

**STAFF COMMENTS TO
AMENDMENTS TO OREGON RULES OF CIVIL PROCEDURE
PROMULGATED 12-6-14**

INTRODUCTION

These staff comments are provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2014-2015 biennium. Language in the staff comments was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. The comments are neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor do they establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at www.counciloncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

Rule 1 Comment

Section E is reorganized in light of the Legislature's enactment of ORS 194.800-194.835 to incorporate the Uniform Foreign Declarations Act into the Oregon Revised Statutes. ORCP 1 E had been amended by the Legislature to refer to that Act; however, the suggested language for foreign declarations found in ORS 194.825 was not incorporated into Rule 1. With this amendment, subsection E(2) retains the approved language for domestic declarations under penalty of perjury and subsection E(3) now contains the approved language for foreign declarations. The amendment guides attorneys and litigants to the appropriate required language that would precede any declarant's signature without reference to the statute or any other source.

A single amendment to section A and two amendments to section F remove or replace more archaic language without the intention to effect a change in the rule's meaning or operation.

Rule 7 Comment

Rule 7 is amended in two respects that change existing procedures:

1. in paragraph C(3)(b), the notice language to be included in the summons directed to a party to be joined in the original action is amended, consistent with Rule 22 D(1), to include a cross-claim, as well as the counterclaim provided for in the existing rule; and
2. a service requirement is added; paragraph F(2)(a) now requires the server to specify in the certificate of service the specific documents that were served.

Numerous other changes are made to improve accuracy, clarity, or consistency. From paragraph C(1)(b) through paragraph D(6)(g), 24 internal references to the rule are amended for accuracy and consistency with the Council's format. A comma is added in paragraph C(1)(b). The word "which" is replaced by "that" three times in subsection C(3) and once in subparagraph D(2)(d)(i) and in paragraph D(6)(a). In paragraph C(3)(b), the reference to Rule 22 D(1) is reformatted for consistency. The word "will" in paragraph C(3)(c)'s notice language is amended to read "may." One comma is deleted from subsection D(1) and three commas are deleted from paragraph D(2)(b). Four archaic uses of "such" in paragraphs D(2)(b) and D(2)(c) are eliminated by rephrasing and two more extraneous commas are deleted from paragraph D(2)(c). Subparagraph D(2)(d)(i) is amended to include the clarifying phrase "service by mail is." Thirteen archaic uses of the word "such" in paragraph D(3)(a) are rephrased or eliminated. Subparagraph D(3)(a)(i) is amended in two places to make clear that service of the summons may be had on the defendant or on some other person authorized to receive service to be consistent with the first sentence of the subparagraph. In subparagraph D(3)(a)(ii), the specified age of the person to be served is amended to be consistent as used within the rules and with statutory conventions. Also in subparagraph D(3)(a)(ii), the sentence is amended to clarify who must be served in addition to the minor. The references to Rule 27 in subparagraphs D(3)(a)(ii) and D(3)(a)(iii) are amended to reflect the correct section of the Rule 27 that was concurrently amended. Four additional words are added and a comma is deleted to clarify service requirements on incapacitated persons in subparagraph D(3)(a)(iii).

Subparagraphs D(3)(a)(iv) through D(3)(d)(ii) are reformatted to properly and consistently set off the parts that are included within the subparagraphs. Further, a comma is added in subparagraph D(3)(a)(iv); a colon, a semicolon, and two commas are added and one comma is deleted in part D(3)(b)(ii)(C); and a colon, two semicolons, and two commas are added and one comma is deleted in parts D(3)(c)(ii)(C) and D(3)(d)(ii)(C). The word "association" is made plural in the lead line in paragraph D(3)(f). In subparagraph D(4)(a)(iii), reference to the appropriate section of Rule 69 is added. In paragraph D(4)(b), the word "person's" replaces "defendant's." The second and third sentences of paragraph D(6)(c) are

revised for clarity. In paragraph D(6)(d), the second placement of the word “ascertain” is changed to be consistent with the first sentence of the paragraph. Reference to Rule 20 in paragraph D(6)(e) is amended to conform with Council formatting and a comma is deleted and the sentence is revised for clarity.

