



Aida S. Montano

Bill Analysis
Legislative Service Commission

Am. H.B. 537
127th General Assembly
(As Reported by H. Civil & Commercial Law)

Reps. Oelslager, J. McGregor, Hughes, Evans, Stebelton, Skindell, Huffman, Okey, Letson, Yuko, DeGeeter

BILL SUMMARY

- Authorizes a retired judge to register with the clerk of a court of common pleas, municipal court, or county court to receive referrals of civil actions for adjudication by the retired judge (existing law) or for trial by jury to be presided over by the retired judge.
- Permits the parties to a civil action to seek a retired judge to preside over a jury trial if a party to the action has properly made a demand for a jury trial in accordance with Civil Rule 38.
- Requires that the parties' written agreement with a retired judge for a referral of the civil action indicate that the parties will assume responsibility for providing, and will pay the costs for, facilities, equipment, personnel, and *other support* (added by the bill) reasonably necessary for the retired judge *or the jury* (added by the bill) to advance and consider the action or to determine a specific issue or question.
- Requires that a trial by jury of a referred action or a determination by a jury of issues in a referred action be conducted in the same manner as trials and determinations by a jury in civil actions, that the selection and summoning of jurors be in accordance with the existing Juror Law, that the fees of the jurors sworn be taxed as costs as in current law, and that the compensation of the jurors be fixed as in current law.
- Requires the parties to pay the fees of the jurors if the referred action is settled before the jurors are sworn.

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CONTENT AND OPERATION

Registration by retired judge to receive referrals of civil actions

Existing law

Under existing law, any "voluntarily" retired judge, or "any judge who is retired under Section 6 of Article IV, Ohio Constitution" (see **COMMENT 1**), may register with the clerk of any court of common pleas, municipal court, or county court for the purpose of receiving referrals for adjudication of civil actions "or proceedings, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding, pending in the court." There is no limitation upon the number, type, or location of courts with which a retired judge may register under this provision. Upon registration with the clerk of any court, the retired judge is eligible to receive referrals "and submissions" from that court in accordance with existing law. Each court of common pleas, municipal court, and county court must maintain an index of all retired judges who have registered with the clerk of that court and must make the index available to any person, upon request. (R.C. 2701.10(A).)

Operation of the bill

The bill provides that any "retired judge" (the bill deletes "voluntarily" and "or any judge who is retired under Section 6 of Article IV, Ohio Constitution" and defines "retired judge" as described in the following paragraph) may register with the clerk of any court of common pleas, municipal court, or county court for the purpose of receiving referrals of civil actions *for adjudication by the retired judge or for trial by jury to be presided over by the retired judge* (the bill adds the

italicized clause and deletes "or proceedings, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding, pending in the court"). There is no limitation upon the number, type, or location of courts with which a retired judge may register under this provision. Upon registration with the clerk of any court, the retired judge is eligible to receive referrals (the bill deletes "and submissions") from that court in accordance with the bill. Each court of common pleas, municipal court, and county court must maintain an index of all retired judges who have registered with the clerk of that court and must make the index available to any person upon request.

The bill defines "retired judge" as any judge who retired from active service after election or appointment to that judgeship without being defeated in an election to retain the judgeship.

The bill provides that it applies to any civil action pending before any court of common pleas, any division of the court of common pleas, or any municipal court or county court, excluding a small claims division of a municipal court or county court. If the parties to a civil action seek a retired judge to preside over a jury trial, a jury trial may be had only if a party to the action has properly made a demand for a jury trial in accordance with Civil Rule 38 (see **COMMENT 2**). (R.C. 2701.10(A), (B), and (C).)

Parties' written agreement of referral

Existing law

Current law permits the parties to any civil action "or proceeding pending in any court of common pleas, municipal court, or county court" unanimously to choose to have the action "or proceeding" in its entirety referred for adjudication, "or to have any specific issue or question of fact or law in the action or proceeding submitted for determination," to a judge of their choosing who has registered with the clerk of that court. If the parties unanimously do choose to have a referral "or submission" made to a retired judge, all of the parties to the action "or proceeding" must enter into a written agreement with the retired judge that does all of the following (R.C. 2701.10(B)(1)):

(1) Designates the retired judge to whom the referral "or submission" is to be made;

(2) "If a submission is to be made, describes in detail the specific issue or question to be submitted";

(3) Indicates either of the following: (a) that the action "or proceeding" in its entirety is to be referred to, and is to be tried, determined, and adjudicated by

that retired judge, or (b) that the "issue or question is to be submitted," and is to be tried and determined by that retired judge;

(4) Indicates that the parties will assume the responsibility for providing facilities, equipment, and personnel "reasonably needed by the retired judge during his consideration of the action or proceeding" and will pay all costs arising out of the provision of the facilities, equipment, and personnel;

(5) Identifies an amount of compensation to be paid by the parties to the retired judge for the judge's services and the manner of payment of the compensation.

