

N O T I C E

PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE

August 9, 1982

The Council on Court Procedures is considering proposed amendments to the Oregon Rules of Civil Procedure. The Council plans to submit these amendments to the 1983 Legislative Assembly. As provided in ORS 1.735, these amendments would go into effect unless rejected or changed by the Legislature.

The Council will be releasing a tentative draft of the amendments to secure comment and suggestions. Written comments and suggestions may be submitted to the Executive Director of the Council. In addition, any interested person is encouraged to present testimony relating to the tentative amendments at the Council's public hearings. The Council will conduct those public hearings according to the following schedule:

<u>DATE</u>	<u>TIME</u>	<u>PLACE</u>
Sept. 11, 1982	9:30 a.m.	Cascade Natural Gas Community Service Room, 334 N.E. Hawthorne Street, Bend, Oregon
Sept. 30, 1982 (Thursday)	9:30 a.m.	Harris Hall (Main Meeting Room), Lane County Courthouse, Corner of 8th & Oak, Eugene, Oregon
Oct. 23, 1982	9:30 a.m.	Willamette University College of Law, Classroom E (off lobby), 250 Winter Street S.E. (one block from Capitol), Salem, Oregon
Nov. 6, 1982	9:30 a.m.	Thunderbird Coliseum (Oregon Room), 1225 North Thunderbird Way, Portland, Oregon
Nov. 20, 1982	9:30 a.m.	County Commissioners' Meeting Room (Rm. 602), Multnomah County Courthouse, Portland, Oregon

The Council will take final action on proposed amendments to the rules of procedure in December 1982.

The following is a summary of amendments which have been adopted or proposed for adoption so far:

AMENDMENTS

Adopted

ORCP 21 A. - DEFENSES AND OBJECTIONS; HOW PRESENTED. To cure any ambiguity in the ability of the court to allow leave to amend after a motion to dismiss has been granted, Rule 21 A. will be amended to specifically refer to leave to amend under ORCP 23 D. The amendment would also make it clear that judgment may be entered if leave to amend is not granted.

ORCP 22 C. - THIRD PARTY PRACTICE. The time for filing and serving a third party complaint will be changed from not later than 10 days after service of the third party plaintiff's original answer to not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Within the 90 days,

third parties may be pled in as a matter of right. After 90 days, third parties may only be pled in by stipulation of the existing parties and leave of court.

ORCP 44 E. - ACCESS TO HOSPITAL RECORDS. The rule will be amended to allow access to hospital records to one against whom a "civil action" has been filed, rather than a "claim."

ORCP 47 - SUMMARY JUDGMENT. When, in opposing a motion for summary judgment, it would be necessary to provide the opinion of an expert to raise a material issue of fact, an affidavit of counsel that a qualified expert is willing to testify to facts and opinions which raise a material issue of fact will be an adequate basis for the court to deny the motion.

ORCP 63 - JUDGMENT NOTWITHSTANDING THE VERDICT. The rule will be amended to make it clear that the motion for directed verdict referred to in ORCP 63 A. is a motion made at the close of all the evidence, not one made at the close of the plaintiff's case-in-chief.

Proposed

ORCP 7. The rule would be amended to:

- (1) Specifically allow service on a county by serving the county clerk or person performing the duties of that office;
- (2) Specifically allow certification of mailing by the attorney for any party;
- (3) Require mailing a copy of the summons and complaint to the defendant's insurance carrier when making substituted service on the Department of Motor Vehicles before a default may be taken, when the identity of the insurance carrier is known to the plaintiff.

ORCP 9 B. - SERVICE; HOW MADE. To cure an ambiguity, the proposed amendment would make it clear that it applies to all parties, represented by an attorney or not.

* * *

Additional matters may be brought to the Council's attention during the hearings process.

COUNCIL ON COURT PROCEDURES:

Donald W. McEwen, Portland (Chairman)	Hon. William L. Jackson, Baker
Hon. William M. Dale, Jr., Portland (Vice Chairman)	Roy Kilpatrick, Mount Vernon
James W. Walton, Corvallis (Treasurer)	Hon. Edward L. Perkins, Bend
Hon. John H. Buttler, Salem	Frank H. Pozzi, Portland
Hon. J. R. Campbell, Salem	Hon. Robert W. Redding, Portland
Hon. John M. Copenhaver, Bend	E. B. Sahlstrom, Eugene
Austin W. Crowe, Jr., Portland	James C. Tait, Oregon City
Robert H. Grant, Medford	Hon. Wendell H. Tompkins, Albany
Wendell E. Gronso, Burns	Lyle C. Velure, Eugene
John J. Higgins, Portland	Hon. William W. Wells, Pendleton
Hon. John F. Hunnicutt, St. Helens	Prof. Bill L. Williamson, Portland

M E M O R A N D U M

TO: COUNCIL ON COURT PROCEDURES:

John H. Buttler	Edward L. Perkins
J.R. Campbell	Frank H. Pozzi
John M. Copenhaver	Robert W. Redding
Austin W. Crowe, Jr.	E.B. Sahlstrom
William M. Dale, Jr.	James C. Tait
Robert H. Grant	Wendell H. Tompkins
Wendell E. Gronso	Lyle C. Velure
John J. Higgins	James W. Walton
John F. Hunnicutt	William W. Wells
William L. Jackson	Bill L. Williamson
Roy Kilpatrick	
Donald W. McEwen	

FROM: DOUGLAS A. HALDANE, Executive Director

DATE: September 7, 1982

REMINDER!

The next meeting of the Council will be held this coming Saturday, September 11, at the Cascade Natural Gas Community Service Room, 334 N.E. Hawthorne Street, Bend, Oregon, commencing at 9:30 a.m.

We have been awaiting receipt of the approved draft of the Oregon Rules of Juvenile Court Procedure prepared by the Juvenile Services Commission. We have yet to receive that draft. We will probably be able to distribute it to the Council members at the September 11th meeting.

DAH:gj

A G E N D A

COUNCIL ON COURT PROCEDURES

Meeting

Date and Time: Saturday, September 11, 1982
9:30 a.m.

Place: Cascade Natural Gas Community
Service Room, 334 N.E. Hawthorne
Street, Bend, Oregon

1. Approval of minutes of meeting held July 31, 1982
2. Staff review of proposed amendments to Oregon Rules of Civil Procedure and Oregon Rules of Juvenile Court Procedure
3. Public testimony relating to proposed amendments
4. NEW BUSINESS

#

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held September 11, 1982

Cascade Natural Gas Community Service Room

Bend, Oregon

Present:	John H. Buttler	John F. Hunnicutt
	John M. Copenhaver	Roy Kilpatrick
	Robert H. Grant	Donald W. McEwen
	Wendell E. Gronso	Frank H. Pozzi
	William L. Jackson	
Absent:	J. R. Campbell	James C. Tait
	Austin W. Crowe, Jr.	Wendell H. Tompkins
	William M. Dale, Jr.	Lyle C. Velure
	John J. Higgins	James W. Walton
	Edward L. Perkins	William W. Wells
	Robert W. Redding	Bill L. Williamson
	E. B. Sahlstrom	

(Also present were Douglas Haldane, of the Council staff, and Sande Schmidt, of the Oregon State Bar, representing the Burns Paiute Indians)

The meeting was called to order at 9:45 a.m. Chairman McEwen recognized Ms. Schmidt for the purpose of offering public testimony on the proposed Code of Juvenile Procedure. Ms. Schmidt indicated that she had just received the proposed Code of Juvenile Procedure a few days prior to the Council meeting and had no substantive proposals to put forth at the meeting. She further indicated, however, that those familiar with Indian affairs in Oregon were concerned that the proposed Juvenile Code did not incorporate certain provisions of the federal Indian Child Welfare Act. It was her contention that many practitioners not necessarily familiar with the Indian Child Welfare Act would proceed under the Oregon Code and thus inadvertently jeopardize the rights and interests of Indian children under the federal Act. She expressed a wish to continue communication with the Council as it proceeds to consider the proposed Juvenile Code.

Mr. Haldane distributed a tentative draft of proposed amendments to ORCP reflecting Council work to date, a copy of which is attached as Appendix "A" to the original of these minutes. He briefly summarized the amendments for the Council.

During summary, comments of Council members were directed to further changes that might be made as follows:

1) ORCP 21. Certain defenses to a claim for relief may be made by motion, as opposed to being asserted in a responsive pleading. In the rule, however, it is stated that a motion making any of these defenses "shall" be made before pleading. The Council felt there was some inconsistency and that the latter "shall" should be changed to "may."

