Quarterly Review

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Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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Ohio Association of Civil Trial Attorneys
The Source for Defense Success

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President's Note

Natalie M. E. Wais, Esq.
Young & Alexander Co., L.P.A.

I blinked and my term as OACTA's President is concluding, and this is my last President's Note. I was sworn in during OACTA's Virtual Annual Meeting last year. Unfortunately, I have not had the opportunity to see most of you this year due to our continuing business in a virtual fashion. Fortunately, this year's Annual Meeting will be in-person! Registration is open. Please plan on attending the Annual Meeting on November 11 and 12 at the Hilton Polaris in Columbus. As we are focused on "Moving Forward," you will hear from an esteemed panel of Supreme Court Justices (Justice Fischer and Justice Stewart) and Appellate Judges (Judge Baldwin and Judge Dorrian); a panel of insurance professionals on updates in the insurance industry in light of the pandemic; the impact on trials in light of Black Lives Matter; legislative and civil rule updates; mediation tips; marketing during the pandemic; techniques to deal with stress to maintain a positive mental health; and breakout sessions on construction law and personal injury cases. Up to 8.75 CLE credits are available, including 2.5 hours of APC credits. I look forward to seeing you at the Annual Meeting. Please make sure to say hi.

Thank you to Karen Ross, Chair of the Environmental Law and Toxic Tort Committee, for assembling such an informative Quarterly. The articles have something for everyone – views from the insurers' side for insurance defense litigation and the pandemic; an in-house counsel's perspective on legal practice generally; considerations and landmines for the new waiver of service rule; and practical tips for successful negotiations. The information provided has benefit to all litigators. I found the articles to be interesting and helpful to my practice, even though environmental law and toxic tort is not my wheelhouse. Thank you to Karen Ross and Jim Kline for authoring the articles and sharing their knowledge and expertise. I hope you enjoy this edition of the Quarterly as much as I did.

I am honored and proud to have been nominated and to have served as the President of this organization. Thank you for your support during the past year. It has been a pleasure working with all of you.

Take care.

Introduction

Environmental Law and Toxic Tort Committee

Karen E. Ross, Esq., Committee Chair
Tucker Ellis LLP

If you are like me, you keep asking yourself: "How is it October 2021 already?" Yes, adulthood (unfortunately) seems to always involve questioning where time went, but the time warp that was 2020 and spanned into 2021 is still affecting our work and professional lives more than any past busy, stressful period. We find ourselves pushing through our daily work and life activities without always taking time to fully engage, observe what is going on around us, and learn from our experiences and those shared by others. The Environmental Law and Toxic Tort committee of the Ohio Association of Civil Trial Attorneys is pleased to provide you with an opportunity to press pause, breathe, and take some time for your professional self by reading the *OACTA Quarterly Review*.

The first article is from Jim Kline, Shareholder at Bonezzi Switzer Polito & Hupp. Jim addresses the continued impact of COVID-19 on insurance defense litigation and the changes it has caused. Will Zoom be a permanent replacement for in-person activities? How should we communicate? Will we ever have a set trial calendar? He discusses these issues with experienced insurance claims professionals and shares their views. Learning the insurers' side, along with Jim's observations and forecast, provides great information and lessons for all involved in litigation.

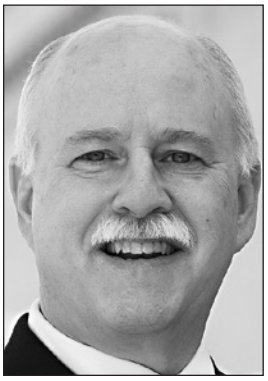
The second article was inspired by Jim's article. Wanting to add to the insight from the insurers, I presented general and timely questions to an in-house litigator. Topics include social media, company concerns, and how counsel can better serve their clients. The honest and instructive answers I received provide a valuable tool to any legal professional – regardless of practice area.

Next, Jim Kline reappears to educate us on the changes to Ohio's Waiver of Service Rule: Civil Rule 4.7. In addition to explaining the rule and its implications, Jim shares some warnings and advice to practice within the bounds of the changes.

Finally, I share practice tips for successful settlement negotiations. Who doesn't love settlement negotiations? They involve a litigator's favorite things (law, facts, strategy, arguing, money, and resolution) without the risk of a trial. No matter your case or negotiation style, this article highlights five important tips for any settlement negotiation.

Insurance Defense Litigation and the Pandemic: Some Views from the Insurers' Side

James N. Kline, Esq.
Bonezzi Switzer Polito & Hupp



That the practice of law is not immune from the effects of the pandemic is not news. We have all been touched by the effects of the illness on family, friends and colleagues. We are thankful for those who have remained healthy and those who have recovered, and we grieve for those who did not fare as well. That, of course, is the true and most critical impact of the pandemic. But at the same time, there are lesser effects of the pandemic on our professional lives, but ones that will be lasting, nevertheless. Notably, each of our practices has been forced to respond in a variety of ways to the ever-changing demands of the pandemic, whether it's in terms of work locations, masking, vaccinating, social distancing, disinfecting, etc. We have also obviously witnessed the "Rise of Zoom" – which sounds more like the latest Marvel superhero thriller than the sea change in technology it has proven to be. Zoom and its sister technology platforms have completely transformed the way we attend events that previously demanded direct, in-person interaction.