In any case described above, the agreement must be filed with the clerk of the court or the judge before whom the action "or proceeding" is pending. Upon the filing of the agreement, the judge before whom the action "or proceeding" is pending, by journal entry, must order the referral "or submission" in accordance with the agreement. No referral "or submission" may be made to a retired judge unless the parties to the action "or proceeding" unanimously choose to have the referral "or submission" made, enter into an agreement of the type described above with the retired judge, and file the agreement in accordance with this provision. (R.C. 2701.10(B)(2).)

Operation of the bill

The bill permits the parties to any civil action (it deletes "or proceeding pending in any court of common pleas, municipal court, or county court" and deletes all references to "or proceeding" in existing law described above and in other parts of this analysis) unanimously may choose to have the action in its entirety *or specific issues or questions in the action* referred (instead of "to have any specific issue or question of fact or law in the action or proceeding submitted for determination") to a *retired* judge of their choosing who has registered with the clerk of the court *in which the action is pending*. If the parties unanimously choose to have a referral (the bill deletes "or submission" and all references to "submission" of issues or questions in existing law described above and in other parts of this analysis) made to a retired judge, all of the parties to the action must enter into a written agreement with the retired judge that does all of the following (R.C. 2701.10(D)(1)) (new or modified language is in italics):

(1) Designates the retired judge to whom the referral is to be made;

(2) *Describes in detail the specific issues or questions to be determined in the action;*

(3) Indicates either of the following: (a) that the action in its entirety is to be referred to, and is to be tried, determined, and adjudicated by that retired judge *or by a jury presided over by the retired judge*, or (b) that any *specific* issue or question *in the action* is to be tried and determined by that retired judge *or by a jury presided over by the retired judge*;

(4) Indicates that the parties will assume the responsibility for providing facilities, equipment, personnel, *and other support reasonably necessary for the retired judge or the jury to advance and consider the action or to determine a specific issue or question in the action* (instead of "reasonably needed by the retired judge during the judge's consideration of the action or proceeding") and will pay all costs arising out of the provision of the facilities, equipment, personnel, *and other support*;

(5) Indicates that, if the action or any specific issue or question in the action is to be tried and determined by a jury presided over by the retired judge and the action is settled by the parties before the jurors are sworn, the parties will pay the fees of the jurors;

(6) Identifies an amount of compensation to be paid by the parties to the retired judge for the retired judge's services and the manner of payment of the compensation.

In any case described above, the agreement must be filed with the clerk of the court or the judge before whom the action is pending. Upon the filing of the agreement, the judge before whom the action is pending, by journal entry, must order the referral in accordance with the agreement. No referral can be made to a retired judge unless the parties to the action unanimously choose to have the referral made, enter into an agreement of the type described above with the retired judge, and file the agreement in accordance with this provision. (R.C. 2701.10(D)(2).)

Powers of retired judge

Under current law, upon the entry of an order of referral "or submission," the retired judge to whom the referral "or submission" is made, relative to the action "or proceeding" referred "or the issue or question submitted," has all of the powers, duties, and authority of an active judge of the court in which the action "or proceeding" is pending. "The court in which the action or proceeding is pending is not required to provide the retired judge with court or other facilities, equipment, or personnel during his consideration of the action, proceeding, issue, or question." The retired judge cannot receive any compensation, other than that agreed to by the parties and the retired judge, for the judge's services during consideration of the action, "proceeding," issue, or question. (R.C. 2701.10(C).)

