STAFF COMMENTS TO
THE AMENDMENTS TO THE
OREGON RULES OF CIVIL PROCEDURE
PROMULGATED 12-3-16

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 2015-2017 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.councilоncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

Rule 9

The significant change in Rule 9 is an attempt to authorize e-mail service of documents and to better facilitate e-mail service between parties or counsel who consent to that mode of service. The amendment also defines when e-mail service occurs in cases where consent is given as well as when there is no consent. Section G of the current rule requires that a party agree in writing to accept service by e-mail before e-mail can be used as a method of service on that party and, additionally, requires confirmation of receipt of the e-mail in all cases for service to be complete. The amendment to section G provides that service by e-mail is one of the accepted methods of serving documents on other parties, unless a party or an attorney is exempted from service by e-mail by an order of the court. The amendment specifies that parties and lawyers who consent to receive service by e-mail are deemed to be served at the time of the transmission of the e-mail. For those parties and attorneys who do not consent to service by e-mail, service is complete only if the receiving party confirms receipt of the e-mail, and service is deemed to have occurred when the receiving party confirms receipt. (*See*, subsection C(3) and section G.)

Automatically generated messages from the recipient that will not support a certificate of service are further clarified in subsection C(3). Section G now requires that the name and e-mail address of any party, attorney, or attorney's designee serving documents by e-mail or by electronic service must appear on the document served rather than in the prior agreement to accept e-mail service. The amendment also requires any party or attorney who has communicated by e-mail or who has used electronic service to notify the other parties in writing of any change in the party's or attorney's e-mail address. Service by e-mail remains subject to the three-day extension specified by Rule 10 B for the recipient to act or to respond.

The title of Rule 9 is amended to delete the word "papers" and insert "documents" in recognition of the implementation of electronic filing. Section B is amended to better state that Rule 9 specifies the methods of service for all documents other than those documents, e.g., summonses and writs, that are governed by Rule 7 and Rule 8. (Documents to bring a party into contempt also continue to require personal service.)

Service by e-mail and service by facsimile are no longer described jointly in section B and section C; each method now receives separate treatment. Office service in section B is rewritten to remove ambiguity as to whether or not the person served is a clerk and whether the person served is in charge of the office or is in charge of the clerk, all without the intention to effect a change in the rule's meaning or operation. With the implementation of electronic filing of documents, section B's requirement of "filing a copy" of documents for any party who has appeared without providing an address for service is deleted. However, see subsection C(5), for applicable certificate of service requirements.

To improve readability, the phrase "service upon" or "upon the document" and like uses of "upon" are amended to "service on" and "on the document" twice in section A, six times in section B, twice in section C, once in section E, and twice in section F, all without the intention to effect a change in the rule's meaning or operation.

The requirements for certificates of service are more precisely delineated in five new subsections under section C. One change is in the new subsection C(2). Session law c. 255, section 15 (2007), authorized a sheriff to sign a certificate of service for facsimile service, seemingly authorizing sheriffs to serve documents on defendants and respondents by facsimile. The inclusion of the "or sheriff" language appears to be an error and is deleted. The Oregon Sheriff's Association confirmed that service of documents on defendants and respondents via facsimile was not understood to be among the service methods used by sheriffs.

Requirements for certificates of service for electronic service and for service on parties who did not provide an appropriate address for service are now specified in subsection C(4) and subsection C(5), respectively, with the expectation that the court's record of how service was achieved will be improved thereby.

Rule 22

The significant change to Rule 22 is opening up the right for "any party" to assert a claim against a third-party defendant who is brought into the action, so long as the claim arises out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. (*See*, subsection C(1)). The current rule specifies only that "the plaintiff" may assert a claim against such third-party defendants. Some trial courts have restricted the right to litigate such claims to plaintiffs; other courts have allowed other parties to also pursue such claims, likely in the interest of judicial economy.

The adjectival use of "third-party" is properly hyphenated in the title, the lead line of section C, 23 times in section C, and once in section E without the intention to effect a change in the rule's meaning or operation. The noun "third-party defendant" replaces the phrase "third party," once in subsection C(1) and once in subsection C(2), for clarity and without the intention to effect a change in the rule's meaning or operation.