Questions arise, however, as to the views of our clients, and particularly our insurance clients, with respect to the changes that have been forced upon them: how do they view those changes, which of those changes do they anticipate will remain in place, and what changes may yet still be in the offing? In an effort to obtain and share some of these views, I contacted some experienced claims professionals. This is by no means an exhaustive exploration of the topic, but rather an effort to reach out to some experienced claims professionals to obtain their views on the changes that have occurred and are yet to occur and share those views with the OACTA membership. None of these represent the official views of their respective businesses, nor are they official "spokespeople." Rather, they were kind enough to share some of what they have experienced, and for that, I am most appreciative.

In speaking with one experienced claims professional in the toxic tort area who also has a legal background, she noted a distinct slowdown from her perspective in both the filing and handling of cases. This is the cumulative effect of so many courts still being affectively shut down with respect to conducting trials. Overall, she has found the courts have become particularly methodical in terms of handling cases such that very little is being done. Rather than calling cases for trial, some have relied simply on large cattle-call conferences to discuss cases, but without actually setting them for trial. Overall, she agrees that with respect to asbestos litigation, the numbers appear to be falling for diagnoses and the number of claims that have been filed, but this may be due to suppression attributable to the pandemic, whether the issue is due to getting medical care for existing conditions or accessing the courts.

This slowdown in setting trial dates has created some concern over the impact on insurers if and when the various courts, currently closed to trials, finally reopen, forcing the carriers to face a torrent of trials. Recognizing this potential looming problem, this particular carrier has undertaken efforts to resolve cases at an earlier stage in the proceedings today so as to avoid an onslaught of cases tomorrow when trials

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are suddenly assigned en masse. Of particular concern are those jurisdictions in which cases are more likely to be grouped for trial when trials finally commence, which carries the consequent danger of jury confusion in which defendants with viable defense arguments are undermined by that confusion.[1]

She also recognized the adoption of Zoom trials as seen in California, but looked with skepticism on their reliability, especially given the stories that emerged regarding the conduct of jurors and even counsel during the course of those trials. Nevertheless, this particular claims professional believed that the use of Zoom as a means of conducting trials may be a growing trend in the future. Or there may be a hybrid with portions done live and in-person, while some witnesses, such as experts, might instead appear via Zoom.

While recognizing that reliance upon Zoom is growing, she indicated that she had only utilized it in limited circumstances for court events. She has participated in its use during mediation. She also acknowledged that even prior to the pandemic, there had been some use of streaming services to allow insurance claims personnel to view some activities such as appellate arguments. She also noted the current use of Zoom by enterprising counsel as a means of conducting preparations for various legal events such as court arguments. Obviously Zoom has become a tool for use in depositions, though this claims professional had not yet had cases where plaintiffs had been deposed using it. However, she was concerned over the use of Zoom for depositions, as she believed it could undermine the observations of counsel with respect to witnesses, losing those personal insights that come from being in the same room as the deponent that can be critical to case evaluation. She noted, however, that there had already been an ongoing effort to rely on quantifiable data to develop algorithms to determine case values, and believed that that trend would only continue, as the computer systems and the data utilized by them have increased. To some extent, the limitations imposed by the pandemic may have expedited this development.

That younger claims personnel seem to have adapted well to employing technology and the remote handling of matters is consistent with her experience. Nevertheless, with respect to her company, there has been an effort to assure that these junior personnel do not work only remotely, but rather are also in the office for certain periods of time to assure their interaction and training with more experienced personnel.

In speaking with another experienced claims representative in the toxic tort arena, he had some different insights. As his company had transitioned to remote operations for claims personnel long before the pandemic, he believed his company was well placed to deal with the demands of the pandemic when it arose. He was already working from home, in a home office, and experienced with the tools and techniques for effective remote operations.

At the same time, however, his company's use of video platforms is intentionally limited due to concerns over the security of those platforms and their potential vulnerability to unauthorized persons accessing the feed. That hasn't prevented him, however, from utilizing some court-related video/communication platforms for court-related events.

Zoom trials were also a concern. He acknowledged one had been on his horizon, but ultimately did not proceed. From his perspective, a major concern was assuring the dedicated attention of jurors. He recognized the inevitable plethora of potential distractions for jurors attending via zoom, and even the possibility that jurors could be going to other locations and doing other things at the time they were supposed to be in "attendance" at trial. You don't want the jurors multi-tasking. He believed courts could certainly seek to address these issues in

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different ways. He noted his own thought that potential trial orders might be needed requiring jurors to remain in a particular location during Zoom trials to assure their complete and undivided attention to the testimony.

In his experience, it seemed that some of the court case numbers are starting to return to pre-pandemic levels including the filing of cases and the assignment of trial orders to them. These trial orders, however, may simply be a means by the courts to encourage settlement. There has been some concern at his company over a potential rush of future filings when the pandemic fully eases. In his experience, tolling agreements have served as a means for easing that potential future burden. Of course, this has required the cooperation of both plaintiffs and defendants/insurers, but plaintiffs in some instances have seemed receptive to this suggestion.

As for the use of Zoom as a tool for depositions, he believed that it was effective, and that there was little, if any, decline in the ability of counsel to evaluate witnesses deposed via a video platform. He noted that the reports he receives still provide worthwhile witness evaluations. To some extent, Zoom may have even allowed counsel to notice issues with a witness by observing them more closely on video which might otherwise have gone unnoticed in a live deposition. As his company has recognized the value in conducting video depositions without incurring consequent travel expenses, this is obviously a change that is here to stay to the extent such depositions can be conducted.

