MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 8, 2018, 9:00 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Jay Beattie
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Hon. Timothy C. Gerking
Hon. Norman R. Hill*
Meredith Holley
Robert Keating
Hon. David E. Leith
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts*
Derek D. Snelling*
Hon. Douglas L. Tookey
Margurite Weeks*
Hon. John A. Wolf*
Deanna L. Wray

Members Absent:

Troy S. Bundy
Jennifer Gates
(1 vacant position)

Guest:

Brenda Tracy

Council Staff:

Shari C. Nilsson, Executive Assistant
Hon. Mark A. Peterson, Executive Director

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 15 ORCP 16 ORCP 22 ORCP 23 C/34 ORCP 38 ORCP 44 ORCP 55 ORCP 65	ORCP 23 C/34	ORCP 7 ORCP 15 ORCP 16 ORCP 22 B ORCP 38 ORCP 44 ORCP 55 ORCP 65	Discovery Guardians Ad Litem ORCP 7 ORCP 15 ORCP 17 ORCP 23 C/34

I. Call to Order

Mr. Keating called the meeting to order at 9:37 a.m.

II. Administrative Matters

A. Approval of September 8, 2018, Minutes

Mr. Keating asked whether any Council members had any amendments to the draft September 8, 2018, minutes (Appendix A). Judge Bailey and Mr. Eiva noted that they were absent from the meeting but that the minutes reflected that they were present. A motion was made and seconded to approve the September minutes as amended to reflect the appropriate attendance. The amended minutes were approved unanimously by voice vote.

Ms. Nilsson noted that Judge Tookey wished to make an amendment to the previously adopted June 8, 2018, minutes. Judge Tookey explained that he wished to change a sentence in the second paragraph on page 24 for clarification. He stated that he would prefer the sentence in question to read, "Judge Tookey suggested that the Council should be careful with lead lines, as lawyers will sometimes rely on them for guidance when they also need to read the text of the rules." Judge Leith made a motion to approve this amendment to the June 8, 2018, minutes. Judge Norby seconded the motion. The amended minutes were approved unanimously by voice vote.

B. Election of Legislative Advisory Committee

Judge Peterson explained that Oregon statutes require the election of a Legislative Advisory Committee (LAC) each biennium; however, the Legislature does not often call on the LAC for counsel. The LAC's purpose is to answer questions for any legislative committee chair and to provide any needed testimony before the Legislature. Judge Peterson stated that the LAC has traditionally been made up of the chair, the vice chair, and one or two judges, usually those who are located in Salem to make travel to the Legislature easier.

Judge Gerking, Judge Bailey, Judge Leith, and Mr. Keating volunteered to be on the committee. Judge Norby volunteered to join if Rule 55 is promulgated. Mr. Keating suggested that Ms. Gates should be on the LAC since she is the vice chair, and also suggested that the LAC be increased to six members.

1. ACTION ITEM: Nominate and Vote on LAC

Mr. Crowley moved to nominate the suggested slate of six volunteers. Judge Bailey seconded the motion, which passed unanimously by voice vote. Mr. Crowley then moved to elect the six nominated volunteers. Ms. Payne seconded the motion, which passed unanimously by voice vote.

C. Council Membership

Ms. Nilsson listed the Council members with terms expiring at the end of the current biennium who are not eligible for reappointment: Mr. Beattie, Mr. Keating, and Judge Gerking. The Council thanked them all for their dedicated service over the years.
Ms. Nilsson then listed the Council members with terms expiring at the end of the current biennium who are eligible for reappointment: Mr. Bundy, Mr. Crowley, Mr. Snelling, Judge Leith, and Judge Roberts. She asked them to contact her or Judge Peterson to indicate whether or not they wish to be reappointed.

Judge Norby asked whether there are term limits for serving on the Council. Ms. Nilsson stated that two consecutive terms are the limit, although there is nothing in the statute that precludes a member from serving again after a hiatus.

D. Set First Council Meeting for September of 2019

Judge Peterson explained that Council tradition has been to set the first Council meeting for the upcoming biennium at the final December meeting of the current biennium. The first meeting is traditionally held on either the first or second Saturday of September in odd-numbered years. Judge Peterson stated that there are no federal or religious holidays on the first two Saturdays of September, 2019. He noted that there is a home game for the Ducks, but that it is a non-conference giveaway. The Beavers are playing an away game. Ms. Payne asked if choosing this meeting would commit the Council to either the first or second Saturday for the rest of the biennium. Judge Peterson stated that the new Council would make that determination during the first meeting.

After consulting their calendars, the Council decided to schedule the first meeting of the 2019-2021 biennium for September 14, 2019, at 9:30 a.m. at the Oregon State Bar offices.

E. Communication with Legislators

Judge Peterson admitted that he has not done a good job in getting draft emails to the Council for Council members to send to their legislators. He noted that, if he can get a draft promptly to Council members after this meeting, it will be useful and will serve to prepare them for the transmittal letter that Mr. Keating will sign. Judge Peterson

explained that, typically, the transmittal letter is written in less "lawyerly" language and is used to show how the Council's work has improved the Oregon Rules of Civil Procedure to work better for the people.

III. Old Business

A. Committee Reports

1. ORCP 23 C/34 Committee

Ms. Wray explained that Mr. Andersen, Judge Leith, and Ms. Payne had planned to work on a suggestion to the Legislature for improving ORCP 23 but that they had not yet gotten to the point of drafting that language. Judge Peterson stated that the issue can be put on the agenda for next biennium. Ms. Payne observed that the point is that the Council decided that it was not appropriate for the Council to take action, so it was going to ask the Legislature to do so. Mr. Keating asked for a refresher on what the issue was. Ms Payne reminded the Council that the issue had to do with defendants who quietly pass away prior to a case being filed against them, and shortly before the statute of limitations bars an action against the estate. Judge Peterson noted that the Council agreed that the issue is a trap for the unwary, but that there is not a procedural rule fix.

Ms. Wray asked whether the language forwarded to the Legislature would have to be approved by the Council. Judge Peterson stated that, if it is a recommendation from the Council, yes. Ms. Wray agreed that there is not time for the language to be sent to the Legislature this biennium because there are no remaining Council meetings. Mr. Andersen observed that the consensus was that the suggestion would have more impact if it came from the Council, but a suggestion could be submitted by anyone. Judge Peterson stated that the transmittal letter goes to house and senate leadership and officers of the judiciary committees. Judge Norby wondered whether a suggestion could be included in the transmittal letter this biennium. Judge Peterson stated that he does not believe so unless it is a proposal that the entire Council agrees on, and there is no time for the entire Council to review such a proposal.

B. Discussion/Voting on Amendments Published September 8, 2018

Judge Gerking asked for clarification on the promulgation process. He wondered whether the published rules will receive up or down votes only, or whether they can be changed at this time. Judge Peterson stated that the Council published the rules and that the bench and bar have had opportunity to look at them. If there is a plain typographical error between publication and promulgation, or something that needs to be clarified, the Council can fix it. In terms of changing a rule to be vastly different, he stated that he does not believe that is permissible because there would be no opportunity for comment at

that point (although the Council always republishes any rule to which a minor change is made, as required by statute). Judge Norby asked what the point of republishing is if there is no chance for comment. Judge Peterson explained that it is to put everyone on notice that a small change occurred after publication.

1. ORCP 7

Judge Norby stated that no comments from the bench or bar regarding the published amendment to Rule 7 (Appendix B) had been received. Judge Peterson noted that he had a conversation with Holly Rudolph, the forms manager for the Oregon Judicial Department. She mentioned that the change requiring amendment of the certificate of service if electronic alternative service turns out to have been delivered to someone other than the defendant will require her to create a new document. Judge Conover wondered how significant this concern is. Judge Peterson stated his conversation with Ms. Rudolph was enlightening in that he learned about the process she uses when creating new forms such as this new amended certificate of service. Ms. Rudolph did wonder why the Council was also approving mail as a form of alternative service when mail is already an approved method of service. Judge Peterson explained to her that sometimes mail comes back unclaimed or refused and a plaintiff will ask the court for leave to serve by alternative means to avoid the defendant attacking the judgment using Rule 71. He noted Judge Roberts' position that, if one is using alternative service, it is a good practice to also serve by mail. He observed that, often, people are not receptive to being served, so careful lawyers sometimes want to use both the belt and the suspenders.

Judge Peterson explained that, during his conversation with Ms. Rudolph, she mentioned that the she looks at the rule as a sort of flow chart when creating her documents. This led Judge Peterson to examine the rule in a similar way, and he noticed that, in subsection D(6), the sentence structure in the three sentences regarding the follow-up mailing that is required if the plaintiff is using alternative service is not parallel. He expressed concern that this could cause students of statutory construction to wonder why the sentences are worded differently, and pointed out that it was not the Council's intention to indicate any difference between the sentences with different language. He stated that he and Ms. Nilsson had drafted some language to improve the subsection's clarity. Ms. Nilsson read the suggested language and Council members made suggestions to improve the word flow. The final language agreed upon was:

> If the plaintiff does not know, and with reasonable diligence cannot ascertain, the current address of any defendant, the plaintiff must mail true copies of the summons and the complaint by the methods

specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and with reasonable diligence cannot ascertain, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

Judge Norby made a motion to adopt the amended language. Ms. Payne seconded the motion, which passed unanimously by voice vote.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 7

Judge Norby made a motion to promulgate the amendment to Rule 7, as amended above. Mr. Beattie seconded the motion, which passed by roll call vote with 19 votes in favor and one opposed.

2. ORCP 15

Judge Gerking apologized for not attending the September meeting. He thanked Mr. Bundy for his summary of Rule 15 at that meeting and for the Council's thorough discussion. He noted that the Council had received no comments regarding the published amendment of Rule 15 (Appendix B). He opined that the amendment has been thoroughly vetted and suggested that the Council approve the promulgation.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 15

Judge Gerking made a motion to promulgate the amendment to Rule 15. Judge Bailey seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

3. ORCP 16

Mr. Crowley observed that the Council had received many comments (Appendix C) about the published amendment to Rule 16 (Appendix B). He noted that most comments were supportive, and that the majority appeared to follow a form response. As far as he could tell, there were two comments opposed to the amendment. One comment was from Judge James Hargreaves, which did not appear to be entirely opposed, as the judge seemed resigned to the idea that the change was going to be approved. However, Judge Hargreaves appeared to be still of the opinion that there is no legal support for the type of change that the Council

published. Attorney David Paul suggested that things are fine as they are right now and did not think the rule change was necessary.

Mr. Crowley stated that one of the things that struck him about the many comments in support of the rule change is that there seemed to be a belief that the rule change gives support to the idea that there is judicial discretion to allow pseudonyms be employed. He stated that he is not sure that was the Council's intent. Rather, the intent of the language of the amendment itself is to provide a procedure for litigants to make an application to the court to allow the use of pseudonyms but the motion needed to be supported by existing law. In other words, the rule change is merely a procedural way for litigants to make that application and it is the court's decision based on the applicable law whether it is appropriate for pseudonyms to be used. He noted that the Council's language is very straightforward, but suggested that there perhaps needs to be a staff comment to clarify that the rule change is not intended to be a substantive change. Mr. Crowley observed that much of the support of the rule change came from organizations, such as the association of district attorneys and victims' rights groups.

Mr. Crowley introduced a guest to speak in favor of the amendment of Rule 16, Brenda Tracy. Ms. Tracy explained that she is a rape survivor who was drugged and gang raped in 1998 by a group of football players, two of whom attended Oregon State University. In 2014, she came forward with her story publicly in the Oregonian. She stated that she came before the Council to support the amendment because she is most concerned about the safety and privacy of survivors of crime. She noted that it is really hard to come forward and say that you are a survivor, and that it is really hard to pursue justice. She stated that anything the Council can to do to support survivors and to empower them to come forward is important. Ms. Tracy observed that survivors often do not come forward in our culture, and one reason is fear of backlash. She stated that she endures this backlash every day, as she is bullied, called names, called a liar, and receives death and rape threats. She stated that she deals with it, but it is not easy. There are days she wants to quit but she does not because she knows how important it is for other survivors to see her coming forward and pushing back on this hatred. She stated that she knows that survivors of stigmatizing crimes are going to endure some backlash no matter what, but some of it can be mitigated in the beginning of a case by allowing survivors to use pseudonyms. She stated that she does not want to discourage survivors from coming forward, because we all deserve the right and opportunity to pursue justice. Ms. Tracy stated that the Oregon Legislature has already done a great job in in supporting survivors and, while this change seems small, it is really big to someone like her and to other survivors. Ms. Tracy thanked the Council for allowing her to come today, and

stated that she had rearranged her schedule to be here. She urged the Council to adopt this amendment. Mr. Keating thanked her on behalf of the Council for a very powerful and moving statement.

Judge Peterson noted that Mr. Crowley had mentioned that the Council is not creating substantive rights with this amendment, and he agreed that such a disclaimer should probably be included in the staff comments. He observed that this clarification is not a big stretch because the Council's enabling statute does not allow it to make substantive law changes. In other words, the Council is neutral on whether Oregon law permits pseudonyms to be used, and that decision is up to individual judges.

Judge Peterson stated that a good part of the discussion during the September meeting had to do with concerns about an ethical trap of ex parte contact. There was some comment that this amendment would allow plaintiffs to go in ex parte and not be concerned about this ethical trap. He does not think that it would. Rule 3.5(b) of the Oregon Rules of Professional Conduct prohibits ex parte contact with a judge, and Rule 3.9 of the Oregon Code of Judicial Conduct also prohibits a judge from having ex parte contact on a matter. He noted that some counties do not have a regularized time for hearing ex parte motions and, if a plaintiff is going to ask to proceed under a pseudonym, the plaintiff would likely ask at the beginning of the case, not later. Multnomah County has a Supplemental Local Rule (SLR) that allows for fictitious names to be used, and Clackamas County has a similar rule. In those rules, a motion seeking leave to proceed using a fictitious name is required to be presented in person at ex parte, rather than filed electronically. For ex parte motions in Multnomah County, one day's judicial notice is required to be given to the other side unless it is a motion for a temporary restraining order. So, unless a local jurisdiction writes into a SLR that this can be an ex parte contact that does not require advising the other side, Judge Peterson believes that advising the other side is necessary.

Mr. Eiva observed that there is no other side until you have filed the case. Judge Peterson disagreed. He recalled that he once needed to sue a mental health facility, and the Illinois Secretary of State did not have a website to tell him who to designate as the proper party defendant, so he called the facility. The person at the other end of the telephone conversation asked why he wanted to know. His response was, "Because we are suing you." Judge Peterson pointed out that a plaintiff is required to contact the other side unless a SLR says that such contact is not required, because otherwise the other side does not have an opportunity to be heard. Mr. Eiva noted that the defendant can object after a plaintiff files. Judge Peterson stated that does not think that this amendment avoids the ethical requirement to not have ex parte contact with a judge. Judge Gerking asked

whether that rule applies to prospective litigation that has not yet been filed. Judge Peterson recalled that there was a fairly beefy discussion at the Council's September meeting as to whether the amendment would give a free pass to approach a judge ex parte. Mr. Eiva explained that this is commonly done in conservatorship cases where a party is given a new name through a conservator without letting anyone on the other side know. Judge Norby observed that conservatorship proceedings are not adversarial proceedings in the same sense as other lawsuits. Mr. Eiva stated that, if plaintiffs are allowed to file cases under a pseudonym, of course the other side can be heard by a motion. He opined that notifying the party being sued would create a delay in the process by turning it into a contested procedure. Judge Peterson stated that it is a telephone call. Mr. Andersen and Judge Gerking wondered who a plaintiff would call. Ms. Payne stated that it is not always so easy to pick up the telephone and get a hold of an individual. Mr. Andersen noted that this would be a lawyer contacting an unrepresented party, which could present its own ethical problems.

Ms. Holley noted that the Council does not have to solve this problem with this rule, but she stated that if the motion and complaint are filed at the same time, using a pseudonym and the other side objects, a party could amend the complaint to use the plaintiff's name. She stated that rules such as the UTCR will likely solve these issues. Mr. Andersen observed that the real change is that right now people sometimes file a lawsuit using a pseudonym without asking a court – they just do it. Other than Judge Hargreaves, he does not know if any judge is having a problem with it. He stated that the defense can ask for disclosure of the name. He noted that the amendment states that a party "may" seek a court order, and that "may" saves the amendment in his opinion. If the Council were to say that a party must give notice to the other side before seeking an ex parte order, it is problematic. Often the other side cannot be located or the statute of limitation is about to run, and there could then be a new body of litigation as to whether the notice was sufficient, the problem of ex parte contact with the unrepresented individual, and potentially alerting the other side that something is coming that may help the defendant evade service of the summons and complaint. These problems magnify, compared to the status quo where plaintiffs just file the case under a pseudonym.

Judge Peterson stated that the discussion from the September meeting seemed to indicate that the amendment removed ex parte contact as a problem. However, just as the amendment does not give a right to file using a pseudonym but, rather, puts in place a procedure to request permission to do so, he does not think that the Council should weigh in on whether a plaintiff has a duty to communicate with the other side beforehand. It will be each attorney's problem to deal with those issues. Judge Bailey stated that this sounds like a good subject for an advisory letter to the Oregon State Bar. Judge Roberts noted that, under Multnomah

County rules, even if it is at ex parte, a party is still required to give a day's notice if possible to the other side. So, the fact that the motion is made at a time reserved ex parte motions does not mean that the motion is actually ruled on ex parte; the other side can come. She observed that motions that are handled in that manner are often not contested.