2) ORCP 44 E. The rule refers to any party "legally liable" to a party may examine and make copies of all records. The suggestion was made that legal liability will not be determined until after a claim is determined, and the words "legally liable" thus amount to surplusage in the rule and should be stricken.

3) ORCP 7. The suggestion was made that instead of providing for service of process on "county clerks," the rule should provide for service upon the county counsel or person performing the duties of that office, since that party will be responsible for defending the action in any case.

4) ORCP 9. Apparently some problem has been experienced with an inability to serve papers subsequent to the filing of a responsive pleading when the responsive pleading contains no return address of the party. It was suggested that any party who appears without providing a name and address may be served by placing a copy of a further pleading in the court file. A further suggestion was that the Council might provide for striking such pleading if an address is not included.

NEW BUSINESS. Chairman McEwen and Mr. Pozzi brought to the attention of the Council a communication from Mr. Garry Kahn, of Portland, describing a problem with the number of peremptory challenges allowed each party in a third party case. A copy of that letter is attached as Appendix "B" to these minutes.

Mr. Haldane then described the situation surrounding the submission to the Council of the recommendations by the Juvenile Services Commission for a revised Code of Juvenile Court Procedure. Since the Council on Court Procedures is responsible for "all civil proceedings in all courts of the state" and since juvenile proceedings are normally considered to be "civil" in nature even though they often deal with acts which would be considered criminal if performed by an adult, the legislature charged the Juvenile Services Commission with

recommending its revised Code of Procedure to the Council on Court Procedures. Members of the Council expressed some degree of discomfort in dealing with the proposed Juvenile Code because members of the Council are not generally familiar with juvenile law or procedure. It was suggested that the proposed code, while procedural, also contains many provisions which could be considered substantive and therefore outside the jurisdiction of the Council. Further, the view was expressed that while within the letter of the Council's responsibilities, to the extent that juvenile procedures are "civil" in nature, it is clearly outside the spirit of the Council's charge and that the Council is probably an inappropriate body to deal with issues of this magnitude in an area where the Council has no expertise.

Mr. Pozzi suggested that the Council staff poll the membership of the Council to determine whether the Council believes it appropriate to proceed to consider the proposed Code of Juvenile Procedure.

Judge Jackson expressed a desire to have reflected in the records of the Council's deliberations that he remains convinced that verification of pleadings by the parties to a civil action should be required. He further suggested that Rule 59 be amended to allow the submission of jury instructions to the jury by audio-recording instead of in written form at the discretion of the court.

The next meeting of the Oregon Council on Court Procedures is scheduled for September 30, 1982 at 9:30 a.m. at the Harris Hall Meeting Room of the Lane County Courthouse.

The meeting adjourned at 11:00 a.m.

Respectfully submitted,

Douglas A. Haldane

DAH:gh

GARRY L. KAHN, P.C.

ATTORNEY AT LAW

THE 1515 BUILDING

SUITE 808

1515 S. W. FIFTH AVENUE

PORTLAND, OREGON 97201

TELEPHONE 227-4488

AREA CODE 503

August 23, 1982

RECEIVED
Post Office

Mr. Donald W. McEwen
Attorney at Law
Council on Court Procedures
1408 Standard Plaza Building
1100 SW Sixth Avenue
Portland, Oregon 97204

AUG 24 1982
A.M. P.M.
7:8:9:10:11:12:1:2:3:4:5:6

Re: Oregon Rules of Civil Procedure 57D(2)

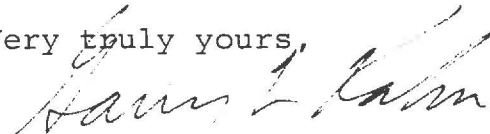
Dear Don:

As a follow-up to our discussion of a few days ago, I wanted to bring to the Council's attention a provision I feel is basically unfair.

I recently tried a case on behalf of a plaintiff who sued one defendant. The named defendant filed a third-party complaint against a third-party defendant. The case proceeded to trial on all issues between the parties. The trial court, over my objection, allowed each of the defendants three separate challenges and only allowed three challenges to the plaintiff. Inasmuch as both defendants were interested in defeating the plaintiff's claim, it placed the plaintiff at a substantial disadvantage during the jury selection process. Under ORCP 57D(2), the court has the discretion to allow any of the parties additional preemptory challenges and permit them to be exercised separately or jointly.

It is my recollection that when the rules were being discussed in the hearings, it was pretty much agreed that the procedure on preemptory challenges would remain the same. Namely, that the defendants would have to agree on the three challenges that would be exercised by them. It seems to me that if the defendants are going to be granted additional preemptory challenges, that a provision should be added to the Rule providing for the plaintiff to have an equal number of challenges. In my case, this would mean the plaintiff would get six challenges and the defendants would get a total of six challenges.

Very truly yours,



GARRY L. KAHN, P.C.

GLK:alh

cc: Fredric R. Merrill
University of Oregon School of Law

APPENDIX "B" TO MINUTES OF
COUNCIL MEETING HELD 9/11/82

PROPOSED AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

TENTATIVE DRAFT

APPENDIX "A"
TO MINUTES OF COUNCIL MEETING
HELD 9-11-82

SEPTEMBER 11, 1982

PROPOSED AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE

and

PROPOSED RULES OF JUVENILE COURT PROCEDURE

Tentative Draft

September 11, 1982

The following amendments to the Oregon Rules of Civil Procedure are being considered by the Oregon Council on Court Procedures for promulgation and submission to the 1983 Legislature under ORS 1.735. Where amendments are referred to as "adopted," they have received tentative Council approval. "Proposed" amendments are under consideration by the Council.

Pursuant to ORS 417.490(h), the Juvenile Services Commission has recommended Proposed Rules of Juvenile Court Procedure to the Council on Court Procedures. Those proposed rules will be the subject of Council review and are included as a part of this tentative draft.

As with rules and amendments promulgated in the past, the comments following the amendments were drafted by Council staff and are not officially adopted by the Council.

COUNCIL ON COURT PROCEDURES

Donald W. McEwen, Portland (Chairman)
Hon. William M. Dale, Jr., Portland
(Vice Chairman)
James W. Walton, Corvallis (Treasurer)
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Hon. Wendell H. Tompkins, Albany
Lyle C. Velure, Eugene
Hon. William W. Wells, Pendleton
Prof. Bill L. Williamson, Portland

Douglas A. Haldane
Executive Director

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I.

ADOPTED AMENDMENTS

DEFENSES AND OBJECTIONS;
HOW PRESENTED; BY
PLEADING OR MOTION;
MOTION FOR JUDGMENT ON
THE PLEADINGS

RULE 21

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion [to dismiss]:

- (1) lack of jurisdiction over the subject matter,
- (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and
- (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion [to dismiss] making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated

defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion [to dismiss] asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. When a motion to dismiss has been allowed, judgment shall be entered in favor of the moving party unless the court has allowed leave to file an amended pleading under Rule 23 D.

COMMENT

To cure any ambiguity in the ability of the court to allow leave to amend after a motion to dismiss has been granted, Rule 21 A. will be amended to specifically refer to leave to amend under ORCP 23 D. The amendment would also make it clear that judgment may be entered if leave to amend is not granted.

COUNTERCLAIMS,
CROSS-CLAIMS, AND THIRD
PARTY CLAIMS

RULE 22

C. Third party practice.

C.(1) [At any time after] After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third party plaintiff for all or part of the plaintiff's claim against the third party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. [The third party plaintiff need not obtain leave to make the service if the third party complaint is filed not later than 10 days after service of the third party plaintiff's original answer.] Otherwise the third party plaintiff must obtain agreement of all existing parties and leave on motion [upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties]. The person served with the summons and third party complaint, hereinafter called the third party defendant, shall assert any defenses to the third party plaintiff's claim as provided in Rule 21 and counterclaims against the third

party plaintiff and cross-claims against other third party defendants as provided in sections A. and B. of this rule. The third party defendant may assert against the plaintiff any defenses which the third party plaintiff has to the plaintiff's claim. The third party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff. The plaintiff may assert any claim against the third party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third party plaintiff, and the third party defendant thereupon shall assert the third party defendant's defenses as provided in Rule 21 and the third party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third party claim, or for its severance or separate trial. A third party may proceed under this section against any person not a party to the action who is or may be liable to the third party defendant for all or part of the claim made in the action against the third party defendant.

C.(2) A plaintiff against whom a counterclaim has been asserted may cause a third party to be brought in under circumstances which would entitle a defendant to

do so under subsection C.(1) of this section.