The pandemic has limited or changed the way investigations are conducted. Whereas in the past, in-person investigative techniques, including private investigators, may have been used, there is now more of a resort to the internet, since in-person contact just isn't feasible. This includes review and evaluation of social media, to gain insight into plaintiffs. What people continue to post about themselves on social media still provides worthwhile information, possibly exceeding that which might be obtained by hiring a living, breathing "Sam Spade" as might have been done in the past.

With respect to the old standby, the telephone, the experience of these two claims professionals was somewhat different. One believed that the use of telephone communication was an effective tool, one that is relied on too infrequently, especially by younger counsel or claims personnel. Make no mistake, she is emailing just as much as everyone else, except that occasionally the phone can be useful to avoid or clarify misunderstandings and focus the recipient in what would otherwise be a lengthy bullet point discussion in an email.

The other claims representative found that his use of the telephone for direct communication was fairly rare, relying extensively on email instead. However, that may well have been the result of the overall transition of his company to remote operations that occurred prior to the pandemic.

So what are the takeaways? Clearly, Zoom and similar platforms are here to stay. They have a clear role in the conduct of depositions, and one that is only likely to increase. However, their use with some companies as a means of direct communication may be limited due to security concerns, so you should become aware of the specific requirements of your own carriers when it comes to accessing their personnel via platforms like Zoom or Teams. While the concept of the Zoom trial has gotten off to a notably bumpy start as many of us are aware, both of these claims representatives seemed to recognized a potential inevitable invocation of these video platforms in the future for trials. However, any such trials may require a distinct set of orders by the courts to control the conduct of the jurors and to assure a fair trial. And finally, some sensitivity on the part of counsel might be appropriate with respect to communicating with claims professionals, since the

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volume of electronic communications they are receiving is high, all vying for their attention, even as they learn to master the influx of these communications.

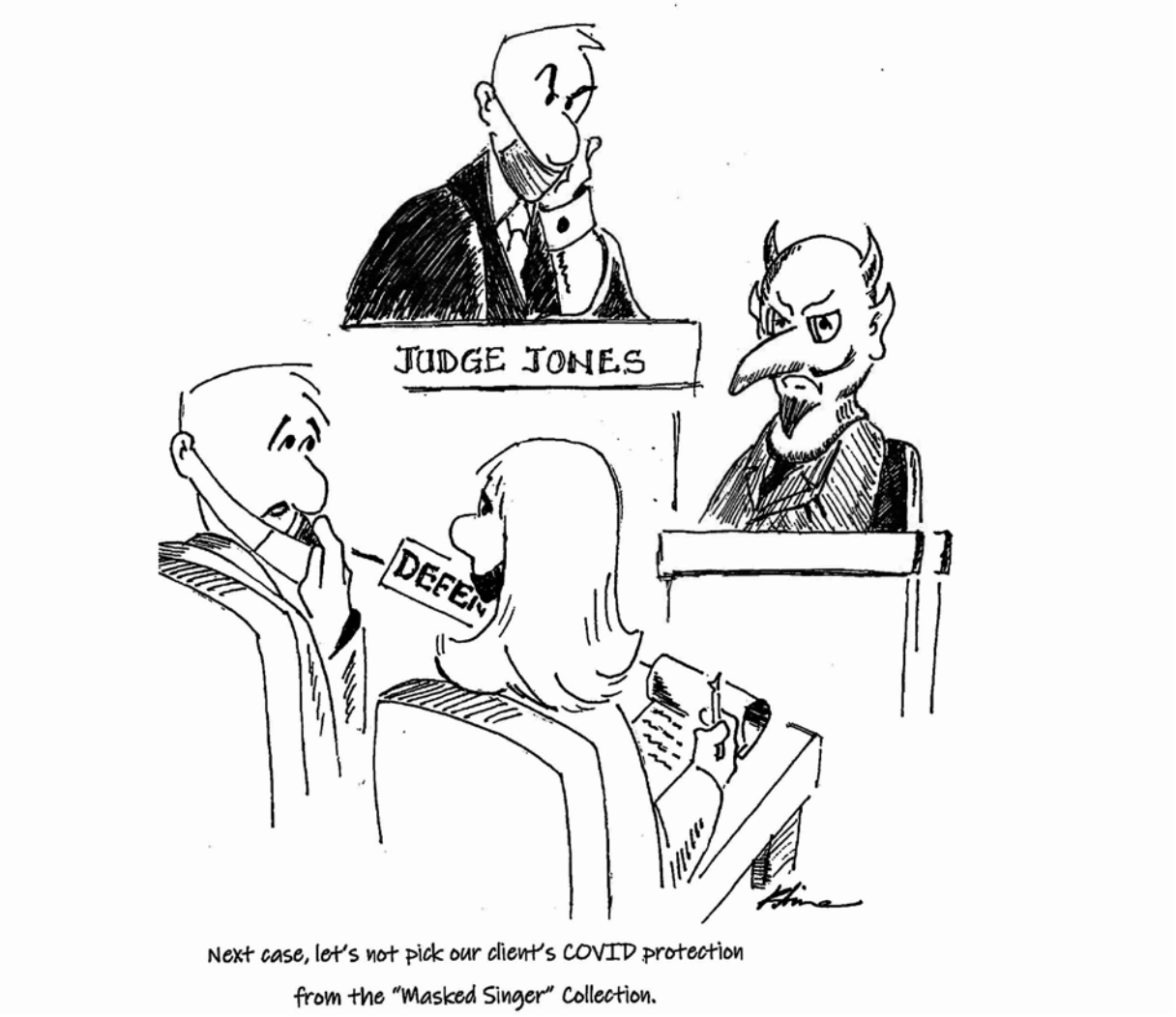
As in all crises, the way we live and work and recreate is changed forever even after the immediate effects end. This is true for the business of litigation and the way we do it now and will do it in the future, even when the masks can finally come off.