Mr. Keating stated that his experience has been that, when he has received a complaint filed under a pseudonym, he would call the adverse attorney and ask for the name of the patient so that he could get the medical records. He believes that this is the way that filing under a pseudonym is commonly being done: that most lawyers go ahead and file the case without asking first. He noted that the Council's discussions have concluded that there is nothing in the ORCP that supports this current practice, so the Council is trying to address that concern. Mr. Keating observed that he has never seen a pseudonym case contested. In his experience, the plaintiffs' bar exercises very good discretion in selecting cases where the use of a pseudonym is appropriate.

Mr. Crowley stated that he thinks that this amendment is about developing a procedure, and that it is a starting point. If the subject matter Judge Peterson raised turns into an issue, the next step will be how to address that issue. The place to address it is probably in the UTCR, where there are already rules that address confidentiality.

Judge Peterson explained that he did not mean to throw a wrench in the machinery, but just wanted to make clear that the rule change is neutral. It just provides a procedure while remaining neutral on whether there is authority to grant the order as well as on the ethics of ex parte contact. He noted that practitioners will have to make a decision on what is appropriate under the circumstances.

Judge Conover asked for clarification about comments regarding the discretion of the court. Mr. Crowley stated that many of the comments that the Council received in support of the amendment seemed to have the idea that the published amendment supports the long history of discretionary actions by judges allowing the use of pseudonyms, but it was not the Council's intent to provide support necessarily for this or even to suggest that this is the case. The Council's intent is to provide a procedure for these issues to be addressed.

Judge Peterson stated that he will write a staff comment regarding this.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 16

Judge Leith made a motion to promulgate the published amendment. Justice Nakamoto seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

4. ORCP 22

Mr. Beattie explained that the Council had received many comments (Appendix D) to the published amendment to Rule 22 (Appendix B). These were mostly objections from the plaintiffs' bar and centered on the published change to subsection C(1) that eliminates the requirement that all parties agree to add a new third-party defendant if 90 days have elapsed from the service of the original summons. He stated that the objections claim that the change is unfair, but stated that the basis of these claims seems somewhat unclear to him.

Mr. Beattie stated that the existing rule is patently unfair to defendants because it restricts their access to justice and their ability to fully litigate a case that involves a defendant who should share the liability, but who was discovered at a later date, more than 90 days after the case was commenced. As the rule is currently constituted, when a defendant discovers another defendant who needs to be brought into the case to have that potential defendant's fault compared, the defendant currently in the case has to get agreement from every other party and, in a single plaintiff and single defendant case, that means agreement from the plaintiff, before that potential defendant can be brought in. The court has no supervision or discretion to bring in that potential defendant if the plaintiff objects; therefore, the plaintiff has a unilateral veto right in third-party practice. There is no such veto right in the federal rules or any state procedural rule that he is aware of that gives either party the right to unilaterally veto an activity by the other party without any sort of oversight by the court. Third-party practice is merely an aspect of pleading and practice. It is adding a defendant, it is handled by an amendment, and amendments are historically and throughout the ORCP allowed at the discretion of the court. Defendants do not have the right to prevent a plaintiff from amending his or her complaint; that does not appear in the rules. Defendants do not have the right to prevent the plaintiff from bringing in another defendant, or bringing in another plaintiff, for that matter.

Mr. Beattie admitted that bringing in new and different parties can create some prejudice, but stated that amending a complaint to add a claim can also cause prejudice. Judges figure out whether the prejudice is so overwhelming that the amendment should be denied. He opined that the published amendment simply places third-party practice on the same footing as other amendment practice and leaves it up to the court's discretion. He stated that it conforms the rule somewhat

to the federal rule [FRCP 14(a)(1)] that allows amendment as a matter of right for 14 days, after which the authority of the court is required. It creates the same kind of fairness in our rule for all parties. Mr. Beattie stated that he strongly supports the amendment.

Judge Gerking stated that, on the drive to the Council meeting, he was not sure what side he was going to take regarding this amendment. He stated that he does not agree with the 90 day period because he thinks it is unreasonably short. On the other hand, he thinks that, if a defendant wants to amend to add a third-party defendant after six to eight months of litigation where depositions have been taken, that should not be allowed because that would be clearly prejudicial. But to him, it is all beside the point. He noted that Oregon trial judges were reminded recently that it is the court that has ultimate responsibility to make sure a case is properly administered from the standpoint of efficiency, timeliness, and obtaining a just disposition. This is the court's responsibility and the court's alone. In this particular rule, one of the parties has veto power over what the court might otherwise believe to be an appropriate motion. Because that party's veto power is embedded in Rule 22 and that interferes with the court's ultimate responsibility for the administration of that case, he has no other choice but to support the amendment to the rule. Without a change, the rule does interfere with the court's discretion to control a case.

Judge Bailey agreed with all of Judge Gerking's comments. He stated that when he presides over construction defect cases in Washington County, one of the first things he does is to set a cutoff date for the parties to get their third-party defendants in, with the understanding that the case is subject to bifurcation if any parties are brought in later. He stated that he believes that this is where the discretion should be. He noted that courts know the timely disposition standards that the Chief Justice just adopted where courts are expected to get 90% of their cases done in a year and a half period of time, and he stated that it is incumbent upon judges to exercise their authority to get these cases done. Judge Bailey observed that, if the defendant had the right to veto the use of a pseudonym under Rule 16, the plaintiffs' bar would be getting up in righteous indignation about it, and rightfully so, because that would be absolutely wrong. He stated that, if one really believes the court system is about fairness, he cannot understand how anyone would oppose this change.

Ms. Payne pointed out that it is important to understand where a rule came from and its history. She stated that the rule at one time allowed 10 days to have third-party practice by right. There was then a compromise between the plaintiffs' bar and defense bar to change the rule to its current form. The defense bar wanted the 90 days and the plaintiffs' bar agreed, but only if there was an agreement

among the parties to add any third-party defendants after the 90 days. Ms. Payne opined that now the defense bar is wanting to have its cake and to eat it too. She noted that the federal rule is 14 days, and that Oregon's rule used to be 10. The 90 day period is to allow the extra time that the defense wanted, but it is important to remember the compromise and not to take away what was given in exchange for that extra time.

Mr. Beattie stated that this compromise occurred in the 1979-1981 biennium. He pointed out that, since then, Oregon's tort law has been completely rewritten and has eliminated joint and several liability, and noted ORS 31.600, which has specific third-party practice built into it. He pointed out that the world has changed.

Mr. Eiva stated that we are dealing with the controversies and claims that one party brings. He suggested taking a step back with regard to the idea that this is what the plaintiffs' bar wants. He stated that, in the 1999-2000 biennium, the idea to remove the post-90 day agreement of the parties rule came up. Prof. Maury Holland, who was no great friend of the plaintiffs' bar, actually suggested shortening the time because we should know who the parties are early in the litigation. Judge Richard Barron disagreed and said that 90 days is enough.

Mr. Eiva stated that the way this request is being sought is all from the perspective of counsel. However, the plaintiff's bar is dealing with the perspective of their clients, who have a duty to know what they have been through and who caused the harm. Plaintiffs and defendants can be identifying the appropriate parties early on. If a defendant engaged in some kind of conduct, they should have knowledge. The suggestion that third-party defendants are a bolt from the blue is generally not the case. Mr. Eiva opined that there is framing that is calling it a "plaintiffs' veto," but there is another side – are we going to give defendants some authority to change the chess board after 90 days? He stated that he is not worried about day 91 but, rather, he is worried about month 10. He observed that this problem can occur on the eve of trial, and some counsel are far more persuasive in getting these motions through. Mr. Eiva also noted that there are more and more judges on the bench with less experience who may not be familiar with the complexity of multi-party litigation. He expressed concern that adding third parties at the last minute is driving up costs and compromising principles of efficiency. He stated that it will create unnecessary motion practice if we give defendants the authority to seek to change the chess board late in the game.

Mr. Eiva also pointed out that the Council did not receive a request from the bar saying that it needed to change Rule 22 in this regard. He stated that the Council was looking at Rule 22 because there was a request from the bar regarding making a cross claim to a party that was already in the case, and Mr. Beattie stated that he

hates the veto. Mr. Eiva claimed that there is no giant record of injustices and that no one has brought forward a single case to try and prove that this horrible thing is happening.

Mr. Beattie noted that he can state on behalf of his firm that there are often late-discovered defendants in multi-party cases where the courts recognize the injustice of Rule 22 and allow parties to bring a separate claim and join that case with the case where adding the third-party defendant was disallowed. In other words, the courts are doing an "end around" on this rule already. What about plaintiffs adding defendants after 90 days, in terms of fairness? Mr. Eiva stated that the statute of limitations prevents plaintiffs from adding defendants most of the time. Mr. Beattie wondered about newly discovered defendants, where a plaintiff did not even know that a defendant was involved, and the plaintiff wanted to bring them in. What if there were a 90 day rule that said you cannot bring them in without permission of the defendant? That is why we have good judges.

Mr. Andersen stated that Mr. Beattie is correct that tort law has changed over the years, with one such change being eliminating joint and several liability. He stated, however, that the mischief of this amendment is the clever defendant who discovers that they can add additional defendants, no matter how nebulous the claim may be. Post-1990, with the rules of joint and several liability being eliminated, there can be a defendant who recognizes that, the more people on the verdict form, the more the potency of the main claim against that defendant is diminished. If there is a true meritorious third-party defendant, plaintiffs will also want them in the case. However, if a defendant wants to add a third-party defendant after 90 days, a plaintiffs' lawyer's first suspicion is about diluting the verdict form. As far as the plaintiff being able to add a third-party defendants at any time, that cannot be done without court approval. Oregon made the compromise, rather than following the federal rule, giving the defendant 90 days as a complete freebie, with the trade off being, after 90 days, the defendant has to have the plaintiff's permission because the litigation is in progress and discovery has occurred. If it is a meritorious defendant, the plaintiff will agree.

Mr. Beattie posited a situation where plaintiff's counsel is unreasonable and dislikes him for reasons beyond the litigation. He noted that this is why we have judges. Judge Roberts stated that, as a judge, she feels that judges generally make decisions in a reasonable way. She noted that the supposition of the plaintiffs' bar seems to be that judges will be putty in the hands of unscrupulous parties but, on the other hand, if a plaintiff asks to add a party late, judges will never allow that. She stated that this is unrealistic and not the way that Oregon judges behave. She also pointed out that this debate has already taken place and does not need to be rehashed. Mr. Beattie agreed. Mr. Eiva noted that the change had been rejected in

1992 and in 1999. Mr. Beattie noted that the United States used to have slavery, which it also eventually rejected.

Mr. Keating stated that there is an underlying assumption that 90 days is adequate time to identify other parties that should be involved in the litigation. Things have changed dramatically in the 45 years he has been in practice. The Council has been born, and rules have changed. In the medical malpractice context, in identifying providers who might have liability, changes have been made in policies and rules that affect what a defendant can discover in a timely fashion. It occurs more often than one might believe that service of a summons and complaint is the first notice that a claim exists and then it can take a while to get to the desk of a defense attorney. The defense attorney then must talk to the client and find out what parties might have been involved. After that meeting, the attorney files a request for production for medical records, which takes up to 30 days of the 90 days. In his experience, common responses from the plaintiff are: 1) that they will provide discovery at a later date; or 2) an objection that he is seeking privileged material. If the defendant files a motion to compel after that response, getting the motion argued and heard in a timely manner is very difficult. Assuming that happens and the judge orders the plaintiff to provide the requested records, the 90 days has already passed. The second way to get the records is to notice the deposition of the subsequent treating physicians that you know about because your client can identify them, but that is going to be quashed. The third thing you can do is file a subpoena for the records, but you have to go to the plaintiff's lawyer and there are 14 days before you can serve the subpoena to the doctor or hospital. Within the time to object, the plaintiff makes an objection for privilege, and the only way the plaintiff's counsel will agree is if you issue a subpoena directing the health care provider to provide the medical records to them. Then that also takes a period of time. The reason that plaintiff's counsel objects is to go through and edit the records for privilege. That is also going to take time. When the records come to the defendant's attorney, they need to be reviewed to see if there is a basis for a claim against a potential third-party defendant.

Mr. Keating stated that, as a practical reality, it is impossible to bring in a third-party defendant within 90 days using the procedures and rules in effect. The reason there are not a lot of complaints about subsection C(1)'s 90-day rule is because there are no judicial opinions about whether it would be reasonable to add a third-party defendant after 90 days, because plaintiffs' counsel know how to read the rule. As a practical matter, he does no third-party practice, because it cannot be done in 90 days. If something develops in discovery, he does not have the right he would have in federal court to say, "justice requires that I be allowed to bring this defendant into the case." This has always been the rule in the federal court, and everywhere else of which he is aware.

Mr. Keating stated that he did read the comments that the Council received regarding the amendment to Rule 22. He stated that, of the list of "horrible injustices" that are posited to happen, he has never heard a word about that in trial practice. He stated that all lawyers understand that, if you have a dispute, you go to the judge who is managing the litigation. Every argument in the comments received by the Council is an argument that can be made to the judge. He stated that his understanding is that the current rule was created because of the desire of the plaintiffs' bar to maintain some control over the structure of the litigation. The current rule gives the plaintiffs' bar a significant advantage with regard to the structuring of who the players are going to be. He noted that any concern about a defense lawyer's motives or reasonableness can be brought before a trial judge. Mr. Keating pointed out that the Council has observed frequently that the discretion of the trial court can solve problems, and he stated that Rule 22 is the only rule in the ORCP that restricts the discretion of a duly appointed or elected trial judge.

Judge Norby stated that, if the original language of the rule was a compromise between the plaintiffs' bar and the defense bar, perhaps the amendment should undo the whole compromise, not only half. For example, the time period could be changed back to 10 days. Mr. Keating stated that he looked at the legislative history and that his interpretation was a lot different from Mr. Eiva's. He stated that the Council did not focus on this issue in 1992. Mr. Keating stated that the desire of one side of civil litigation to maintain control of the structure of the litigation should not be something that governs what this Council does. He opined that it really is not a matter of negotiation between the plaintiffs' bar and defense bar but, rather, a matter of what is right and proper. Mr. Keating stated that this is a circumstance that is not fair, that the playing field is tilted, and that all he wants is the opportunity to make a case to the court in light of the context of the specific case.

Judge Gerking stated that he is unaware of any previous compromise with regard to amending Rule 22 but, if there was a compromise, he believes that it was a compromise that had no right to be made because it usurps the authority of the trial court judge to exercise his or her discretion to determine who the parties will be at the time of trial. Judge Norby stated that judges do not have much discretion on over who the parties are. She also noted that many things usurp the discretion of trial court judges, such as sentencing guidelines. She observed that perhaps not all judges are always fair at all times. Judge Norby opined that, ultimately, if there was a compromise, it does have meaning or value. She noted that the Council is a body that requires people who are on very different sides of an issue to meet and try to agree to things, and this is important. Judges do get distanced from discovery procedures over time, whereas practitioners know and have strong

feelings about them. She stated that, if both sides were able to meet in the middle, that agreement should be honored.

Judge Hill noted that the Council has plowed this ground before, but that he keeps coming back to what Mr. Beattie said at the beginning. There is already a workaround that courts frequently use. He stated that he is hearing from the plaintiffs' bar that their primary objection is additional motion practice, but the rules already allow for that by filing a direct action and then filing a motion to consolidate. The exact same discretionary rules are used by the judge in deciding whether the case should be consolidated. The amendment would simply allow to be done in a more streamlined way what is currently being done in a more complex way. Judge Norby stated that the current workaround requires that the defendant not be a strategic ploy type of defendant, which seems like a good check and balance.

Mr. Beattie wondered why a defendant would bring a non-legitimate third-party defendant into the case. Mr. Andersen stated that it is to get such a defendant on the verdict form. Mr. Beattie noted that he has no reason to put someone on the verdict form to whom the jury will not allocate liability and damages. He stated that, with ORS 31.600 and the elimination of joint and several liability and active/passive indemnity, as well as the potential elimination of contribution actions because of *Eclectic Investment, LLC v. Patterson* [357 Or 25, 346 P3d 468, *aff'd on rehearing*, 357 Or 327, 346 P3d 468 (2015)], a defendant can actually be in the position of losing their contribution rights if they do not bring in someone as a third-party defendant who should be paying some part of a loss. While they may not be not a defendant who is attractive to the plaintiff, and they might add to the plaintiff's burden in the case, nonetheless they should be paying part of the verdict. Mr. Eiva stated that *Eclectic Investment* was carefully worded and did not necessarily strike that right. Mr. Beattie stated that It remains to be seen whether Oregon will go this way, but he pointed out that Arizona has virtually the same statute as Oregon and its courts have interpreted its statute as eliminating claims for indemnity and contribution and requiring the defendant to bring defendants in at trial so the same jury can compare the fault of all of the defendants. Mr. Eiva stated that he thought that Oregon is far away from any court ruling that a newly discovered defendant post 90 days will eliminate the indemnification claim that has always been there since 1856. Mr. Beattie stated that he would again like to dispel the notion that defendants want to bring in phony third-party defendants. Mr. Keating agreed that there is no reason to do that.

