the court” from any order of a magistrate “by filing a motion to set the order aside.” The new language refers to the appropriate challenge to a magistrate’s order as solely a “motion to set aside” the order. Crim. R. 19(D)(2)(b) likewise limits the authorization to file a motion to “any party,” though an occasional nonparty may be entitled to file a motion to set aside a magistrate’s order. Sentence two of Crim. R. 19(D)(2)(b) changes the trigger for the ten days permitted to file a motion to set aside a magistrate’s order from entry of the order to filing of the order, as the latter date is definite and more easily available to counsel.

Magistrate's decision; objections to magistrate's decision

Crim. R. 19(D)(3) prescribes procedures for preparation of a magistrate’s decision and for any objections to a magistrate’s decision.

Crim. R. 19(D)(3)(a)(ii), unlike former Crim. R. 19(E), adapts language from Civ. R. 52. The change is intended to make clear that a request for findings of fact and conclusions of law in a referred matter should be directed to the magistrate rather than to the court. Crim. R. 19(D)(3)(a)(ii) explicitly authorizes a magistrate’s decision, subject to the terms of the relevant reference, to be general absent a timely request for findings of fact and conclusions of law or a provision of law that provides otherwise. Occasional decisions under former Civ. R. 53 said as much. See, e.g., *In re Chapman* (Apr. 21, 1997), 12th Dist. App. No. CA96-07-127, 1997 WL 194879 at *2; *Burke v. Brown*, 4th Dist. App. No. 01CA731, 2002-Ohio-6164 at ¶ 21; and *Rush v. Schlagetter* (Apr. 15, 1997), 4th Dist. App. No. 96CA2215, 1997 WL 193169 at *3. For a table of sections of the Ohio

Revised Code that purport to make findings of fact by judicial officers mandatory in specified circumstances, see 2 Klein-Darling, Ohio Civil Practice § 52-4, 2002 Pocket Part at 136 (West Group 1997).

Crim. R. 19(D)(3)(a)(iii) now requires that the magistrate's decision be served on the parties or their attorneys no later than three days after the decision was filed. The former rule contained no specific time requirement. The provision further requires that a magistrate's decision include a conspicuous warning of the waiver rule prescribed by amended Crim. R. 19(D)(3)(b)(iv). The latter provision now provides that a party shall not assign as error on appeal a court's adoption of any factual finding or legal conclusion of a magistrate, whether or not specifically designated as a finding of fact or conclusion of law under Crim. R. 19(D)(3)(a)(ii), unless that party has objected to that finding or conclusion as required by Crim. R. 19 (D)(3)(b). The amended waiver rule applies to any factual finding or legal conclusion in a magistrate's decision and the required warning is broadened accordingly.

Crim. R. 19(D)(3)(b)(i) retains the fourteen-day time for filing written objections to a magistrate's decision. While the rule continues to authorize filing of objections by a "party," it has been held that a non-party attorney can properly object to a magistrate's decision imposing sanctions on the attorney. *All Climate Heating & Cooling, Inc. v. Zee Properties, Inc.* (May 17, 2001), 10th Dist. App. No. 00AP-1141, 2001 WL 521408 at *3.

Sentence one of Crim. R. 19(D)(3)(b)(iii) requires that an objection to a factual finding in a magistrate's decision, whether or not specifically designated as a finding of fact under Crim. R. 19(D)(3)(a)(ii), be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or by an affidavit of that evidence if a transcript is not available. The Supreme Court has prescribed the consequences on appeal of failure to supply the requisite transcript or affidavit as follows: (1) "appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision]" and (2) "the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254.

Sentence two of Crim. R. 19(D)(3)(b)(iii) adds a new requirement, adapted from Loc. R. 99.05, Franklin Cty. Ct. of Common Pleas, that the requisite transcript or affidavit be filed within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. The last sentence of Crim. R. 19(D)(3)(b)(iii) allows an objecting party to seek leave of court to supplement previously filed objections where the additional objections become apparent after a transcript has been prepared.

Crim. R. 19(D)(3)(b)(iv) applies a “waiver rule” to include any factual finding or legal conclusion in a magistrate’s decision, whether or not specifically designated as a finding of fact or conclusion of law under Crim. R. 19(D)(3)(a)(ii). The Rules Advisory Committee was unable to discern a principled reason to apply different requirements to, e.g., a factual finding depending on whether or not that finding is specifically designated as a finding of fact under Crim. R. 19(D)(3)(a)(ii). An exception to the “waiver rule” exists for plain error, which cannot be waived based on a party’s failure to object to a magistrate’s decision.

Action of court on magistrate’s decision and on any objections to magistrate’s decision; entry of judgment or interim order by the court

Crim. R. 19(D)(4)(a), like sentence one of former Crim. R. 19(E)(3)(a), confirms that a magistrate’s decision is not effective unless adopted by the court.

Crim. R. 19(D)(4)(b) provides that a court may properly choose among a wide range of options in response to a magistrate’s decision, whether or not objections are timely filed. See, e.g., *Johnson v. Brown* 2nd Dist. App. No. 2002 CA 76, 2003-Ohio-1257 at ¶ 12 (apparently concluding that former Civ. R. 53 permitted the trial court to modify an aspect of the magistrate’s decision to which no objection had been made).

Crim. R. 19(D)(4)(c) provides that if no timely objections are filed, the court may adopt a magistrate’s decision unless the court determines that there is an error of law or other defect evident on the face of the decision. A similar result was reached under sentence two of former Crim. R. 19(E)(3)(a). See, e.g., *Perrine v. Perrine*, 9th Dist. App. No. 20923, 2002-Ohio-4351 at ¶ 9; *City of Ravenna Police Dept. v. Sicuro* (Apr. 30, 2002), 11th Dist. App. No. 2001-P-0037; and *In re Weingart* (Jan. 17, 2002), 8th Dist. App. No. 79489, 2002 WL 68204 at *4. The language of Crim. R. 19(D)(4)(c) has been modified in an attempt to make clear that the obligation of the court does not extend to any “error of law” whatever but is limited to errors of law that are evident on the face of the decision. To the extent that decisions such as *In re Kelley*, 11th Dist. App. No. 2002-A-0088, 2003-Ohio-194 at ¶ 8 suggest otherwise, they are rejected. The “evident on the face” standard does not require that the court conduct an independent analysis of the magistrate’s decision. The amended rule does not speak to the effect, if any, on the waiver rule prescribed by amended Crim. R. 19(D)(3)(b)(iv) of the “evident on the face” requirement. At least two courts have explicitly held that the “evident on the face” standard generates an exception to the waiver rule. *Dean-Kitts v. Dean*, 2nd Dist. App. No. 2002CA18, 2002-Ohio-5590 at ¶ 13 and *Hennessy v. Hennessy* (Mar. 24, 2000), 6th Dist. App. No. L-99-1170, 2000 WL 299450 at *1. Other decisions have indicated that the standard may generate an exception to the waiver rule. *Ohlin v. Ohlin* (Nov. 12, 1999), 11th Dist. App. No. 98-PA-87, 1999 WL 1580977 at *2; *Group One Realty, Inc. v. Dixie Intl. Co.* (1998), 125 Ohio App.3d 767, 769, 709 N.E.2d 589; *In re Williams* (Feb. 25, 1997), 10th Dist. App. No. 96APF06-778, 1997 WL 84659 at *1. However, the Supreme Court applied the waiver rule three times without so much as referring to the “evident on the face” standard as a possible exception. *State ex rel. Wilson v. Industrial Comm’n.* (2003), 100 Ohio St. 3d 23, 24, 2003-Ohio-4832 at ¶ 4, 795 N.E.2d 662; *State ex rel. Abate v. Industrial Common.* (2002), 96

Ohio St.3d 343, 2002-Ohio-4796, 774 N.E.2d 1212; *State ex rel. Booher v. Honda of America Mfg. Co., Inc.* (2000), 88 Ohio St.3d 52, 2000-Ohio-269, 723 N.E.2d 571.