A comma is deleted from paragraph D(6)(f). In paragraph D(6)(g), the existing sub-listing (using i and ii) is inconsistent with the rules' format and is revised to eliminate the sub-listing and to add correct punctuation. In subparagraphs F(2)(a)(i) and F(2)(a)(ii), the words "if any" are added and a semicolon replaces a comma in subparagraph F(2)(a)(ii). A comma is added to the lead line in paragraph F(2)(d). In section G, the articles "a" and "the" are added three times and once respectively, and the word "that" is added to improve readability.

The listed changes, other than those identified in the first paragraph that specifically refer to a change in existing procedure, are made without the intention to effect changes to the rule’s meaning or operation

Rule 9 Comment

Section H is added to define and section B is amended to authorize electronic service to complement electronic filing on the system provide by the Oregon Judicial Department as part of the statewide transition to eCourt. In light of these changes, the word “papers” is replaced by the word “documents” in section C. The term “e-mail” was retained over “electronic mail” to differentiate service by e-mail in section G from electronic service provided for in section H. Further, section G now requires attorneys who have consented to service by e-mail to notify other parties in writing of a change in the attorney’s e-mail address.

Facsimile service is redefined in sections B, C, and F to reflect current technology without the intention to otherwise effect a change in the rule’s meaning or operation. Section G’s provision that an automatically generated message advising that an intended recipient of e-mail is out of the office is insufficient to support proof of service has been amended for clarity without the intention to change the section’s meaning or operation and has been added to section C to apply also to facsimile service. Section F’s reference to Rule 10 C [now Rule 10 B due to HB 2911 (2015)], adding three days for service by facsimile communication, is amended for clarity without the intention to change the section’s meaning or operation. The same addition of three days is made applicable to service by e-mail in section G, a change from the prior rule.

References to offers to allow judgment in sections A and D are amended to be consistent with previous amendments to Rule 54 E, without the intention to change either rule’s meaning or operation. Likewise, language describing service on a person 14 years of age or older in section B is amended to be consistent with other rules, e.g., Rule 7 D(2)(b) and Rule 27 A (now Rule 27 B (1)), without the intention to change the section’s operation or meaning.

Section E relating to the requirements for documents to be filed is amended for clarity and consistency with Uniform Trial Court Rule 2.010(7) and (11) and now requires certain contact information for the attorney or the document’s author. Other changes to section E are made without the intention to change the section’s meaning or operation.

Finally, there are additions or changes in word usage (one in section A, ten in section B, eight in section C, and four in section E) and punctuation (two in section B and five in section E) that are intended to replace archaic or imprecise language and to improve clarity and consistency without intending to change the rule’s operation or meaning.

Rule 10 Comment

The amendment of section C continues the allowance of three additional days in computing the time in which to respond following service of a document by mail or by facsimile service without the intention to change the previous practice under Rule 9 F (facsimile service) and this section. The same three day extension is now made applicable to documents served by e-mail and by the newly available electronic service, providing equal treatment of these forms of service and specifying that treatment in one provision. The description of the additional time in section C is amended to improve clarity without the intention to change the rule's meaning or operation. With the establishment of eCourt, the word "paper," appearing twice in section C, is replaced with "document."

Two punctuation changes are made in section A and a less accurate or archaic word is replaced in sections A, B, and C to improve clarity and consistency without the intention to change the rule's meaning or operation.

Rule 27 Comment

Rule 27 is substantially rewritten and reorganized. Three significant changes are incorporated into the amended rule:

- 1) absent a waiver authorized by the court, notice of the request for appointment of a guardian ad litem must be provided to the party for whom the guardian ad litem is sought and to other persons or entities (taken largely from ORS 125.060) with the opportunity for objections to be filed and a hearing to be held;
- 2) a new section C authorizes the discretionary appointment of a guardian ad litem for a party who is disabled but for whom the appointment of a guardian ad litem is not required; and
- 3) direction is provided in section I on the procedures necessary to obtain court approval of any settlement that will involve the receipt of money or property by the party for whom the guardian ad litem was obtained.

Section E's requirement of providing notice to the party and to other listed persons or entities can be waived or modified by the court under section H for good cause shown. The notice and related procedures specified in sections D through G are not applicable when the appointment is made on the court's own motion or pursuant to a statute that provides for a different procedure.

The reorganization of Rule 27 includes changes to section A and section B to make those sections applicable to minors, incapacitated persons, or financially incapable parties; previously section A pertained to minors and section B pertained to incapacitated and financially incapable persons. The requirement that the court appoint a suitable person (in sections A and B) is now found in section D. The procedures in the former subsections A(1) and A(2) applicable for minors who are plaintiffs or defendants of various ages are now found in subsections B(1) and B(2). The procedures applicable for parties who are incapacitated or financially incapable formerly found in subsections B(1) and B(2) are now found in subsections B(3) and B(4).