Mr. Andersen stated that most of his work is medical malpractice and that he has never seen a fact situation where it was not pretty evident who the defendant should be. As far as a defendant in a medical malpractice case, it is not necessary

for all of the discovery to come in to determine who might be an appropriate third-party defendant. It is pretty clear and, if there are negotiations before, the defendant sometimes identifies who the third-party defendant should be and the plaintiff will add that party to the complaint. Mr. Andersen stated that Judge Gerking recently addressed the Jackson County bar about the need to get every case tried within one year. He opined that adding third-party defendants more than 90 days after service of the summons will lead to no trials being completed in a year. On the plaintiffs' side, every open case is a case that is costing money in terms of time and expenses for the plaintiff's attorney and emotion for the client. Justice delayed is justice denied. Judge Bailey stated that he rarely hears that sentiment from plaintiffs because they are frequently the ones asking to go past the one year mark. Judge Roberts reiterated that she resents the implication that all judges are so utterly feckless that they will allow any motion.

Judge Peterson stated that he is assuming that the case law behind Rule 23 is in effect. He appreciates from the many comments that one half of the bar does not want to be bothered with these motions on the eve of trial and is concerned about getting to justice. He stated that he believes that the case law is pretty clear that, the closer you are to trial, the more this motion is disfavored and the more havoc that it causes in terms of discovery having occurred. This motion is also disfavored to the extent that the defendant should have known about the party and come forward earlier. Mr. Eiva opined that the way the amendment is written it is standardless and expressed concern as to whether judges would make the right decision. Judge Peterson noted that it is the Rule 23 standard. Mr. Eiva asked if there has ever been a Court of Appeals decision where a judge erred by granting an amendment to a pleading, rather than denying one. He stated that the power is only one way, and the judicial review is only based on whether amendments are denied. He fears such pure judicial power and discretion with no parameters, since nothing in the rule even requires that the defendant has to show that they could not have identified the third-party defendant within 90 days. Judge Roberts opined that it is of course an appealable issue.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 22

Mr. Beattie made a motion to promulgate the published amendment to Rule 22: Judge Bailey seconded the motion, which failed by roll call vote with 11 votes in favor and 9 opposed.

Mr. Keating pointed out that, aside from the change to subsection C(1), there is also an amendment to Section B and staff amendments to sections B, C, and D that appear to be noncontroversial. Prof. Peterson stated that

the change to section B is a law improvement amendment that was suggested by a member of the Council. He asked whether the Council would like to vote on promulgating only these amendments to sections B through D. Judge Gerking made such a motion. Judge Norby seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

5. ORCP 43 - Legislative Counsel Recommendation

Judge Peterson reminded the Council that, when Rule 43 was amended last biennium, the first section did not read well. On recommendation from Legislative Counsel, the Council staff made a change in wording without a change in substance. Section A was broken into subsections: one for documents and things, and one for entering property. Changes were also made to change the word "shall" to "must" or "may" or "will" as appropriate. Judge Peterson noted that the amendment was put on the Council's publication docket early in the biennium and that no comments were received from the bench or bar on the published amendment to Rule 43 (Appendix B).

Ms. Payne stated that the change of the word "shall" to "may" on line 25 of subsection B(2) seems substantive to her. Judge Peterson explained that the word "shall" is disfavored because it means different things in different contexts. Ms. Payne stated that she understands changing a "shall" to a "must," but that she believes that changing it to "may" has a very different meaning. Judge Leith stated that "may not" does mean that it is forbidden. Ms. Payne stated that she did not see the word "not." Judge Peterson stated that the intent was to indicate what the word "shall" actually meant. Judge Leith asked whether "must" is better. Judge Peterson stated that "must not" are words of command, whereas "may not" are words of permission. Judge Bailey opined that either phrase would have the same meaning.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 43

Mr. Crowley made a motion to promulgate the published amendment to Rule 43. Ms. Payne seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

6. ORCP 55

Judge Gerking noted that he was not at the September meeting when Rule 55 was discussed comprehensively. He stated that he appreciated that Ms. Nilsson lead

the discussion. He read the minutes carefully regarding suggested changes and did not disagree with any of them. Mr. Andersen stated that he was on the Rule 55 committee with Judge Gerking and Judge Norby. The committee's task was to make order out of what had been chaos without making any substantive changes, and he believes that was accomplished. He stated, however, that Richard Lane, an accomplished attorney in legislative matters, offered some last-minute comments (Appendix E) to the published amendment to Rule 55 (Appendix B) that suggested some items he flagged as potential substantive changes. Mr. Andersen stated that he believes that only one of those items may be an unintended substantive change. Current subsection H(2) reads as follows:

> Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.

However, the language in the amendment at subsection D(3) reads as follows:

> A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not fully comply, then the recipient is entitled to disregard the subpoena and withhold the CHI it seeks.

Mr. Andersen agreed with Mr. Lane that the current language in subsection H(2) invites some discussion between the health care provider and attorneys, whereas the amendment's language in subsection D(3) appears to give the health care provider unilateral discretion to disregard the subpoena. Mr. Andersen suggested that the problem can be fixed by putting the existing language in the new sentence as follows:

> If a subpoena does not comply, then the CHI shall not be disclosed in response to the subpoena unless the requesting party has complied with the appropriate law.

Judge Norby stated that, to her, the current language in subsection H(2) is just a softer and more vague version of subsection D(3) in the amendment. She explained that she wanted the new version to be crystal clear so that, ultimately, next biennium, the Council could decide whether the rule needed to be further modified. While she believes that the new language in subsection D(3) says the same thing, she was not opposed to the change. Mr. Beattie opined that the

language may be structural and wondered to what degree it can be changed at this point. Judge Peterson observed that he was surprised that Mr. Beattie did not say that the decision to make records available is really up to the health care record holder, so it does not make a dime's worth of difference what our rule says. Mr. Beattie agreed that it does not matter because the record holder is following the Health Insurance Portability and Accountability Act (HIPAA) and could not care less about Oregon's court rules. However, he asked whether the minor language change was procedurally appropriate. Judge Norby thought it was appropriate. Judge Gerking agreed, but suggested changing the word "unless" to "until."

Judge Norby asked Mr. Andersen to restate his suggested language. He stated that, with Judge Gerking's suggested change, it would read as follows:

> If a subpoena does not comply, then the CHI shall not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

Mr. Snelling asked if the word "protected" could be inserted before the term "CHI." He stated that his concern is that the existing subsection H(2) seems to suggest that records custodians would only be able to withhold protected information; however, the amended language in subsection D(3) seems to imply that, if there is one technical flaw with the subpoena, the whole thing is null and void and the holder of the records does not have to provide anything. Judge Gerking stated that he likes Mr. Andersen's suggested language. He stated that it does not matter to him if the word "protected" is there. Judge Peterson noted that "CHI" (confidential health information) is already defined. Judge Norby suggested that adding "protected" would be a substantive change because the current law says the record holder does not have to provide anything. Mr. Snelling stated that the current rule says that the protected records shall not be disclosed. Judge Peterson asked whether the definition of CHI in subsection D(1) takes care of it. Judge Norby stated that it does because it cites to statutes that define those words. Mr. Snelling stated that, to him, referring to other state and federal protections looks like a pretty big change from the existing rule that states that, if compliance requirements have not been met, then those records that are protected by state and federal rules would not be disclosed. He stated that it appears that the published amendment makes a change that, if there is one bit of that request that is protected by a state or federal law then, even if the remainder of the records are not protected, the entire request is going to be denied. He admitted that he might not be reading it correctly. Judge Norby stated that he is reading it correctly, and that inserting the word "protected" does make sense. Ms. Holley noted that this clarifies that it means versus all other records.

Mr. Beattie asked whether the amendment can be changed and promulgated, because it seemed to him that this would be a substantial modification. Judge Norby stated that her rewrite is different from the existing rule. Ms. Payne agreed that this is an instance of going back to the language in the original rule rather than changing the language of the amendment in any substantive way. Judge Peterson stated that, in this context, the principal author of the amendment seems to argue that the proposed amendment is for clarification. He noted that the Council is simply trying to clarify to say that this is what we meant. Judge Leith observed that one way to test is whether there is any possibility that there is a person who exists who would object to the rule with the change as opposed to without the change. He does not think that there is, but the Council is trying to be clear in our intent of not making a substantive change. Judge Norby made a motion to amend with the addition of the word "protected" as suggested by Mr. Snelling. Judge Bailey suggested taking the changes one at a time because some people might not agree with the structural change or the word "protected." Judge Norby stated that Mr. Andersen was trying to come up with a way to say what the existing rule already said, and Mr. Snelling was trying to help him to add a word that he had inadvertently missed. Mr. Andersen agreed.

Mr. Andersen proposed the following language:

> If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

Ms. Payne made a motion to amend the published amendment to Rule 55 as suggested by Mr. Andersen. Judge Gerking seconded the motion, which passed by unanimous voice vote.

Judge Norby pointed out that Mr. Lane had also suggested that the language in the amendment's paragraph D(6)(b) would authorize recovery of the expense for inspecting records, not just for copying them. This is different from the existing rule. Judge Norby suggested changing deleting "the inspection or copies" and inserting "the copies." Judge Norby made a motion to amend accordingly. Mr. Andersen seconded the motion, which passed unanimously by voice vote.

Judge Norby stated that Mr. Lane had also pointed out that, in the amendment's subsection D(11), the language used is "notwithstanding any other provisions this section does not expand the scope of discovery," whereas the existing language in subsection H(6) is "notwithstanding any other provisions this rule does not expand the scope of discovery." She noted that, at the time this language was originally added to the rule, the word "rule" was used, which meant that nothing in the

entirety of Rule 55 should expand the scope of discovery. She stated that she does not believe it was an issue before the question of individually identifiable health information came up, as people historically did not assume that any subpoena process could expand the scope of discovery so there was no need for any comment about it. Her understanding of why the language was kept is to advise people not to get too haughty about CHI and to let them know that the fact that they are subpoenaing it does not override any other limitation on the scope of discovery. Ms Payne asked whether there is anything else in Rule 55 that expands the scope of discovery. Judge Norby stated that there is not, and she believes that leaving the existing language causes no harm, whereas the change could potentially cause harm. Ms. Payne stated that she prefers to keep the language the same to avoid unintended consequences.

Judge Norby pointed out that, because section D only applies to CHI, the only way to keep the existing language is to move it to section A in order to make it apply to the whole rule. Judge Tookey suggested making a new section E. Judge Norby opined that having a whole section for one item that could have gone into section A would be odd. Ms. Holley agreed with creating a new section E. Judge Gerking also agreed with Judge Tookey that the language should be in a separate section, as a concluding, stand-alone statement about the impact. Mr. Andersen agreed. Mr. Eiva stated that he liked that positioning for ease of finding it.

Judge Norby reiterated that everything that applies to the entire rule is in section A, so it would be odd to put this in its own section. Mr. Eiva stated that he can support loyalty to that principle. Ms. Payne made a motion to amend to move subsection D(11) to a new subsection A(8) to read:

> Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

Judge Norby seconded the motion, which passed unanimously by voice vote.

Mr. Andersen congratulated Judge Norby for her enormous undertaking. Judge Leith stated that, since it was such a huge undertaking that is intended to be non-substantive, there will inevitably be something that someone can point to that will have an unintended consequence. He stated that is he nervous about the possibility that the amendment has inadvertently done something to affect the discoverability of confidential health information. Judge Norby noted that Mr. Lane is nervous about that too, and that it is a natural reaction. She pointed out that the committee and staff had spent hundreds of hours of work on this, and that Legislative Counsel had also reviewed it. Judge Leith clarified that, while it is almost inevitable something will come up that the Council will need to fix, the

purpose of fixing the rule warrants the risk and he supports the change.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 55

Judge Norby made a motion to promulgate the published amendment to Rule 55, as amended above. Ms. Holley seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

7. ORCP 38, 44, 65

Judge Peterson reminded the Council that Rule 38, Rule 44, and Rule 65 were only amended because there are references to Rule 55 in them. Staff also made a few minor stylistic changes. He suggested a joint motion to promulgate all three published amendments (Appendix B).

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendments of ORCP 38, 44, 65

Judge Bailey made a motion to promulgate the published amendments to Rule 38, Rule 44, and Rule 65. Ms. Holley seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

IV. New Business

A. Potential amendment to Rule 7, Rule 17, and regarding Guardians Ad Litem

Mr. Keating noted that these potential amendments (Appendix F) are information items only and require no discussion today. They will be placed on the docket for next biennium.

B. UTCR Committee Workgroup on E-Signatures for Declaration of Parties and Witnesses

Judge Peterson stated that the UTCR Committee had requested that the Council have one of its members participate in its Workgroup on E-Signatures for Declaration of Parties and Witnesses. He had previously reached out to the Council for volunteers, and Judge Conover agreed to participate.

C. Budget and Website

Judge Peterson stated that a budget person from Oregon Judicial Department (OJD) typically calls him each biennium and asks for the Council's budget needs. He usually

replies that whatever biennial increase allotted to other agencies will suffice. The OJD representative suggested that the Council should ask for a higher amount this biennium. Judge Peterson pointed out that his Executive Director stipend is $1000 a month, and it has probably been at that level since the inception of the Council. At some point, he will pass the job off to someone else, and that low stipend is not a big incentive for anyone to take the job. The OJD representative suggested doubling the stipend, and he put in a request for that increase. Someone from the Council may have to testify regarding the budget request.

Judge Peterson also reported on some changes regarding the Council's website. He reminded the Council that the site is a creation of Ms. Nilsson, who also has a day job at the Campaign for Equal Justice (CEJ). CEJ has recently changed to a Wordpress platform for its website, which makes editing the site much easier and more streamlined. The Council also decided to hire a contractor to convert the site to Wordpress, and the new site should be ready by the fall of 2019. Mr. Keating asked whether this is just an informational item or whether the Council needs to vote on it. Judge Peterson stated that it is just informational.

V. Adjournment

The meeting was adjourned at 12:20 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 8, 2018, 9:00 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Hon. D. Charles Bailey, Jr.
Jay Beattie
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer Gates
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. Lynn R. Nakamoto
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling
Hon. Douglas L. Tookey*
Margurite Weeks
Hon. John A. Wolf

Members Absent:

Kelly L. Andersen
Hon. Timothy C. Gerking
Hon. David E. Leith
Hon. Susie L. Norby
Sharon A. Rudnick
Deanna L. Wray

Guests:

Amy Zubko, Oregon State Bar

Council Staff:

Shari C. Nilsson, Executive Assistant
Hon. Mark A. Peterson, Executive Director

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Moved to Publication Docket this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 15 ORCP 16 ORCP 22 ORCP 38 ORCP 44 ORCP 55 ORCP 65		ORCP 7 ORCP 15 ORCP 16 ORCP 22 ORCP 38 ORCP 43 ORCP 44 ORCP 55 ORCP 65	Discovery ORCP 7 ORCP 15

I. Call to Order

Mr. Keating called the meeting to order at 9:31 a.m.

II. Administrative Matters

A. Approval of June 9, 2018, Minutes

Mr. Keating asked Council members if they had any comments or changes to the draft minutes from the June 9, 2018, meeting (Appendix A). Hearing none, he asked for a motion to approve the minutes. Ms. Gates made a motion to approve the minutes. The motion was seconded by Judge Wolf and was approved unanimously without abstention.

B. Election of Officers

Judge Peterson explained that the Council's authorizing statutes require annual elections, but nothing says that a member cannot be re-elected for a second one-year term. He noted that, since the Council operates on a biennial schedule, most of the work is done in first year. During the second year, officers mostly deal with anything that comes up during the legislative session and then hand over the reigns to the new officers at the first Council meeting of the next biennium.

Judge Peterson asked for nominations for the three officer positions of chair, vice chair, and treasurer. He stated that each could be voted on individually or that it could be done as a slate. Mr. Crowley nominated Mr. Keating as chair, Ms. Gates as vice chair, and Ms. Weeks as treasurer. Ms. Payne seconded the nomination, which was approved unanimously without abstention.

III. Old Business

A. Committee Reports

1. ORCP 23 C/34 Committee

Judge Peterson noted that neither Ms. Wray nor Mr. Andersen were present to report on the committee's progress on suggested language for a legislative change. He observed that a recommendation to the Legislature is not something that the Council would publish in any case but, if the Council decides to recommend something in its transmittal letter, it would be necessary to round table the suggestion before making that recommendation.

B. Discussion of Draft Amendments

1. ORCP 7

Mr. Keating explained that neither Judge Norby nor Judge Gerking were present to give an overview of the suggested changes to Rule 7. He asked if any other committee member would like to make comments. Judge Wolf stated that he felt that both the committee and the Council had discussed fairly thoroughly the changes that dealt with electronic service issues and that there was no need to rehash all of that today.