As noted above, even if no timely objection is made, a court may, pursuant to Crim. R. 19(D)(4)(b), properly choose a course of action other than adopting a magistrate's decision even if there is no error of law or other defect evident on the face of the decision.

Sentence one of Crim. R. 19(D)(4)(d), like sentence one of former Crim. R. 19(E)(3)(b), requires that the court rule on timely objections. Sentence two of Crim. R. 19(D)(4)(d) requires that, if timely objection is made to a magistrate's decision, the court give greater scrutiny than if no objections are made. The "independent review as to the objected matters" standard that applies if timely objection is made should be distinguished from the lesser scrutiny permitted if no objections to a magistrate's decision are timely filed, the latter standard having been retained by new Crim. R. 19(D)(4)(c), discussed above.

The "independent review as to the objected matters" standard is intended to exclude the more limited appellate standards of review and codify the practice approved by most courts of appeals. The Second District Court of Appeals has most clearly and consistently endorsed and explained that standard. *See, e.g., Crosby v. McWilliam*, 2nd Dist. App. No. 19856, 2003-Ohio-6063; *Quick v. Kwiatkowski* (Aug. 3, 2001), 2nd Dist. App. No. 18620, 2001 WL 871406 (acknowledging that "Magistrates truly do the 'heavy lifting' on which we all depend"); *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 758 N.E.2d 1234. Other district courts of appeal have followed suit. *Reese v. Reese*, 3rd Dist. App. No. 14-03-42, 2004-Ohio-1395; *Palenshus v. Smile Dental Group, Inc.*, 3rd Dist. App. No. 3-02-46, 2003-Ohio-3095; *Huffer v. Chafin*, 5th Dist. App. No. 01 CA 74, 2002-Ohio-356; *Rhoads v. Arthur* (June 30, 1999), 5th Dist. App. No. 98CAF10050, 1999 WL 547574; *Barker v. Barker* (May 4, 2001), 6th Dist. App. No. L-00-1346, 2001 WL 477267; *In re Day*, 7th Dist. App. No. 01 BA 28, 2003-Ohio-1215; *State ex rel. Ricart Auto. Personnel, Inc. v. Industrial Comm'n. of Ohio*, 10th Dist. App. No. 03AP-246, 2003-Ohio-7030; *Holland v. Holland* (Jan. 20, 1998), 10th Dist. App. No. 97APF08-974, 1998 WL 30179; *In re Gibbs* (Mar. 13, 1998), 11th Dist. App. No. 97-L-067, 1998 WL 257317.

Only one court of appeals appears consistently and knowingly to have taken a different approach. *Lowery v. Keystone Bd. of Ed.* (May 9, 2001), 9th Dist. App. No. 99CA007407, 2001 WL 490017; *Weber v. Weber* (June 30, 1999), 9th Dist. App. No. 2846-M, 1999 WL 459359; *Meadows v. Meadows* (Feb. 11, 1998), 9th Dist. App. No. 18382, 1998 WL 78686; *Rogers v. Rogers* (Dec. 17, 1997), 9th Dist. App. No. 18280, 1997 WL 795820.

The Rules Advisory Committee believes that the view adopted by the majority of courts of appeals is correct and that no change was made by the 1995 amendments to Crim. R. 19 in the review required of a trial judge upon the filing of timely objections to a magistrate's decision.

The phrase “as to the objected matters” permits a court to choose to limit its independent review to those matters raised by proper objections. If a court need apply only the “defect evident on the face” standard if no objections are filed at all, then, if one or more objections *are* filed, a court logically need apply the more stringent independent review only to those aspects of the magistrate’s decision that are challenged by that objection or those objections.

Sentence three of Crim. R. 19(D)(4)(d) provides that, before ruling on objections, a court may hear additional evidence and that it may refuse to hear additional evidence unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

Crim. R. 19(D)(4)(e) requires that a court that adopts, rejects, or modifies a magistrate’s decision also enter a judgment or interim order. Crim. R. 19(D)(4)(e)(i) permits the court to enter a judgment during the fourteen days permitted for the filing of objections to a magistrate’s decision but provides that the timely filing of objections operates as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered. Crim. R. 19(D)(4)(e)(ii) permits the court, if immediate relief is justified, to enter an interim order based on the magistrate’s decision without waiting for or ruling on timely objections. The timely filing of objections does not stay such an interim order, but the order may not properly extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. New sentence three of Crim. R. 19(D)(4)(e)(ii) provides that an interim order shall comply with Civ. R. 54(A), be journalized pursuant to Civ. R. 58(A), and be served pursuant to Civ. R. 58(B). See *Hall v. Darr*, 6th Dist. App. No. OT-03-001, 2003-Ohio-1035.

Extension of time

Crim. R. 19(D)(5) is new and requires the court, for good cause shown, to provide an objecting party with a reasonable extension of time to file a motion to set aside a magistrate’s order or file objections to a magistrate’s decision. “Good cause” would include the failure of a party to receive timely service of the magistrate’s order or decision.

Disqualification of a magistrate

Crim. R. 19(D)(6) has no counterpart in former Crim. R. 19. The statutory procedures for affidavits of disqualification apply to judges rather than magistrates. Rev. Code §§ 2101.39, 2501.13, 2701.03, 2701.131; *In re Disqualification of Light* (1988), 36 Ohio St.3d 604, 522 N.E.2d 458. The new provision is based on the observation of the Chief Justice of the Supreme Court that “[t]he removal of a magistrate is within the discretion of the judge who referred the matter to the magistrate and should be brought by a motion filed with the trial court.” *In re Disqualification of Wilson* (1996), 77 Ohio St. 3d 1250, 1251, 674 N.E.2d 260; see also *Mascorro v. Mascorro* (June 9, 2000), 2nd Dist. App. No. 17945, 2000 WL 731751 at *3 (citing *In re Disqualification of Wilson*); *Reece v. Reece* (June 22, 1994), 2nd Dist. App. No. 93-CA-45, 1994 WL 286282 at *2 (“Appointment of a

referee is no different from any other process in which the trial court exercises discretion it is granted by statute or rule. * * * If the defect concerns possible bias or prejudice on the part of the referee, that may be brought to the attention of the court by motion.”); *Moton v. Ford Motor Credit Co.*, 5th Dist. App. No. 01CA74, 2002-Ohio-2857, appeal not allowed (2002), 95 Ohio St.3d 1422, 2002-Ohio-1734, 766 N.E.2d 163, reconsideration denied (2002), 95 Ohio St.3d 1476, 2002-Ohio-244, 768 N.E.2d 1183; *Walser v. Dominion Homes, Inc.* (June 11, 2001), 5th Dist. App. No. 00-CA-G-11-035, 2001 WL 704408 at *5; *Unger v. Unger* (Dec. 29, 2000), 12th Dist. App. No. CA2000-04-009, 2000 WL 1902196 at *2 (citing *In re Disqualification of Wilson, supra*); *Jordan v. Jordan* (Nov. 15, 1996), 4th Dist. App. No. 1427, 1990 WL 178162 at *5 (“Although referees are not judges and arguably, are not bound by Canon 3(C)(1) of the Code of Judicial Conduct, it would appear axiomatic that a party should be able to petition the court to have a referee removed from the case if the referee is unable to render a fair and impartial decision.”); *In re Reiner* (1991), 74 Ohio App.3d 213, 220, 598 N.E.2d 768 (“where a referee affirmatively states that he is biased on the matter before him, it is an abuse of the court’s discretion to fail to recuse the referee”). Particularly because “a [magistrate’s] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them,” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphases added), Crim. R. 19(D)(6) contemplates that disqualification on a ground other than bias may sometimes be appropriate.