The list of those persons who may apply for appointment of a guardian ad litem in subsections B(1) and B(2) now includes other interested persons, consistent with case law. The terms "plaintiff" and "defendant" are amended to include their equitable counterparts "petitioner" and "respondent" for clarity.

Section D requires the filing of a motion supported by one or more affidavits or declarations that will provide the court with a factual basis to determine whether the appointment is appropriate. Section E identifies persons or entities, taken from ORS 125.060,

in addition to the party for whom the appointment is sought, to be served with notice of the motion. Unless the court waives or modifies the required notices, service must occur within 7 days of the filing of the motion for the appointment of a guardian ad litem. Section F describes the content of the notice, including a description of the procedure for filing any objection to the appointment within 14 days from the date of the notice. Section G specifies that a hearing on any objection shall be held as soon as practicable. Section H authorizes the court to waive or to modify the requirements and procedures for providing notice. Section I outlines the procedures for obtaining court approval when a proposed settlement will result in the receipt of money or property by the person for whom the guardian ad litem was appointed.

Rule 46 Comment

Rule 46 was amended to improve clarity. In section A, use of “apply” and “application” are changed to the correct terminology, “motion.” Likewise, “submitted” is changed to “served.” Language describing the court is changed to “circuit court.” Discovery methods are more accurately described. An extraneous comma is deleted and three commas are added. References to rules 39 and 40 are separately stated for consistency. One archaic “such...as” is replaced. The article “an” is added twice and the phrase “attorney’s fee” is altered to avoid a possessive. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

Subsection A(2) now requires that the items a party seeks to discover be “identified,” rather than “set out,” at the beginning of the motion.

In section B, lead lines are added. Three internal references to the rules are consistently and separately stated. Four archaic uses of the word “such” have been modernized. A preposition is corrected in subsection B(1). Paragraph B(2)(a) is rewritten for clarity. Punctuation between the paragraphs in section B(2) is corrected. Paragraph B(2)(d) and subsection B(3) are rewritten for clarity. “Attorney’s fee” in subsection B(3) is amended to not require a possessive form. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

Section C is amended to make the words “admissions” and “grounds” singular rather than plural, and “attorney’s fee” is amended to not require a possessive. The existing sub-listing by number within the section is inconsistent with the rules’ format and is eliminated, and proper punctuation for a series is added. One archaic use of “such” is eliminated. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

Section D’s lead line is amended to read more clearly and to remove a reference to language previously moved to Rule 36. The existing sub-listing by number within the section is inconsistent with the rules’ format and is eliminated. “To,” “or,” and “where” are added to or substituted for existing language. Two archaic uses of “such” are modernized. An internal reference to the rule is amended to be consistent with other rules. Two commas are added and “attorney’s fees” is made non-possessive. The listed amendments are made for the purpose of improved clarity and consistency and are made without the intention to effect a change in the section’s meaning or operation.

Rule 54 Comment

The title of Rule 54 is amended to follow and correctly reflect previous changes to section E. In subsection A(1), the existing alphabetical sub-listing is deleted as inconsistent with the rules' format and the Arabic numeral "5" replaces the word "five" to achieve consistency. Two archaic uses of "such" are reworded. One internal reference to the rule is restated to achieve consistency. The listed changes are not meant to effect a change in the section's meaning or operation.

In section B, two archaic uses of "such" are modernized. The correct term, "motion," replaces "application" and the second sentence of subsection B(3) is amended for clarity. The listed changes are not meant to effect a change in the section's meaning or operation.

Lead lines are added to section D and one archaic use of "such" is modernized. The listed changes are not meant to effect a change in the section's meaning or operation.

Lead lines are also added in section E. References to statutes and internal references to the rule are amended to achieve consistency. Three archaic uses of "such" are modernized. The word "seven" is replaced with the Arabic number "7" to be consistent with other rules. Two amendments, "accepted offer" for "same" and "from" for "of," are made for clarity. The listed changes are not meant to effect a change in the section's meaning or operation.