Ms. Payne pointed out that Judge Roberts had a concern about alternative service and mailing but that it appears that the concern had been addressed in the proposed amendment before the Council today (Appendix B). Judge Peterson explained that Judge Roberts thought that mailing should be required for all forms of alternative service and that the committee attempted to address that. He stated that he hoped that it was resolved to Judge Roberts' satisfaction. Judge Roberts stated that she believed that it was.

Ms. Payne stated that she had one concern regarding ascertaining the address for mailing. In subsection D(6)(A) of the proposed amendment, it reads:

> If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the current address of any defendant, true copies of the summons and the complaint must be mailed by the methods specified above to the defendant at the defendant's last known address.

Ms. Payne wondered whether it should read, "does know and can ascertain" because it then seems to repeat itself in stating, "If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required." Judge Wolf explained that the attempt was to clarify that, if a plaintiff does not know a current address, he or she must mail to the last known address but, if a plaintiff does not know any address for the defendant, then no mailing is required. Ms. Payne stated that this clarification makes sense to her.

Judge Peterson stated that the past minutes contain a pretty thorough recitation of all of the issues that the committee and Council had discussed. Judge Peterson noted that Judge Leith stated that he would not be able to attend this meeting, but Judge Peterson wanted to raise Judge Leith's ongoing concern about the micromanagement of electronic alternative service. Judge Leith's concerns

included whether, if a plaintiff does not get one aspect of the specific requirements of electronic alternative service exactly correct, would that defeat service? Judge Peterson stated that his own position is that, if it is a minor defect that does not affect a substantial right of a party, Rule 7 G will take care of it in the same way as for any other minor error in service. He reminded the Council that the initial suggestion came from a member of the bar to "do something about electronic service" and he believes that what the Council has crafted is more sweeping than anything the committee found anywhere else in the country.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 7

Judge Wolf made a motion to publish the suggested amendment to Rule 7. Mr. Bundy seconded the motion, which was approved unanimously without abstention.

2. ORCP 15

Mr. Bundy explained that, after going through the issues that were raised about the language in section D, the committee decided it was not going to address section D. He stated that there are other changes in section A that the Council ultimately agreed would clear up some of the language with respect to the third-party complaint issue and other motion issues (Appendix C). Judge Peterson reminded the Council that the original suggestion for improvement to Rule 15 came from the Oregon State Bar's Procedure and Practice Committee. He pointed out that the current rule seems to tie the time in which to respond to pleadings to service of the summons; however, some pleadings are not served with a summons. He stated that the last sentence of section A, that is hard to understand, is a vestige of when the former language afforded only 10 days to respond to some pleadings, e.g., a counterclaim. The last sentence would appear to now apply only to replies in response to affirmative defenses that, when appropriate, are still required within 10 days. The amendment is an attempt to make the rule more uniform and avoid any traps. With the suggested revision, for any pleading entitled to a response, the responder gets 30 days.

Justice Nakamoto noted that the changes to language in section A require that the defendant appear within 30 days of the date of first publication. She wondered what would happen if a defendant finds out at some point after the last publication – has his or her time to respond already run? Judge Peterson stated that section A is consistent with Rule 7 in that the 30 days start on the first publication date [and that deadline is specified in the published summons]. Judge Wolf noted that a defendant would have a little time left in which to file a

response if that defendant received notice via the final publication, although it would be considerably limited. Mr. Beattie agreed that this has been the rule historically. Justice Nakamoto thanked them for the explanation.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 15

Ms. Payne made a motion to publish the suggested amendment to Rule 15. Mr. Beattie seconded the motion, which was approved unanimously without abstention.

3. ORCP 16

Mr. Crowley reminded the Council that the committee had put a lot of work into the concept of how to use pseudonyms in pleadings and how the Council should address that issue in the rules. He stated that the proposed amendment to Rule 16 (Appendix D), with the addition of one new section, was the result. Mr. Crowley pointed out that the Council had engaged in a lot of discussion about the proposed amendment at the June Council meeting. He guessed that the proposed amendment would probably get a lot of attention if it is published and that the Council can see what concerns the bench and bar may have. He proposed publishing the draft amendment.

Ms. Payne stated that she did not understand why the term "legal name" was removed from the prior draft of the amendment. Ms. Holley explained that there may be cases where a defendant is only known by a nickname but that his or her actual first name is different. She stated that the goal was to not have the entire pleading be wrong because the plaintiff was not aware of the correct legal name. Ms. Payne noted that a plaintiff would normally have to substitute for the correct legal name at some point. Judge Peterson stated that there was some discussion about whether the phrases "true name" and "legal name" could cause some mischief in that someone could challenge a pleading because "Bob" got sued as "Bob" as opposed to "Robert." He stated that, by just using the word "name," the rule is not loaded with any baggage. Ms. Holley explained that the plaintiff will seek to file under a pseudonym and, if the plaintiff misidentifies the defendant in the caption, he or she does not totally fall victim to the statute of limitations.

Mr. Bundy asked whether a plaintiff would file the motion to request filing under a pseudonym before filing the pleading, or file the motion and pleading simultaneously. Judge Conover stated that the consensus seems to be that there will be all kinds of issues and ramifications coming from this, but that the Council needs to get something started and will deal with any problems as they come

along. He pointed out that this is a serious issue that should not be put off because there are no current rules to deal with it. In Lane County, for instance, if an attorney files a case using a pseudonym it would not be seen by any judge until the day of trial. He stated that cases that are filed under a pseudonym usually involve issues of a very personal nature and are probably worth a lot of money, and judges are being faced on the morning of trial, with a jury panel seated, with the decision of whether to proceed or dismiss the case. Judge Hill agreed that this is an issue of concern that currently exists. Judge Roberts noted that an earlier time in the case where problems could well arise is under the statute of limitations. If there is a plaintiff who files under a pseudonym and the truly named defendant subsequently raises the question of the statute of limitations, does the complaint relate back if there was no permission to file under a pseudonym? She pointed out that, if people intend to ignore the rule, they take their chances.

Judge Peterson stated that, under *Worthington v. Estate of Milton E. Davis*, 250 Or App 755, 282 P3d 895 (2012), where there is a misnomer, but where the adverse party knows he or she has been sued, the case can probably be amended and would relate back if it is later determined that it was not appropriate to proceed using the pseudonym. He noted that ours is an adversarial system and that, frequently, unless it is a default, the case would be subject to motion practice or a responsive pleading.

Judge Conover stated that raising the issue of using a pseudonym early in the case is not currently happening in Lane County because there have been only a handful of cases filed under pseudonyms. He explained that he is only aware of one case where a Lane County judge raised the issue, and that case was eventually dismissed. There was one case where a defense attorney raised the issue himself or herself, but it was never litigated before the case settled. Judge Conover stated that most Lane County judges have taken the position that the court is not able to make that call unless the defense raises the issue so, to that extent, it does not happen. He stated that cases have proceeded with fictitious names in Lane County but, with this change, there would be a rule that specifically says what needs to happen, so the judge would be put into the position of making that call. He stated that he could envision some possibly significant issues coming up, particularly in the context of a very serious and significant complaint being filed.

Mr. Keating noted that the whole discussion regarding filing a case under a pseudonym developed as a result of concern that there is currently no provision in the Oregon rules to do so and a suggestion that the open court provision of Oregon's Constitution makes it inappropriate. Mr. Crowley stated that he is not certain that the proposed amendment answers all of these questions, but it is a start. He noted that a lot will have to be worked out through case history and that

local rules may need to be adopted. He suggested that perhaps the Uniform Trial Court Rules might need to be amended to come up with a way of addressing the issue. He also suggested that the Council may receive a lot of feedback and accordingly walk back the amendment, but he personally believes that it is a fairly simple statement that puts the issue clearly out there, which is the goal.

Judge Peterson again raised the issue of when the motion should be filed. Ms. Holley responded that the committee did not want to put a time period on it and that the amendment allows the motion to be filed at any time. However, she stated that, ideally, a plaintiff would appear ex parte before a judge before filing the case. She observed that there is not much point to obtaining a pseudonym if the party's real name has already been made public. She stated that it may be problematic if a party runs up against the statute of limitations in a county where there is no time scheduled for ex parte motions, but she anticipates that each court will have to set a procedure. She stated that another option is filing the motion with the complaint and, if the judge denies the motion, everything subsequently filed must be filed with the party's real name.

Ms. Payne observed that, every once in a while, there is a rule change that should be accompanied by education of the bar. She suggested that perhaps the Council should write an article if this amendment is eventually promulgated. Judge Peterson observed that he writes a summary of the changes to the ORCP for the Bar's Legislative Highlights publication each biennium. Ms. Payne stated that, depending on any feedback the Council receives, if the amendment is promulgated, the Council should pay particular attention to the education aspect.

Judge Hill pointed out that the ethical rules require that, before a lawyer has an ex parte contact, he or she must have express authority in a rule to do so. Because of this, he expressed concern that this amendment might be substantive. Judge Peterson noted that the procedure in Multnomah County is that the opposing party must be contacted before a party has ex parte contact with a judge. Judge Hill stated that, since the ex parte contact would occur before the case was filed, there would be no opposing party to contact. Ms. Payne stated that it would be similar to the procedure for appointing a guardian ad litem. Judge Hill noted that, in that context, there is a local rule that authorizes that ex parte contact under some circumstances. Judge Peterson stated that there must be an opposing party if you are suing someone. Judge Wolf stated that the opposing party may not have counsel yet, but they do exist. Mr. Beattie stated that, as a practical matter, pre-suit procedures are difficult in terms of getting notice on the other party and, in Multnomah County, it is now an ex parte matter . Judge Hill replied that, in that case, a lawyer would be all right ethically because there is a rule that authorizes the ex parte contact. However, it may be an ethical trap without specifically saying

that the motion can be done ex parte. Ms. Holley stated that her thought has always been that the motion would be filed simultaneously with the complaint and, if the motion was denied, all of the documents would then carry the real name. She stated that, if a county wanted parties to present the motion at ex parte, that county could write a local rule requiring it. Judge Hill agreed that this would solve the problem.

Judge Conover stated that there are a lot of significant issues, so he assumes that the intent of the Council with moving forward is to let each county and judge decide how it will be carried out. He noted that this will create a lot of problems with inconsistency between judges and counties. He observed that there has been a whole movement within the Oregon Judicial Department (OJD) to make things more uniform statewide, and this change may run afoul of that. Judge Roberts pointed out that this is the current situation.

Mr. Beattie asked whether it would be possible to use some sort of permission procedure that is already in place, such as a procedure for waiving a fee, without using the terms "seeking permission of the court" or "motion"? Judge Wolf stated that, with regard to a waiver of fee, there is a procedure that authorizes the ex parte procedure, which fits with Judge Hill's point. He noted that, in the 7th district, there is not a procedure and that district would need to come up with something if the amendment goes into effect. Judge Hill noted that Mr. Beattie's suggestion is just a motion by another name. Mr. Beattie wondered whether there may be a subtle way of putting it so it does not engage so much machinery. Ms. Holley stated that we do not want to have a procedure that is so informal that the other side does not have an opportunity to respond. Mr. Bundy stated that it would be something along the lines of a preliminary order to grant the ability to file subject to later objection by the defendant. Judge Roberts observed that the discussion was veering into the local rule level and that these changes are not within the Council's purview.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 16

Ms. Payne made a motion to publish the suggested amendment to Rule 16. Ms. Holley seconded the motion, which was approved unanimously without abstention.

4. ORCP 22

Mr. Beattie explained that the proposed changes to Rule 22 (Appendix E) are primarily technical, with one procedural change in subsection C(1) that would eliminate the current requirement that, in order to add a third-party defendant more than 90 days after service on the defendant (who would be the third-party plaintiff), permission from every party that had appeared in the case as well as leave of court is required. He stated that permission of other parties has been eliminated and, like all other rules, only leave of court is required. He also explained that there is a change in subsection B(3), which is a technical change to make it more clear that a party must serve a cross-claim on a defendant who may or may not have appeared at that point. He stated that it differentiates the cross-claim defendant from other parties that may have appeared.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 22

Ms. Gates made a motion to publish the suggested amendment to Rule 22. Judge Roberts seconded the motion, which was approved unanimously without abstention.

5. ORCP 43 - Legislature Recommendation

Judge Peterson reminded the Council that this draft amendment (Appendix F) was suggested by Legislative Counsel because the current version of the rule does not read very well. He stated that staff simplified the rule so that it now reads better. Section A is broken into subsections A(1) and A(2) with no intent to change any meaning. Staff also changed some instances of the word “shall” to "must" or "may" as appropriate.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 43

Judge Roberts made a motion to publish the suggested amendment to Rule 43. Judge Wolf seconded the motion, which was approved unanimously without abstention.

6. ORCP 55

Ms. Nilsson explained that the draft amendment before the Council (Appendix G) includes multiple colors of highlighting that indicate as follows:

yellow:	Legislative Counsel suggestions - Judge Gerking and Judge Norby agree with these changes
green:	Judge Norby's and Judge Gerking's suggestions
blue:	Questions for the Council
orange:	Staff suggestions for discussion.

Ms. Nilsson suggested that she review each portion of the rule that required the discussion of the Council.

Page 11, line 18

> A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule 38 C;

Judge Peterson explained that the reference to Rule 38 C was added to clarify that foreign depositions would not be in the court where the action is pending. The Council's consensus was to keep the reference.

Page 12, line 1

The reference "as described in Rule 43" was suggested by Legislative Counsel. Judge Gerking and Judge Norby disagree with the addition. Judge Norby's position is that electronically stored information is not exclusively described in Rule 43. Ms. Payne stated that it is defined in Rule 43 but that it is also used in other rules. Judge Wolf explained that Judge Gerking also had a concern that it might imply some need to comply with sections of Rule 43 that he did not think were appropriate. The Council's consensus was to remove the reference.

Page 12, line 15

There were questions about whether the two occurrences of the word "has" accurately describe the time frame of the procedure that has to be followed. The Council agreed that they are in the correct tense.

Judge Hill asked whether the rule currently requires as a basis for validity of the subpoena for a deposition that a notice of deposition be given. In other words, does the failure to give a notice of subpoena invalidate the subpoena? Several

Council members stated that they read the rule that way. Judge Roberts noted that this is a condition of the clerk issuing a subpoena. Judge Peterson stated that this would typically be for a self-represented litigant. Judge Hill agreed that, if this is a direction to the clerk, it makes sense. Justice Nakamoto suggested adding the words "by the clerk" on line 14 to make it very clear that this sentence applies only to subpoenas issued by the clerk, since there was confusion even among Council members. The sentence would read:

> Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

Judge Hill made a motion to amend the sentence as proposed by Justice Nakamoto. Judge Wolf seconded the motion, which was passed unanimously by voice vote.

Page 13, line 4

An internal reference to Rule 7 F(2)(a) was suggested. Judge Peterson stated that he is not a huge fan of internal references, but he pointed out that the subpoena rule is often used by self-represented litigants and it may be useful to help direct them to the proper requirements for service. Mr. Keating asked whether Judge Gerking and Judge Norby agreed with this addition. Ms. Nilsson stated that they do, but that staff wanted to run it by the Council as well. Mr. Beattie noted that the overall language is cumbersome. Judge Wolf observed that it is dealing with the proof of service, not the actual service. He agreed that the language is awkward, but it is accurate.

The Council's consensus was to leave the internal reference in.

Page 13, line 10

Ms. Nilsson explained that the language in the existing rule, "unless sooner discharged" seemed ambiguous. Judge Roberts expressed concern that the proposed language "unless the court or party who served the subpoena discharges the witness sooner" implies that the party that subpoenaed the witness can discharge the witness at any time, i.e., after they have asked their questions.

Judge Hill pointed out that a lawyer should not need court approval to discharge a

witness who he or she has subpoenaed but later decides is not needed to testify. Ms. Payne asked whether this section is not intended to cover deposition subpoenas because subsection 6(C) addresses deposition subpoenas. Judge Hill stated that it covers both. Ms. Nilsson stated that the language of the current rule also covers both. Judge Wolf noted that, theoretically, under the current rule a lawyer can also dismiss a witness at any time.

Judge Hill suggested changing the language back to the existing language, despite its ambiguity, because it can be dealt with the same way any other dispute about a deposition can be dealt with. Mr. Keating made a motion to change the sentence to read:

> A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

Judge Roberts seconded the motion, which was passed unanimously by voice vote.

Page 14, line 9

This is a question for the Council on a preferred lead line. The lead line from the prior version of the amendment was, “Written objection.” Judge Norby initially suggested, “Timing,” and also suggested, “Timeline” in a later e-mail to Ms. Nilsson. Staff suggested the combination of, "Written objection; timing."

Mr. Keating made a motion to use, “Written objection; timing.” Judge Roberts seconded the motion, which was passed unanimously by voice vote.

Page 18, line 10

The suggestion was made to add the language “who are not in default” to modify “parties to the action.” Judge Peterson stated that this was a staff suggestion because it is current practice and the existing language does not reflect it. Ms. Gates asked whether Judge Gerking and Judge Norby agree with the change. Ms. Nilsson stated that they do. Judge Wolf agreed that it accurately reflects practice. The consensus of the Council was to keep the suggested language.