Recording of proceedings before a magistrate

Crim. R. 19(D)(7), generally requiring recording of proceedings before a magistrate, is taken verbatim from former Crim. R. 19(D)(2).

Contempt in the presence of a magistrate

Crim. R. 19(D)(8) is adapted from sentences two, three, and four of former Crim. R. 19(C)(5)(c). Crim. R. 19(D)(8)(b), unlike its predecessor, explicitly requires that the clerk provide a copy of a contempt order to the subject of the order.

* * *

RULE 24 Trial Jurors

(A) Brief introduction of case. To assist prospective jurors in understanding the general nature of the case, the court, in consultation with the parties, may give jurors a brief introduction to the case.

(B) Examination of prospective jurors. Any person called as a prospective juror for the trial of any cause shall be examined under oath or upon affirmation as to the prospective juror’s qualifications. The court may permit the attorney for the defendant, or the defendant if appearing *pro se*, and the attorney for the state to conduct the examination of the prospective

jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry. Nothing in this rule shall limit the court's discretion, with timely notice to the parties at anytime prior to trial, to allow the examination of all prospective jurors in the array prior to any challenges for cause or peremptory challenges.

(C) Challenge for cause. A person called as a juror may be challenged for the following causes:

(1) That the juror has been convicted of a crime which by law renders the juror disqualified to serve on a jury.

(2) That the juror is a chronic alcoholic, or drug dependent person.

(3) That the juror was a member of the grand jury that found the indictment in the case.

(4) That the juror served on a petit jury drawn in the same cause against the same defendant, and the petit jury was discharged after hearing the evidence or rendering a verdict on the evidence that was set aside.

(5) That the juror served as a juror in a civil case brought against the defendant for the same act.

(6) That the juror has an action pending between him or her and the State of Ohio or the defendant.

(7) That the juror or the juror's spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against the juror.

(8) That the juror has been subpoenaed in good faith as a witness in the case.

(9) That the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that the juror will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That the juror is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That the juror is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That the juror is the employer or employee, or the spouse, parent, son, or daughter of the employer or employee, or the counselor, agent, or attorney, of any person included in division (C)(11) of this rule.

(13) That English is not the juror's native language, and the juror's knowledge of English is insufficient to permit the juror to understand the facts and the law in the case.

(14) That the juror is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in division (C) of this rule shall be determined by the court.

(D) Peremptory challenges. In addition to challenges provided in division (C) of this rule, if there is one defendant, each party peremptorily may challenge three prospective jurors in misdemeanor cases, four prospective jurors in felony cases other than capital cases, and six prospective jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of prospective jurors as if the defendant was the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of prospective jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations, or complaints for trial, the consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information, or complaint.

(E) Manner of exercising peremptory challenges. Peremptory challenges may be exercised after the minimum number of jurors allowed by the Rules of Criminal Procedure has been passed for cause and seated on the panel. Peremptory challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge, but does not constitute a waiver of any subsequent challenge. However, if all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another prospective juror shall be called who shall take the place of the prospective juror excused and be sworn and examined as other prospective jurors. The other party, if that party has peremptory challenges remaining, shall be entitled to challenge any prospective juror then seated on the panel.

Nothing in this rule shall limit the court's discretion to allow challenges under this division or division (D) of this rule to be made outside the hearing of prospective jurors.

(F) Challenge to array. The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to division (B) of this rule and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(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. Except in capital cases, an alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. 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. No alternate juror shall be substituted during any deliberation. Any alternate juror shall be discharged after the trial jury retires to consider the penalty.

(H) Control of juries.

(1) Before submission of case to jury. Before submission of a case to the jury, the court, upon its own motion or the motion of a party, may restrict the separation of jurors or may sequester the jury.

(2) After submission of case to jury.

(a) Misdemeanor cases. After submission of a misdemeanor case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors.

(b) Non-capital felony cases. After submission of a non-capital felony case to the jury, the court, after giving cautionary instructions, may permit the separation of jurors during any period of court adjournment or may require the jury to remain under the supervision of an officer of the court.

(c) Capital cases. After submission of a capital case to the jury, the jury shall remain under the supervision of an officer of the court until a verdict is rendered or the jury is discharged by the court.

(3) Separation in emergency. Where the jury is sequestered or after a capital case is submitted to the jury, the court may, in an emergency and upon giving cautionary instructions, allow temporary separation of jurors.

(4) Duties of supervising officer. Where jurors are required to remain under the supervision of an officer of the court, the court shall make arrangements for their care, maintenance and comfort.

When the jury is in the care of an officer of the court and until the jury is discharged by the court, the officer may inquire whether the jury has reached a verdict, but shall not:

- (a) Communicate any matter concerning jury conduct to anyone except the judge or;
- (b) Communicate with the jurors or permit communications with jurors, except as allowed by court order.

(I) Taking of notes by jurors. The court, after providing appropriate cautionary instructions, may permit jurors who wish to do so to take notes during a trial. If the court permits the taking of notes, notes taken by a juror may be carried into deliberations by that juror. The court shall require that all juror notes be collected and destroyed promptly after the jury renders a verdict.

(J) Juror questions to witnesses. The court may permit jurors to propose questions for the court to ask of the witnesses. If the court permits jurors to propose questions, the court shall use procedures that minimize the risk of prejudice, including all of the following:

- (1) Require jurors to propose any questions to the court in writing;
- (2) Retain a copy of each proposed question for the record;
- (3) Instruct the jurors that they shall not display or discuss a proposed question with other jurors;
- (4) Before reading a question to a witness, provide counsel with an opportunity to object to each question on the record and outside the hearing of the jury;
- (5) Read the question, either as proposed or rephrased, to the witness;

(6) Permit counsel to reexamine the witness regarding a matter addressed by a juror question;

(7) If a question proposed by a juror is not asked, instruct the jurors that they should not draw any adverse inference from the court's refusal to ask any question proposed by a juror.

Staff Note (July 1, 2006 Amendment)

Crim. R. 24 is amended to recognize the existence of alternative methods of jury selection and expressly permit the use of these methods in Ohio courts. The amendments are consistent with recommendations contained in the February 2004 *Report and Recommendations of the Supreme Court of Ohio Task Force on Jury Service*, at pp. 10-11.