COMMENT

The time for filing and serving a third party complaint will be changed from not later than 10 days after service of the third party plaintiff's original answer to not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Within the 90 days, third parties may be pled in as a matter of right. After 90 days, third parties may only be pled in by stipulation of the existing parties and leave of court.

PHYSICAL AND MENTAL
EXAMINATION OF PERSONS;
REPORTS OF EXAMINATIONS

RULE 44

E. Access to hospital records.

Any party legally liable or against whom a [claim] civil action is [asserted] filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.

COMMENT

The rule will be amended to allow access to hospital records to one against whom a "civil action" has been filed, rather than a "claim."

SUMMARY JUDGMENT

RULE 47

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

C. Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party, prior to the day of hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of

law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of affidavits; defense required. [Supporting] Except as provided by section E. of this rule, supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed to

be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions. If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

[E] F. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present by affidavit facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to

be taken or discovery to be had, or may make such other order as is just.

[F] G. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

[G] H. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with Rule 67 B. shall not constitute a final judgment.

COMMENT

When, in opposing a motion for summary judgment, it would be necessary to provide the opinion of an expert to raise a material issue of fact, an affidavit of counsel that a qualified expert is willing to testify to facts and opinions which raise a material issue of fact will be an adequate basis for the court to deny the motion.

JUDGMENT
NOTWITHSTANDING THE
VERDICT

RULE 63

A. Grounds. When a motion for a directed verdict, made at the close of all the evidence, which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

COMMENT

The rule will be amended to make it clear that the motion for directed verdict referred to in ORCP 63 A. is a motion made at the close of all the evidence, not one made at the close of the plaintiff's case-in-chief.

II.

PROPOSED AMENDMENTS

SUMMONS

RULE 7

D.(3)(d) Public bodies. Upon any county, incorporated city, school district, or other public corporation, commission, board or agency, by personal service or office service upon an officer, director, managing agent, [clerk,] or secretary [thereof], or county clerk or person performing the duties of that office. When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served in the same manner upon the District Attorney of the county [in the same manner as required for service upon the county clerk].

* * * *

(SPACE RESERVED FOR FURTHER AMENDMENTS)

* * * *

F.(2)(a)(i) Certificate of service when summons not served by sheriff of deputy. If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney

for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate may be made by the attorney for any party and shall state the circumstances of mailing and the return receipt shall be attached.

COMMENT

D.(3)(d) The rule would be amended to specifically allow service on a county by serving the county clerk or person performing the duties of that office.

D.(4) The subcommittee of the Council assigned to study amendments to ORCP 7 is currently studying a proposal to amend 7 D.(4) to provide for service of a copy of the summons and complaint on a defendant's insurance carrier before a default judgment may be taken when the identity of the insurance carrier is known to the plaintiff. The purpose of the amendment is to avoid the result in Harp v. Loux, 54 Or App 840 (1981).

F.(2)(a)(i) The rule would be amended to specifically allow certification of mailing by the attorney for any party.

SERVICE AND FILING OF
PLEADINGS AND OTHER
PAPERS
RULE 9

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. Service by mail is complete upon mailing. Service of any notice or other paper to bring a party into contempt may only be upon such party personally.

COMMENT

To cure an ambiguity, the proposed amendment would make it clear that it applies to all parties, represented by an attorney or not.

OREGON RULES OF JUVENILE COURT PROCEDURE

Oregon Juvenile Services Commission

August 30, 1982

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300 DEFINITIONS

300 A Adjudicatory hearing. A hearing to determine whether a child is within the jurisdiction of the court by reason of an allegation under ORS 419.476(1) is an adjudicatory hearing. Where these rules refer to portions of the Criminal Code (ORS Chapters 131-153), the adjudicatory hearing is synonymous with the "trial" of a criminal case.

300 B Dispositional hearing. A hearing to determine the disposition of a child who has been found to be within the jurisdiction of the juvenile court is a dispositional hearing. Where these rules refer to portions of the Criminal Code (ORS Chapters 131-153) a dispositional hearing in a case arising under ORS 419.476(1)(a) is synonymous with a "sentencing" proceeding in a criminal case.

300 C Dispositional review hearing. A hearing to determine whether a dispositional order should be modified or continued or whether the court's jurisdiction should be terminated, except in the case of a probation violation hearing, is a dispositional review hearing. A hearing pursuant to RJCP 350 D is a dispositional review hearing.

300 D Probation violation hearing. In the case of a child who is found to be within the jurisdiction of the court in a case arising under ORS 419.476(1)(a), (b), (c) or (f) and who has been placed on probation, a hearing to determine whether the child is in violation of his probation is a probation violation hearing.

300 E Remand. The word "remanded" as used in ORS 419.575 (2)(b) is defined not to include that individual who is subject to an order of remand from the juvenile court but who has filed an appeal of the order of remand.

301 TRANSFER

301 A Transfer of proceeding to juvenile court.

301 A (1) If the defendant in a criminal proceeding was under the age of 18 years at the time the offense charge was alleged to have been committed, unless he has been transferred to criminal court as provided in ORS 419.533, the court exercising criminal jurisdiction shall transfer the case to the juvenile court of the county of the defendant's residence, together with a copy of the accusatory pleading and other papers and documents relating to the case, including the order issued pursuant to RJCP 301 A(2).

301 A (2) The transferring court shall order that the person shall be held in temporary custody and transported to a place of detention or shelter care within the person's county of residence, if possible, or shall make a determination that the child may be released on recognizance or released into the custody of a parent, guardian, legal custodian or other responsible person.

301 A (3) When the juvenile court of the county of residence is notified of transfer of the case and the order of temporary custody or release is issued pursuant to RJCP 301 A(1) and 301 A(2), all further proceedings relating to the case are subject to ORS Chapter 419 and the Oregon Rules of Juvenile Court Procedure.

301 B Disposition of transferable case. When a juvenile court proceeding is pending in a county other than the county in which the child resides and the case is transferable under ORS 419.479 or RJCP 302, the juvenile court of the county in which the child resides may authorize the court in which the case is pending to proceed with the case in either of the following ways where it will facilitate disposition of the case without adverse effect on the interests of the child:

1. To hear, determine and dispose of the case in its entirety; or

2. Prior to transferring the case, to conduct the hearing into the facts alleged to bring the child within the jurisdiction of the juvenile court, to determine the facts and to certify its findings to the juvenile court of the county in which the child resides.

302 POWER OF JUVENILE COURT WHERE CASE PENDING TO AUTHORIZE ACTION BY ANOTHER JUVENILE COURT: COSTS

Where a proceeding is pending in the juvenile court of any county, the juvenile court of that county may authorize the juvenile court of any other county to do one or both of the following, where it will facilitate the disposition of the case without adverse effect on the interests of the child.

1. To conduct a hearing into the facts alleged to bring the child within the jurisdiction of the juvenile court, to determine the facts and to certify its findings to the court in which the case is pending.
2. To assume jurisdiction over the case and administer probation or protective supervision of the child, where the court in which the proceeding is pending:
 - a. Finds that the child has moved to the other county or orders as part of its disposition of the proceeding that physical or legal custody of the child be given to a person residing in the other county; and
 - b. Is advised that the court of the other county will accept jurisdiction of the case. The cost of administering probation or protective supervision of the child shall be paid by the county accepting jurisdiction, unless the transferring and receiving counties otherwise agree. The costs of transporting the child shall be paid by the county transferring

jurisdiction, unless the transferring and receiving counties otherwise agree.

303 EFFECT OF ACTIONS BY OTHER AUTHORIZED COURTS

Where the juvenile court of one county is authorized by the juvenile court of another county to conduct a hearing into the facts as provided in RJCP 301 B or of RJCP 302, the facts so found and certified may be taken as established by the court of the county authorizing the hearing and, if adopted by written order of the latter court, form a part of its record in the case.

304 TRANSPORTATION AND SAFEKEEPING OF CHILD

If the child who is the subject of the proceeding is, at the time of a transfer or temporary transfer provided for in ORS 419.479 or RJCP 301 B or 302, in detention or shelter care or for other reasons needs transportation to the other county, the county in which the child resides shall make such order or provision for the transportation and safekeeping of the child as is appropriate in the circumstances, including an order directing any peace officer in the county in which the child resides to transfer the child in the manner directed.

305 REFERRAL TO THE JUVENILE COURT

305 A Filing of juvenile petition. Any person may file a petition in the juvenile court alleging that a child named therein is within the jurisdiction of the court as provided in ORS 419.476(1).