I want to thank the claims professionals with whom I spoke for graciously sharing their time and insights with me.

Endnote

1 [*Ed.:* Think *Ingham v. Johnson & Johnson* which consolidated 22 plaintiffs at trial in St. Louis City Circuit Court, including 17 plaintiffs who did not reside in Missouri, who brought claims under 12 different states laws for talcum powder exposure resulting in a $4.69 billion award (which was reduced to a mere $2.12 billion). Thus, to say that this kind of consolidation can lead to potentially higher demands, higher expenses and higher payouts is definitely an understatement.]

Jim Kline, Esq., is a Shareholder at Bonezzi Switzer Polito & Hupp. He has over 35 years of experience defending product liability, toxic tort, personal injury, first-party insurance, commercial and construction related claims. He has been named to Ohio Super Lawyers since 2012 andBest Lawyers for 2021 – Mass Tort Litigation – Defendants. He served as President of OACTA from 2018-2019 and President of the Cleveland Assn. of Civil Trial Attorneys from 2007-2008. He received his B.A. from the Univ. of Michigan and his J.D. from the Ohio State University. He also worked as a traveling stand-up comedian from 1990-1999.



Next case, let's not pick our client's COVID protection from the "Masked Singer" Collection.

Insight from the Inside

Karen E. Ross, Esq.
Tucker Ellis LLP

Regardless of which "side of the v." your work involves, insight from the inside is a valuable tool. I was fortunate enough to connect with an in-house litigator, whose work includes environmental and toxic tort cases, to address seven hot topics.

1. **Often during the life of a case interactions with other parties lead to new strategies or lessons, can you share an instance where you learned something from "the other side"?**

   I was recently told by an adversary that both sides need to get uncomfortable [with their case] before settlement is possible. This was a good lesson that even though one side may really want to settle, if the other side is not ready you cannot force it.

2. **What is keeping you up at night compared to two years ago?**

   More to do, with less people. COVID-19 caused businesses/sales to suffer, make less money and search for ways to cut costs. Cutting headcount happened and now we are expected to provide the same level of service, with less people.

3. **Has 24-hour news or social media impacted the way you manage your docket?**

   Yes. Reputational concerns are much higher on the radar than they ever used to be, even for nonsense claims. It affects the way I evaluate and defend and could result in pressure to resolve claims that I view as meritless from a legal standpoint.

4. **How do you differentiate the roles of in-house and outside counsel?**

   I am here to manage the claims, direct strategy, facilitate the collection of evidence and working with witnesses. Outside counsel is there to do the day to day work, interface with the court and other counsel, and guide me. [They should] manage my expectations and challenge me when appropriate. We need to have the same goal: get the best outcome for the company. And, hopefully do it in an efficient and cost-effective manner.

5. **Time management continues to be an issue as caseloads increase and budgets decrease, how can outside counsel better help their clients?**

   Ask me what is important to me, communicate often and at the proper level of detail – bottom line up front. No long emails. Don't send me longwinded case reports when I don't ask for them. Don't assume-ask me up front. Then, check in periodically to be sure I am getting what I need and that my needs/wants haven't changed. Corporate pressures change and therefore my needs change over time. Anticipate my needs – don't just forward me something. Think about it first and tell me how you recommend responding, what you think we should do, why it's important or not important, etc.

6. **Training and gaining experience for new lawyers are more difficult now given remote work, what skills/habits do you find most important in outside counsel?**

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Organization, efficiency, good grasp of the law and facts. Be clear and concise in emails. Be early – [there is] nothing worse than dropping things on me last minute. You have no idea the number of other things I have on my plate on any given day or the number of emails I receive.

7. **If you could go back in time to your first day at your current position, what advice would you give yourself?**

Meet as many business people as you can and build relationships. That is key to being good counsel, is to have a trusting relationship where your client thinks to call you BEFORE making decisions that might result in claims down the road. Being a partner to the business is the key to success.

Karen E. Ross, Esq., is Counsel at Tucker Ellis LLP. As local and national counsel in premises, asbestos, silica, coal mine dust, and other toxic exposure litigation in Ohio and across the United States, Karen develops and executes targeted strategies to address client needs. Her ability to identify key issues, understand all sides of a matter, and appreciate clients' interests allows her to achieve each client's objectives in an efficient manner, while minimizing litigation risks. She received her B.A. from Kenyon College and her J. .D. from Case Western Reserve University School of Law. She is also dedicated to community service, including as a mock trial coach for Cleveland Early College High School and serving on the Board of The May Dugan Center.