The Task Force on Jury Service identified two primary methods of jury selection and encouraged the use of a selection process that is efficient and enhances juror satisfaction. The Rules Advisory Committee learned that some judges and lawyers believe that the pre-2006 version of Crim. R. 24 precluded the use of a selection method, commonly referred to as the "struck" method, whereby prospective jurors are examined as a group and then the trial judge and attorneys meet privately to challenge jurors for cause and exercise peremptory challenges. Two amendments to Crim. R. 24 are added to expressly permit alternative selection methods. Crim. R. 24(C), (F), and (G) also are revised to correct erroneous cross-references resulting from the 2005 amendments to the rule.

Rule 24(B) Examination of prospective jurors

The last sentence of Crim. R. 24(B) is added to expressly permit the examination of prospective jurors in an array. The rule differs slightly from the corresponding provision in Civ. R. 47 by requiring that the court provide the parties with timely notice, at anytime prior to trial, of the intent to conduct an examination of prospective jurors in an array. The Rules Advisory Committee is of the opinion that pretrial notice to the parties in criminal cases is necessary to comport with constitutional requirements.

Rule 24(E) Manner of exercising peremptory challenges

The last sentence of Civ. R. 24(E) is added to expressly afford the trial court the discretion to allow the exercise of challenges for cause and peremptory challenges outside the hearing of the jury.

* * *

RULE 46. Bail

(A) Types and amounts of bail. Any person who is entitled to release shall be released upon one or more of the following types of bail in the amount set by the court:

- (1) The personal recognizance of the accused or an unsecured bail bond;
- (2) A bail bond secured by the deposit of ten percent of the amount of the bond in cash. Ninety percent of the deposit shall be returned upon compliance with all conditions of the bond;
- (3) A surety bond, a bond secured by real estate or securities as allowed by law, or the deposit of cash, at the option of the defendant.

(B) Conditions of bail. The court may impose any of the following conditions of bail:

- (1) Place the person in the custody of a designated person or organization agreeing to supervise the person;
- (2) Place restrictions on the travel, association, or place of abode of the person during the period of release;
- (3) Place the person under a house arrest, electronic monitoring, or work release program;
- (4) Regulate or prohibit the person's contact with the victim;
- (5) Regulate the person's contact with witnesses or others associated with the case upon proof of the likelihood that the person will threaten, harass, cause injury, or seek to intimidate those persons;
- (6) Require a person who is charged with an offense that is alcohol or drug related, and who appears to need treatment, to attend treatment while on bail;
- (7) Any other constitutional condition considered reasonably necessary to ensure appearance or public safety.

(C) Factors. In determining the types, amounts, and conditions of bail, the court shall consider all relevant information, including but not limited to:

- (1) The nature and circumstances of the crime charged, and specifically whether the defendant used or had access to a weapon;
- (2) The weight of the evidence against the defendant;

(3) The confirmation of the defendant's identity;

(4) The defendant's family ties, employment, financial resources, character, mental condition, length of residence in the community, jurisdiction of residence, record of convictions, record of appearance at court proceedings or of flight to avoid prosecution;

(5) Whether the defendant is on probation, a community control sanction, parole, post-release control, bail, or under a court protection order.

(D) Appearance pursuant to summons. When summons has been issued and the defendant has appeared pursuant to the summons, absent good cause, a recognizance bond shall be the preferred type of bail.

(E) Amendments. A court, at any time, may order additional or different types, amounts, or conditions of bail.

(F) Information need not be admissible. Information stated in or offered in connection with any order entered pursuant to this rule need not conform to the rules pertaining to the admissibility of evidence in a court of law. Statements or admissions of the defendant made at a bail proceeding shall not be received as substantive evidence in the trial of the case.

(G) Bond schedule. Each court shall establish a bail bond schedule covering all misdemeanors including traffic offenses, either specifically, by type, by potential penalty, or by some other reasonable method of classification. The court also may include requirements for release in consideration of divisions (B) and (C)(5) of this rule. Each municipal or county court shall, by rule, establish a method whereby a person may make bail by use of a credit card. No credit card transaction shall be permitted when a service charge is made against the court or clerk unless allowed by law.

(H) Continuation of bonds. Unless otherwise ordered by the court pursuant to division (E) of this rule, or if application is made by the surety for discharge, the same bond shall continue until the return of a verdict or the acceptance of a guilty plea. In the discretion of the court, the same bond may also continue pending sentence or disposition of the case on review. Any provision of a bond or similar instrument that is contrary to this rule is void.

(I) Failure to appear; breach of conditions. Any person who fails to appear before any court as required is subject to the punishment provided by the law, and any bail given for the person's release may be forfeited. If there is a breach of condition of bail, the court may amend the bail.

(J) Justification of sureties. Every surety, except a corporate surety licensed as provided by law, shall justify by affidavit, and may be required to describe in the affidavit, the property that the surety proposes as security and the encumbrances on it, the number and amount of other bonds and undertakings for bail entered into by the surety and remaining undischarged, and all of the surety's other liabilities. The surety shall provide other evidence of financial responsibility as the court or clerk may require. No bail bond shall be approved unless the surety

or sureties appear, in the opinion of the court or clerk, to be financially responsible in at least the amount of the bond. No licensed attorney at law shall be a surety.

Staff Note (July 1, 2006 Amendment)

Rule 46 was modified, effective July 1, 1998, to reflect the amendment to Article I, Section 9 of the Ohio Constitution approved by the voters in November 1997. Subsequent changes in the law, such as the standard civil protection order forms promulgated by the Supreme Court (Rule 10.01 of the Rules of Superintendence for the Courts of Ohio) and legislative revisions to the criminal code make some elaboration appropriate. The changes to divisions (B), (C), and (G) are intended to update the rule to reflect available technology, provide for greater safety, amplify the options that may be used by the trial court, and confirm the ability of a trial court to control conditions and type of bail.

Rule 46(B) Conditions of bail

Division (B)(3) is modified to include electronic monitoring as one of the permissible conditions of bail that may be imposed by the trial court.

Rule 46(C) Factors

Division (C) is amended to permit the trial court to consider two express factors in determining the amount and conditions of bail. Division (C)(1) permits the trial court to consider whether the defendant used or had access to a weapon. Division (C)(5) allows the court to consider whether the defendant is subject to a court-issued protection order.

Rule 46(G) Bond schedule

Division (G) is revised to permit the court to include factors and conditions of bail in the bond schedule that the court must establish.

* * *

RULE 59. Effective Date

* * *

(V) Effective date of amendments. The amendments to Criminal Rules 19, 24, and 46 filed by the Supreme Court with the General Assembly on January 12, 2006 shall take effect on July 1, 2006. 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 JUVENILE PROCEDURE

* * *

RULE 40. Magistrates

(A) Appointment

The court may appoint one or more magistrates who shall be attorneys at law admitted to practice in Ohio. A magistrate appointed under this rule also may serve as a magistrate under Crim. R. 19. The court shall not appoint as a magistrate any person who has contemporaneous responsibility for working with, or supervising the behavior of, children who are subject to dispositional orders of the appointing court or any other juvenile court.

(B) Compensation

The compensation of magistrates shall be fixed by the court, and no part of the compensation shall be taxed as costs.

