STAFF COMMENTS TO
THE AMENDMENTS TO THE
OREGON RULES OF CIVIL PROCEDURE
PROMULGATED 12-8-18

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 2017-2019 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 7

The significant change to Rule 7 relates to service by alternative means [ORCP 7 D (6)], often referred to as service by publication or service by posting. When the defendant or respondent cannot readily be found so that personal service, substitute service, office service, or service via other procedures spelled out in ORCP 7 D can be effected, the plaintiff or petitioner may file a motion to allow service of the summons and complaint or petition on the defendant by use of an "other method." It should be noted that seeking an order to serve the summons and complaint by use of an "other method" is not appropriate unless the defendant cannot be served "by any method otherwise specified in these rules [the ORCP] or [any] other rule or statute." Further, the "other method" proposed should meet the ORCP 7 D(1) constitutional standard, i.e., that the "method or combination of methods [chosen] . . . under the circumstances is the most reasonably calculated to apprise the defendant of the existence and pendency of the action" so as to afford the defendant a reasonable opportunity to appear and defend.

It also should be noted that a successful motion that gains a court's approval to serve by an "other method" does not protect the plaintiff from a collateral attack, typically under ORCP 69 or ORCP 71, alleging that the plaintiff's attempts to locate or to serve the defendant, or the "other means" of service chosen, were inadequate and that any judgment is void, personal jurisdiction never having been established. *See, In re Marriage of Dhulst*, 61 Or App 383, 657 P2d 231 (1983).

The previous version of the rule, [ORCP 7 D(6)(a)] described publication, posting, and mailing as "other methods" of obtaining service. Although some direction was provided regarding the requirements for publishing and for mailing the summons for the purpose of service, oddly, subsection 7 D(6) offered no guidance as to how service by posting should be accomplished.

The tools for service by alternative means described in the previous version of Rule 7D have proven to be inadequate. Publication is an established alternative method of service, despite the relatively high cost. However, Council members expressed the view that service by publication has little likelihood of providing actual notice to a defendant. Council members essentially agreed with the sentiments expressed in *Dickenson v. Babich*, 213 Or 472, 476, 326 P2d 446, 448 (1958): "Service of process by publication is at best a harsh and technical substitute for personal service of summons . . . even being described as a 'miserable substitute' for personal service . . . ." Some Council members did believe that service by publication might be more effective in rural counties.

Alternative service by mail (first class and another mailing, e.g., certified, that requires a signature from the recipient) is uncertain, as the mailing requiring a signature is often unclaimed or refused. Even when a recipient signs a return receipt, the signature is often

undecipherable. Therefore, service has been effected but the plaintiff cannot be confident that a subsequent attack on the validity of that service will not ensue. That said, the primary shortcoming of mailing as an alternative service method is that a reliable address for the defendant often cannot be located.

Although subsection 7 D(6) of the previous version of the rule offered no direction as to where and how to serve by posting, such service is generally understood to be accomplished by posting a copy of the summons and complaint at the local courthouse or at a specific location where the posting might attract the defendant's attention. The amendment provides better direction on where the summons and complaint are to be posted and includes posting at the courthouse in all cases. If the plaintiff knows of no physical address where the defendant might be found, posting at the courthouse likely provides only the form of service, not the substance.

The Council's rewrite of subsection 7 D(6) authorizes, if approved by the court, service of the summons and complaint by the methods provided in the previous version of the rule and, also, by e-mail, text message, facsimile transmission, or posting to a social media account. This array of methods of alternative service by electronic means is believed to be the most comprehensive codification that has been put into effect in any jurisdiction in the United States. The inclusion of alternative service by electronic means in the amendment is considered to represent a reliable improvement over the current rule.

The inclusion of alternative service by electronic means was undertaken due to suggestions from the bar. Some defendants have historically been difficult to locate and that problem has been exacerbated by changes in communications and technology. Geography – where a person is physically located – may be less relevant to getting notice to a defendant than is the defendant's location in cyberspace. For example, many households have abandoned their traditional "land line" telephones and rely solely on cellular telephones.

In addition to providing guidance as to the content of an affidavit or declaration seeking an order to allow alternative service by electronic means, subparagraphs 7 D(6)(b)(i) and 7 D(6)(b)(ii) of the amendment provide direction on the content and placement of the information to make it more likely that the recipient will be notified that he or she is being sued. Finally, paragraph 7 D(6)(b) requires that the certificate of service in cases of alternative service by electronic means must be amended if, subsequent to that service, "it becomes evident that the intended recipient did not personally receive the electronic transmission."