New Waiver of Service Rule Now in Effect in Ohio – Considerations and Landmines for Plaintiffs and Defendants

James N. Kline, Esq.
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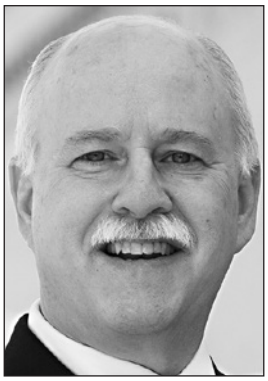

In the most recent amendments to the Ohio Rules of Civil Procedure, Ohio has chosen to further emulate the Federal Rules of Civil Procedure by adopting Civ. Rule 4.7 regarding waiver of service.[1] In the apparent give and take of negotiating a range of amendments to the Ohio Civil Rules effective July 2020, Rule 4.7 was adopted purportedly to "avoid unnecessary expenses of serving the summons."[2] Instead, plaintiffs may notify a defendant that an action has been commenced and request that the defendant waive service of summons. This rule — apparently simple on its face — can have some traps for unwary parties and counsel on both sides of the *'v'*, as there are certain requirements that must be met both in the plaintiff's notice seeking the request and in the defendant's response to it.

For a plaintiff seeking a waiver of service, the notice and request must:

(1) be in writing and be addressed as required by Civ. R. 4.2;

(2) name the court where the complaint was filed;

(3) be accompanied by a copy of the complaint, *two* copies of the waiver form appended to this Rule 4.7, *and a prepaid means for returning the form*;

(4) inform the defendant, using the form appended to this Rule 4.7, of the consequences of waiving and not waiving service;

(5) state the date when the request is *sent*;

(6) give the defendant a reasonable time of at least twenty-eight days after the request *was sent* - or at least sixty days if sent to the defendant outside of the United States - to return the waiver; and

(7) be sent by first-class mail *or other reliable means*.[3]

Ohio R. Civ. P. 4.7 (emphasis added).

What is particularly concerning for defendants is that the form can be signed and returned by either **the defendant** to whom it is sent **or their counsel**. Thus, your putative client could waive service before you ever get an opportunity to weigh in on the matter. The risk of this is increased if your client is used to normal service of summons and is unfamiliar with this new procedure.

One potentially confusing element of this rule is that dates are based upon when the waiver request was *sent*, not when it was received by the defendant. If a defendant timely returns a waiver (i.e. within 28 days after the request was *sent* to defendants in the United States) an Answer need not be served until 60 days after the request was sent in most cases. Of course, the "reward" to defendants of an extended answer date for easing the plaintiff's filing and financial burdens is likely of little true value given that 1) defendants in many counties in Ohio are entitled to a first leave under a local rule simply by filing a form request,[4] and 2) obtaining a first leave from plaintiff's counsel to respond to a Complaint, even in the absence of a local rules providing for one, is rarely a problem.

At the same time, there is a penalty that can be imposed on a defendant for not agreeing to a waiver request. If a

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defendant "over which the court has personal jurisdiction fails, without good cause, to sign and return a waiver request by a plaintiff," the court may impose on that defendant expenses later incurred in making service and reasonable expenses. This isn't simply limited to the cost of issuing the Summons, but can and likely will include attorneys fees for any motion required to collect those service expenses.[5]

The rule does contemplate circumstances in which a defendant might not comply with the waiver request, but could nevertheless avoid the imposition of costs, but the Staff Notes indicates this would be rare and a difficult burden for a defendant to meet.[6] A defendant must demonstrate "good cause for the failure," but "sufficient cause should be rare." [7] These costs can only be shifted to defendant if the defendant is subject to the court's personal jurisdiction.[8] It can be assumed that a defendant hoping that plaintiff will somehow bungle actual service of summons and that by plaintiff doing so, defendant could thus potentially avoid personal jurisdiction, might seem a bit circular, and likely might also not be deemed "good cause." Moreover, to argue to a court in front of your opponent that you believed that very opponent was sufficiently inept that you expected him or her to drop the ball could be a bit awkward. You probably won't be sharing a lunch date after that hearing. Rather, the ability to avoid costs appears to be limited to situations where there was an actual failure of receipt or a genuine lack of understanding, possibly due to a language barrier.[9]

These rules were adopted despite opposition of many of our members to them.

How widespread this practice is among plaintiff's counsel is not known. However, anecdotal experience by this author has shown that this procedure is beginning to be used. Of particular concern is that utilization of these written requests for waiver may engender confusion on the part of clients or their agents receiving them as they may not be familiar with this practice. It's even conceivable that they might ignore it entirely, believing that this procedure, departing as it does from the prior familiar practice, is not a legitimate legal procedure. Moreover, because of the manner in which some of the waiver requests might be phrased, clients receiving them might sign and return them without ever consulting legal counsel, who might have advised against a waiver in a particular case or circumstance. An exemplar form entitled "NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF SUMMONS" as referenced by Civ. Rule 4.7 can be accessed at: file:///C:/Users/jkline/Downloads/Ohio%20Civ.%20R.%204.7%20(2).pdf.

However, it is possible that correspondence issued by plaintiffs' counsel may deviate from the language in the exemplar, causing even greater confusion and an opportunity for either a default or subjecting a client to unnecessary costs

Of course it is axiomatic that by waiving service of summons, there is a correspondent relinquishment of defenses associated with deficiencies in the summons and its service (e.g., the aforementioned hoped-for bungling of service), though all other defenses are preserved. As the Staff Notes acknowledge:

> Paragraph (F) of Rule 4.7 is explicit that a timely waiver of service of a summons does not prejudice the right of a defendant to object by means of a motion authorized by Rule 12(B) to the absence of jurisdiction, or to assert improper venue under Rule 12(B)(3). **The only issues eliminated are those involving the sufficiency of the summons or the sufficiency of the method by which it is served.**

Staff Notes, Ohio R. Civ. P. 4.7 (emphasis added.)