(C) Authority

(1) *Scope.* To assist juvenile courts of record and pursuant to reference under Juv. R. 40(D)(1), magistrates are authorized, subject to the terms of the relevant reference, to do any of the following:

(a) Determine any motion in any case, except a case involving the determination of a child's status as a serious youthful offender;

(b) Conduct the trial of any case that will not be tried to a jury, except the adjudication of a case against an alleged serious youthful offender;

(c) Upon unanimous written consent of the parties, preside over the trial of any case that will be tried to a jury; except the adjudication of a case against an alleged serious youthful offender;

(d) Exercise any other authority specifically vested in magistrates by statute and consistent with this rule.

(2) *Regulation of proceedings.* In performing the responsibilities described in Juv. R. 40(C)(1), magistrates are authorized, subject to the terms of the relevant reference, to regulate all proceedings as if by the court and to do everything necessary for the efficient performance of those responsibilities, including but not limited to, the following:

(a) Issuing subpoenas for the attendance of witnesses and the production of evidence;

- (b) Ruling upon the admissibility of evidence;
- (c) Putting witnesses under oath and examining them;
- (d) Calling the parties to the action and examining them under oath;
- (e) When necessary to obtain the presence of an alleged contemnor in cases involving direct or indirect contempt of court, issuing an attachment for the alleged contemnor and setting the type, amount, and any conditions of bail pursuant to Crim. R. 46;
- (f) Imposing, subject to Juv. R. 40(D)(8), appropriate sanctions for civil or criminal contempt committed in the presence of the magistrate.

(D) Proceedings in Matters Referred to Magistrates

(1) *Reference by court of record.*

(a) *Purpose and method.* A court may, for one or more of the purposes described in Juv. R. 40(C)(1), refer a particular case or matter or a category of cases or matters to a magistrate by a specific or general order of reference or by rule.

(b) *Limitation.* A court may limit a reference by specifying or limiting the magistrate's powers, including but not limited to, directing the magistrate to determine only particular issues, directing the magistrate to perform particular responsibilities, directing the magistrate to receive and report evidence only, fixing the time and place for beginning and closing any hearings, or fixing the time for filing any magistrate's decision on the matter or matters referred.

(2) *Magistrate's order; motion to set aside magistrate's order.*

(a) *Magistrate's order.*

(i) *Nature of order.* Subject to the terms of the relevant reference, a magistrate may enter orders without judicial approval if necessary to regulate the proceedings and if not dispositive of a claim or defense of a party.

(ii) *Form, filing, and service of magistrate's order.* A magistrate's order shall be in writing, identified as a magistrate's order in the caption, signed by the magistrate, filed with the clerk, and served on all parties or their attorneys.

(iii) *Magistrate's order include.* A magistrate's order includes any of the following:

(A) Pretrial proceedings under Civ. R. 16;

(B) Discovery proceedings under Civ. R. 26 to 37, Juv. R. 24, and Juv. R.25;

(C) Appointment of an attorney or guardian ad litem pursuant to Juv. R. 4 and Juv. R.29(B)(4);

(D) Taking a child into custody pursuant to Juv. R. 6;

(E) Detention hearings pursuant to Juv. R. 7;

(F) Temporary orders pursuant to Juv. R. 13;

(G) Extension of temporary orders pursuant to Juv. R. 14;

(H) Summons and warrants pursuant to Juv. R. 15;

(I) Preliminary conferences pursuant to Juv. R. 21;

(J) Continuances pursuant to Juv. R. 23;

(K) Deposition orders pursuant to Juv. R. 27(B)(3);

(L) Orders for social histories, physical and mental examinations pursuant to Juv. R. 32;

(M) Proceedings upon application for the issuance of a temporary protection order as authorized by law;

(N) Other orders as necessary to regulate the proceedings.

(b) *Motion to set aside magistrate's order.* Any party may file a motion with the court to set aside a magistrate's order. The motion shall state the moving party's reasons with particularity and shall be filed not later than ten days after the magistrate's order is filed. The pendency of a motion to set aside does not stay the effectiveness of the magistrate's order, though the magistrate or the court may by order stay the effectiveness of a magistrate's order.

(3) *Magistrate's decision; objections to magistrate's decision.*

(a) *Magistrate's decision.*

(i) *When required.* Subject to the terms of the relevant reference, a magistrate shall prepare a magistrate's decision respecting any matter referred under Juv. R. 40(D)(1).

(ii) *Findings of fact and conclusions of law.* Subject to the terms of the relevant reference, a magistrate's decision may be general unless findings of fact and conclusions of law are timely requested by a party or otherwise required by law. A request for findings of fact and conclusions of law shall be made before the entry of a magistrate's decision or within seven days after the filing of a magistrate's decision. If a request for findings of fact and conclusions of law is timely made, the magistrate may require any or all of the parties to submit proposed findings of fact and conclusions of law.

(iii) *Form; filing, and service of magistrate's decision.* A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Juv. R. 40(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Juv. R. 40(D)(3)(b).

(b) *Objections to magistrate's decision.*

(i) *Time for filing.* A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Juv. R. 40(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

(ii) *Specificity of objection.* An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

(iii) *Objection to magistrate's factual finding; transcript or affidavit.* An objection to a factual finding, whether or not specifically designated as a finding of fact under Juv. R. 40(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

(iv) *Waiver of right to assign adoption by court as error on appeal.* Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Juv. R. 40(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Juv. R. 40(D)(3)(b).

(4) *Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by court.*

(a) *Action of court required.* A magistrate's decision is not effective unless adopted by the court.

(b) *Action on magistrate's decision.* Whether or not objections are timely filed, a court may adopt or reject a magistrate's decision in whole or in part, with or without modification. A court may hear a previously-referred matter, take additional evidence, or return a matter to a magistrate.

(c) *If no objections are filed.* If no timely objections are filed, the court may adopt a magistrate's decision, unless it determines that there is an error of law or other defect evident on the face of the magistrate's decision.

(d) *Action on objections.* If one or more objections to a magistrate's decision are timely filed, the court shall rule on those objections. In ruling on objections, the court shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law. Before so ruling, the court may hear additional evidence but may refuse to do so unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

(e) *Entry of judgment or interim order by court.* A court that adopts, rejects, or modifies a magistrate's decision shall also enter a judgment or interim order.

(i) *Judgment.* The court may enter a judgment either during the fourteen days permitted by Juv. R. 40(D)(3)(b)(i) for the filing of objections to a magistrate's decision or after the fourteen days have expired. If the court enters a judgment during the fourteen days permitted by Juv. R. 40(D)(3)(b)(i) for the filing of objections, the timely filing of objections to the magistrate's decision shall operate as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered.

(ii) *Interim order.* The court may enter an interim order on the basis of a magistrate's decision without waiting for or ruling on timely objections by the parties where immediate relief is justified. The timely filing of objections does not stay the execution of an interim order, but an interim order shall not extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown.

(5) *Extension of time.* For good cause shown, the court shall allow a reasonable extension of time for a party to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" includes, but is not limited to, a failure by the clerk to timely serve the party seeking the extension with the magistrate's order or decision.

(6) *Disqualification of a magistrate.* Disqualification of a magistrate for bias or other cause is within the discretion of the court and may be sought by motion filed with the court.

(7) *Recording of proceedings before a magistrate.* Except as otherwise provided by law, all proceedings before a magistrate shall be recorded in accordance with procedures established by the court.