It should be noted that alternative service by electronic means would essentially foreclose establishing ORCP 4 personal jurisdiction based on the defendant's presence at a geographical location at the time of service. *See, Pennoyer v. Neff*, 95 US 714, 24 LeD 565 (1877).

An additional requirement is made applicable to all methods of alternative service. If the

plaintiff has knowledge of or can ascertain a current or last-known address for the defendant, the alternative service by mail method must also be used, e.g., the summons and complaint must be mailed to the defendant by both first class mail and by certified mail or another mailing that requests a return receipt.

The amendment's subsection 7 D(6) as a whole provides practical measures for providing notice of the filing of actions to defendants while satisfying defendants' constitutional rights to receiving notice: 1) alternative service is only available when the primary forms of service enumerated in subsection 7 D(2) through subsection 7 D(5) are not possible; 2) alternative service is directed by a judge; 3) safeguards for service by electronic means are written into the amendment; and 4) judge members on the Council are currently using text messages and other forms of electronic communication to communicate future proceedings in cases, e.g., notifying criminal defendants of upcoming hearings.

The reorganization of subsection 7 D(6) resulted in paragraphs 7 D(6)(e), 7 D(6)(f), and 7 D(6)(g) of the previous version of the rule being re-designated as paragraphs 7 D(6)(c), 7 D(6)(d), and 7 D(6)(e). In cases where alternative service was made by publication, paragraph 7 D(6)(f) of the previous version of the rule authorized a defendant (or a defendant's personal representative) to, on motion with sufficient cause, appear and defend in a case at any time prior to entry of a judgment and, as allowed by the court's discretion, to be allowed to defend after entry of judgment for a further period of one year. Oddly, the same right to appear and defend after a default or after entry of judgment did not extend to cases where the service was by some other alternative means, e.g., posting, that would generally be thought to be at least as unreliable as service by publication. The amendment, in new paragraph 7 D(6)(d), affords any defendant served by any of the alternative service methods the same opportunity to seek leave to defend after default and after entry of judgment.

An amendment, in section 7 E, clarifies that a plaintiff's attorney, in addition to being authorized to mail the summons and complaint to effect service by mail as authorized in paragraph 7 D(2)(d), is authorized to complete service for substituted service [paragraph 7 D(2)(b)], office service [paragraph 7 D(2)(c)], and service on a tenant of a mail agent [part 7 D(2)(a)(iv)(B)] by mailing copies of the summons, complaint, and a statement detailing the earlier delivery to the defendant.

There are other amendments to Rule 7 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- A lead line is added for section 7 C to improve uniformity and add clarity.
- An internal reference in subsection 7 C(2) is amended to direct the reader to the correct subparagraph of the substantially amended subsection 7 D(6).
- A correction, from "section" to "paragraph," is made in subparagraph 7

D(2)(d)(i).

- The numbers, relating to days or years, in subparagraph 7 D(2)(d)(ii) and paragraph 7 D(4)(b) are now Arabic numerals, in an effort to make such information more searchable.
- Text that was a part of part 7 D(3)(a)(iv)(B) but was incorrectly separated by a line break and indentation, is now included with the preceding text for clarification and to simplify citation. Text in part 7 D(4)(a)(i)(C) was similarly included with the preceding text.
- The word "shall" is replaced by "will" twice in paragraph 7 D(6)(c) and twice more in paragraph 7 D(6)(d), in keeping with current legislative drafting norms.
- In paragraph 7 D(6)(e), a colon is deleted to conform with Council standards, and a comma is added to better convey a series of three conditions. Also, "applicable" is substituted for "authorized" and "the plaintiff" is added to improve clarity.
- In section 7 E, the list of persons not authorized to serve a summons is rewritten to improve clarity.

Rule 15

The primary impetus for an amendment to Rule 15 was to clarify and to correct the previous version of the rule's deadline [at section 15 A] for filing an answer to a cross-claim. That previous language was expressed as the time to respond to a summons. As a cross-claim is not accompanied by a summons, it seemed appropriate to specify the deadline for an answer to a cross-claim as 30 days from the date of service. The clarification was suggested by the Oregon State Bar's Procedure and Practice Committee.