Ms. Nilsson explained that there is an overarching question in section D that starts on page 18. The issue is the term “confidential health information.” She stated that Legislative Counsel had suggested the term “confidential health information records,” which staff felt was too long. Staff shortened it to “confidential health

information" and also eliminated the use of the word "records" throughout the section because the word "records" seemed too nebulous. Judge Norby then expressed concern that repeating the term "confidential health information" throughout the section was onerous, so staff abbreviated it to "CHI" throughout the section, similar to "ESI" in Rule 43.

Mr. Bundy stated that the term personal health information (PHI) is used in healthcare settings as well as in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and expressed concern that CHI is different from PHI. Mr. Keating and Mr. Beattie explained that it can be. Mr. Bundy stated that, as a health law lawyer, it is confusing to him. Mr. Beattie pointed out that the problem with this rule is trying to incorporate all of HIPAA into it. Judge Wolf noted that CHI in subsection D(1) includes both individually identifiable health information and protected health information, so CHI is really a third category that includes both.

Judge Roberts stated that she could see Legislative Counsel's point, because Information and records are two different things. Information is something that people know and a record is a document or thing. A party cannot subpoena information; rather, the party must subpoena things that embody or record a thing. Judge Hill asked whether there is a distinction between a medical record and something that does not fall within the technical definition of a medical record, because he has concerns about inadvertently excluding something by using the term "record."

Ms. Payne asked whether this would also apply to depositions or testimony that reveals CHI. Mr. Beattie stated that it would not unless one can put a deposition in an envelope. Judge Wolf stated that there is a section that deals with records that are introduced at a deposition. Judge Roberts stated that she would have thought the intention was to deal with documents or things. Judge Hill asked whether those with greater expertise in health care litigation know whether the term "records" is a term of art that may be narrower than information that we want to treat with sensitivity. Mr. Keating stated that Judge Hill's premise is correct but, ever since HIPAA was adopted, it uses the phrase "the record" as the official record and various institutions define that differently. He stated that, if the Council undertakes to address and solve that problem here, it will never get done. What constitutes the official record is treated differently by people who go to different seminars on what constitutes the official record.

Judge Hill explained that his fear is that, by using the term "records," the Council will be inserting itself into the middle of that controversy. Are we going to use the term record, which does create mischief as opposed to saying just information, where it is obvious there is some kind of document element to it. Mr. Keating stated that, if it is not a document or recording of some sort, what is it? Mr. Keating further questioned whether a record can be defined that broadly. Judge Hill stated that he does not see how adding the word "record" to "confidential health information" adds anything. He suggested that it creates a potential loop where a party gets to argue that they are subpoenaing something other than the official record as defined for HIPAA so that the party does not have to comply with Rule 55. He opined that the intent is just to say that, if it is this type of information sought, a party must go through this door to get it.

For further clarification, Judge Roberts suggested inserting the words, "documents containing" after the word "means" on page 18, line 21, to read:

> For purposes of this section, CHI means **documents containing** information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

Judge Hill stated that the rule is already talking about subpoenas for physical things, so he did not know that inserting those words adds anything. Judge Roberts expressed concern that using the word "information" implies that you can subpoena knowledge. Judge Hill opined that adding the word "documents" would narrow the scope and exclude things that people can argue are not documents. Ms. Nilsson suggested solving the problem by paralleling the language in the lead line for section C, " Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule." She proposed that the new lead line for section D would read, "Subpoenas for documents and things containing confidential health information ("CHI")."

Mr. Beattie made a motion to make this lead line change. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

Page 18, line 22

There is a question as to how to list the entities from which CHI may be collected. Judge Norby had a more narrow definition. Legislative Counsel suggested a more comprehensive list than the committee originally used. Staff then went to ORS

192.556(8), ORS 192.556(11), and HIPAA and pulled out all possible iterations of entities from which these records could be collected. Judge Peterson asked those who do a lot of healthcare practice whether anything seems to be missing. Ms. Payne stated that her concern is what happens if the statute changes, and she wondered if there a way to refer to these entities without individually listing them. She stated that HIPAA uses the particular statutory language, “covered entity.” Ms. Nilsson explained that the term “covered entity” is used in the draft amendment and that a list of covered entities is also included. Ms. Payne suggested simply using the term “covered entity as defined in these statutes.”

Mr. Beattie advised the Council to be careful in making any ad hoc changes without a careful analysis of HIPAA and stated that his objection to the rule all along has been trying to conform it to HIPAA. He stated that, prior to the mid-1980s, a party subpoenaed hospital records just like any other document, which was an easy way for defendants to get medical records, which was objectionable to plaintiffs’ counsel. Then we trended to a rule that had a specific subsection that was headed hospital records and that used the same subpoena process but required the records to be produced at the time of trial or deposition, which essentially gave plaintiffs’ counsel the first opportunity to look at the records and review them for privilege. That seemed to be a workable approach. Then, in the early 1990s, the Council tried to conform the rule to HIPAA, which he believes was a mistake because we end up trying to keep our rule complaint with state and federal law that is complicated and beyond the scope of most Council members. Mr. Beattie suggested that returning every cycle and trying to keep this rule in compliance is impossible. He did not think the Council should make any changes to the recommendations without either a serious review of what the federal and state laws are or without a more global discussion about whether the Council wishes to continue doing this.

Ms. Payne stated that she is simply suggesting changing to "covered entity,” a phrase that is defined in the statutes. It would be easier to keep up because, if the statute changes to add more covered entities, they are still covered in the rule. She stated that she is not trying to make a substantive change here. Judge Peterson suggested changing the language to “covered entities, including" so that the language would not need to be changed every time the statute added a covered entity.

Judge Hill stated that he is not experienced in this area of law and he objects to referencing the covered entity because he does not want to know what that might mean. He would prefer to be given a list so that he and the opposing party can fight over that list. He agreed that Mr. Beattie makes a good point about whether we should or not, but he prefers that the rule be specific so that he doe not have

to search all through the law library to figure out how to serve a subpoena. Judge Wolf agreed, because a covered entity could be defined under HIPAA or Oregon state law. Mr. Keating stated that a subpoena is usually served on medical records clerks, who do not have to do legal research about covered entities.

The Council's consensus was to leave the language as it is in the draft rule.

Page 19 line 12

Judge Peterson noted that the language in the current rule is "issuing a subpoena." and the suggestion is to change to "serving a subpoena." He noted that attorneys issue subpoenas and self-represented litigants do not, but that the operative function in this instance is service.

Judge Hill asked why there is a distinction between "attorney or party" and suggested simply using the language "party." Ms. Nilsson explained that the current language is "attorney for the party issuing the subpoena." Judge Wolf noted that there is a reference later in the rule to just "party," so perhaps this reference should be changed as well. Ms. Gates made a motion to make this change. Judge Wolf seconded the motion, which was passed unanimously by voice vote.

Staff wondered whether the language "other record keeper," which exists in the current rule, is different from "custodian of records" and whether the language should be kept. Mr. Bundy stated that many clinics do not have a designated custodian of records. Judge Hill suggested keeping the language in to avoid semantic arguments over the definition of 'custodian of records." The Council agreed.

Page 19, line 18

Staff wanted the Council's opinion on which lead line it prefers: "Sufficient context," or, "Sufficient information." Judge Roberts preferred the latter. Mr. Bundy pointed out that the rule requires more than sufficient information because it says that the written notice must include the subpoena and sufficient information, so "information" is not 100% accurate as to what the sentence requires. Mr. Crowley suggested, "Sufficiency." Ms. Gates made a motion for that change. Mr. Bundy seconded the motion, which was passed unanimously by voice vote.

Page 23, line 4

Staff did not know what the language, “or other charge,” which is in the existing rule, meant and wanted the Council’s input on whether it should remain. Judge Hill suggested that it might mean copy charges. Judge Peterson stated that Judge Norby had also suggested that. Mr. Bundy wondered if it might be a per page charge allowed by statute. Mr. Keating suggested leaving the language there and exploring it at another time.

Judge Wolf pointed out that the existing rule uses the language “payment of more than one witness fee” and the draft amendment says, “the legal witness fee,” which could potentially be more than one fee. Judge Hill stated that he is confused by the way it is phrased. He was unsure about whether he can charge an “other charge.” He pointed out that the “other charge” completely obliterates the limitation on the witness fee. He stated that this can be important because of the fees charged by parties producing records, which is a question that courts could hear on objection. He noted that he was not sure that the Council wanted to put itself in a position where it is telling a party serving a subpoena that they only need to give a witness fee and mileage, because the subpoenaed party may want to ask the court for additional compensation for their expenses and we do not want to cut the court off from allowing that. He suggested the language, "for one day or other charge as allowed by law."

Mr. Beattie noted that this is sort of a negative provision. Judge Wolf noted that he is not certain what the change to "legal witness fee" was intended to address and again expressed concern that it may open up the possibility of multiple witness fees. Judge Peterson noted that there may be several custodians of records. Judge Wolf stated that he liked Judge Hill's suggestion.

Mr. Keating suggested the language, “more than one witness fee and mileage for one day or other charge as allowed by law."

Mr. Bundy pointed out that this is just a condition on the service of the subpoena. He stated that a party can argue later that they need more fees. He noted that he sends subpoenas to medical providers all of the time and does not come up with the money up front because he does not know how many pages will be produced. Judge Peterson observed that, if there is a dispute, it is a matter for the parties to talk about and bring to the court. As a door opener, there is just the one fee and, if the other side complains and the parties cannot reach agreement, someone will be filing a motion. Judge Hill stated that, if that is where we want to go, we can strike the "or other charge” language.

Mr. Bundy made a motion to amend using the language, “Nothing in this section requires the tender or payment of more than one witness fee and mileage for one

day unless there has been agreement to the contrary." Judge Wolf seconded the motion, which was passed by unanimous voice vote.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 55

Judge Wolf made a motion to publish the suggested amendment to Rule 55, as amended by the Council. Judge Roberts seconded the motion, which was approved unanimously without abstention. Ms. Nilsson stated that she will include a copy of an updated cross-reference chart with the published amendment so that the bench and bar will be able to easily match sections of the current rule with the amendment.

7. Other Draft Amendments Contingent on Whether Draft Amendment of Rule 55 is Published

a. ORCP 38

Judge Peterson explained that the proposed amendment to Rule 38 (Appendix H) is necessary because of the Council's publication of the draft amendment of Rule 55. There is a change of a reference from Rule 55 A to Rule 55 A(1). There are also a few changes to clean up the rule for Council conventions since it was written over decades by different people.

b. ORCP 44

Judge Peterson explained that the proposed amendment to Rule 44 (Appendix I) is necessary because of the Council's publication of the draft amendment of Rule 55. In section E, references to Rule 55 H are now references to Rule 55 D. The phrase"confidential health information" is also used to be consistent with the language in the proposed amendment to Rule 55.

c. ORCP 65

Judge Peterson explained that the proposed amendment to Rule 65 (Appendix J) is necessary because of the Council's publication of the draft amendment of Rule 55. A reference to Rule 55 G is now a reference to Rule 55 A(6)(d).

(1) ACTION ITEM: Vote on Whether to Publish Draft Amendments of ORCP 38, 44, and 65

Judge Wolf made a motion to publish the suggested amendments to Rules 38, 44, and 65. Mr. Crowley seconded the motion, which was approved unanimously without abstention.

IV. New Business

A. Reviser's Bill Modifying Rule 69 C(1)(e)

Judge Peterson explained that the Legislature had made changes to Rule 69 relating to the Servicemembers Civil Relief Act through a Reviser's Bill (Appendix K) to reflect a changed citation and term used in the United States Code.

B. Rule 7

Judge Peterson reminded the Council that he had sent them a suggestion regarding Rule 7 (Appendix L) over the summer but had not received any comment. He noted that someone from the United States Marshals' Office is reading the Council's work and proposed that Rule 7 should allow service alternatives to the U.S. Postal Service. Judge Peterson pointed out that the statute (ORS 19.260) has changed to allow other forms of delivery for notices of appeal. However, it is a can of worms, since not all couriers are created equal: some are less reliable than others and some do not serve everywhere. He stated that the item can be placed on the agenda for next biennium for consideration by the new Council.

C. Deposition Costs by Agreement

Judge Peterson stated that Judge Leith had also raised an issue about whether deposition costs can be obtained by agreement. He suggested placing this issue on the agenda for next biennium.

D. Rule 57 G

Judge Peterson explained that a clerk to Judge Marilyn Litzenberger had raised an issue regarding jurors. The question was whether, under Rule 57 G(3), the same jurors who vote on multiple issues must concur on each vote necessary to a verdict (the "same nine rule"). He stated that he did not know the answer and wondered whether it is an issue for next biennium.

Mr. Beattie stated that it is an issue that the Supreme Court has been addressing recently. Judge Roberts stated that it is a substantive, constitutional issue that is not within the Council's purview. Judge Peterson asked whether it does have to be the same jurors. Judge Roberts stated that it depends on the specific issue. She noted that there has been some case law on variations on special damages versus general damages. There must be nine who agree on whether a party is at fault and that nine may agree on general damages, but a different configuration can agree on medical expenses. The Supreme Court has said that is acceptable but, on the other hand, if there are nine different jurors who concur on damages as a whole who are not the same nine who concurred on liability, that is not acceptable. She stated that it is a difficult issue.

E. Information Regarding Publication

Judge Peterson summarized the next steps for the Council. Each rule that has been approved for publication will be published on the Council's website as well as in the Advance Sheets. The Council will ask the Bar to again assist with an e-mail to all Oregon lawyers. He stated that Council staff will send Council members the changes made today to Rule 55 before the rule gets published.

The Council will meet on December 8, 2018, to consider any comments from the bench and bar. Mr. Beattie added that the Council will also vote on whether to promulgate the published rules on that day. Judge Peterson pointed out that votes to promulgate a rule require a super majority (15 votes) to pass and, if a Council member is not present or on the telephone, that is effectively a "no" vote.

Judge Peterson explained that any promulgated rule will be transmitted to the Legislature at the beginning of the legislative session. If the Legislature follows its typical practice, it will hold no hearings regarding the promulgations and take no action. If that is the case, the Council's promulgated rules become effective on January 1, 2020.

Ms. Payne asked when the public comment period begins and ends. Judge Peterson stated that the comment period will begin as soon as the draft amendments are released to the public, and we usually ask that people send their comments no later than a week before the promulgation meeting. He asked whether the Council would like staff to communicate comments as they are received or in the aggregate, once a week. The Council preferred weekly communications.

Judge Peterson noted that the Council is able to make minor changes based on comments at the December meeting, but no wholesale changes. If any minor changes are made, the Council would publish those changes again. He explained that the Council must also elect a Legislative Advisory Committee in December in case the Legislature has any questions about the promulgations or in case any other questions relating to civil procedure arise

during the legislative session. The Legislative Advisory Committee typically consists of the chair, the vice chair, and one or two judges.

V. Adjournment

Mr. Keating adjourned the meeting at 11:29 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

2018 PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

Written comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent by mail or by e-mail to:

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The Council meeting at which the Council will receive oral comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 8, 2018 — Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

The Council will take final action on the proposed amendments at its December 8, 2018, meeting.

2018 PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

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SUMMONS

RULE 7

A Definitions. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint.

B Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summonses under section E of this rule. A summons is issued when subscribed by plaintiff or an active member of the Oregon State Bar.

C Contents, time for response, and required notices

C(1) **Contents.** The summons shall contain:

C(1)(a) **Title.** The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C(1)(b) **Direction to defendant.** A direction to the defendant requiring defendant to appear and defend within the time required by subsection C(2) of this rule and a notification to defendant that, in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C(1)(c) **Subscription; post office address.** A subscription by the plaintiff or by an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

C(2) **Time for response.** If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to [*subsection D(6)*] **subparagraph D(6)(a)(i)** of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

Council on Court Procedures
December 8, 2018, Meeting
Appendix B-3

C(3) **Notice to party served.**

C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph C(3)(b) or C(3)(c) of this rule, shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

_____

C(3)(b) **Service for counterclaim or cross-claim.** A summons to join a party to respond to a counterclaim or a cross-claim pursuant to Rule 22 D(1) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with

the court a legal document called a "motion," a "reply" to a counterclaim, or an "answer" to a cross-claim. The "motion," "reply," or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

_____

C(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees may be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding

an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

D Manner of service.

D(1) **Notice required.** Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of true copies of the summons and the complaint upon defendant or an agent of defendant authorized to receive process; substituted service by leaving true copies of the summons and the complaint at a person's dwelling house or usual place of abode; office service by leaving true copies of the summons and the complaint with a person who is apparently in charge of an office; service by mail; or service by publication.

D(2) **Service methods.**

D(2)(a) **Personal service.** Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) **Substituted service.** Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together

with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon the mailing.

D(2)(c) **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at that office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or any other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon the mailing.

D(2)(d) **Service by mail.**

D(2)(d)(i) **Generally.** When service by mail is required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested. For purposes of this [*section*] **paragraph**, "first class mail" does not include certified, registered, or express mail, return receipt requested, or any other form of mail that may delay or hinder actual delivery of mail to the addressee.

D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant, or other person authorized by appointment or law, signs a receipt for the mailing, or [*three*] **3** days after the mailing if mailed to an address within the state, or [*seven*] **7** days after the mailing if mailed to an address outside the state, whichever first occurs.