(8) *Contempt in the presence of a magistrate.*

(a) *Contempt order.* Contempt sanctions under Juv. R. 40(C)(2)(f) may be imposed only by a written order that recites the facts and certifies that the magistrate saw or heard the conduct constituting contempt.

(b) *Filing and provision of copies of contempt order.* A contempt order shall be filed and copies provided forthwith by the clerk to the appropriate judge of the court and to the subject of the order.

(c) *Review of contempt order by court; bail.* The subject of a contempt order may by motion obtain immediate review by a judge. A judge or the magistrate entering the contempt order may set bail pending judicial review of the order.

Staff Note (July 1, 2006 Amendment)

Rule 40 has been reorganized in an effort to make it more helpful to bench and bar and reflective of developments since the rule was last substantially revised effective July 1, 1995. The relatively-few significant changes included in the reorganization are noted below.

Rule 40(A) Appointment

Juv. R. 40(A) is similar to former Juv. R. 40(A), except that it now requires all magistrates appointed pursuant to the rule to be attorneys admitted to practice in Ohio. The former rule allowed magistrates first appointed prior to July 1, 1995 to be nonattorneys.

Rule 40(B) Compensation

Juv. R. 40(B) is the same as former Juv. R. 40(B).

Rule 40(C) Authority

Juv. R. 40(C) is drawn largely from former Juv. R. 40(C)(1) and (2) and reflects the admonition of the Supreme Court that “a [magistrate’s] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them.” *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphases added). Juv. R. 40(C) specifies that juvenile court magistrates may determine motions and conduct trials but may not preside over the determination or trial of a serious youthful offender.

Rule 40(D) Proceedings in Matters Referred to Magistrates

Juv. R. 40(D)(1) through (4) treat each of the steps that potentially occur if a magistrate participates: (1) reference to a magistrate; (2) magistrate's orders and motions to set aside magistrate's orders; (3) magistrate's decisions and objections to magistrate's decisions; and (4) action of the court on magistrate's decisions and on any objections to magistrate's decisions and entry of judgment or interim order by the court. Juv. R. 40(D)(5) through (8) deal with good cause extensions of time, disqualification of a magistrate, recording of proceedings before a magistrate, and contempt in the presence of a magistrate.

Reference by court of record

Juv. R. 40(D)(1), unlike former Juv. R. 40(C)(1)(b), specifically authorizes reference of types of matters by rule as well as by a specific or general order of reference. In so doing, it recognizes existing practice in some courts. See, e.g., Loc. R. 99.02, Franklin Cty. Ct. of Common Pleas; Loc. R. 23(B), Hamilton Cty. Ct. of Common Pleas; *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 412-13, 2002-Ohio-4907 at ¶¶ 20-24, 775 N.E.2d 522; *Davis v. Reed* (Aug. 31, 2000), 8th Dist. App. No. 76712, 2000 WL 1231462 at *2 (citing *White v. White* (1977), 50 Ohio App.2d 263, 266-268, 362 N.E.2d 1013), and *Partridge v. Partridge* (Aug. 27, 1999), 2nd Dist. App. No. 98 CA 38, 1999 WL 945046 at *2, (treating a local rule of the Greene Cty. Ct. of Common Pleas, Dom. Rel. Div., as a standing order of reference).

Magistrate's order; motion to set aside magistrate's order

Juv. R. 40(D)(2)(a)(i) generally authorizes a magistrate to enter orders without judicial approval if necessary to regulate the proceedings and, adapting language from Crim. R. 19(B)(5)(a), if "not dispositive of a claim or defense of a party." The new language removes the arguably limiting title of former Juv. R. 40(C)(3)(a) ["Pretrial orders"] and is intended to more accurately reflect proper and existing practice. This language is not intended to narrow the power of a magistrate to enter orders without judicial approval. Juv. R. 40(D)(2)(a) lists certain actions that are included as magistrate orders. These are similar to those listed in former Juv. R. 40(C)(3), with the addition of division (D)(2)(a)(iii)(M) regarding the issuance of a temporary protection order. However, consistent with the admonition in *Hartt, supra*, any temporary protection order issued as a result of such proceedings must be signed by a judge.

Juv. R. 40(D)(2)(b) replaces language in former Juv. R. 40(C)(3)(b), which purported to authorize "[a]ny person" to "appeal to the court" from any order of a magistrate "by filing a motion to set the order aside." The new language refers to the appropriate challenge to a magistrate's order as solely a "motion to set aside" the order. Juv. R. 40(D)(2)(b) likewise limits the authorization to file a motion to "any party," though an occasional nonparty may be entitled to file a motion to set aside a magistrate's order. Sentence two of Juv. R. 40(D)(2)(b) changes the trigger for the ten days permitted to file a

motion to set aside a magistrate's order from entry of the order to filing of the order, as the latter date is definite and more easily available to counsel. Juv. R. 40(D)(2)(b) retains the provision of former Juv. R. 40(C)(3)(b) that the pendency of a motion to set aside a magistrate's order does not stay the effectiveness of the magistrate's order, although the magistrate or the court, by order, may stay the magistrate's order.

Magistrate's decision; objections to magistrate's decision

Juv. R. 40(D)(3) prescribes procedures for preparation of a magistrate's decision and for any objections to a magistrate's decision.

Juv. R. 40(D)(3)(a)(ii), unlike former Juv. R. 40(E)(2), adapts language from Civ. R. 52 rather than simply referring to Civ. R. 52. The change is intended to make clear that, e.g., a request for findings of fact and conclusions of law in a referred matter should be directed to the magistrate rather than to the court. Juv. R. 40(D)(3)(a)(ii) explicitly authorizes a magistrate's decision, subject to the terms of the relevant reference, to be general absent a timely request for findings of fact and conclusions of law or a provision of law that provides otherwise. Occasional decisions under former Juv. R. 40 said as much. See, e.g., *In re Chapman* (Apr. 21, 1997), 12th Dist. App. No. CA96-07-127, 1997 WL 194879 at *2; *Burke v. Brown*, 4th Dist. App. No. 01CA731, 2002-Ohio-6164 at ¶ 21; and *Rush v. Schlagetter* (Apr. 15, 1997), 4th Dist. App. No. 96CA2215, 1997 WL 193169 at *3. For a table of sections of the Ohio Revised Code that purport to make findings of fact by judicial officers mandatory in specified circumstances, see 2 Klein-Darling, Ohio Civil Practice § 52-4, 2002 Pocket Part at 136 (West Group 1997).

Juv. R. 40(D)(3)(a)(iii) now requires that the magistrate's decision be served on the parties or their attorneys no later than three days after the decision was filed. The former rule contained no specific time requirement. The provision further requires that a magistrate's decision include a conspicuous warning of the waiver rule prescribed by amended Juv. R. 40(D)(3)(b)(iv). The latter rule now provides that a party shall not assign as error on appeal a court's adoption of any factual finding or legal conclusion of a magistrate, whether or not specifically designated as a finding of fact or conclusion of law under Juv. R. 40(D)(3)(a)(ii), unless that party has objected to that finding or conclusion as required by Juv. R. 40(D)(3)(b). While the prior waiver rule, prescribed by former Juv. R. 40(E)(3)(b) (effective July 1, 1995) and former Juv. R. 40(E)(3)(d) (effective July 1, 2003), arguably applied only to findings of fact or conclusions of law specifically designated as such, the amended waiver rule applies to any factual finding or legal conclusion in a magistrate's decision and the required warning is broadened accordingly.