In revising the deadline for responding to pleadings, the time specified for filing a motion or an answer to a complaint or to a third-party complaint is 30 days as specified in the accompanying summons. Rule 7 C(2)'s deadline for responding when the summons is served by publication is restated in section 15 A.

An answer to a cross-claim or motion directed against a cross-claim is required within 30 days of service of the cross-claim. The same is true for a reply to (or a motion responsive to) a counterclaim.

The section's last amendment [the 1994 promulgation] intended to clarify that replies to counterclaims were due within 30 days, not 10 days as the then-existing section seemed to specify. However, the 10-day deadline remained in the section for "any other motion or responsive pleading." In light of Rule 13, that would by default apply only to a "reply to assert any affirmative allegations in avoidance of any defenses asserted in an answer," i.e., a reply to an affirmative defense. A reply to an affirmative defense is not automatically appropriate in

every case and the Council was persuaded that the deadline for responding to all pleadings should be uniform – 30 days. Accordingly, the last sentence of section 15 A referring to a 10-day deadline for "any other motion or responsive pleading" is deleted.

It should be noted that Rule 15 D does not entitle the movant to seek enlargement of the time for numerous "substantive" motions available to the parties throughout the ORCP. The time for a party to exercise some rights, e.g., motions for judgment notwithstanding the verdict under Rule 63 and motions for a new trial under Rule 64 cannot be enlarged. Before relying on Rule 15 D to obtain more time in which to exercise a right or remedy, counsel must consult case law surrounding the specific right or remedy to determine whether any timeline that is involved is inflexible.

There are other amendments to Rule 15 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word "shall" is replaced with "must" twice in section 15 B and once in section 15 C, in keeping with current legislative drafting norms.

- The word "such" is replaced with "that" in section 15 B and with "any" in section 15 D, in the first instance to modernize the language and in the second instance for clarity.

Rule 16

An amendment was made to Rule 16, adding a new section B and re-designating the previous section 16 B, section 16 C, and section 16 D as section 16 C, section 16 D, and section 16 E, respectively. The amendment was in response to a comment from a judge noting that supplemental local rules in Multnomah County (SLR 2.035) and in Clackamas County (SLR 2.016) appeared to authorize known parties to engage in litigation under fictitious names. The comment noted that Rule 26 A appears to prohibit the practice: "Every action shall be prosecuted in the name of the real party in interest." The comment observed that Rule 16 A also appeared to require the use of the parties' names. (ORCP 20 H authorizes the use of fictitious names "[w]hen a party is ignorant of the name of an opposing party"; such parties are generally designated as "John Doe" or "Jane Doe.") Further, Article I, Section 10, of the Oregon Constitution seems to mandate open courts: "No court shall be secret, but justice shall be administered openly . . . ." The judge's comment observed that, contrary to the rules, litigants are seemingly filing and litigating cases using identifiers other than their true names, particularly when the subject matter of the cases is of a personal or embarrassing nature.

The Multnomah and Clackamas counties' supplemental local rules, nearly identical, allow parties to litigate cases under fictitious names, but only on motion. Council members noted

that, when parties file cases using a name other than their true name, they frequently simply file the case and serve the complaint.

The Council determined that, if litigants are filing civil actions using names other than the plaintiffs' true names, and if the practice is not clearly prohibited by Article 1, Section 10, of the Oregon Constitution, there should be a procedure for the practice. The Council, in part based on Appellate Rule 2.25(4), determined that the practice is not strictly barred by Article I, Section 10. (Also, ORCP 26 A appears to be directed more as a prohibition on the use of proxies in litigation.) Therefore, the Council addressed the issue as procedural. If a party wishes to commence and litigate a case under a name other than his or her true name, a motion seeking leave to proceed under a pseudonym is appropriate. (The Council elected to refer to the practice as the use of a pseudonym, not a fictitious name; fictitious names are for unknown parties.)

Presumably such a motion would be presented ex parte, contemporaneously with filing the action. Section 16 B creates a procedure for seeking leave to litigate using a pseudonym; it does not create a substantive right to litigate using a pseudonym. It will be the litigant's responsibility to establish in the motion and in any supporting affidavits or declarations a factual and a legal basis to be granted leave to proceed using a pseudonym. The amendment likewise is neutral as to whether a plaintiff is required under Rule 3.5(b) of the Oregon Rules of Professional Conduct and Rule 3.9(A) of the Oregon Code of Judicial Conduct to give notice to the opposing party prior to presenting a motion to proceed using a pseudonym.