Thus far, there is a lack of case law in Ohio addressing the rule and its application. Counsel might, therefore, turn to the application of the federal version which served as the inspiration and model for Ohio's version. However, how far counsel can rely on federal decisions with respect to the state rule is an obviously open question at this time. One issue is the effect of the rule and the impact of signing a waiver. In that regard, the effect of an officer signing the form and it binding the corporation for which he works seems to be likely, if not indisputable. In T*racy v. Fin. Ins.*

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Mgmt. Corp., 33 Employee Benefits Cas. (BNA) 2782, 2004 U.S. Dist. LEXIS 18337 (S.D. IND. 2004), the court held that a corporation could not dispute that it received proper service where the executive vice president of human resources executed the waiver of service and an employee filed the waiver with the court; Fed. R. Civ. P. 4(k)(1)(D) provided that service of summons or filing of waiver of service was effective to establish jurisdiction over person of defendant when authorized by statute. See also *United States v. Hafner*, 421 F. Supp. 2d 1220, 2006 U.S. Dist. LEXIS 11604 (N.D. 2006).

By that same token, certain requirements must be met to comply with the rule to obtain a proper waiver. This can include the seemingly mundane aspects of properly including all of the required documentation under the rule. See e.g., *Norlock v. Garland*, 768 F.2d 654, 656-657 (5th Cir. 1985) affirming dismissal of plaintiff's Complaint ("Norlock's attorney failed to comply with the specific requirement of Rule 4(c)(2)(C)(ii) that the plaintiff include with the summons and complaint "two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender." The cover letter enclosed by Norlock's attorney makes no mention of the need to return a sworn acknowledgment. Therefore, it cannot be seriously contended that this letter "conformed substantially to form 18-A." This is not an instance of a single error in the acknowledgment form, "minor and obviously incorrect," such as the addition of a single word on the form that might be insubstantial and overlooked, nor the omission of only the return envelope. No fault is attributable to the defendant as it might be had he received the notice and acknowledgment form and refused to return the acknowledgment.") But see contra, *United Servs. Auto. Ass'n v. Cregor*, 617 F. Supp. 1053, 1055 (N.D. IL, E. Div. 1985) ("Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure provides the requirements for proper notice by mail. The above section states that a return envelope with prepaid postage must be enclosed with the summons and the complaint. In the present case, plaintiff apparently failed to submit the return envelope with prepaid postage. However, plaintiff's technical error was an oversight which did not greatly prejudice the defendant, if at all. Adequate notice was given and therefore this technical failure creates no basis for dismissal of the action. *SCM Corporation v. Brotherhood International Corp.*, 316 F. Supp. 1328, 1335 (S.D.N.Y. 1970).")

A particular trap for plaintiffs could be the interplay of the waiver rule and the applicable statute of limitations. This is because service is deemed to have occurred "at the time of filing the waiver," i.e. when the executed and returned form is filed by plaintiff. Ohio R. Civ. P. 4.7 (E). Thus, if the applicable limitations period is about to expire, reliance upon the waiver provision could be dangerous for a plaintiff. The Staff Notes suggest that under those circumstances, a plaintiff may want to rely upon the formal methods of service.[10] Of course, this is precisely the reason defense counsel would want their clients to know about this rule and assure the client gets the waiver request to defense counsel to make a knowing "Hamlet-like" decision "to waive or not to waive", for that is the question.

Thus, while in many cases, defense counsel might normally recommend simply signing the waiver and returning it, there may be some circumstances like the statute of limitations situation above where defense counsel would not recommend agreeing to such a waiver, preferring instead to push plaintiff's counsel to actually proceed with service. Of course, under those circumstances, defense counsel may expect that plaintiffs' counsel will consequently pay far greater attention to obtaining proper service of the summons and complaint. In a multi-defendant case, this may even lead to unwanted early attention by plaintiff. That is, in a case involving numerous defendants, this refusal to waive service might only serve to raise one's profile, meriting "special attention" from plaintiff and plaintiff's counsel.

Given this new rule in Ohio, it may be prudent to sensitize your regular clients to it, letting them know that this new procedure and the new forms that go with it may soon cross their path. You will want to advise them to let you know as soon as possible when they receive one of these requests for waiver of service (remember it is the "sent"

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date, not the "received" date that governs), so that you can discuss with them the best strategy in your case to avoid unnecessary traps and expenses while preserving those service defenses upon which you truly intend to rely.

Endnotes

1 "Rule 4.7 is based on the federal rule permitting waiver of service." Staff Notes, Ohio R. Civ. P. 4.7

2 According to the Staff Notes, "the defendant has a duty to avoid costs associated with the service of a summons not needed to inform the defendant regarding the commencement of an action." Staff Notes, Ohio R. Civ. P. 4.7

3 "While private messenger services or electronic communications may be more expensive than the mail, they may be equally reliable and on occasion more convenient to the parties. Especially with respect to transmissions to foreign countries, alternative means may be desirable, for in some countries facsimile transmission or electronic mail are the most efficient and economical means of communication. If electronic means such as facsimile transmission or electronic mail are employed, the sender should maintain a record of the transmission to assure proof of transmission if receipt is denied, but a party receiving such a transmission has a duty to cooperate and cannot avoid liability for the resulting cost of formal service if the transmission is prevented at the point of receipt." Staff Notes, Ohio R. Civ. P. 4.7. The rule fails to state, however, how one would send the waiver request electronically and also comply with Section 3 of the rule which requires the requestor to include " a prepaid means for returning the form." Ohio R. Civ. P. 4.7 (A)(3).