305 B Information that child is within court's jurisdiction. Any person may inform the juvenile department that a child appears to be within the jurisdiction of the juvenile court on one or more of the grounds specified in ORS 419.476. The department shall conduct a preliminary inquiry to determine whether grounds exist

and the interests of the child or society require that further action be taken.

306 PRELIMINARY INQUIRY

306 A Procedure. During the preliminary inquiry, the juvenile department shall confer, if it is reasonable to do so, with the child and the child's parents, guardian or legal custodian for the purpose of effecting adjustments or agreements that will make the filing of a petition unnecessary. At the start of the preliminary inquiry, the child and the child's parents, guardian or legal custodian shall be advised of their rights pursuant to Oregon law and shall be informed that no party may be compelled to appear at any conference, produce any papers or visit any place.

306 B Determination of action to be taken. Upon the basis of the preliminary inquiry, the juvenile department may:

1. Enter into an informal disposition agreement with the child, the child's parents, guardian or legal custodian pursuant to RJCP 310;
2. Cause the filing of a petition; or
3. Proceed on an alleged violation or infraction on the basis of a citation.

306 C Petition may be filed at any time. The court may order the filing of a petition at any time the court is in possession of facts showing that grounds exist and the interests of the child or society require that action be taken.

306 D Dismissal at any stage. The court may dismiss a petition or citation at any stage of the proceedings.

307 STATUS OF RECORDS AND REPORTS; CONFIDENTIALITY: EXCEPTIONS

307 A Maintenance of records. The clerk of the court shall

keep a record of each case, including therein the summons and other process, the petition and all other papers in the nature of pleadings, motions, orders of the court and other papers filed with the court, but excluding reports and other materials relating to the child's history and prognosis. The record of the case shall be withheld from public inspection but shall be open to inspection by the child, parent, guardian or surrogate and their attorneys. The attorneys are entitled to copies of the record of the case.

307 B Privileged status. Reports and other material relating to the child's history and prognosis are privileged and, except at the request of the child, shall not be disclosed directly or indirectly to anyone other than the judge of the juvenile court, those acting under the judge's direction and to the attorneys of record for the child or the child's parent, guardian or surrogate. The attorneys are entitled to examine and obtain copies of any reports or other material relating to the child's history and prognosis. Any attorney who examines or obtains copies of such reports or materials shall be responsible for preserving their confidentiality and shall return the copies to the court upon conclusion of the attorney's involvement in the case.

307 C Disclosure of privileged matter. No information appearing in the record of the case or in reports or other material relating to the child's history or prognosis may be disclosed to any person not described in subsection B of this section without the consent of the court, except for the purposes of evaluating the child's eligibility for special education as provided in ORS Chapter 343, and no such information may be used in evidence in any proceeding to establish criminal or civil liability against the child, whether such proceeding occurs after the child has reached 18 years of age or otherwise, except for the following purposes:

1. In connection with a presentence investigation after the guilt of the child has been admitted or established

in a criminal court.

2. In connection with a proceeding in another juvenile court concerning the child or an appeal from the juvenile court.

307 D Furnishing transcription. If the court finds that the child or parent is without financial means to purchase all or a necessary part of the transcription of the evidence or proceedings, the court shall order upon motion the transcript or part thereof to be furnished. The transcript or part thereof furnished under this subsection shall be paid for in the same manner as furnished transcripts are paid for in criminal cases.

307 E Nonconfidentiality of certain matters. Notwithstanding any other provision of law, the name of the juvenile, the basis for the juvenile court's jurisdiction over the juvenile, the date, time and place of any juvenile court proceeding in which the juvenile is involved and that portion of the juvenile court order providing for the legal disposition of the juvenile where jurisdiction is based on ORS 419.476(1)(a) or (g) shall not be confidential.

308 NONCONFIDENTIALITY OF BOATING, WILDLIFE, COMMERCIAL FISHING AND MOTOR VEHICLE RECORDS

Offenses against traffic, boating, wildlife or commercial fishing laws and rules adopted pursuant thereto committed by a child and not remanded pursuant to ORS 419.533(3) shall be subject to the procedures governing reporting the commission of these offenses by an adult.

309 TRANSFER OF ACADEMIC RECORDS

The academic record of a child who has been a student of an accredited academic program in a juvenile detention facility, a juvenile training school or other child-care facility shall be

transferred to the school district of the child's residence when the child is released from the facility or school and shall be made a part of the academic records of the district of the child's residence at the time of the child's release.

310 INFORMAL DISPOSITION AGREEMENTS

310 A Conditions for informal disposition agreement.

An informal disposition agreement may be entered into when a child has been referred to a county juvenile department, and a juvenile department counselor has probable cause to believe that the child may be found to be within the jurisdiction of the juvenile court for one or more of the acts specified in ORS 419.479(1)(a), (b) or (f) or ORS 419.476(1)(c) when the child's own behavior is such as to endanger the child's welfare or the welfare of others.

310 B Nature of agreement; contents; terms.

310 B (1) An informal disposition agreement is a voluntary contract between a child described in RJCP 310 A and a juvenile department counselor whereby the child agrees to fulfill certain conditions in exchange for not having a petition filed against the child.

310 B (2) An informal disposition agreement may require restitution to be made for damage or injury, participation in or referral to counseling, a period of community service, drug or alcohol education or treatment, vocational training or any other legal activity which in the opinion of the counselor would be beneficial to the child.

310 C Scope and limitation of agreements. An informal disposition agreement shall:

1. Be completed within a period of time not to exceed six months;
2. Be voluntarily entered into by both parties;
3. Be revokable by the child at any time by a written revocation;

4. Be revokable by the juvenile department counselor in the event the counselor has reasonable cause to believe the child has failed to carry out the terms of the informal agreement or has committed a subsequent offense;
5. Not be used as evidence against the child at any adjudicatory hearing;
6. Not require admission of guilt or be used as evidence of guilt;
7. Be executed in writing and expressed in language understandable to the persons involved;
8. Be signed by the juvenile department counselor, the child, the child's parent or parents or legal guardian, and the child's counsel, if any; and
9. Become part of the child's juvenile department record.

310 D Revocation of agreement; hearing.

310 D (1) If an informal disposition agreement is revoked pursuant to RJCP 310 C (3) or (4), the juvenile department counselor may file a petition with the juvenile court, and an adjudicatory hearing may be held.

310 D (2) Notwithstanding the provisions of RJCP 310 D (1), if the juvenile department counselor has reasonable cause to believe that the child has failed to carry out the terms of the informal disposition agreement or has committed a subsequent offense, in lieu of revoking the agreement, the counselor may modify the terms of the agreement and extend the period of the agreement for an additional six months from the date on which the modification was made with the consent of the child and the child's counsel, if any.

310 D (3) If after the filing of a petition, it is determined that an informal disposition agreement is appropriate, the child, the child's parents, guardian or legal custodian may be permitted to enter into an informal disposition agreement upon condition that the pending petition may be dismissed without prejudice to the filing of a new petition should the child fail to comply with the terms of the informal disposition agreement.

311 CITATION IN LIEU OF TAKING INTO CUSTODY, DISPOSITION UPON CITATION.

311 A Issuance of citation permitted. In lieu of taking a child into temporary custody a peace officer may issue a citation to a child.

311 B Copy of citation to juvenile department. A copy of a citation issued to a child shall be delivered to the juvenile department for appropriate disposition.

311 C Form of citation. Law enforcement agencies, in consultation with the juvenile court of any county, may develop a juvenile citation form for issuance pursuant to this section.

312 TITLE OF PETITION, CONTENTS, SERVICE AND AMENDMENT

312 A Title of petition. The petition and all subsequent court documents in the proceeding shall be entitled, "In the matter of _____, a child." The petition shall be in writing and verified. When the petition is filed by a peace officer, counselor or employee of the Adult and Family Services Division or the Children's Services Division, it may be verified upon the information and belief of the petitioner and may be filed without prior direction or authorization of the court. When the petition is filed pursuant to direction of the court as provided in RJCP 305, it may be upon information and belief. In other cases, the petition shall be on the personal knowledge of the petitioner.

312 B Contents of petition. The petition shall set forth in ordinary and concise language such of the following facts as are known and indicate any which are not known:

1. The name, age and residence of the child.
2. The facts which bring the child within the jurisdiction of the court as provided in ORS 419.476(1), including but not limited to the manner and place of the alleged behavior and the date or period on or about which said behavior occurred.

3. The name and residence of the child's parents; if the child has no parents or the names and residences of both parents are unknown, then the name and address of the child's guardian, if the child has a guardian.
4. The name and residence of the person having physical custody of the child.