Rule 55 Comment

Rule 55 is amended for improved clarity. In section A, two archaic uses of “such” are reworded, one comma is deleted, and three commas are added. The phrase, “title of the action” is amended to read “the case name, and the case number” to improve accuracy. The listed amendments are made for the purpose of improved clarity and consistency and are not meant to effect a change in the section’s meaning or operation.

In section B, one archaic use of the word “such” is reworded. Four commas are added. An existing numerical sub-listing is deleted as inconsistent with the rules’ format. The listed amendments are made for the purpose of improved clarity and consistency and are not meant to effect a change in the section’s meaning or operation.

Section C is reorganized for clarity. Lead lines are amended and expanded. An amended paragraph C(1)(a) now identifies the purposes for which subpoenas may be issued, provisions that were found in the former subsection C(1). New paragraph C(1)(a) describes how subpoenas require attendance of persons or production of things in civil actions. New paragraph C(1)(b) refers to foreign depositions. New paragraph C(1)(c) describes subpoenas requiring attendance out of court. Subsection C(2) specifies who has authority to issue subpoenas, provisions that were found in the former subsection C(1). New paragraph C(2)(a) authorizes issuance of a subpoena by the clerk of the court or by judges, justices, and attorneys, and was moved from the former subsection C(1). Subparagraph C(2)(a)(i) restates (from former subsection C(2)) that subpoenas may be issued in blank but now includes a better defined requirement that the attorney or party requesting the subpoena must, before service, include the name of the person to appear or the things to be produced and the time and the location for the appearance or production. Subparagraphs C(2)(b) through C(2)(d) authorize clerks, judges, justices, and attorneys to issue subpoenas in specified categories of proceedings: foreign depositions, out-of-court, and in civil actions. The listed amendments are not meant to effect a change to the section’s meaning or operation, but now specify what is required of an attorney or party to “fill in” a blank subpoena.

In subsection D(1), an internal reference to the rule is amended to be consistent with the rules’ format. Two commas are added and another comma is deleted. The articles “the” and “a” are added. “Copies” is made singular to be in agreement with the verb. The phrase “that is” is added. The word “seven” is replaced with the Arabic numeral “7” to achieve consistency.

Lead lines are added or amended in subsections D(2) through D(5). The articles “an” and “a” are added three times in paragraph D(2)(a) and an internal reference to the rule is amended to be consistent with the rules’ format. In paragraph D(2)(b), the phrase “the officer’s” is added for clarity and an archaic use of “such” is reworded. An internal reference to

the rule in paragraph D(2)(c) is made consistent with the rules' format. Two commas are deleted from subsection D(3). "Designation" is changed to "form," "that is" is added, and "three" is replaced with the Arabic numeral "3" in paragraph D(3)(c).

In subsection D(4), the article "a" is added and in subsection D(5), two semicolons and a comma are added and a comma is deleted. The listed amendments in section D are made for the purpose of improved clarity and consistency and are not meant to effect a change in the section's meaning or operation.

In section E, a comma is added and two archaic uses of "such" are reworded without the intention to change the section's meaning or operation.

An internal reference to this rule and references to Rule 39 C and Rule 40 C are amended in section F to be consistent with the rules' format. Five archaic uses of "such" are deleted or reworded. "As" is replaced with "that" twice. The article "the" is added as is the preposition "of." "The word "all" is replace by "any." The listed amendments are made for the purpose of improved clarity and consistency and are not meant to effect a change in the section's meaning or operation.

In section G, the word "to" is deleted from the lead line. The word "to" is added twice and one archaic use of "such" is reworded without the intention to change to the section's meaning or operation.

Lead lines are added in section H. In subsection H(1), "which" is amended to "that" five times. One comma is deleted and one comma is added. Two archaic uses of "such" are reworded. In subsection H(2), two archaic uses of the word "such" are reworded and the word "to" is added. The word "and" is moved, a period is deleted, and a semicolon is added to reflect a reorganization of subparagraphs H(2)(a)(i) to H(2)(a)(iii) within the subsection, and moving a formerly unattached sentence to subparagraph H(2)(a)(iv). Subparagraph H(2)(a)(iv) is reworded to flow with the immediately preceding subparagraphs. In paragraph H(2)(c), two internal references to the rule are amended to be consistent with the rules' format. The archaic "therewith" is reworded. The word "five" is replaced with "5" to be consistent with the rules' format.