4 See e.g. Summit County Local Rule 7.13(A) Leaves to Plead, providing a first leave for up to 21 days by filing a certification.

5 "The costs that may be imposed on the defendant could include, for example, the cost of the time of a process server required to make contact with a defendant residing in a guarded apartment house or residential development. The paragraph is explicit that the costs of enforcing the cost-shifting provision are themselves recoverable from a defendant who fails to return the waiver. In the absence of such a provision, the purpose of the rule would be frustrated by the cost of its enforcement, which is likely to be high in relation to the small benefit secured by the plaintiff." Staff Notes, Ohio R. Civ. P. 4.7.

6 "A defendant failing to comply with a request for waiver shall be given an opportunity to show good cause for the failure, which is the case under paragraph (B), but sufficient cause should be rare. It is not a good cause for failure to waive service that the claim is unjust or that the court lacks jurisdiction. Sufficient cause not to shift the cost of service would exist, however, if the defendant did not receive the request or was insufficiently literate in English to understand it. It should be noted that the provisions for shifting the cost of service apply only if the defendant is subject to the court's personal jurisdiction." Staff Notes, Ohio R. Civ. P. 4.7.

7 Id.

8 Id.

9 Id.

10 Staff Notes, Ohio R. Civ. P. 4.7.

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Five Practical Tips for Successful Settlement Negotiations

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Unlike fictional civil litigation, the majority of our cases end settlement. This means that all attorneys – regardless of their level of experience – should be well versed in settlement strategy. Personally, I love settlement negotiations because they involve knowing your case inside and out; being able to understand and anticipate your opposing counsel's position; understanding the law, jurisdiction, and court in play; arguing the strengths of your case while also recognizing the weaknesses; seeing the case through from start to finish; and substantively engaging with opposing counsel. Frequent settlement negotiations also allow you to build professional relationships that will help you and your clients down the road. While everyone has different styles, there are five practice tips that apply equally to every settlement negotiation.

1. Think about settlement early and often.

Settlement considerations start with the complaint, as they should be on the mind of the attorney preparing a complaint and the attorney answering the complaint. For the plaintiff, counsel should consider if there are any viable claims that should be included to get a defendant's attention and/or hit areas of concern as both relate to ultimate settlement value. As a defendant, one should consider whether certain motion practice will drive down settlement value, such as a motion to dismiss (for lack of personal jurisdiction, failure to state a claim, etc.) or a *forum non conveniens* motion. Additionally, defense counsel should consider if there are grounds for counterclaims or filing a third party complaint that could influence settlement opportunities/value.

Further, settlement should always be an option and you need to know your client's opinions on it from the start of the case and as the case progresses as these opinions often change. Keeping settlement top of mind also helps remind you to consider the full picture throughout the life of your case.

2. Know your client's goals.

Each client and each case are different. Even experienced attorneys and attorneys litigating similar claims must remember to keep track of their client's goals for each case throughout the life of the case. Most importantly, your client should be the one to define what a "successful settlement" is. So be sure to ask them their goals and ensure you are on the same page. What matters to your client? Do they want their day in court to prosecute/defend the case? Are the interested in obtaining the best settlement amount early? Something else? How far are they willing to prosecute/defend the case? Do you know and understand the implications/factors outside the specific case? Is publicity an issue? As a plaintiff, "punishment" is not always a viable option and it is counsel's role to educate their client so they can work to achieve an obtainable goal. As a defendant, what will discovery establish? Is the defendant still in business/own the property/make the product at issue? Is the defendant worried about copycat claims and/or setting a settlement record? Does one party want the case to end in/avoid legal precedent?

Since civil litigation can last several years absent settlement, parties without litigation experience must be educated on the realities of the timing so they can make informed decisions about their goals. Also, the life of a

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case often varies by jurisdiction, especially as courts work to reopen post-COVID shutdowns, so knowing how long your client is willing to litigate a case must be balanced with their goals. Does the client want to get out of a case as fast as possible? Do they want to wait to engage in discovery or avoid depositions? Do they understand the costs as the case proceeds, including expert retention/discovery, motion practice, etc.? Are there any other issues or concerns your client has about litigating the case? Often attorneys are afraid of open-ended questions, but attorneys must ask them when learning about their client's goals.

3. Attract attention without being over-eager.

Getting the attention of your opposing side can often prove difficult…even if you are the one offering money. In fact, sometimes your client wants you to settle fast and cannot understand why the opposing side is not responding. This requires one to meet the client's needs without looking desperate. Indeed, until you have strong relationships with opposing counsel getting a call back can take longer than your client likes. So be creative. Here are some ideas:

- Gently poke the bear. I was once engaged in negotiations with an attorney who was not responding to my last offer. My client wanted the case resolved and I wanted to avoid my client paying the costs/fees of my appearance at an upcoming settlement conference out of state. Therefore, I sent opposing counsel an email saying: "Having not heard back from you after my last offer, I take your silence as acceptance." He called me within minutes of receiving the email exclaiming: "Silence is not acceptance-that is crazy. I do not accept." I replied (with a light tone): "I knew your silence was not acceptance, but I also knew that email would get you to call me and it was cheaper than me sending a supermodel to your office to get your attention." He literally laughed out loud and that was the start of a great professional relationship with him. While that example may not work for you, think about what would "gently poke" your opposing counsel into responding. Also, never be afraid to ask someone else for ideas. Do not forget that chances are someone you know has dealt with your opposing counsel before and may know how to get their attention.