312 C Service of petition. A certified copy of the petition shall be served, together with the summons, upon all persons upon whom summons are served under RJCP 313.

312 D Amendment of petition.

312 D (1) The biographical data contained in a juvenile court petition pursuant to RJCP 312 B(1), (3), and (4) may be amended at any time at the discretion of the court on the recommendation of any person. Notification of the amendment shall be given to the parties.

312 D (2) The allegations of a petition not subject to amendment under RJCP 312 D(1) may be amended on motion of the court or, at the court's discretion, on motion of a party. The parties shall be notified of the suggested amendment. If the amendment results in a substantial departure from the original allegations of the petition, an objecting party, upon motion, shall be allowed a continuance for a reasonable time.

313 SUMMONS

313 A Those entitled to service. After a petition has been filed, the court shall direct the issuance of summonses to the child, if the child is 12 or more years of age, to the parent, guardian and legal custodian of the child and to such other persons as the court considers necessary and proper to the proceedings. Any noncustodial parent shall receive notice of the proceedings.

313 B Contents of summons. The summons shall be signed by a counselor or some other person acting under the direction of the court and shall contain the name of the court, the title of the proceedings and, except for a published summons, a brief

statement of the facts which bring the child within the jurisdiction of the juvenile court. A published summons shall contain the statement provided in RJCP 314 B(3). The summons shall require the persons to whom directed to appear to answer or testify concerning the allegations of the petition.

313 C Notice of rights. Summonses which are directed to the parties shall advise them of their rights to counsel under Oregon law, and each summons so directed shall have attached to it a copy of the petitions.

313 D Mandatory appearance of child. The court may endorse upon the summons an order directing the parent, guardian or legal custodian having the custody or control of the child to bring the child to the hearing.

314 SERVICE OF SUMMONS AND PROCESS

314 A Method of service. Summons or other process issuing from the juvenile court may be served without further endorsement in any county of the state by an officer of the county in which the proceeding is pending, by an officer in the county in which the person to be served is found or by any person authorized by the court to serve the process. Except as otherwise provided in ORS 419.472 to 419.597, 419.800 to 419.840 and 419.990(2), the provisions of law or the Oregon Rules of Civil Procedure applicable to summons in civil cases apply to summons issued from juvenile court.

314 B Alternate methods of service of summons. If any parent or guardian required to be summoned as provided in RJCP 313 cannot be found within the state, summons may be served on the parent or guardian in any of the following ways:

1. If the address of the parent or guardian is known, by sending the parent or guardian a copy of the summons by certified mail with a return receipt to be signed by the addressee only.
2. By personal service outside the state.

3. If, after reasonable inquiry, the whereabouts of the parent or guardian cannot be ascertained, by publishing a summons in a newspaper having general circulation in the county in which the proceeding is pending. In lieu of the brief statement of facts required by RJCP 313 B, the published summons shall simply state that a proceeding concerning the child is pending in the court and an order making an adjudication will be entered therein. The summons shall be published once a week for a period of three weeks, making three publications in all. If the names of one or both parents or the guardian are unknown, they may be summoned as "the parent(s) or guardian of (naming or describing the child), found (stating the address or place where the child was found)."

314 C Jurisdiction of court upon service. Service as provided in this section shall vest the court with jurisdiction over the parents or guardian in the same manner and to the same extent as if the person served were served personally within this state.

314 D Waiver of service. A party may waive service of summons by written stipulation or by a voluntary appearance at the hearing.

315 TRAVEL EXPENSES OF PERSON SUMMONED

The court may authorize payment of travel expenses of any person summoned, as provided in ORS 136.603.

316 COMPLIANCE WITH SUMMONS: ISSUANCE OF WARRANT OF ARREST

No person required to appear as provided in RJCP 313 A shall without reasonable cause fail to appear or, where directed in the summons, to bring the child before the court.

317 WARRANT OF ARREST AGAINST PERSON SUMMONED OR AGAINST CHILD

If the summons cannot be served, if the person to whom the

summons is directed fails to obey it or if it appears to the court that the summonses will be ineffectual, the court may direct issuance of a warrant of arrest against the person summoned or against the child.

318 POWER OF COURT TO PROCEED WHEN CHILD IS BEFORE COURT: EXCEPTION

If the child is before the court, the court has jurisdiction to proceed with the case notwithstanding the failure to serve summons upon any person required to be served by RJCP 313 A, except that:

1. No order entered pursuant to ORS 419.523 may be entered unless ORS 419.525 is complied with.
2. No order for support as provided in ORS 419.513 may be entered against a person unless that person is served as provided in RJCP 314 A.
3. If it appears to the court that a parent or guardian required to be served by RJCP 313 A was not served as provided in RJCP 314, or was served on such short notice that the parent or guardian did not have a reasonable opportunity to appear at the time fixed, the court shall, upon petition by the parent or guardian, reopen the case for full consideration.

319 ACQUISITION OF JUVENILE COURT JURISDICTION

319 A Time at which jurisdiction over juvenile is obtained. A juvenile court acquires jurisdiction over a person whose alleged act, behavior or condition is within the provisions of ORS 419.476(1)(a) through (g) at the time the person is served with summons or taken into temporary custody.

319 B Jurisdiction over parents or guardians. A juvenile court acquires jurisdiction over a parent, guardian or legal custodian when such person is served with summons or waives service as defined in RJCP 314 D.

320 CONSOLIDATION OF PROCEEDINGS IN JUVENILE COURT: TRANSFER OF RECORDS

320 A When consolidation may occur. Any proceeding in which the juvenile court is given exclusive jurisdiction may be consolidated with any other proceeding where:

1. The consolidation will not impair any constitutional right of a party to any of the proceedings; and either
2. Each of the proceedings to be consolidated relates, in whole or in part, to the same child or other person under 18 years of age, or to children or other persons under 18 years of age who have at least one parent in common; or
3. The proceedings involve the same or related issues of fact.

320 B Record of consolidated proceedings. After the consolidated proceedings are heard and determined, as provided in RJCP 320 A, the record of the proceedings shall be filed in both courts. However, no part of the juvenile court findings and orders, except orders affecting custody and support, shall be filed in any court other than the juvenile court.

321 REFEREES: HEARINGS, FINDINGS AND RECOMMENDATIONS: HEARING BY JUDGE

321 A Appointment and qualification of referees. The judge of the juvenile court may appoint one or more persons as referee of the juvenile court, to serve at the pleasure of the judge. For the purposes of hearing those cases relating to the use or operation of a motor vehicle, boating laws or game laws not remanded to the criminal or municipal courts pursuant to ORS 419.533(3) or those cases returned to the juvenile court pursuant to ORS 419.533(3)(b), the judge of the juvenile court may appoint any person referee deemed qualified by training and experience and such other further qualifications as may be

prescribed by law. Referees appointed for any other juvenile court purpose must be qualified by training and experience in handling of juvenile matters and show such further qualifications as may be prescribed by law, but may not be a person who simultaneously holds a position defined in ORS 419.604 or otherwise constitutes an employee of the juvenile court.

321 B Reference to referee. The judge may direct that any case, or all cases of a class designated by the judge shall be processed or heard in the first instance by a referee in the manner provided for the hearing of cases by the court. Upon conclusion of the hearing in each case the referee shall transmit to the judge the referee's findings, recommendations or order in writing.

321 C Notification of referee's findings. Where the referee conducts a hearing, the child, the parent, guardian or other person appearing upon the child's behalf and the petitioner, shall be notified of the referee's findings, recommendations or order, together with a notice to the effect that a rehearing shall be had before a judge if requested within ten days. A rehearing before a judge of the juvenile court may be determined on the same evidence introduced before the referee if a stenographic transcript of the proceedings was kept; provided, however, in any case, additional evidence may be presented. In the absence of a stenographic or electronic record the hearing shall be de novo.

321 D Effective date of referee's order. All orders of a referee shall become immediately effective, subject to the right of review provided in this section, and shall continue in full force and effect until vacated or modified upon rehearing by order of a judge of the juvenile court. Any order entered by a referee shall become a final order of the juvenile court upon expiration of ten days following its entry, unless a rehearing is ordered or requested.

321 E Approval of referee's findings may be required. The judge of the juvenile court, or in counties having more than one

judge of the juvenile court, the presiding judge of the juvenile court may establish requirements that any or all orders of referees must be expressly approved by a judge of the juvenile court before becoming effective.

321 F Rehearings on judge's motion. A judge of the juvenile court may, on the judge's own motion, order a rehearing of any matter heard before a referee.