Under the bill, upon the entry of an order of referral, the retired judge to whom the referral is made, relative to the action referred, has all of the powers, duties, and authority of an active judge of the court in which the action is pending. *In connection with a referral made under the bill, no court is required to provide the parties and the retired judge with facilities, equipment, personnel, or other support* (instead of "[t]he court in which the action or proceeding is pending is not required to provide the retired judge with court or other facilities, equipment, or personnel during his consideration of the action, proceeding, issue, or question"). The retired judge cannot receive any compensation, other than that agreed to by the parties and the retired judge, for the retired judge's services *to advance and consider the action or to determine a specific issue or question in the action* (modified language is in italics). (R.C. 2701.10(E).)

Trial by retired judge or by jury

Existing law

Current law requires a retired judge to whom a referral is made to try all of the issues in the action "or proceeding," to prepare relevant findings of fact and conclusions of law, and to enter a judgment in the action "or proceeding" in the same manner as if the retired judge were an active judge of the court. *A retired judge to whom a submission is made under existing law must try the specific issue or question submitted, prepare relevant findings of fact or conclusions of law, and make a determination on the issue or question submitted, and must file the findings, conclusions, and determination with the clerk of the court in which the action or proceeding is pending.*

Any judgment entered, and any finding of fact, conclusion of law, or determination of an issue or question made, by a retired judge has the same force and effect as if it had been entered or made by an active judge of the court, and any appeal from the judgment, finding, conclusion, or determination must be made as if the judgment had been entered, or the finding, conclusion, or determination had been made, by an active judge of the court. (R.C. 2701.10(D).) (See **COMMENT 3**.)

Operation of the bill

The bill provides that *if no jury trial is had*, a retired judge to whom a referral is made must try all *or some* of the issues in the action, prepare relevant findings of fact and conclusions of law, and enter a judgment in the action in the same manner as if the retired judge were an active judge of the court. The bill deletes the italicized provision described in the 2nd preceding paragraph. It adds the following provisions. If a party has properly demanded a trial by jury in accordance with Civil Rule 38 (see **COMMENT 2**), a retired judge to whom a

referral is made must preside over the jury trial and determination of all or some of the issues in the action. A trial by a jury under the bill must be conducted, and a determination by a jury must be made, in accordance with the applicable provisions of R.C. Chapter 2315. (Civil Trial Procedure Law) and the Rules of Civil Procedure and in the same manner as trials and determinations by a jury in civil actions. The selection and summoning of jurors for a jury trial and determination under the bill must be in accordance with the applicable provisions of R.C. Chapter 2313. (Commissioners of Jurors and Juror Law). The fees of the jurors sworn must be taxed as costs pursuant to R.C. 2335.28 (see **COMMENT 4**). If the action is settled by the parties before the jurors are sworn, the parties must pay the fees of the jurors. The jury commissioner or clerk in charge of jurors must make all of the necessary arrangements to provide the jurors to the retired judge in the same manner as jurors are provided pursuant to R.C. Chapter 2313. to the active judge of the court in which the action is pending.

The bill modifies existing law by providing that any judgment entered, and any finding of fact, conclusion of law, or determination of an issue or question made, by a retired judge *or by a jury* in accordance with the bill has the same force and effect as if it had been entered or made by an active judge of the court *or by a jury presided over by an active judge of the court*, and any appeal from the judgment, finding, conclusion, or determination must be made as if the judgment had been entered, or the finding, conclusion, or determination had been made, by an active judge of the court *or by a jury presided over by an active judge of the court* (new language is in italics). (R.C. 2701.10(F).)

Compensation of jurors

The bill provides that the compensation of the jurors serving in a jury trial of an action or a specific issue or question in the action under the bill must be fixed in the same manner as in R.C. 2313.34 (see **COMMENT 5**) (R.C. 2701.10(G)).

Request to modify rules

The bill provides that the General Assembly respectfully requests the Supreme Court to modify Rule VI of the Rules for the Government of the Judiciary (reference of civil action pursuant to R.C. 2701.10), including the corresponding forms 3 and 4 appended to that Rule, pursuant to its authority under the Ohio Constitution to make that Rule consistent with the amendments of the act to R.C. 2701.10. The General Assembly further respectfully requests the Supreme Court to modify Rules 38 and 39 of the Rules of Civil Procedure pursuant to its authority under the Ohio Constitution to specify that those Rules apply to civil actions or proceedings under R.C. 2701.10, as amended by the act. (Section 3.)