In paragraph H(2)(d), the word "title" is amended to specify the "name of the court, case name" and an extraneous comma is deleted. In paragraph H(2)(e), "which" is replaced with "that." In paragraph H(2)(f), an internal reference to the rule is amended to be consistent with the rules' format. Another internal reference to the rule in paragraph H(3)(a) is amended for consistency with the rules' format. A colon, a comma, and two semicolons are added and two commas are deleted; the article "the" is added twice; and the word "prepared" is repeated in subparagraph H(3)(a)(iii.)

In paragraph H(4)(b), an internal reference to the rule is amended to be consistent with the rules' format. The listed amendments to section H are made for the purpose of improved clarity and consistency and are not meant to effect a change in the rule's meaning or operation.

Rule 67 Comment

The lead line for section C is amended for clarity. In section D, one comma is deleted and one comma is added; six words are added; and the word “same” is deleted for clarity. The word “which” is amended to “that” twice and “such” is reworded three times in section E. In section F, “of” is replaced by “by,” “which” is replaced by “that” twice, and “such” is replaced by “the.” The first sentence in subsection F(2) is broken into two sentences.

The listed amendments are made for the purpose of improved clarity and consistency and are not meant to effect a change in the rule’s meaning or operation.

Rule 68 Comment

Rule 68 is amended in three significant respects:

1. A new subparagraph [C(4)(d)(ii)] authorizes the court to exercise discretion to expand the 14 day period for filing and serving statements of attorney fees and objections thereto, and the 7 day period for filing and serving a response to any objection, and the court may in its discretion allow filing or service of those documents after the specified time has expired;
2. A new subparagraph [C(5)(b)(ii)] authorizes the court to exercise discretion to award attorney fees or costs and disbursements in the form of a limited judgment after the entry of a limited judgment that affects fewer than all of the parties or fewer than all of the claims or defenses in a case;
3. A new subsection [C(7)] is added to provide a procedure for a party to seek a supplemental judgment for attorney fees or costs and disbursements for those additional attorney fees and costs and disbursements incurred in collecting or enforcing the underlying judgment;

Other changes for clarification or consistency include a change to the title of the rule to more readily identify the rule as the procedure for drafting statements of attorney fees and the related objections and responses. Internal references to the rule are amended in subsection A(2), subsection C(3), subsection C(4), paragraph C(2)(a), and paragraph C(4)(g) for accuracy and consistency. Eight archaic or imprecise uses of “such” are deleted or reworded. The paragraphs within subsections C(1) and C(4) are amended to conform to the Council’s format. Lead lines are added or amended from paragraph C(2)(b) through subparagraph C(5)(b)(ii). The word “or” is substituted for “and” in subsection C(3) and in paragraphs C(6)(a) and C(6)(b). The article “a” is added in paragraph C(4)(a). References to Rule 67 are deleted in paragraphs C(4)(a) and C(5)(a) as unnecessary. Clarification is made that objections and responses to objections are to be filed as well as served within their respective timelines in paragraphs C(4)(b) and C(4)(c), and the word “seven” is replaced with the Arabic numeral “7” in subparagraph C(4)(c) for consistency. The word “title” is replaced with “caption” in paragraph C(4)(g). The words “or supplemental” are added in subparagraph C(5)(b)(i) to more properly describe the judgments to which the subparagraph refers. The amendments listed in this paragraph are made for the purpose of improved clarity and consistency and are not meant to effect a change in the rule’s meaning or operation.

Rule 69 Comment

The amendment of subsection B(2) is to make clear that the notice of intent to apply for an order of default cannot be served prior to the expiration of the time for filing a responsive motion or pleading. Some parties have been observed serving the notice concurrently with the summons or during the time for filing a response, in essence treating the 10 days afforded in Rule 69 B to be concurrent, not consecutive, with the time authorized in which to defend.

The citation to the federal statute in paragraph C(1)(e) is amended to conform with a preference for official citations.

Rule 73 Comment

The lead lines for sections A and C are amended for clarity. Two archaic uses of “such” are reworded and five uses of the word “which” are changed to “that.” An article “the” is added and the punctuation and a disjunctive “or” are amended in subsection A(2). Subsections B(1) through B(4) are revised to conform to the Council’s format. In subsection B(3) and in section D, three uses of the indefinite pronoun “it” are replaced by the appropriate nouns. The word “debtors” is added in section D. The listed amendments are made for the purpose of improved clarity and consistency and are not meant to effect a change in the rule’s meaning or operation.