Juv. R. 40(D)(3)(b)(i) retains the fourteen-day time for filing written objections to a magistrate's decision. While the rule continues to authorize filing of objections by a "party," it has been held that a non-party attorney can properly object to a magistrate's decision imposing sanctions on the attorney. *All Climate Heating & Cooling, Inc. v. Zee Properties, Inc.* (May 17, 2001), 10th Dist. App. No. 00AP-1141, 2001 WL 521408 at *3.

Sentence one of Juv. R. 40(D)(3)(b)(iii) requires that an objection to a factual finding in a magistrate's decision, whether or not specifically designated as a finding of fact under Juv. R. 40(D)(3)(a)(ii), be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or by an affidavit of that evidence if a transcript is not available. The Supreme Court has prescribed the consequences on appeal of failure to supply the requisite transcript or affidavit as follows: (1) "appellate review of the court's findings is limited to whether the trial court abused its discretion in adopting the [magistrate's decision]" and (2) "the appellate court is precluded from considering the transcript of the hearing submitted with the appellate record." *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730, 654 N.E.2d 1254.

Sentence two of Juv. R. 40(D)(3)(b)(iii) adds a new requirement, adapted from Loc. R. 99.05, Franklin Cty. Ct. of Common Pleas, that the requisite transcript or affidavit be filed within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. The last sentence of Juv. R. 40(D)(3)(b)(iii) allows an objecting party to seek leave of court to supplement previously filed objections where the additional objections become apparent after a transcript has been prepared.

Juv. R. 40(D)(3)(b)(iv), as noted above, expands the "waiver rule" prescribed by former Juv. R. 40(E)(3)(b) (effective July 1, 1995) and former Juv. R. 40(E)(3)(d) (effective July 1, 2003) to include any factual finding or legal conclusion in a magistrate's decision, whether or not specifically designated as a finding of fact or conclusion of law under Juv. R. 40(D)(3)(a)(ii). The Rules Advisory Committee was unable to discern a principled reason to apply different requirements to, e.g., a factual finding depending on whether or not that finding is specifically designated as a finding of fact under Juv. R. 40(D)(3)(a)(ii). An exception to the "waiver rule" exists for plain error, which cannot be waived based on a party's failure to object to a magistrate's decision.

Action of court on magistrate's decision and on any objections to magistrate's decision; entry of judgment or interim order by the court

Juv. R. 40(D)(4)(a), like sentence one of former Juv. R. 40(E)(4)(a), confirms that a magistrate's decision is not effective unless adopted by the court.

Juv. R. 40(D)(4)(b) provides that a court may properly choose among a wide range of options in response to a magistrate's decision, whether or not objections are timely filed. See, e.g., *Johnson v. Brown* 2nd Dist. App. No. 2002 CA 76, 2003-Ohio-1257 at ¶ 12 (apparently concluding that former Civ. R. 53(E)(4)(b) permitted the trial court to modify an aspect of the magistrate's decision to which no objection had been made).

Juv. R. 40(D)(4)(c) provides that if no timely objections are filed, the court may adopt a magistrate's decision, unless the court determines that there is an error of law or other defect evident on the face of the decision. A similar result was reached under sentence two of former Civ. R. 53(E)(4)(a). See, e.g., *Perrine v. Perrine*, 9th Dist. App. No. 20923, 2002-Ohio-4351 at ¶ 9; *City of Ravenna Police Dept. v. Sicuro* (Apr. 30, 2002), 11th

Dist. App. No. 2001-P-0037; and *In re Weingart* (Jan. 17, 2002), 8th Dist. App. No. 79489, 2002 WL 68204 at *4. The language of Juv. R. 40(D)(4)(c) has been modified in an attempt to make clear that the obligation of the court does not extend to any “error of law” whatever but is limited to errors of law that are evident on the face of the decision. To the extent that decisions such as *In re Kelley*, 11th Dist. App. No. 2002-A-0088, 2003-Ohio-194 at ¶ 8 suggest otherwise, they are rejected. The “evident on the face” standard does not require that the court conduct an independent analysis of the magistrate’s decision. The amended rule does not speak to the effect, if any, on the waiver rule prescribed by amended Juv. R. 40(D)(3)(b)(iv) of the “evident on the face” requirement. At least two courts have explicitly held that the “evident on the face” standard generates an exception to the waiver rule. *Dean-Kitts v. Dean*, 2nd Dist. App. No. 2002CA18, 2002-Ohio-5590 at ¶ 13 and *Hennessy v. Hennessy* (Mar. 24, 2000), 6th Dist. App. No. L-99-1170, 2000 WL 299450 at *1. Other decisions have indicated that the standard may generate an exception to the waiver rule. *Ohlin v. Ohlin* (Nov. 12, 1999), 11th Dist. App. No. 98-PA-87, 1999 WL 1580977 at *2; *Group One Realty, Inc. v. Dixie Intl. Co.* (1998), 125 Ohio App.3d 767, 769, 709 N.E.2d 589; *In re Williams* (Feb. 25, 1997), 10th Dist. App. No. 96APF06-778, 1997 WL 84659 at *1. However, the Supreme Court applied the waiver rule three times without so much as referring to the “evident on the face” standard as a possible exception. *State ex rel. Wilson v. Industrial Comm’n.* (2003), 100 Ohio St. 3d 23, 24, 2003-Ohio-4832 at ¶ 4, 795 N.E.2d 662; *State ex rel. Abate v. Industrial Comm’n.* (2002), 96 Ohio St.3d 343, 2002-Ohio-4796, 774 N.E.2d 1212; *State ex rel. Booher v. Honda of America Mfg. Co., Inc.* (2000), 88 Ohio St.3d 52, 2000-Ohio-269, 723 N.E.2d 571.

As noted above, even if no timely objection is made, a court may, pursuant to Juv. R. 40(D)(4)(b), properly choose a course of action other than adopting a magistrate’s decision, even if there is no error of law or other defect evident on the face of the magistrate’s decision.

Sentence one of Juv. R. 40(D)(4)(d), like sentence one of former Juv. R. 40(E)(4)(b), requires that the court rule on timely objections. Sentence two of Juv. R. 40(D)(4)(d) requires that, if timely objection is made to a magistrate’s decision, the court give greater scrutiny than if no objections are made. The “independent review as to the objected matters” standard that applies if timely objection is made should be distinguished from the lesser scrutiny permitted if no objections to a magistrate’s decision are timely filed, the latter standard having been first adopted by former Juv. R. 40(E)(4)(a), effective July 1, 1995, and retained by new Juv. R. 40(D)(4)(c), discussed above.

The “independent review as to the objected matters” standard is intended to exclude the more limited appellate standards of review and codify the practice approved by most courts of appeals. The Second District Court of Appeals has most clearly and consistently endorsed and explained that standard. *See, e.g., Crosby v. McWilliam*, 2nd Dist. App. No. 19856, 2003-Ohio-6063; *Quick v. Kwiatkowski* (Aug. 3, 2001), 2nd Dist. App. No. 18620, 2001 WL 871406 (acknowledging that “Magistrates truly do the ‘heavy lifting’ on which we all depend”); *Knauer v. Keener* (2001), 143 Ohio App.3d 789, 758 N.E.2d 1234. Other district courts of appeal have followed suit. *Reese v. Reese*, 3rd Dist. App. No. 14-03-42, 2004-Ohio-1395; *Palenshus v. Smile Dental Group, Inc.*, 3rd Dist. App. No.