321 G Application for rehearing by others. At any time prior to the expiration of ten days after notice of the order and findings of a referee, a child, his parent, guardian or other person appearing on the child's behalf or the petitioner may apply to the juvenile court for a rehearing. The application may be directed to all or to any specified part of the order or findings.

322 CAUSES FOR TAKING TEMPORARY CUSTODY OF A CHILD

A child may be taken into temporary custody by a peace officer, juvenile court counselor, Children's Services Division caseworker, or any other person authorized by the juvenile court in the following circumstances:

1. Where the standards of ORS 133.310 have been met;
2. Where a child is an escaped or absent student as defined in ORS 420.905 et seq;
3. Where the juvenile court has by summons or otherwise ordered a child be taken into temporary custody; or
4. Where there are reasonable grounds to believe the child's behavior, condition or circumstances reasonably appear to endanger the physical or mental welfare of the child or of another.

323 ADVICE OF BASIC RIGHTS

A person taking a child into temporary custody as defined in RJCP 322 shall advise said child of the right to counsel and

to court-appointed counsel, if indigent, and the privilege against self-incrimination, including the right to remain silent.

324 TEMPORARY CUSTODY BY PRIVATE PERSON

A private person taking a child into temporary custody shall, without unnecessary delay, take the child before a juvenile court or deliver the child to a peace officer.

325 POWER OF COURT TO AUTHORIZE RELEASE OR DIVERSION

It is within the power of any juvenile court in the State of Oregon to issue an order pursuant to ORS 419.573(3)(a) whereby the peace officer or other responsible person in this state may release the child on the child's own recognizance or divert the child to an agency which has been determined to be acceptable to the county juvenile court.

326 PROCEDURE AS TO PAROLE VIOLATORS

A person taking a child into temporary custody who has run away from a juvenile training school or who is alleged to have violated parole will proceed as provided in ORS Chapter 420 and the related administrative rules.

327 WRITTEN REPORT RELATED TO TEMPORARY CUSTODY

The report required in ORS 419.577(2)(b) shall include the following information:

1. Efforts to notify the child's parent, guardian, legal custodian or other person responsible for the child and the results of those efforts;
2. Reason for and circumstances under which the child was taken into temporary custody;

3. Disposition of the child; and
4. Rationale by which the child qualified for custody pursuant to ORS 419.577.

328 CRITERIA FOR SECURE CUSTODY

Any child being evaluated for secure custody pursuant to ORS 419.577 may be evaluated on the basis of each of the elements found in that statute without reference necessarily to those provisions of ORS 419.476(1) which constitute the basis for referral.

329 PREFERENCE FOR SHELTER CARE

Except where inconsistent with the safety and welfare of the child or of others, a child taken into temporary custody shall be placed in shelter care or other responsible alternative placement rather than detention.

330 APPLICABILITY OF STANDARDS FOR SECURE CUSTODY TO INITIAL DETENTION DECISION

The standards for secure custody defined in ORS 419.577(5) that constitute the frame of reference with which the juvenile court judge or referee makes the detention decision are equally applicable to the juvenile court intake worker at the time of the initial detention decision.

331 JUDICIAL REVIEW FOR DETENTION UNDER 12 YEARS OF AGE

No child under 12 years of age shall be placed in detention except pursuant to judicial review. Such review may be ex parte, but a juvenile court judge or referee must determine that the behavior of the child immediately endangers the welfare of the child or of another and that appropriate alternative methods

of controlling the child's behavior are unavailable.

332 CHILD'S RIGHT TO COUNSEL

332 A Child's right to appear by counsel. A child who is the subject of a proceeding arising or having arisen under an allegation or finding that the child is within the jurisdiction of the juvenile court on one or more of the grounds specified in ORS 419.476(1) has the right to be represented by counsel in all juvenile court proceedings.

332 B Right to appointed counsel. Upon a finding that a child is without the means to retain counsel, and unless the child has made a voluntary, knowing and intelligent waiver of counsel before a judge or referee of the juvenile court, the court shall appoint counsel for the child if:

1. The child is the subject of a proceeding arising or having arisen under an allegation or finding of jurisdiction on one or more of the grounds specified in ORS 419.476(1)(a), (b), (c) or (f); or
2. The child is the subject of a proceeding arising or having arisen under an allegation or finding of jurisdiction on one or more of the grounds specified in ORS 419.476(1)(d) or (e) or a petition to terminate parental rights pursuant to ORS 419.523 and the child is eight years of age or over and requests representation by counsel. The court shall, at the request of any party, examine the child to determine whether the child desires the appointment of counsel.

332 C Revocation of waiver. A child who has waived right to counsel may revoke the waiver at any time during the proceedings. Upon revocation, the court shall appoint counsel and grant such continuances as are necessary to allow the child to consult with counsel.

332 D Discretionary appointment of counsel. Except as provided in RJCP 332(B)(2), the appointment of counsel to represent a child who is the subject of a proceeding arising or having arisen under an allegation or finding of jurisdiction on one or more of the grounds specified in ORS 419.476(1)(d) or (e) or who is the subject of a petition to terminate parental rights pursuant to ORS 419.523 is subject to the discretion of the court. In exercising its discretion the court shall consider, among other factors, the following:

1. Whether the child is capable of understanding the nature and import of the proceedings.
2. Whether the child has expressed an opinion on the matters before the court and needs the assistance of counsel to effectively present the child's desires.
3. Whether the child is a potential witness before the court and needs the assistance of counsel to effectively present the child's testimony or protect the child's interests as a witness.
4. Whether, when the state is the petitioner, the child's expressed opinions conflict with the relief requested by the state.
5. Whether there is an actual or apparent conflict between the interests or opinions of the child and the position of the other parties.

332 E Appointment of qualified counsel. No person shall be appointed to represent a child before the juvenile court who does not possess skills and experiences commensurate with the case.

333 PARENT'S RIGHT TO COUNSEL

333 A Parent's right to counsel. A child's parent, guardian or legal custodian has the right to be represented by counsel in all proceedings in which the child is alleged to be within the jurisdiction of the juvenile court.

333 B Right to appointed counsel. The court shall appoint counsel for an indigent parent, guardian or legal custodian on a petition alleging jurisdiction as stated in ORS 419.476(1)(c), (d) or (e), unless the person has made a voluntary, knowing and intelligent waiver of the right.

334 APPOINTMENT OF GUARDIAN AD LITEM

At any stage of the proceedings on a petition, the court may appoint a guardian ad litem for the child if the child has no parent, guardian or legal custodian appearing on the child's behalf or if the interests of such person appear to conflict with those of the child. A party to the proceedings or an employee or representative of a party shall not be so appointed.

335 RIGHTS OF CHILD AND PARENT

335 A Right to notice. A child alleged to be within the jurisdiction of the court on one or more of the grounds specified in ORS 419.476(1) and the parent, guardian or legal custodian shall have the right to adequate notice of all court proceedings and to a copy of the petition containing the facts which allegedly bring the child within the jurisdiction of the court. Any noncustodial parent shall receive notice of the proceedings.

335 B Hearing rights. A child alleged to be within the jurisdiction of the court on one or more of the grounds specified in ORS 419.476(1), and the parent, guardian or legal custodian of a child alleged to be within the court's jurisdiction on one or more of the grounds specified in ORS 419.476(1)(d) or (e) shall have the following rights:

1. The right to appear and present evidence;
2. The right to subpoena witnesses in the same manner as provided in ORS 136.555 to 136.603;
3. The right to counsel as specified in RJCP 332 and 333;

4. The right to confront and cross-examine witnesses;
5. The right to examine reports, documents and psychological, psychiatric or medical records; and
6. The right to request hearings on continued detention or shelter care.

336 PRELIMINARY MOTIONS

Preliminary motions shall be filed and heard as they would be in a criminal proceeding. For purposes of this rule, a petition alleging the child to be within the jurisdiction of the juvenile court or a petition to terminate parental rights is an "accusatory instrument." Notwithstanding any provisions of the Criminal Code, and except as provided in ORS 135.640, a motion shall be deemed to be timely if it is filed within a reasonable time prior to the adjudicatory hearing.

337 DISCOVERY

The provisions of ORS 135.805 through 135.873, relating to pretrial discovery in criminal cases, shall apply to adjudicatory, dispositional, dispositional review, probation violation and termination of parental rights hearings before the juvenile court. In addition thereto, the district attorney, the child and the child's parents or other lawful custodian shall have access to any records regarding the child maintained by a juvenile department of this state or any public or private agency having physical or legal custody or guardianship of the child.