COMMENT

1. Section 6, Article IV, Ohio Constitution, provides for the election of the Chief Justice and the Justices of the Supreme Court, the judges of the courts of appeals, and the judges of the courts of common pleas and their divisions. The terms of office of not less than six years are to begin on the days fixed by law. Division (C) provides as follows:

No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

2. Rule 38 of the Rules of Civil Procedure provides as follows:

(A) The right to trial by jury shall be preserved to the parties inviolate.

(B) Any party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefor at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue. Such demand shall be in writing and may be indorsed upon a pleading of the party. If the demand is endorsed upon a pleading the caption of the pleading shall state "jury demand endorsed hereon." In an action for appropriation of a right of way brought by a corporation pursuant to Article XIII, Section 5, of the Ohio Constitution, the jury shall be composed of twelve members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such action the jury shall be composed of the greater number not to exceed

twelve. In all other civil actions the jury shall be composed of eight members unless the demand specifies a lesser number; and in the event of timely demand by more than one party in such actions the jury shall be composed of the greater number not to exceed eight.

(C) In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within fourteen days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(D) The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(D) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

3. In *State ex rel. Russo v. McDonnell* (2006), 110 Ohio St.3d 144, a Cuyahoga County Court of Common Pleas judge sought a writ of prohibition to prevent the administrative judge from facilitating jury trials in civil cases referred to private judges and to prevent the administrative judge from permitting the use of court facilities, equipment, resources, or personnel in those referred cases. The Supreme Court granted a peremptory writ of prohibition to prevent the administrative judge from compelling or facilitating jury trials in R.C. 2701.10 proceedings but denied the writ with respect to the use in nonjury trials of court facilities, resources, utilities, and personnel, for which the party must pay. The Court held in its syllabus as follows:

1. R.C. 2710.01 and Gov. Jud. R. VI require bench trials in referrals of civil actions or submission of issues or questions, pursuant to the statute and the rule, which both specify that cases referred and issues submitted to a retired judge pursuant to these provisions must be tried and determined by a judge.

2. In matters referred to private judges pursuant to R.C. 2710.01 and Gov. Jud. R. VI, the court in which the action or proceeding is pending is not

required to provide the retired judge with court or other facilities, equipment, or personnel, but may in its discretion do so if the parties assume the responsibility and pay for all costs arising out of the provision of the facilities, equipment, and personnel.

4. R.C. 2335.28, not in the bill, provides as follows:

(A) Except as provided in division (B) of this section, in any civil action in a court of common pleas in which a jury is sworn, the fees of the jurors sworn shall be taxed as costs unless the court determines that the payment of the fees by a party against whom they are proposed to be taxed would cause significant financial hardship to that party or would not be in the interest of justice.

(B) If a civil action in a court of common pleas is settled after jurors are sworn, the fees of the jurors sworn shall be paid in accordance with the settlement agreement. If the agreement does not provide for the payment of the fees, the court shall order that the fees be paid by any party, allocated among the parties, or paid by the county. In making this determination, the court shall consider whether the payment of the fees by a party against whom they are proposed to be taxed would cause significant financial hardship to that party or would not be in the interest of justice.

(C) Upon receipt of fees taxed as costs under division (A) or (B) of this section or paid in accordance with a settlement agreement, the clerk of the court shall pay the fees to the county treasurer to be deposited in the county treasury.

(D) If any juror serves on more than one jury on the same day, the court shall tax the juror's jury fees for that day as costs equally among the parties who are required to pay the fees under this section either as determined by the court or pursuant to a settlement agreement.

(E) Jury fees shall be taxed as costs pursuant to this section for each day or part of a day that a sworn juror serves.

5. R.C. 2313.34(B), not in the bill, provides as follows:

(B)(1) The board of county commissioners by resolution shall fix the compensation of each juror payable out of the county treasury.

(2) After ten days of actual service, except as otherwise authorized by division (B)(2) of this section, the compensation of a juror shall be fixed for each additional day of actual service at an amount equal to the greater of fifteen dollars or one and one-half times the compensation fixed pursuant to division (B)(1) of this section. The board of county commissioners by resolution may set the compensation at a greater amount that shall not exceed two times the compensation fixed pursuant to division (B)(1) of this section.

(3) Residents of townships that are comprised entirely of islands shall be reimbursed for the additional transportation costs they incur to serve as a juror, in the amount certified to be due by a judge of the court in which the jury service is performed.

HISTORY

ACTION	DATE
Introduced	04-15-08
Reported, H. Civil & Commercial Law	05-29-08

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