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

D(3)(a)(i) **Generally.** Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to the defendant or other person authorized by appointment or law to receive service of summons on behalf of the defendant, by substituted service, or by office service. Service may also be made upon an individual defendant or other person authorized to receive service to whom neither subparagraph D(3)(a)(ii) nor D(3)(a)(iii) of this rule applies by a mailing made in accordance with paragraph D(2)(d) of this rule provided the defendant or other person authorized to receive service signs a receipt for the certified, registered, or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

D(3)(a)(ii) **Minors.** Upon a minor under 14 years of age, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the minor; and additionally upon the minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor, or with whom the minor resides, or in whose service the minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iii) **Incapacitated persons.** Upon a person who is incapacitated or is financially incapable, as both terms are defined by ORS 125.005, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the person and, also, upon the conservator of the person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iv) **Tenant of a mail agent.** Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646A.340, by delivering true copies of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

D(3)(a)(iv)(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

D(3)(a)(iv)(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint. **Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.**

[*Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.*]

D(3)(b) Corporations including, but not limited to, professional corporations and cooperatives. Upon a domestic or foreign corporation:

D(3)(b)(i) **Primary service method.** By personal service or office service upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) **Alternatives.** If a registered agent, officer, or director cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(b)(ii)(A) by substituted service upon the registered agent, officer, or director;

D(3)(b)(ii)(B) by personal service on any clerk or agent of the corporation who may be found in the county where the action is filed;

D(3)(b)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the corporation, if any, as shown by the records on file in the office of the

Secretary of State; or, if the corporation is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(b)(ii)(D) upon the Secretary of State in the manner provided in ORS 60.121 or 60.731.

D(3)(c) **Limited liability companies.** Upon a limited liability company:

D(3)(c)(i) **Primary service method.** By personal service or office service upon a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(c)(ii) **Alternatives.** If a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(c)(ii)(A) by substituted service upon the registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

D(3)(c)(ii)(B) by personal service on any clerk or agent of the limited liability company who may be found in the county where the action is filed;

D(3)(c)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited liability company, as shown by the records on file in the office of the Secretary of State; or, if the limited liability company is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited liability company; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely

to result in actual notice; or

D(3)(c)(ii)(D) upon the Secretary of State in the manner provided in ORS 63.121.

D(3)(d) **Limited partnerships.** Upon a domestic or foreign limited partnership:

D(3)(d)(i) **Primary service method.** By personal service or office service upon a registered agent or a general partner of a limited partnership; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(d)(ii) **Alternatives.** If a registered agent or a general partner of a limited partnership cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(d)(ii)(A) by substituted service upon the registered agent or general partner of a limited partnership;

D(3)(d)(ii)(B) by personal service on any clerk or agent of the limited partnership who may be found in the county where the action is filed;

D(3)(d)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited partnership, as shown by the records on file in the office of the Secretary of State; or, if the limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited partnership; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(d)(ii)(D) upon the Secretary of State in the manner provided in ORS 70.040 or 70.045.

D(3)(e) **General partnerships and limited liability partnerships.** Upon any general partnership or limited liability partnership by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership or limited

liability partnership.

D(3)(f) **Other unincorporated associations subject to suit under a common name.** Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) **State.** Upon the state, by personal service upon the Attorney General or by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(h) **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, or attorney thereof.

D(3)(i) **Vessel owners and charterers.** Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in the owner's or charterer's employment or any agent authorized by the owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D(4) **Particular actions involving motor vehicles**.

D(4)(a) **Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law of this state if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection D(3) of this rule except service by mail pursuant to subparagraph D(3)(a)(i) of this rule and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in

accordance with paragraph D(2)(d) of this rule addressed to that defendant at:

D(4)(a)(i)(A) any residence address provided by that defendant at the scene of the accident;

D(4)(a)(i)(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

D(4)(a)(i)(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule that reasonably might result in actual notice to that defendant. **Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule is made. If the mailing required by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not know of any address other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.**

[*Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule is made. If the mailing required by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not*

know of any address other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.]

D(4)(a)(ii) Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph D(4)(a)(i) of this rule may be recovered as provided in Rule 68.

D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph D(4)(a)(i) of this rule are as provided in Rule 69 E.

D(4)(b) **Notification of change of address.** Any person who; while operating a motor vehicle upon the roads, highways, streets, or premises open to the public as defined by law of this state; is involved in any accident, collision, or other event giving rise to liability shall forthwith notify the Department of Transportation of any change of the person's address occurring within [*three*] **3** years after the accident, collision, or event.

D(5) **Service in foreign country.** When service is to be effected upon a party in a foreign country, it is also sufficient if service of true copies of the summons and the complaint is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases service shall be reasonably calculated to give actual notice.

[*D(6)* ***Court order for service; service by publication.***

D(6)(a) ***Court order for service by other method.*** *On motion upon a showing by affidavit or declaration that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods that under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of the defendant by first class mail and any of the following: certified, registered, or express mail,*

return receipt requested; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D(6)(b) ***Contents of published summons****. In addition to the contents of a summons as described in section C of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) of this rule shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.*

D(6)(c) ***Where published.*** *An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. The summons shall be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county in which the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in the affidavit or declaration required by paragraph D(6)(a) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county in which the action is commenced.*

D(6)(d) ***Mailing summons and complaint****. If the court orders service by publication and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff shall mail true copies of the summons and the complaint to the defendant at that address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know and cannot ascertain upon diligent inquiry the current address of any defendant, true copies of the summons and the complaint shall be mailed by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's*

current and last known addresses, a mailing of copies of the summons and the complaint is not required.]

D(6) Court order for service by other method. When it appears that service is not possible under any method otherwise specified in these rules or other rule or statute, then a motion supported by affidavit or declaration may be filed to request a discretionary court order to allow alternative service by any method or combination of methods that, under the circumstances, is most reasonably calculated to apprise the defendant of the existence and pendency of the action. If the court orders alternative service and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff must mail true copies of the summons and the complaint to the defendant at that address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the current address of any defendant, true copies of the summons and the complaint must be mailed by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

D(6)(a) Non-electronic alternative service. Non-electronic forms of alternative service may include, but are not limited to, publication of summons; mailing without publication to a specified post office address of the defendant by first class mail as well as either by certified, registered, or express mail with return receipt requested; or posting at specified locations. The court may specify a response time in accordance with subsection C(2) of this rule.

D(6)(a)(i) Alternative service by publication. In addition to the contents of a summons as described in section C of this rule, a published summons must also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) of this rule must state: "The motion or answer or reply must be given to the

court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons must also contain the date of the first publication of the summons.

D(6)(a)(i)(A) Where published. An order for publication must direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. The summons must be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county in which the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff must so state in the affidavit or declaration required by paragraph D(6) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county in which the action is commenced.

D(6)(a)(ii) Alternative service by posting. The court may order service by posting true copies of the summons and complaint at a designated location in the courthouse where the action is commenced and at any other location that the affidavit or declaration required by subsection D(6) of this rule indicates that the posting might reasonably result in actual notice to the defendant.

D(6)(b) Electronic alternative service. Electronic forms of alternative service may include, but are not limited to: e-mail; text message; facsimile transmission as defined in Rule 9 F; or posting to a social media account. The affidavit or declaration filed with a motion for electronic alternative service must include: verification that diligent inquiry revealed that the defendant's residence address, mailing address, and place of employment are unlikely to accomplish service; the reason that plaintiff believes the defendant has recently sent and received transmissions from the specific e-mail address or telephone or facsimile number, or maintains an active social media account on the specific platform the plaintiff asks to use; and facts that indicate the intended recipient is likely to personally receive the electronic

transmission. The certificate of service must verify compliance with subparagraph D(6)(b)(i) and subparagraph D(6)(b)(ii) of this rule. An amended certificate of service must be filed if it later becomes evident that the intended recipient did not personally receive the electronic transmission.

D(6)(b)(i) Content of electronic transmissions. If the court allows service by a specific electronic method, the case name, case number, and name of the court in which the action is pending must be prominently positioned where it is most likely to be read first. For e-mail service, those details must appear in the subject line. For text message service, they must appear in the first line of the first text. For facsimile service, they must appear at the top of the first page. For posting to a social media account, they must appear in the top lines of the posting.

D(6)(b)(ii) Format of electronic transmissions. If the court allows alternative service by an electronic method, the summons, complaint, and any other documents must be attached in a file format that is capable of showing a true copy of the original document. When an electronic method is incapable of transferring transmissions that exceed a certain size, the plaintiff must not exceed those express size limitations. If the size of the attachments exceeds the limitations of any electronic method allowed, then multiple sequential transmissions may be sent immediately after the initial transmission to complete service.

[*D(6)(e) **Unknown heirs or persons.***] **D(6)(c) Unknown heirs or persons.** If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in Rule 20 I and J, the action [*shall*] **will** proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of the commencement of the action, and who are served by publication, [*shall*] **will** be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action had been brought

against those defendants by name.

[*D(6)(f) **Defending before or after judgment.***] **D(6)(d) Defending before or after judgment.** A defendant against whom [*publication*] **service pursuant to this subsection** is ordered or that defendant's representatives, on application and sufficient cause shown, at any time before judgment [*shall*] **will** be allowed to defend the action. A defendant against whom [*publication*] **service pursuant to this subsection** is ordered or that defendant's representatives may, upon good cause shown and upon any terms that may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on that judgment, to a purchaser in good faith, [*shall not be*] **will not be** affected thereby.

[*D(6)(g) **Defendant who cannot be served.***] **D(6)(e) Defendant who cannot be served.** Within the meaning of this subsection, a defendant cannot be served with summons by any method authorized by subsection D(3) of this rule if[*:*] service pursuant to subparagraph D(4)(a)(i) of this rule is not [*authorized*] **applicable**, [*and*] the plaintiff attempted service of summons by all of the methods authorized by subsection D(3) of this rule**,** and **the plaintiff** was unable to complete service; or if the plaintiff knew that service by these methods could not be accomplished.

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and [*is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise.*] **is neither a party to the action, corporate or otherwise, nor any party's officer, director, employee, or attorney, except as provided in ORS 180.260.** However, service pursuant to subparagraph D(2)(d)(i)**, as well as the mailings specified in paragraphs D(2)(b), D(2)(c), and part D(3)(a)(iv)(B)** of this rule**,** may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in

this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F Return; proof of service.

F(1) **Return of summons.** The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by first class mail.

F(2) **Proof of service.** Proof of service of summons or mailing may be made as follows:

F(2)(a) **Service other than publication.** Service other than publication shall be proved by:

F(2)(a)(i) **Certificate of service when summons not served by sheriff or deputy.** If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: the specific documents that were served; 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 true copies of the summons and the complaint were left or describe in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate may be made by the person completing the mailing or the attorney for any party and shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating: the specific documents that were served; the time, place, and manner of service; and, if defendant is not personally served, when, where, and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true copies of the

summons and the complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(b) **Publication.** Service by publication shall be proved by an affidavit or by a declaration.

F(2)(b)(i) A publication by affidavit shall be in substantially the following form:

_____

Affidavit of Publication

State of Oregon)
) ss.
County of)

I, _____, being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 2_____.

_____
Notary Public for Oregon
My commission expires
____ day of _____, 2____

_____

F(2)(b)(ii) A publication by declaration shall be in substantially the following form:

_____

Declaration of Publication

State of Oregon)
) ss.
County of)

I, _____, say that I am the _____ (here set forth the title or job description of the person making the declaration), of the _____, a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

_____

____ day of _____, 2____

_____

F(2)(c) **Making and certifying affidavit.** The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting in that capacity by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of that person shall be affixed to the affidavit. The signature of the notary or other official, when so attested by the affixing of the official seal, if any, of that person, shall be prima facie evidence of authority to make and certify the affidavit.

F(2)(d) **Form of certificate, affidavit, or declaration.** A certificate, affidavit, or declaration containing proof of service may be made upon the summons or as a separate document

attached to the summons.

F(3) **Written admission.** In any case proof may be made by written admission of the defendant.

F(4) **Failure to make proof; validity of service.** If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of a summons, issuance of a summons, or who may serve a summons shall not affect the validity of service of that summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, affidavit, declaration, or certificate of service of summons. The court shall disregard any error in the content of a summons that does not materially prejudice the substantive rights of the party against whom the summons was issued. If service is made in any manner complying with subsection D(1) of this rule, the court shall also disregard any error in the service of a summons that does not violate the due process rights of the party against whom the summons was issued.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. [*A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim shall*] **An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, must** be filed with the clerk [*by*] **within** the time required by Rule 7 C(2) to appear and defend. **If the summons is served by publication, the defendant must appear and defend within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.** [*Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.*]

B Pleading after motion.

B(1) If the court denies a motion, any responsive pleading required [*shall*] **must** be filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, [*such*] **that** pleading [*shall*] **must** be filed within 10 days after service of the order, unless the order otherwise directs.

C Responding to amended pleading. A party [*shall*] **must** respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

D Enlarging time to plead or do other act. The court may, in its discretion, and upon [*such*] **any** terms as may be just, allow an answer or reply to be made, or allow any other

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pleading or motion after the time limited by the procedural rules, or by an order enlarge such time.

FORM OF PLEADINGS

RULE 16

A Captions; names of parties. Every pleading [*shall*] **must** contain a caption setting forth the name of the court, the title of the action, the register number of the cause, and a designation in accordance with Rule 13 B. In the complaint the title of the action [*shall*] **must** include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

B Pseudonyms. Each party must be identified by the party's name except that a party may seek a court order permitting use of a pseudonym when otherwise permitted by law.

[*B*] C Concise and direct statement; paragraphs; separate statement of claims or defenses. Every pleading [*shall*] **must** consist of plain and concise statements in paragraphs consecutively numbered throughout the pleading with Arabic numerals, the contents of which [*shall*] **must** be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Each separate claim or defense [*shall*] **must** be separately stated. Within each claim alternative theories of recovery [*shall*] **must** be identified as separate counts.

[*C*] D Consistency in pleading alternative statements. Inconsistent claims or defenses are not objectionable[,] and, when a party is in doubt as to which of two or more statements of fact is true, the party may allege them in the alternative. A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based [*upon*] **on** legal or equitable grounds or [*upon*] both. All statements [*shall*] **must** be made subject to the obligation set forth in Rule 17.

[*D*] E Adoption by reference. Statements in a pleading may be adopted by reference in a different part of the same pleading.

COUNTERCLAIMS, CROSS-CLAIMS,

AND THIRD-PARTY CLAIMS

RULE 22

A Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as that defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in that defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action, and [*shall*] **must** be one arising out of the occurrence or transaction set forth in the complaint or related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim [*shall be served on the parties*] **must be served on any party against whom relief is sought in the cross-claim and on all other parties** who have appeared.

C Third-party practice.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on 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. Otherwise the third-party plaintiff must obtain [*agreement of parties who have appeared and*] leave of court. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, [*shall*] **must** assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in this rule. The third-party defendant may assert against the plaintiff any defenses that 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. Any party may assert any claim against a 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*] **must** assert the third-party defendant's defenses as provided in Rule 21 and may assert 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 defendant 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 defendant to be brought in under circumstances that would entitle a defendant to do so under subsection C(1) of this section.

D Joinder of additional parties.

D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rule 28 and Rule 29.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under

that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D(3) In any action against a party joined under this section of this rule, the party joined [*shall*] **will** be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E Separate trial. On the motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third-party claim so alleged if to do so would be more convenient, avoid prejudice, or be more economical and expedite the matter.

PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS;

FOREIGN DEPOSITIONS

RULE 38

A Within Oregon.

A(1) Within this state, depositions shall be preceded by an oath or affirmation administered to the deponent by an officer authorized to administer oaths by the laws of this state or by a person specially appointed by the court in which the action is pending. A person so appointed has the power to administer oaths for the purpose of the deposition. A(2) For purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if either the deponent or the person administering the oath is located in this state.

B Outside the state. Within another state, or within a territory or insular possession subject to the dominion of the United States, or in a foreign country, depositions may be taken: [*(1)*]

B(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States; [*(2)*]

B(2) before a person appointed or commissioned by the court in which the action is pending, and such a person shall have the power by virtue of such person's appointment or commission to administer any necessary oath and take testimony; or [*(3)*]

B(3) pursuant to a letter rogatory. A commission or letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the state, territory, or country)." Evidence obtained in a foreign country in response to a letter rogatory need not be excluded merely for

the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C Foreign depositions and subpoenas.

C(1) Definitions. For the purpose of this section:

C(1)(a) "Foreign subpoena" means a subpoena issued under authority of a court of record of any state other than Oregon.

C(1)(b) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

C(2) Issuance of subpoena.

C(2)(a) To request issuance of a subpoena under this section, a party or attorney shall submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state.

C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure and requirements, shall assign a case number and promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed. If a party to an out-of-state proceeding retains an attorney licensed to practice in this state, that attorney may assist the clerk in drafting the subpoena.

C(2)(c) A subpoena under this subsection shall:

[*(i)*] **C(2)(c)(i)** Conform to the requirements of these Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in [*Rule 55 A*] **Rule 55 A(1)** but may otherwise incorporate the terms used in the foreign subpoena as long as those terms conform to these rules; and

[(*ii)*] **C(2)(c)(ii)** Contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any

party not represented by counsel.