338 RULES OF EVIDENCE

338 A Evidence in open court. Except as otherwise provided in these rules, in all hearings conducted before the juvenile court, the court shall consider only that evidence which is offered in open court, except that with the consent of the parties, the court may receive evidence by telephone or by perpetuation deposition.

338 B Evidence at dispositional hearings. At a dispositional hearing, the court may admit into evidence reports or other materia relating to the child's mental, physical and social history and prognosis or other evidence it finds to be relevant and which either conforms to the Oregon Rules of Evidence or has other indicia of substantial reliability. Any hearsay evidence shall be attributed to its source. Nothing in this rule shall abrogate the evidentiary privilege rules of Article 5 of the Oregon Rules of Evidence.

339 INCORPORATION OF PROVISIONS OF CRIMINAL CODE

Except as otherwise provided in these rules, the adjudicatory hearing, pleas of no contest or admissions to the petition, shall be conducted as if it were a trial or a plea of no contest or guilty in a criminal proceeding.

340 ADMISSIBILITY OF CERTAIN STATEMENTS

An extra judicial statement which would be constitutionally inadmissible in a criminal proceeding is inadmissible in a juvenile adjudicatory proceeding arising under ORS 419.476(1)(a).

341 HEARING BY THE COURT

The adjudicatory hearing shall be conducted by the court sitting without a jury.

342 DOUBLE JEOPARDY PROHIBITED

Except as provided in ORS 484.395(1), proceedings in adult criminal court and other juvenile court proceedings based on an offense alleged in a petition or citation to have been committed

by a child or allegations arising out of the same conduct are barred when the juvenile court judge or referee has begun taking evidence in an adjudicatory hearing or has accepted a child's admission or answer of no contest to the allegations of the petition.

343 TIME OF ADJUDICATORY HEARING

343 A Time of hearing. An adjudicatory hearing on a petition alleging a child to be within the jurisdiction of the juvenile court shall be heard within 60 days from the filing of the petition except as ordered by the juvenile court upon a showing of good cause.

343 B Child in detention. If a child is in detention, the adjudicatory hearing shall occur within 30 days of the child's being placed in detention, except as ordered by the juvenile court upon a showing of good cause. In no case, however, shall a child be detained for more than 60 days pending an adjudicatory hearing unless the delay is at the child's request or with the child's consent. When a child has been detained 21 days prior to an adjudicatory hearing, and on a weekly basis thereafter until such time as the hearing occurs or the child is released, the juvenile department shall report in writing to the juvenile court. The report shall contain a recommendation for the child's release or continued detention and shall explain the reason the adjudicatory hearing has not occurred.

343 C Child removed from home. When a child has been removed from the custody of the child's parents or other lawful custodian by an order of the juvenile court, the adjudicatory hearing shall occur within 30 days from the filing of the petition except as ordered by the juvenile court upon a showing of good cause.

343 D Dismissal for violation of the rule. If no hearing has been conducted within the time period specified in this rule, the petition shall be dismissed and shall not be refiled except by leave of the juvenile court.

344 TIME OF DISPOSITIONAL HEARING

After a finding that the child is within the court's jurisdiction and upon motion, the court shall continue the proceedings upon a determination that a party needs a continuance to prepare for a dispositional hearing.

345 LEAST RESTRICTIVE ALTERNATIVE

Consistent with the provisions of ORS 419.474(2), in determining the proper disposition of a child found to be within the jurisdiction of the court, the court and any social agency charged with the care of the child shall utilize the least restrictive alternatives compatible with the child's welfare, the best interests of the public, and the promotion of the unity of the family.

346 DISPOSITIONAL ALTERNATIVES

346 A Methods. Where a child is found to be within its jurisdiction, and when the court determines it will lead to the child's welfare and the best interests of the public and promotion of the unity of the family, the court may:

1. Place the child on probation or under protective supervision.

- (a) The court may direct that a child placed on probation or under protective supervision remain in parental custody or the custody of some other person with whom the child is living at the time of the disposition, or the court may direct that the child be placed in the custody of a relative or some person maintaining a foster home approved by the court or in a child care center or a youth care center authorized to accept the child. The court may specify particular requirements to be

observed during the probation or protective supervision consistent with recognized juvenile court practice, including but not limited to restrictions on visitation by the child's parents, restrictions on the child's parents, restrictions on the child's associates, occupation and activities, restrictions on and requirements to be observed by the person having the child's custody, and requirements for visitation by and consultation with a juvenile court counselor or other suitable person. Restitution for property taken, damaged or destroyed by the child may be required as a condition of probation.

- (b) i. Pursuant to hearing, the juvenile court may order a child 12 years of age or older placed in a detention facility for children for a specific period of time not to exceed eight days, in addition to time already spent in a facility, when:
 - (A) The child has been found to be within the jurisdiction of the juvenile court by reason of having committed an act which would be a crime if committed by an adult; or
 - (B) The child has been placed on formal probation for an act which would be a crime if committed by an adult, and has been found to have violated a condition of that probation.
- ii. The juvenile court shall not place a child in a detention facility for children under subsection (b)i. of this section unless the facility:
 - (A) Houses children in a room or ward screened from the sight and sound of adults who may be detained in the facility; and
 - (B) Is staffed by juvenile department employees.

- iii. In no case may the court order, pursuant to this section, that a child under 14 years of age be placed in any detention facility in which adults are detained or imprisoned.
2. Make a child a ward of the court.
- (a) The court may direct that the child remain in parental custody or the custody of some other person with whom the child is living at the time of the disposition, or the court may direct that the child be placed in the custody of a relative or some person maintaining a foster home approved by the court or in a child care center or a youth care center authorized to accept the child.
 - (b) Any order of placement in the legal custody of Children's Services Division or any social agency shall be as an incident of wardship.
 - (c) The court may place the child in the legal custody of Children's Services Division for care, placement and supervision.
 - i. The division may place the child in a child care center authorized to accept the child.
 - ii. If the child has been placed in the custody of the Children's Services Division, the court shall make no commitment directly to any residential facility, but shall cause the child to be delivered into the custody of the Children's Services Division at the time and place fixed by rules of the Division. No child so committed shall be placed in the Oregon State Penitentiary or the Oregon State Correctional Institution or the Oregon Women's Correctional Center.
 - iii. Uniform commitment blanks, in a form approved by the assistant director for Children's Services, shall be used by all courts for

placing children in the legal custody of the Children's Services Division.

- iv. To insure effective planning for children, the Children's Services Division shall take into consideration recommendations and information provided by the committing court before placement in any facility certified by the Children's Services Division.
 - v. Whenever a child who is in need of medical care or other special treatment by reason of his physical or mental condition is placed in the custody of the Children's Services Division by the juvenile court, the Division shall prepare a plan for care or treatment within 14 days after assuming custody of the child. The court may indicate in general terms the types of care which it regards as initially appropriate. A copy of the plan, including a time schedule for its implementation, shall be sent to the juvenile court which committed the child to the Division. The court may at any time request regular progress reports on implementation of the plan. The Division shall notify the court when the plan is implemented, and shall report to the court concerning the progress of the child annually thereafter. If the plan is subsequently revised, the Division shall notify the court of the revisions and the reasons therefor.
 - vi. Commitment of a child to the Children's Services Division does not terminate the court's continuing jurisdiction to protect the rights of the child or the child's parents or guardians.
3. If there is an interstate compact or agreement or an informal arrangement with another state permitting the child to reside in another state while on probation or

under protective supervision, or to be placed in an institution or with an agency in another state, place the child on probation or under protective supervision in such other state, or, subject to ORS 419.509, place the child in an institution in such other state in accordance with the compact, agreement or arrangement.

4. In the circumstances set forth in ORS 419.533, remand the child to the appropriate court handling criminal actions, or to municipal court.

346 B Retention of wardship by the court. The juvenile court shall retain wardship as to any child committed to the care of the Children's Services Division or a social service agency, and the agency shall retain legal custody regardless of the physical placement of the child by the agency.

347 LAW VIOLATION CASES

A dispositional hearing regarding a child who has been found to be within the jurisdiction of the juvenile court pursuant to ORS 419.476(1)(a) shall be conducted as follows:

1. Whenever the court makes a dispositional order placing the child in the custody of any public or private agency or otherwise vests the child's legal custody in someone other than a parent, the court shall state on the record the reasons for its order.
2. Whenever the court places a child on probation, the terms and conditions of probation shall be made a part of the court's written order.
3. Whenever the court orders a child to pay restitution pursuant to RJCP 346 A 1(a), the court shall state the amount to be paid and a period of time in which payment shall be made. If the amount of restitution is disputed, the court may hold a hearing on the matter in the nature of a dispositional hearing.