A number of other changes specified in this paragraph are made to improve clarity, consistency, or grammar without the intention to effect a change in the rule's meaning or operation. The word "such" is replaced with "that" in subsections A(1) and B(1) to modernize the language. A comma is added in subsection B(1). Internal lettered headings and accompanying punctuation are deleted in subsection B(1) as contrary to Council format that reserves such headings for sections, paragraphs, and parts. The word "upon" is replaced with "on" in subsection B(3) and in subsection C(1), and with "on the" in section E. The word "which" is replaced with "that" in

subsections C(1) and C(2). In section D the language “Rules 28 and 29" is replaced with “Rule 28 and Rule 29" for consistency and to facilitate word searches. Internal numbered headings and accompanying punctuation are deleted in section E as contrary to Council format that reserves such headings for subsections, subparagraphs, and subparts.

Rule 27

The word “or” is added at the end of subsection B(3) and prior to subsection B(4) to correct an omission in the 2014 promulgation and without the intention to effect a change in the rule’s meaning or operation.

Rule 36

The changes made to Rule 36 are made to improve clarity, consistency, or grammar without the intention to effect a change in the rule’s meaning or operation. The word “upon” is replaced with the word “on” once in section A, four times in section B, and once in section C. The word “upon” is also removed in section A. An unnecessary comma is deleted in section A. The word “which” is replaced with “that” three times in section B and once in section C. The article “a” is added in subsection B(1). Four lead lines are added to paragraphs under subsection B(2). Subsection B(3) is organized into paragraphs and two lead lines are added. The word “insure” is replaced with the word “ensure” in paragraph B(2)(b). Internal lettered headings and accompanying punctuation are deleted in paragraph B(3)(b) as contrary to Council format that reserves such headings for sections, paragraphs, and parts. The sentence that included these lettered headings is also modified for greater clarity. Internal numbered headings are deleted in subsection C(1) as contrary to Council format that reserves such headings for subsections, subparagraphs, and subparts. Section C is organized into subsections with two lead lines added.

Rule 43

The significant change to Rule 43 relates to requests to obtain discovery of electronically stored information (ESI) and is found in section E. The Council amended Rule 43 in 2010 to facilitate the exchange of ESI. The 2016 amendment authorizes any party to an action in which the discovery of ESI is anticipated, or the court, to request one or more meetings to confer about the scope of production of ESI as well as seven additional but non-exclusive issues that often arise in the discovery of ESI. Subsection E(2) specifies when a meeting to confer can be requested–no sooner than after all parties have appeared or have provided a Rule 69 B(1) notice of an intent to appear. Parties are directed to meet within 21 days of a request. The Council understands that, early in the litigation, one or more of the parties may not yet be aware of what ESI exists. Nonetheless, the Council expects that a meeting early in the case will assist the parties in seeking, and in producing, ESI that more accurately describes what ESI is in fact available and should make the production better meet the parties’ abilities and

expectations. Additional meetings to resolve discovery concerns may be requested as ESI becomes available to the producing party and is received by the requesting party. Good faith compliance with the requirement for meetings to confer under subsection E(2) will be considered by the court in ruling on a motion to compel or a motion for a protective order. The last sentence in subsection E(2) confirms that this duty to confer is separate and distinct from the Uniform Trial Court Rule 5.010(2)'s duty to confer prior to filing a discovery motion. Section E is also organized into two subsections and lead lines are added.

Other changes to Rule 43 include replacing "entry upon land" in the title with "entering property" as a more descriptive term of the discovery encompassed in the rule. This language is also used in a new lead line in subsection A(2). (The first sentence of subsection A(2) makes it clear that "land" is included in the more expansive word, "property.") Section A is treated to a minor reorganization to divide the section into two subsections with new lead lines. Internal numbered headings are deleted as inconsistent with Council format that reserves such headings for subsections, subparagraphs, and subparts. The word "which" is replaced with "that" twice in subsection A(1) and once in subsection B(4). The word "upon" is replaced with "on" once in subsection A(1), once in subsection A(2), and once in subsection B(1); it is deleted once in subsection B(2) and once in section D.