3-02-46, 2003-Ohio-3095.; *Huffer v. Chafin*, 5th Dist. App. No. 01 CA 74, 2002-Ohio-356; *Rhoads v. Arthur* (June 30, 1999), 5th Dist. App. No. 98CAF10050, 1999 WL 547574; *Barker v. Barker* (May 4, 2001), 6th Dist. App. No. L-00-1346, 2001 WL 477267; *In re Day*, 7th Dist. App. No. 01 BA 28, 2003-Ohio-1215; *State ex rel. Ricart Auto. Personnel, Inc. v. Industrial Comm'n. of Ohio*, 10th Dist. App. No. 03AP-246, 2003-Ohio-7030; *Holland v. Holland* (Jan. 20, 1998), 10th Dist. App. No. 97APF08-974, 1998 WL 30179; *In re Gibbs* (Mar. 13, 1998), 11th Dist. App. No. 97-L-067, 1998 WL 257317.

Only one court of appeals appears consistently and knowingly to have taken a different approach. *Lowery v. Keystone Bd. of Ed.* (May 9, 2001), 9th Dist. App. No. 99CA007407, 2001 WL 490017; *Weber v. Weber* (June 30, 1999), 9th Dist. App. No. 2846-M, 1999 WL 459359; *Meadows v. Meadows* (Feb. 11, 1998), 9th Dist. App. No. 18382, 1998 WL 78686; *Rogers v. Rogers* (Dec. 17, 1997), 9th Dist. App. No. 18280, 1997 WL 795820.

The Rules Advisory Committee believes that the view adopted by the majority of courts of appeals is correct and that no change was made by the 1995 amendments to Juv. R. 40 in the review required of a trial judge upon the filing of timely objections to a magistrate's report.

The phrase "as to the objected matters" permits a court to choose to limit its independent review to those matters raised by proper objections. If a court need apply only the "defect evident on the face" standard if no objections are filed at all, then, if one or more objections *are* filed, a court logically need apply the more stringent independent review only to those aspects of the magistrate's decision that are challenged by that objection or those objections.

Sentence three of Juv. R. 40(D)(4)(d) provides that, before ruling on objections, a court may hear additional evidence and that it may refuse to hear additional evidence unless the objecting party demonstrates that the party could not, with reasonable diligence, have produced that evidence for consideration by the magistrate.

Juv. R. 40(D)(4)(e) is similar to former Juv. R. 40(D)(4)(c) and requires that a court that adopts, rejects, or modifies a magistrate's decision also enter a judgment or interim order. Juv. R. 40(D)(4)(e)(i) permits the court to enter a judgment during the fourteen days permitted for the filing of objections to a magistrate's decision but provides that the timely filing of objections operates as an automatic stay of execution of the judgment until the court disposes of those objections and vacates, modifies, or adheres to the judgment previously entered. Juv. R. 40(D)(4)(e)(ii) permits the court, if immediate relief is justified, to enter an interim order during the fourteen days permitted for the filing of objections to a magistrate's decision. The timely filing of objections does not stay such an interim order, but the order may not properly extend more than twenty-eight days from the date of entry, subject to extension by the court in increments of twenty-eight additional days for good cause shown. Juv. R. 40(D)(4)(e)(ii) allows multiple twenty-eight day extensions, whereas the former Juv. R. 40(D)(4)(c) allowed only one such extension.

Extension of time

Juv. R. 40(D)(5) is new and requires the court, for good cause shown, to provide an objecting party with a reasonable extension of time to file a motion to set aside a magistrate's order or file objections to a magistrate's decision. "Good cause" would include the failure of a party to receive timely service of the magistrate's order or decision.

Disqualification of a magistrate

Juv. R. 40(D)(6) has no counterpart in former Juv. R. 40. The statutory procedures for affidavits of disqualification apply to judges rather than magistrates. Rev. Code §§ 2101.39, 2501.13, 2701.03, 2701.131; *In re Disqualification of Light* (1988), 36 Ohio St.3d 604, 522 N.E.2d 458. The new provision is based on the observation of the Chief Justice of the Supreme Court that "[t]he removal of a magistrate is within the discretion of the judge who referred the matter to the magistrate and should be brought by a motion filed with the trial court." *In re Disqualification of Wilson* (1996), 77 Ohio St. 3d 1250, 1251, 674 N.E.2d 260; see also *Mascorro v. Mascorro* (June 9, 2000), 2nd Dist. App. No. 17945, 2000 WL 731751 at *3 (citing *In re Disqualification of Wilson*); *Reece v. Reece* (June 22, 1994), 2nd Dist. App. No. 93-CA-45, 1994 WL 286282 at *2 ("Appointment of a referee is no different from any other process in which the trial court exercises discretion it is granted by statute or rule. * * * If the defect concerns possible bias or prejudice on the part of the referee, that may be brought to the attention of the court by motion."); *Moton v. Ford Motor Credit Co.*, 5th Dist. App. No. 01CA74, 2002-Ohio-2857, appeal not allowed (2002), 95 Ohio St.3d 1422, 2002-Ohio-1734, 766 N.E.2d 163, reconsideration denied (2002), 95 Ohio St.3d 1476, 2002-Ohio-244, 768 N.E.2d 1183; *Walser v. Dominion Homes, Inc.* (June 11, 2001), 5th Dist. App. No. 00-CA-G-11-035, 2001 WL 704408 at *5; *Unger v. Unger* (Dec. 29, 2000), 12th Dist. App. No. CA2000-04-009, 2000 WL 1902196 at *2 (citing *In re Disqualification of Wilson, supra*); *Jordan v. Jordan* (Nov. 15, 1996), 4th Dist. App. No. 1427, 1990 WL 178162 at *5 ("Although referees are not judges and arguably, are not bound by Canon 3(C)(1) of the Code of Judicial Conduct, it would appear axiomatic that a party should be able to petition the court to have a referee removed from the case if the referee is unable to render a fair and impartial decision."); *In re Reiner* (1991), 74 Ohio App.3d 213, 220, 598 N.E.2d 768 ("where a referee affirmatively states that he is biased on the matter before him, it is an abuse of the court's discretion to fail to recuse the referee"). Particularly because "a [magistrate's] oversight of an issue or issues, or even an entire trial, is not a *substitute* for the judicial functions but only an *aid* to them," *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 6, 1993-Ohio-177, 615 N.E.2d 617 (emphases added), Juv. R. 40(D)(6) contemplates that disqualification on a ground other than bias may sometimes be appropriate.

Recording of proceedings before a magistrate

Juv. R. 40(D)(7), generally requiring recording of proceedings before a magistrate, is taken verbatim from former Juv. R. 40(D)(2).

Contempt in the presence of a magistrate

Juv. R. 40(D)(8) is adapted from sentences two, three, and four of former Juv. R. 40(C)(3)(c). Juv. R. 40(D)(8)(b), unlike its predecessor, explicitly requires that the clerk provide a copy of a contempt order to the subject of the order.

* * *

RULE 47. Effective Date

* * *

(R) Effective date of amendments. The amendments to Juvenile Rule 40 filed by the Supreme Court with the General Assembly on January 12, 2006 shall take effect on July 1, 2006. 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.