C(3) Service of subpoena. A subpoena issued by a clerk of court under subsection (2) of this section shall be served in compliance with Rule 55.

C(4) Effects of request for subpoena. A request for issuance of a subpoena under this section does not constitute an appearance in the court. A request does allow the court to impose sanctions for any action in connection with the subpoena that is a violation of applicable law.

C(5) Motions. A motion to the court, or a response thereto, for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this section is an appearance before the court and shall comply with the rules and statutes of this state. The motion shall be submitted to the court in the county in which discovery is to be conducted.

C(6) Uniformity of application and construction. In applying and construing this section, consideration shall be given to the need to promote the uniformity of the law with respect to its subject matter among states that enact it.

PRODUCTION OF DOCUMENTS AND THINGS AND ENTERING PROPERTY FOR INSPECTION AND OTHER PURPOSES

RULE 43

A Scope. [*Any party may serve on any other party any of the following requests:*]

A(1) **Documents or things.** **Any party may serve on any other party a** [*A*] request to produce and permit the party making the request, or someone acting on behalf of the party making the request, to inspect and copy any designated documents (including electronically stored information, writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations from which information can be obtained and translated, if necessary, by the respondent through detection devices or software into reasonably usable form) or to inspect and copy, test, or sample any tangible things that constitute or contain matters within the scope of Rule 36 B and that are in the possession, custody, or control of the party on whom the request is served[*;*]**.**

A(2) **Entering property.** **Any party may serve on any other party a** [*A*] request to enter land or other property in the possession or control of the party on whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 36 B.

B Procedure.

B(1) **Generally.** A party may serve a request on the plaintiff after commencement of the action and on any other party with or after service of the summons on that party. The request [*shall*] **must** identify any items requested for inspection, copying, or related acts by individual item or by category described with reasonable particularity, designate any land or other property on which entry is requested, and [*shall*] **must** specify a reasonable place and manner for the inspection, copying, entry, and related acts.

B(2) **Time for response.** A request [*shall*] **may** not require a defendant to produce or allow inspection, copying, entry, or other related acts before the expiration of 45 days after

service of summons, unless the court specifies a shorter time. Otherwise, within 30 days after service of a request in accordance with subsection B(1) of this rule, or such other time as the court may order or to which the parties may agree in writing, a party [*shall*] **must** serve a response that includes the following:

B(2)(a) a statement that, except as specifically objected to, any requested item within the party's possession or custody is provided, or will be provided or made available within the time allowed and at the place and in the manner specified in the request, and that the items are or [*shall*] **must** be organized and labeled to correspond with the categories in the request;

B(2)(b) a statement that, except as specifically objected to, a reasonable effort has been made to obtain any requested item not in the party's possession or custody, or that no such item is within the party's control;

B(2)(c) a statement that, except as specifically objected to, entry will be permitted as requested to any land or other property; and

B(2)(d) any objection to a request or a part thereof and the reason for each objection.

B(3) **Objections.** Any objection not stated in accordance with subsection B(2) of this rule is waived. Any objection to only a part of a request [*shall*] **must** clearly state the part objected to. An objection does not relieve the requested party of the duty to comply with any request or part thereof not specifically objected to.

B(4) **Continuing duty.** A party served in accordance with subsection B(1) of this rule is under a continuing duty during the pendency of the action to produce promptly any item responsive to the request and not objected to that comes into the party's possession, custody, or control.

B(5) **Seeking relief under Rule 46 A(2).** A party who moves for an order under Rule 46 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry, or related acts as requested, [*shall*] **must** do so within a reasonable time.

C Writing called for need not be offered. Though a writing called for by one party is

produced by the other, and is inspected by the party calling for it, the party requesting production is not obliged to offer it in evidence.

D Persons not parties. A person not a party to the action may be compelled to produce books, papers, documents, or tangible things and to submit to an inspection thereof as provided in Rule 55. This rule does not preclude an independent action against a person not a party for permission to enter land.

E Electronically stored information ("ESI").

E(1) **Form in which ESI is to be produced.** A request for ESI may specify the form in which the information is to be produced by the responding party but, if no such specification is made, the responding party must produce the information in either the form in which it is ordinarily maintained or in a reasonably useful form.

E(2) **Meetings to resolve issues regarding ESI production; relevance to discovery motions.** In any action in which a request for production of ESI is anticipated, any party may request one or more meetings to confer about ESI production in that action. No meeting may be requested until all of the parties have appeared or have provided written notice of intent to file an appearance pursuant to Rule 69 B(1). The court may also require that the parties meet to confer about ESI production. Within 21 days of the request for a meeting, the parties must meet and confer about the scope of the production of ESI; data sources of the requested ESI; form of the production of ESI; cost of producing ESI; search terms relevant to identifying responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; issues pertaining to metadata; and any other issue a requesting or producing party deems relevant to the request for ESI. Failure to comply in good faith with this subsection [*shall*] **will** be considered by a court when ruling on any motion to compel or motion for a protective order related to ESI. The requirements in this subsection are in addition to any other duty to confer created by any other rule.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS;

REPORTS OF EXAMINATIONS

RULE 44

A Order for examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B Report of examining physician or psychologist. If requested by the party against whom an order is made under section A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the

claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

D Report; effect of failure to comply.

D(1) Preparation of written report. If an obligation to furnish a report arises under sections B or C of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.

D(2) Failure to comply or make report or request report. If a party fails to comply with sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

E Access to [*individually identifiable*] <u>confidential</u> health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of [*individually identifiable*] **<u>confidential</u>** health information as defined in [*Rule 55 H*] **<u>Rule 55 D</u>** within the scope of discovery under Rule 36 B. [*Individually identifiable*] **<u>Confidential</u>** health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with [*Rule 55 H*] **<u>Rule 55 D</u>**.

SUBPOENA

RULE 55

[***A Defined; form.*** *A subpoena is a writ or order directed to a person and may require the attendance of the person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require the person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged but, at the end of each day's attendance, a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and, if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court, the case name, and the case number.*

B For production of books, papers, documents, or tangible things and to permit inspection. *A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents, or tangible things but not commanded to also appear for deposition, hearing, or trial may, within 14 days after service of the subpoena or before the time specified for compliance if that time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an*

order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents, or tangible things the court, upon motion made promptly and, in any event, at or before the time specified in the subpoena for compliance therewith, may quash or modify the subpoena if it is unreasonable and oppressive or condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

C Purpose; issuance.

C(1) ***Purpose.***

C(1)(a) ***Civil actions.*** *A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents, or tangible things and to permit inspection thereof.*

C(1)(b) ***Foreign depositions.*** *A subpoena may be issued to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony.*

C(1)(c) ***Other uses.*** *A subpoena may be issued to require attendance out of court in cases not provided for in paragraph C(1)(a) or C(1)(b) of this rule, before a judge, justice, or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.*

C(2) ***By whom issued.***

C(2)(a) ***By the clerk of the court, or a judge or justice of the court for civil actions.*** *A subpoena may be issued in blank by the clerk of the court in which the action is pending or, if there is no clerk, by a judge or justice of that court.*

C(2)(a)(i) ***Requirements for subpoenas issued in blank.*** *Upon request of a party or attorney, any subpoena issued by a clerk of the court may be issued in blank and delivered to the party or attorney requesting it, who shall before service include on the subpoena the name*

of the person commanded to appear; or the books, papers, documents, or tangible things to be produced or inspected; and the particular time and location for the attendance of the person or the production or the inspection, as applicable.

C(2)(b) ***By the clerk of the court for foreign depositions.*** *A subpoena for a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of a circuit court in the county in which the witness is to be examined.*

C(2)(c) ***By a judge, justice, or other officer.*** *A subpoena to require attendance out of court in cases not provided for in paragraph C(1)(a) or C(1)(b) of this rule may be issued by the judge, justice, or other officer before whom the attendance is required.*

C(2)(d) ***By an attorney.*** *A subpoena may be issued by an attorney of record of the party to the action on whose behalf the witness is required to appear, subscribed by the attorney.*

D Service; service on law enforcement agency; service by mail; proof of service.

D(1) ***Service.*** *Except as provided in subsection D(2) of this rule, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, one day's attendance fees. If the witness is under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the witness's parent, guardian, or guardian ad litem. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for the taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i), D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h). A copy of each subpoena commanding production of books, papers, documents, or tangible things and inspection thereof before trial that is not accompanied by a command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least 7 days before*

the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) ***Service on law enforcement agency.***

D(2)(a) ***Designated individuals.*** *Every law enforcement agency shall designate an individual or individuals upon whom service of a subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of a subpoena pursuant to paragraph D(2)(b) of this rule may be made upon the officer in charge of the law enforcement agency.*

D(2)(b) ***Time limitation.*** *If a peace officer's attendance at trial is required as a result of the officer's employment as a peace officer, a subpoena may be served on the officer by delivering a copy personally to the officer or to one of the individuals designated by the agency that employs the officer. A subpoena may be served by delivery to one of the individuals designated by the agency that employs the officer only if the subpoena is delivered at least 10 days before the date the officer's attendance is required, the officer is currently employed as a peace officer by the agency, and the officer is present within the state at the time of service.*

D(2)(c) ***Notice to officer.*** *When a subpoena has been served as provided in paragraph D(2)(b) of this rule, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.*

D(2)(d) ***"Law enforcement agency" defined.*** *As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.*

D(3) ***Service by mail.*** *Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:*

D(3)(a) ***Contact with willing witness.*** *The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness and the witness indicated a willingness to appear at trial if subpoenaed;*

D(3)(b) ***Payment to witness of fees and mileage.*** *The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and*

D(3)(c) ***Time limitations.*** *The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other form of mail that provides a receipt for the mail that is signed by the recipient and the attorney received a return receipt signed by the witness more than 3 days prior to trial.*

D(4) ***Service by mail of subpoena not accompanied by command to appear.*** *Service of a subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.*

D(5) ***Proof of service; qualifications.*** *Proof of service of a subpoena is made in the same manner as proof of service of a summons except that the server need not certify that the server is not a party in the action; an attorney for a party in the action; or an officer, director, or employee of a party in the action.*

E Subpoena for hearing or trial; prisoners. *If the witness is confined in a prison or jail in this state, a subpoena may be served on that person only upon leave of court and attendance of the witness may be compelled only upon the terms that the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or*

may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F Subpoena for taking depositions or requiring production of books, papers, documents, or tangible things; place of production and examination.

F(1) ***Subpoena for taking deposition.*** *Proof of service of a notice to take a deposition as provided in Rule 39 C and Rule 40 A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.*

F(2) ***Place of examination.*** *A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein the person resides, is employed, or transacts business in person, or at any other convenient place that is fixed by an order of the court. A nonresident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein the person is served with a subpoena, or at any other convenient place that is fixed by an order of the court.*

F(3) ***Production without examination or deposition.*** *A party who issues a subpoena may command the person to whom it is issued to produce books, papers, documents, or tangible things, other than individually identifiable health information as described in section H of this rule, by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to whom the subpoena is directed complies if the person produces copies of the specified items in the specified manner and certifies that the copies are true copies of all of the items responsive to the subpoena or, if any items are not included, why they are not.*

G Disobedience of subpoena; refusal to be sworn or to answer as a witness. *Disobedience to a subpoena or a refusal to be sworn or to answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or to answer as a witness, that party's complaint, answer, or reply may be stricken.*

H Individually identifiable health information.

H(1) ***Definitions.*** *As used in this rule, the terms "individually identifiable health information" and "qualified protective order" are defined as follows:*

H(1)(a) ***"Individually identifiable health information."*** *"Individually identifiable health information" means information that identifies an individual or that could be used to identify an individual; that has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and that relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.*

H(1)(b) ***"Qualified protective order."*** *"Qualified protective order" means an order of the court, by stipulation of the parties to the litigation or otherwise, that prohibits the parties from using or disclosing individually identifiable health information for any purpose other than the litigation for which the information was requested and that requires the return to the original custodian of the information or the destruction of the individually identifiable health information (including all copies made) at the end of the litigation.*

H(2) ***Procedure.*** *Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.*

H(2)(a) ***Supporting documentation.*** *The attorney for the party issuing a subpoena*

requesting production of individually identifiable health information must serve the custodian or other keeper of that information either with a qualified protective order or with an affidavit or declaration together with attached supporting documentation demonstrating that:

H(2)(a)(i) the party has made a good faith attempt to provide written notice to the individual or to the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object;

H(2)(a)(ii) the notice included the proposed subpoena and sufficient information about the litigation in which the individually identifiable health information was being requested to permit the individual or the individual's attorney to object;

H(2)(a)(iii) the individual did not object within the 14 days or, if objections were made, they were resolved and the information being sought is consistent with that resolution; and

H(2)(a)(iv) the party issuing a subpoena certifies that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

H(2)(b) ***Objection.*** *Within 14 days from the date of a notice requesting individually identifiable health information, the individual or the individual's attorney objecting to the subpoena shall respond in writing to the party issuing the notice, stating the reason for each objection.*

H(2)(c) ***Time for compliance.*** *Except as provided in subsection H(4) of this rule, when a subpoena is served upon a custodian of individually identifiable health information in an action in which the entity or person is not a party, and the subpoena requires the production of all or part of the records of the entity or person relating to the care or treatment of an individual, it is sufficient compliance with the subpoena if a custodian delivers by mail or otherwise a true and correct copy of all of the records responsive to the subpoena within 5 days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection H(3) of this rule.*

H(2)(d) ***Method of compliance.*** *The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records to the attorney or party issuing the subpoena, then a copy of the proposed subpoena shall be served on the person whose records are sought, and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the entity or person. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.*

H(2)(e) ***Inspection of records.*** *After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are not introduced in evidence or required as part of the record shall be returned to the custodian who produced them.*

H(2)(f) ***Service of subpoena.*** *For purposes of this section, the subpoena duces tecum to*

the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection D(3) of this rule.

H(3) Affidavit or declaration of custodian of records.

H(3)(a) ***Content.*** *The records described in subsection H(2) of this rule shall be accompanied by the affidavit or declaration of a custodian of the records, stating in substance each of the following:*

H(3)(a)(i) that the affiant or declarant is a duly authorized custodian of the records and has authority to certify records;

H(3)(a)(ii) that the copy is a true copy of all the records responsive to the subpoena; and

H(3)(a)(iii) that the records were: prepared by the personnel of the entity or the person, acting under the control of either; prepared in the ordinary course of the entity's or the person's business; and prepared at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) ***When custodian has no records or fewer records than requested.*** *If the entity or person has none of the records described in the subpoena, or only a part thereof, the affiant or declarant shall so state in the affidavit or declaration and shall send only those records of which the affiant or declarant has custody.*

H(3)(c) ***Multiple affidavits or declarations.*** *When more than one person has knowledge of the facts required to be stated in the affidavit or declaration, more than one affidavit or declaration may be used.*

H(4) ***Personal attendance of custodian of records may be required.***

H(4)(a) ***Required statement.*** *The personal attendance of a custodian of records and the production of original records is required if the subpoena duces tecum contains the following statement:*

_____

The personal attendance of a custodian of records and the production of original records

is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

H(4)(b) ***Multiple subpoenas.*** *If more than one subpoena duces tecum is served on a custodian of records and personal attendance is required under each pursuant to paragraph H(4)(a) of this rule, the custodian shall be deemed to be the witness of the party serving the first such subpoena.*

H(5) ***Tender and payment of fees.*** *Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.*

H(6) ***Scope of discovery.*** *Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.*]

A Generally: form and contents; originating court; who may issue; who may serve; proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) General requirements. A subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending ,except as provided in Rule 38 C;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number; and

A(1)(a)(iv) command the person to whom the subpoena is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(A) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books,

documents, electronically stored information, or tangible things in the person's possession, custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(C) produce records of confidential health information for inspection and copying as provided in section D of this rule.

A(2) Originating court. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38 C, a subpoena may be issued by the court in the county in which the witness is to be examined.

A(3) Who may issue.

A(3)(a) Attorney of record. An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) Clerk of court. The clerk of the court in which the action is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

A(3)(c) Clerk of court for foreign depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the court in the county in which the witness is to be examined.

A(3)(d) Judge, justice, or other authorized officer.

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, a justice, or an authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) Who may serve. A subpoena may be served by a party, the party's attorney, or any other person who is 18 years of age or older.

A(5) Proof of service. Proving service of a subpoena is done in the same way as provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

A(6)(b) Witness appearance contingent on fee payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. At the end of each day's attendance, a witness may demand payment of legal witness fees and mileage for the next day. If the fees and mileage are not paid on demand, the witness is not obligated to return.

A(6)(c) Deposition subpoena; place where witness can be required to attend or to produce things.

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) Nonresidents. A nonresident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

A(6)(d) Obedience to subpoena. A witness must obey a subpoena. Disobedience or a refusal to be sworn or to answer as a witness may be punished as contempt by the court or

by the judge who issued the subpoena or before whom the action is pending. At a hearing or trial, if a witness who is a party disobeys a subpoena, or refuses to be sworn or to answer as a witness, that party's complaint, answer, or other pleading may be stricken.