Lead lines are added for the five subsections in section B for clarity. Minor modifications are made to the language of subsection B(2) and paragraph B(2)(a), again for greater clarity. Paragraph B(2)(b) and paragraph B(2)(c) are reorganized to read consistently with paragraph B(2)(a). The amendments, other than those previously discussed related to ESI, are made to improve clarity, grammar, and uniformity without the intention to effect a change in the rule's meaning or operation.

Rule 45

The significant change in Rule 45 is to reorganize section F to create an additional class of requests for admission that are not included in the current limitation of 30 such requests. Section F is organized into two subsections with lead lines. Subsection F(2) authorizes a "reasonable number" of additional requests for admission to establish the authenticity and admissibility of documents under Oregon Evidence Code Rule 803(6) [ORS 40.460(6)], often called the "business record exception to hearsay." This amendment is expected to reduce the number of times the custodian of the records will be required to appear and testify at trial when a party fails or refuses to stipulate to the authenticity and admissibility of documents.

Other changes to Rule 45 include replacing the word "upon" with "on" four times in section A, twice in section B, and once in subsection F(1). "Type size" is replaced with "font size at least as large as that" in section A. The word "such" is replaced with "that" once in section B and five times in section D. "Subserved thereby" is replaced with "furthered" in section D. An unnecessary comma in subsection F(1) is deleted. The modifications specified in this paragraph are made to improve grammar and clarity and to modernize the language without the intention to effect a change in the rule's meaning or operation.

Rule 47

The significant changes in Rule 47 are found in sections A, B, and H. In sections A and B, the existing language did not appear to authorize the use of a motion for summary judgment to challenge an affirmative defense. It was reported that some trial court judges were not allowing a motion for summary judgment to be so utilized. The limitation has not been universally applied. *Hooker Creek v. Central Oregon Land Development*, 279 Or App 117 (2016), discloses without further comment that in the trial court proceedings a party used a Rule 47 motion successfully against an affirmative defense. In section A and section B, the language "claim, counterclaim, or cross-claim" is replaced with "any type of claim," an expansive phrase meant to encompass all of the previously listed claims. Also in section A and section B, the language "all or any part thereof" (of a claim) is expanded and modernized to read "all or any part of any claim or defense." Likewise, in section H, "claims" is expanded to read "claims or defenses." In section A, the second use of "upon" is replaced with "as to" to read consistently with section B.

Section G is rewritten to more clearly state that, if a court finds that an affidavit or declaration supporting or opposing a Rule 47 motion is presented in bad faith or solely for the purpose of delay, the court shall order the party filing that affidavit or declaration to pay the other party's expenses and attorney fees that were caused by the filing of the affidavit or declaration. However, the court is no longer required to enter such an order "forthwith"; the court is required to enter an order for the listed sanctions but may do so with the timing left to the court's discretion.

Other changes include replacing "shall" with " must" once in section C, four times in section D, and once in section E in an attempt to clarify the intended meaning, i.e., a party is required to observe the timing and content requirements specified in the rule if the party chooses to file a motion for summary judgment; no party has a duty to file a motion for summary judgment. Still other changes include replacing "upon" with "on" one time in section A, one time in section C, and one time in section D. An Oxford comma is added in section C and section D; three additional commas are added in section D; and one comma is deleted and three are added in section E. The word "papers" is replaced with "documents" in section D. In the last sentence in section D, a clause beginning with "but" is replaced with "rather" and the punctuation is

changed from a comma to a semi-colon. The word “which” is replaced with “that” in section E and in section G. The word “such” is replaced once with “the” and once with “any” in section F. In section H, the word “less” is replaced with the word “fewer” and, again, it is clarified that a limited judgment can be entered when fewer than all parties or fewer than all claims or defenses are resolved by a motion for summary judgment. The modifications specified in this paragraph are made to improve grammar and clarity and to modernize the language without the intention to effect a change in the rule’s meaning or operation.

Rule 57

The only change in Rule 57 is to delete unnecessary internal lettered headings and accompanying punctuation in subsection F(3) as contrary to Council format that reserves such headings for sections, paragraphs, and parts. The amendment furthers consistency within the rules without the intention to effect a change in the rule’s meaning or effect.