- Seek court assistance. While courts vary on their pre-trial involvement, the majority of judges want their dockets deceased. If direct outreach is not viable, or you have other reasons to inform the court of your client's willingness to resolve the case, then do not hesitate to inquire about the court's ability to facilitate discussion amongst the parties. You can start by including/requesting a settlement conference in the case management order/case schedule. While such a deadline can be overlooked, having it provides a good opportunity for resolution discussion without appearing worried about your case as you are just adhering to the court's schedule; it also provides an opportunity to evaluate your opposition's evidence. Thereafter, depending on your specific case and circumstances you can contact the court, with opposing counsel included, to request appropriate assistance.

- Paper the file. While it may seem obvious for a lawyer to keep good records, attempts to contact opposing counsel to discuss resolution often occur via telephone or otherwise do not become part of the case "file." To avoid unfavorable claims/arguments by opposing counsel and to show your client's willingness to discuss resolution, be sure to document all telephone calls with a follow-up email or use email instead of voicemail. Of course, the content of the email should be written in a way that it could be submitted to the court if needed (also keep in mind that anything you write in email or a text or say in a voicemail could be used by your opposition).

- Take advantage of pre-trial practice procedures. Without overstepping any ethical boundaries, consider if there are any pre-trial activities you could implement to get the opposing sides' attention. Some parties want to avoid litigation costs and/or disclosing

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information, so determine if serving discovery, requesting depositions, etc., is an appropriate step to get your opposing side's attention. Be careful, however, as turnabout is fair play.

4. Think outside the box

Taking into account what you learn about the goals of your client and adding what you have learned about the opposing side, you need to think outside the box during negotiations. Settlement is not always about money- either getting the most or spending the least. Money matters of course, but it is not always about money. Parties often concede on the settlement amount if they get something else in return that is more important to them than money. You need to learn what matters to the other side and work from there, while protecting your client's interests and goals. The key to thinking outside the box is paying attention to what is said and not said during the course of a case (by counsel and the parties) and communicating with opposing counsel about what matters to their client.

In addition to asking your opposing counsel what is important to their client (honesty and boldness often pay off), being observant and making suggestions can help you identify non-monetary settlement elements. During one mediation, I noticed the deceased plaintiff's family waiting in the hall with several poster boards of photos. When I was in the Judge's chambers with my local counsel talking about case value, the Judge commented on plaintiff's value being too high, but they were very upset about what happened. I asked if he thought it would help if they were given the opportunity to present their photos and tell us about their husband/father. At first the Judge was shocked that I was willing to do that, but as we discussed it he realized it likely would help them and he was happy to have the suggestion and offer. The Judge took my suggestion to the other side and the plaintiff's lawyer was beyond grateful for this opportunity. Thereafter, we all went into the courtroom and listened to the family tell us about their deceased love one. As my client's representative, I let them blame me for what happened, which allowed them to shed some of their pain. After that, we were able to resolve the case. I was surprised that neither the plaintiff's counsel or the Judge had thought of this option to move settlement negotiations along because, as a product and mass tort defense attorney, I have been to many settlement conferences and mediations where the plaintiff just wants to yell at someone and blame them for what happened. Those acts provide them closure they need on a personal/emotional level. It also provides an opportunity for plaintiff's counsel to utilize a settlement/mediation presentation as their client's "day in court" and then direct their clients back to reality on settlement monetary values.

Other case specific ways to think outside the box include "wishes" that could be included as part of the settlement; for example, in employment matters some settlements include insurance coverage/payments for a set period. Put another way, be sure to consider what could make your opposing side accept your offer/pay your demand. If you are defense counsel, also consider if there is anything you can offer to reduce costs for the plaintiff; this could include paying court costs, preparing closing documents, participating in probate hearings, etc. In sum, thinking beyond the settlement amount, and not being afraid to talk about it with opposing counsel and/or the court, often results in a better result for your client.

5. Discuss Release Terms During Negotiations.

Often issues come up when negotiating counsel do not discuss all of the terms of the settlement agreement, so be sure to do have those discussions to avoid problems on the back end. The following issues should always be discussed as part of settlement negotiations:

1. Timing of payment. This is not only necessary to avoid claims of failure to timely pay the settlement, but it can also be a negotiating tool.

2. Full or partial release? Making clear if the release includes all potential injuries/damages (when allowed by state law), is a key to case value.

3. Who is signing? Depending on state law/procedures, considering if non-parties can also sign the release to avoid future litigation for the same injury should be done before final agreement.

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4. Minors involved? Guardians appointed? Will settlement amount be made public?

5. Confidentiality clauses (including who is bound and penalties for breach).

6. Attorney approval of certain terms – ensure that plaintiff's counsel will agree to form and any applicable Medicare/Medicaid sections.

7. Court costs.

8. Impact on other defendants. If a multi-defendant case, how does one defendant settling impact your case- who controls experts, joint motions, who can go on the verdict form, etc.?

9. Notary requirements and issues. While this issue has always been important, COVID 19 has created additional considerations given state/ local restrictions, work situations, and personal preference.

10. When is the dismissal filed?

11. Cross-claims against your client? Ones you need to dismiss?

12. Medicare/Medicaid and liens?

13. If participating in a mediation/settlement conference, consider taking a release with you or having the ability to print one at the end of the session to ensure the agreement is confirmed in writing by all parties.

14. Always paper any settlement agreement (even just to an amount) with opposing counsel immediately after reaching an agreement.

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