There are other amendments to Rule 16 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word "shall" is replaced with "will" twice in section 16 A, four times in section 16 B, and once in section 16 D, in keeping with current legislative drafting norms.
- A comma in section 16 D is relocated to improve clarity.

<u>Rule 22</u>

One clarifying amendment was made to subsection 22 B(3).Council members observed that instances had occurred where a cross-claim seeking additional relief had been filed by a co-defendant but not served on the opposing defendant because the opposing defendant was in default. Such a failure to serve appears to be based on a misreading of ORCP 9 A: "[n]o service need be made on parties in default for failure to appear . . . . " Indeed, the balance of the sentence reads: ". . . except that pleadings asserting new or additional claims for relief against them shall be served . . . in the manner provided . . . in Rule 7." The amendment to subsection 22 B(3) makes clear that, if a cross-claim seeks relief against another defendant, it must be

served on that defendant, even though that party is in default for the party's failure to appear and defend.

There are other amendments to Rule 22 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word "shall" is replaced with "must" two times in section 22 B and two times in section 22 C, and "shall" is replaced with "will" in section 22 D, in keeping with current legislative drafting norms.

Rule 38

Rule 38 was amended in subparagraph 38 C(2)(c)(i) to make the reference to the completely revised Rule 55 more specific.

There are other amendments to Rule 38 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- In section 38 B, numbered designations to emphasize a series of three in a long paragraph are separated into three subsections for clarity and to simplify citations to the relevant part of the section.
- In paragraph 38 C(2)(c), the existing subparagraphs are more completely identified to be consistent with ORCP format.

Rule 43

Section A is amended by moving the phrase "Any party may serve any other party" from immediately following the section lead line and inserting it at the beginning of each of the two subsections to improve clarity and readability.

There are other amendments to Rule 43 that are of a technical nature for the purposes identified below; these are not expected to affect the meaning or operation of the rule.

- The word "shall" is replaced with "must" seven times in section 43 B and with "will" one time in section 43 E, in keeping with current legislative drafting norms.

Rule 44

Rule 44 required an amendment in section 44 E to replace "individually identifiable health information" where that phrase appeared three times with "confidential health information,"

to reflect the concurrent rewrite of Rule 55. Also, two references to "Rule 55 H" are amended to read "Rule 55 D" to be an accurate reference to the completely redrafted Rule 55.

Rule 55

Rule 55 has been the subject of criticism as being overly long, organizationally deficient, and lacking in clarity. Rule 55 is completely rewritten in an effort to remedy its flaws while maintaining, to the degree possible, its operation and meaning.

The previous version of the rule was made up of eight sections; the new rule contains four. Section 55 A is an introductory guide to the basics of all subpoenas: 1) the form and contents of a subpoena; 2) from what court a subpoena may be issued; 3) who may issue a subpoena; 4) who may serve a subpoena; 5) how proof of service is made; and 6) the duties of a recipient of a subpoena.

Section 55 B governs subpoenas that require an appearance and testimony. Subsection 55 B(1) describes the kinds of proceedings to which a witness may be subpoenaed to provide testimony. Subsection B(2) specifies particular requirements for service on individuals and organizations as well as offering or tendering a witness fee. Subsections 55 B(3) and 55 B(4) specify requirements for subpoenaing peace officers and prisoners.

Section C specifies timing and service requirements for subpoenas that require only the production of records (other than confidential health information) and things. Section 55 D replaces section 55 H of the previous rule and details the particularized requirements when confidential health information is the subject of a subpoena.

The Council endeavored to redraft Rule 55 in a manner that would not change the rights, obligations, and procedures contained in the previous version of the rule. It was thought that a change to those rights, obligations, or procedures might adversely impact successfully promulgating a much-improved rendering of those rights, obligations, and procedures. However, with the improved organization, some inconsistencies became apparent. At least one correction was made in paragraph 55 C(3)(a) and paragraph 55 D(6)(a) to make clear that, in accord with ORCP 9 A, copies of subpoenas need not be served on parties who are in default.

Rule 65

Rule 65 required an amendment in subsection 65 D(2). A reference to "Rule 55 G" is amended to "Rule 55 A(6)(d)" to be an accurate reference to the completely redrafted Rule 55.