348 NON-LAW VIOLATION CASES; FINDINGS OF FACT

A dispositional hearing regarding a child who has been found to be within the jurisdiction of the juvenile court pursuant to ORS 419.476(1)(b), (c), (d), (e) or (f) shall be conducted in the following manner. Whenever the court makes a dispositional order placing the child in the legal custody of any private or public agency or otherwise vests the child's legal custody in someone other than a parent, the court shall state on the record:

1. The harm to the child which the court anticipates would occur if the child were to remain in the custody of the child's parents;
2. The circumstances which indicate the likelihood of such harm;
3. The conditions precedent to the return of the child to the parents' custody; and
4. The proposed timetable for such return or other permanent placement.

349 COURT ORDERED MEDICAL CARE

The court may, in lieu of or in addition to any disposition under RJCP 346 direct that the child be examined or treated by a physician, psychiatrist or psychologist, or receive other special care or treatment and for that purpose may place the child in a hospital or other suitable facility.

350 REPORTS BY AGENCIES HAVING GUARDIANSHIP OR LEGAL CUSTODY OF CHILD; HEARING BY COURT TO REVIEW CONDITION AND CIRCUMSTANCES OF CHILD

350 A Reports to be filed by those having guardianship. Any public or private agency having guardianship or legal custody of a child pursuant to court order shall file reports on the child with the juvenile court which entered the original order concerning the child or, where no such order exists, with the juvenile court

of the county of the child's residence in the following circumstances:

1. Where the child has been placed with the agency as the result of a court order and remains under agency care for six consecutive months except for a child who has been committed to a state training school; or
2. Where the child has been surrendered for adoption or the parents' rights have been terminated and the agency has not physically placed the child for adoption or initiated adoption proceedings within six months of receiving the child.

350 B Time for filing reports. The reports required by RJCP 350 A shall be filed by the agency at the end of the initial six-month period and annually thereafter. The agency shall file reports more frequently if the court so orders. The reports shall include, but not be limited to:

1. A description of the problems or offenses which necessitated the placement of the child with the agency;
2. A description of the type and an analysis of the effectiveness of the care, treatment and supervision that the agency has provided for the child, together with a list of all placements made since the child has been in the guardianship or legal custody of an agency and the length of time the child has spent in each placement;
3. A description of agency efforts to return the child to the parental home or find permanent placement for the child, including, where applicable, efforts to assist the parents in remedying factors which contributed to the removal of the child from the home;
4. A proposed treatment plan or proposed continuation or modification of an existing treatment plan, including, where applicable, terms of visitation to be allowed and expected of parents and a description of efforts expected of the child and the parents to remedy

factors which have prevented the return of the child to the parental home; and

5. If continued foster care is recommended, a proposed timetable for the child's return home or other permanent placement or a justification of why extended foster care is necessary.

350 C Repetition of facts not required. Notwithstanding the requirements of RJCP 350 B, annual reports need not contain information contained in prior reports.

350 D Hearings after receipt of reports authorized. Upon receiving any report required by this section, the court may hold a hearing to review the child's condition and circumstances and to determine if the court should continue jurisdiction over the child or order modifications in the care, placement and supervision of the child. The court shall hold a hearing:

1. In all cases under RJCP 350 A(2) where the parents' rights have been terminated;
or
2. If requested by the child, the attorney for the child, if any, the parents or the public or private agency having guardianship or legal custody of the child within 30 days of receipt of the notice provided in RJCP 350 F.

350 E Conduct of hearing. The hearing provided in RJCP 350 D shall be in the nature of a dispositional hearing. At the dispositional review hearing the burden shall be on the state to demonstrate by a preponderance of the evidence that circumstances which gave rise to the order placing the child in the legal custody of someone other than its parents are still in effect to such a degree that the child cannot be returned to the legal or physical custody of its parents without a substantial risk that the child will suffer the harm specified in the most recent dispositional or dispositional review order. The court shall state on the record the basis for its decision as it would in a dispositional hearing pursuant to RJCP 348.

350 F Reports furnished to interested persons. Except where a child has been surrendered for adoption or the parents' rights have been terminated, the court shall send a copy of the report required by this section to the parents of the child and shall notify the parents either that a hearing will be held or that the parents may request a hearing at which time they may ask for modifications in the care, treatment and supervision of the child. If the court finds that informing the parents of the identity and location of the foster parents of the child is not in the child's best interests, the court may order such information deleted from the report before sending the report to the parents.

350 G Children not surrendered for adoption. Where a child has been surrendered for adoption and the agency has not physically placed the child for adoption or initiated adoption proceedings within six months of receiving the child, the agency shall file a petition alleging that the child comes within the jurisdiction of the court.

350 H Finality of order after hearing. Any decision of the court made pursuant to the hearing provided in RJCP 350 D shall be a final order for the purposes of ORS 419.561 and 419.563.

351 COURT'S POWER TO MODIFY OR SET ASIDE ITS ORDERS; HEARING

351 A Modification of order permitted. Except as provided in these rules, the court may modify or set aside any order made by it upon such notice and with such hearing as the court may direct.

351 B Necessity for notice and hearing. Except as provided in RJCP 351 C, notice and hearing as provided in RJCP 313 to 344 shall be granted in any case where the effect of modifying or setting aside the order will or may be to deprive a parent of the legal custody of the child, to place the child in an institution or agency or to transfer the child from one institution or agency to another. However, the

provisions of this rule shall not apply to a parent whose rights have been terminated under ORS 419.523 to 419.525 or whose child has been permanently committed by order of the court unless an appeal from such order is pending.

351 C Notice not required in certain cases. Notice and a hearing as provided in RJCP 351 B are not required where the effect of modifying or setting aside the order will be to transfer the child from one foster home to another.

351 D Status of orders during adoption proceeding. No order pursuant to ORS 419.527(1)(a) may be set aside or modified during the pendency of a proceeding for the adoption of the child, nor after a petition for adoption has been granted.

352 PROBATION VIOLATION HEARING

The state shall have the burden to prove a violation of a child's probation by a preponderance of the evidence. Upon finding that a child has violated the terms of his probation, the court may consider evidence as in a dispositional hearing.

353 TERMINATION OF PARENTAL RIGHTS HEARING

353 A Discovery. In addition to that discovery provided for in RJCP 337, discovery as provided for in the Rules of Civil Procedure, and as ordered by the juvenile court upon a showing of good cause, may be allowed to assist the parties to prepare for a hearing on a petition to terminate parental rights.

353 B Visitation pending hearings. Pending a hearing on a petition to terminate parental rights the juvenile court, on the motion of a party, may continue visitation or communication between the child and the parents on such terms and conditions as it finds to be appropriate or, upon a finding that such contact would be seriously detrimental to the child, may suspend visitation or communication. A hearing on a motion to suspend visitation or communication shall be conducted as a dispositional hearing.

353 C Time of hearing. A hearing on a petition to terminate parental rights shall occur within 180 days of the filing of the petition. In the event that the parents' visitation or communication with the child is suspended by the juvenile court pending the hearing, the hearing shall occur within 90 days of the order suspending visitation except as ordered by the juvenile court upon a showing of good cause. If no hearing has been conducted within the time periods specified in this rule, the petition shall be dismissed and shall not be refiled except by leave of the juvenile court.

353 D Conduct of hearing. A hearing on a petition to terminate parental rights pursuant to ORS 419.523 and ORS 419.525 shall be conducted as an adjudicatory hearing.

354 TERMINATION OF JURISDICTION

The court's jurisdiction over a child brought before the court continues until whichever of the following occurs first:

1. The court dismisses an adjudicated petition regarding the child.
2. The court enters an order of remand pursuant to ORS 419.533(1), and the court specifically includes a dismissal of prior jurisdiction as an incident to that order of remand.
3. The court transfers jurisdiction of all matters related to the child as provided in ORS 419.479, or RJCP 301 B or 302.
4. The court by order terminates its jurisdiction or its wardship.
5. As to a child subject to the jurisdiction of the court by reason of ORS 419.476(d) or (e), a decree of adoption of the child is entered by a court of competent jurisdiction.
6. The child becomes 21 years of age.

355 COURT ORDERED FINGERPRINTING AND PHOTOGRAPHY

An order of the juvenile court for fingerprinting or photographing a child against the wishes of the child or parents is limited to those circumstances where the law enforcement agency has probable cause for temporary custody without the fingerprints or photographs.