A(7) Recipient's option to object, to move to quash, or to move to modify subpoena for production. A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule, may object, or move to quash or move to modify the subpoena, as provided as follows.

A(7)(a) Written objection; timing. A written objection may be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

A(7)(a)(i) Scope. The written objection may be to all or to only part of the command to produce.

A(7)(a)(ii) Objection suspends obligation to produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

A(7)(b) Motion to quash or to modify. A motion to quash or to modify the command for production must be served and filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of production.

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, and prisoners.

B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or

out of court, including:

B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein.

B(1)(b) Foreign depositions. Any foreign deposition under Rule 38 C presided over by any person authorized by Rule 38 C to take witness testimony, or by any officer empowered by the laws of the United States to take testimony; or

B(1)(c) Administrative and other proceedings. Any administrative or other proceeding presided over by a judge, justice, or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

B(2) Service of subpoenas requiring the appearance or testimony of individuals or non-party organizations; payment of fees. Unless otherwise provided in this rule, a copy of the subpoena must be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place required.

B(2)(a) Service on an individual 14 years of age or older. If the witness is 14 years of age or older, the subpoena must be personally delivered to the witness, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(b) Service on an individual under 14 years of age. If the witness is under 14 years of age, the subpoena must be personally delivered to the witness's parent, guardian, or guardian ad litem, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(c) Service on individuals waiving personal service. If the witness waives personal service, the subpoena may be mailed to the witness, but mail service is valid only if all of the following circumstances exist:

B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that the witness agreed to appear and testify if subpoenaed;

B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory arrangements with the witness to ensure the payment of fees and mileage. or the witness expressly declined payment; and

B(2)(c)(iii) Signed mail receipt. The subpoena was mailed more than 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt more than 3 days before the date to appear and testify.

B(2)(d) Service of a deposition subpoena on a nonparty organization pursuant to Rule 39 C(6). A subpoena naming a nonparty organization as a deponent must be delivered in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

B(3) Service of a subpoena requiring appearance of a peace officer in a professional capacity.

B(3)(a) Personal service on a peace officer. A subpoena directed to a peace officer in a professional capacity may be served by personal service of a copy, along with one day's attendance fee and mileage as allowed by law, unless the peace officer expressly declines payment.

B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a peace officer in a professional capacity may be served by substitute service of a copy, along with one day's attendance fee and mileage as allowed by law, on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge at least 10 days before the date the peace officer is required to attend, provided that the peace officer is currently employed by the law

enforcement agency and is present in this state at the time the agency is served.

B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law enforcement agency means the Oregon State Police, a county sheriff's department, a city police department, or a municipal police department.

B(3)(b)(ii) Law enforcement agency obligations.

B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

B(3)(b)(ii)(B) Ensuring actual notice or reporting otherwise. When a peace officer is subpoenaed by substitute service under paragraph B(3)(b) of this rule, the agency must make a good faith effort to give the peace officer actual notice of the time, date, and location identified in the subpoena for the appearance. If the law enforcement agency is unable to notify the peace officer, then the agency must promptly report this inability to the court. The court may postpone the matter to allow the peace officer to be personally served.

B(4) Service of subpoena requiring the appearance and testimony of prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena on a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

C Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule.

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

C(2) When mail service allowed. A copy of a subpoena for production that does not contain a command to appear and testify may be served by mail.

C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of a subpoena issued solely to command production or inspection prior to a deposition, hearing, or trial must do the following:

C(3)(a) Advance notice to parties. The subpoena must be served on all parties to the action who are not in default at least 7 days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the court orders less time;

C(3)(b) Time for production. The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time; and

C(3)(c) Originals or true copies. The subpoena must specify whether originals or true copies will satisfy the subpoena.

D Subpoenas for documents and things containing confidential health information ("CHI").

D(1) Application of this section; "confidential health information" defined. This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) Qualified protective orders. A qualified protective order means a court order that prohibits the parties from using or disclosing CHI for any purpose other than the litigation for which the information is produced, and that, at the end of the litigation, requires the return of all CHI to the original custodian, including all copies made, or the destruction of all CHI.

D(3) Compliance with state and federal law. A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not fully comply, then the recipient is entitled to disregard the subpoena and withhold the CHI it seeks.

D(4) Conditions on service of subpoena.

D(4)(a) Qualified protective order; declaration or affidavit; contents. The party serving a subpoena for CHI must serve the custodian or other record keeper with either a qualified protective order or a declaration or affidavit together with supporting documentation that demonstrates:

D(4)(a)(i) Written notice. The party made a good faith attempt to provide the person whose CHI is sought, or the person's attorney, written notice that allowed 14 days after the date of the notice to object;

D(4)(a)(ii) Sufficiency. The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the person or the person's attorney to meaningfully object;

D(4)(a)(iii) Information regarding objections. The party must certify that either no written objection was made within the 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

D(4)(a)(iv) Inspection requests. The party must certify that the person or the person's representative was or will be permitted, promptly on request, to inspect and copy any CHI

received.

D(4)(b) Objections. Within 14 days from the date of a notice requesting CHI, the person whose CHI is being sought, or the person's attorney objecting to the subpoena, must respond in writing to the party issuing the notice, and state the reasons for each objection.

D(4)(c) Statement to secure personal attendance and production. The personal attendance of a custodian of records and the production of original CHI is required if the subpoena contains the following statement:

This subpoena requires a custodian of confidential health information to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D(8) is insufficient for this subpoena.

D(5) Mandatory privacy procedures for all records produced.

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) Enclosure in a sealed outer envelope; properly addressed. The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) Court. If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a deposition or similar hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;

D(5)(b)(iii) Other hearings or miscellaneous proceedings. If the subpoena directs attendance at another hearing or another miscellaneous proceeding, to the officer or body conducting the hearing or proceeding at the officer's or body's official place of business; or

D(5)(b)(iv) If no hearing is scheduled. If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) Additional responsibilities of attorney or party receiving delivery of CHI.

D(6)(a) Service of a copy of subpoena on patient and all parties to the litigation. If the subpoena directs delivery of CHI to the attorney or party who issued the subpoena, then a copy of the subpoena must be served on the person whose CHI is sought, and on all other parties to the litigation who are not in default, not less than 14 days prior to service of the subpoena on the custodian or keeper of the records.

D(6)(b) Parties' right to inspect or obtain a copy of the CHI at own expense. Any party to the proceeding may inspect the CHI provided and may request a complete copy of the information. On request, the CHI must be promptly provided by the party who served the subpoena at the expense of the party who requested the inspection or copies.

D(7) Inspection of CHI delivered to court or other proceeding. After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the CHI may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise the copy must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The CHI must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. CHI that is not introduced in evidence or required as part of the record must be returned to the custodian who produced it.

D(8) Compliance by delivery only when no personal attendance is required.

D(8)(a) Mail or delivery by a nonparty, along with declaration. A custodian of CHI who

is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI subpoenaed within five days after the subpoena is received, along with a declaration that complies with paragraph D(8)(b) of this rule.

D(8)(b) Declaration of custodian of records when CHI produced. CHI that is produced when personal attendance of the custodian is not required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) Authority of declarant. The declarant is a duly authorized custodian of the records and has authority to certify records;

D(8)(b)(ii) True and complete copy. The copy produced is a true copy of all of the CHI responsive to the subpoena; and

D(8)(b)(iii) Proper preparation practices. Preparation of the copy of the CHI being produced was done:

D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the declarant;

D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred to in the CHI.

D(8)(c) Declaration of custodian of records when not all CHI produced. When the custodian of records produces no CHI, or less information than requested, the custodian of records must specify this in the declaration. The custodian may only send CHI within the custodian's custody.

D(8)(d) Multiple declarations allowed when necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) Designation of responsible party when multiple parties subpoena CHI. If more

than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

D(10) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness fee and mileage for one day unless there has been agreement to the contrary.

D(11) Scope of discovery. Notwithstanding any other provision of this section, this section does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

ORCP 55
Cross-Reference Chart

Published Amendment 9/8/18	Existing Rule 55 Section Reference	Existing Rule 55 Page Reference (as Shown in 9/8/18 Published Amendment)
A(1)(a)	A	page 1, line 3
A(1)(a)(i)	C(2)(a)	page 2, lines 21-23
A(1)(a)(ii)	A	page 1, line 11
A(1)(a)(iv)(A)	A	page 1, lines 4-5
A(1)(a)(iv)(B)	A	page 1, lines 5-6
A(1)(a)(iv)(C)	H(2)	page 7, line 22
A(2)	C(2)(a) C(2)(b)	page 21, lines 22-23 page 3, lines 4-6
A(3)(a)	C(2)(d)	page 3, lines 10-11
A(3)(b)	C(2)(a) and C(2)(a)(i) F(1)	page 2, line 21-23 through page 3, line 3 page 6, lines 5-10
A(3)(c)	C(2)(b)	page 3, lines 4-6
A(3)(d)	C(2)(c)	page 3, lines 7-9
A(3)(d)(i)	C(2)(a)	page 2, line 23
A(3)(d)(ii)	C(2)(c)	page 3, lines 7-9
A(4)	D(1)	page 3, lines 13-14
A(5)	D(5)	page 5, lines 19-21
A(6)(a)	A	page 1, lines 7-8
A(6)(b)	A	page 1, lines 8-10
A(6)(c)(i)	F(2)	page 6, lines 11-14
A(6)(c)(ii)	F(2)	page 6, lines 15-18
A(6)(d)	G	page 7, lines 1-5
A(7)(a) through A(7)(b)	B	page 1, line 18 through page 2, line 6
B(1)(a)	C(1)(a)	page 2, lines 9-12
B(1)(b)	C(1)(b)	page 2, lines 13-15
B(1)(c)	C(1)(c)	page 2, lines 16-19
B2	D(1)	page 3, lines 19-20
B(2)(a)	D(1)	page 3, lines 14-17
B(2)(b)	D(1)	page 3, lines 17-19
B(2)(c)	D(3)	page 5, lines 1-3
B(2)(c)(i)	D(3)(a)	page 5, lines 4-7
B(2)(c)(ii)	D(3)(b)	page 5, lines 8-9
B(2)(c)(iii)	D(3)(c)	pgae 5, lines 11-14
B(2)(d)	D(1)	page 3, lines 20-22
B(3)	D(1)	page 4, line 5
B(3)(a)	D(2)(b)	page 4, lines 11-13
B(3)(b)	D(2)(a) D(2)(b)	page 4, lines 8-10 page 4, lines 13-17
B(3)(b)(i)	D(2)(d)	page 4, line 24-26
B(3)(b)(ii)(A)	D(2)(a)	page 4, lines 6-8
B(3)(b)(ii)(B)	D(2)(c)	page 4, lines 18-23

ORCP 55
Cross-Reference Chart

Published Amendment 9/8/18	**Existing Rule 55 Section Reference**	**Existing Rule 55 Page Reference (as Shown in 9/8/18 Published Amendment)**
B(4)(a) through B(4)(c)	E	page 5, line 23 through page 6, line 12
C	B H(2)	page 1, lines 12-15 page 7, lines 22-23
C(1)	B	page 1, lines 5-8
C(2)	D(4)	page 5, line 15-18
C(3) through C(3)(b)	D(1)	page 3, line 23 through page 4, line 4
C(3)(c)	F(3)	page 6, lines 23-26
D through D(2)	H through H(1)	page 7, lines 7-21
D(3)	H(2)	page 7, lines 22-25
D4(a)	H(2)(a)	page 7, line 26 through page 8, line 3
D(4)(a)(i)	H(2)(a)(i)	page 8, lines 4-6
D(4)(a)(ii)	H(2)(a)(ii)	page 8, lines 7-9
D(4)(a)(iii)	H(2)(a)(iii)	page 8, lines 10-11
D(4)(a)(iv)	H(2)(a)(iv)	page 8, lines 12-14
D(4)(b)	H(2)(b)	page 8, lines 15-18
D(4)(c)	H(4) through H(4)(a)	page 10, line 12 through page 11, line 2
D(5)(a)	H(2)(d)	page 9, lines 11-13
D(5)(b) through D(5)(b)(iv)	H(2)(d)	page 9, lines 3-10
D(6)(a) through D(7)	H(2)(d)	page 9, lines 10-25
D(8) through D(8)(a)	H(2)(c) H(2)(f)	page 8, lines 19-26 page 9, line 26 through page 10, line 2
D(8)(b) through D(8)d)	H(3)	page 10, lines 3-20
D(9)	H(4)(b)	page 11, lines 4-7
D(10)	H(5)	page 11, lines 8-10
D(11)	H(6)	page 11, lines 11-12

REFEREES

RULE 65

A In general.

A(1) Appointment. A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate.

A(2) Compensation. The fees to be allowed to a referee shall be as provided in ORS 21.400.

A(3) Delinquent fees. The referee may not retain the referee's report as security for compensation.

B Reference.

B(1) Reference by agreement. The court may make a reference upon the written consent of the parties. In any case triable by right to a jury, consent to reference for decision upon issues of fact shall be a waiver of right to jury trial.

B(2) Reference without agreement. Reference may be made in actions to be tried without a jury upon motion by any party or upon the court's own initiative. In absence of agreement of the parties, a reference shall be made only upon a showing that some exceptional condition requires it.

C Powers.

C(1) Order of reference. The order of reference to a referee may specify or limit the referee's powers and may direct the referee to report only upon particular issues, or to do or perform particular acts, or to receive and report evidence only. The order may fix the time and place for beginning and closing the hearings and for the filing of the referee's report.

C(2) Power under order of reference. Subject to the specifications and limitations stated in the order, the referee has and shall exercise the power to regulate all proceedings in every hearing before the referee and to do all acts and take all measures necessary or proper for the efficient performance of duties under the order. The referee may require the

production of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. Unless otherwise directed by the order of reference, the referee may rule upon the admissibility of evidence. The referee has the authority to put witnesses on oath and may personally examine such witnesses upon oath.

C(3) Record. When a party so requests, the referee shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as a court sitting without a jury.

D Proceedings.

D(1) Meetings.

D(1)(a) When a reference is made, the clerk or person performing the duties of that office shall forthwith furnish the referee with a copy of the order of reference. Upon receipt thereof, unless the order of reference otherwise provides, the referee shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys of the meeting date.

D(1)(b) It is the duty of the referee to proceed with all reasonable diligence. Any party, after notice to the parties and the referee, may apply to the court for an order requiring the referee to speed the proceedings and to make the report.

D(1)(c) If a party fails to appear at the time and place appointed, the referee may proceed ex parte or may adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

D(2) Witnesses. The parties may procure the attendance of witnesses before the referee by the issuance and service of subpoenas as provided in Rule 55. If, without adequate excuse, a witness fails to appear or give evidence, that witness may be punished as for a contempt by the court and be subjected to the consequences, penalties, and remedies

provided in [*Rule 55 G*] **Rule 55 A(6)(d)**.

D(3) Accounts. When matters of accounting are in issue, the referee may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the referee may require a different form of statement to be furnished or the accounts or specific items thereof to be proved by oral examination of the accounting parties or in such other manner as the referee directs.

E Report.

E(1) Contents. The referee shall without delay prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the referee shall set them forth in the report.

E(2) Filing. Unless otherwise directed by the order of reference, the referee shall file the report with the clerk of the court or person performing the duties of that office and shall file a transcript of the proceedings and of the evidence and the original exhibits with the report. The referee shall forthwith mail a copy of the report to all parties.

E(3) Effect.

E(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall have the same effect as a jury verdict. Within 10 days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections to the report shall be by motion. The court after hearing may affirm or set aside the report, in whole or in part.

E(3)(b) In any case, the parties may stipulate that a referee's findings of fact shall be binding or shall be binding unless clearly erroneous.

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Shawna Allen <shawmarie71@everyactioncustom.com> Wed, Nov 21, 2018 at 7:26 PM
Reply-To: shawmarie71@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs Shawna Allen
610 S Holly St Medford, OR 97501-3639
shawmarie71@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Amy Anderson <amy_anderson1@everyactioncustom.com> Fri, Nov 16, 2018 at 1:34 PM
Reply-To: amy_anderson1@hotmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Amy Anderson
322 N Hayden Bay Dr Portland, OR 97217-7952
amy_anderson1@hotmail.com

Council on Court Procedures
December 8, 2018, Meeting
Appendix C-2

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Jenna Benton <jennajbenton@everyactioncustom.com> Tue, Nov 20, 2018 at 4:36 AM
Reply-To: jennajbenton@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs. Jenna Benton
2830 Cummings Ln Medford, OR 97501-1749
jennajbenton@gmail.com

Council on Court Procedures
December 8, 2018, Meeting
Appendix C-3

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Lydia Bradley <lydianbradley@everyactioncustom.com> Wed, Nov 14, 2018 at 6:19 PM
Reply-To: lydianbradley@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
As a survivor of child sexual abuse, I thank you for considering this important change. Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Lydia Bradley
9810 SE Grant Ct Portland, OR 97216-2642
lydianbradley@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Nicole Broder <nicole.mendoza.broder@everyactioncustom.com> Fri, Nov 16, 2018 at 11:23 AM

Reply-To: nicole.mendoza.broder@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked at home, at work, at school, and in the community.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Nicole Broder
6312 NE Hoyt St Portland, OR 97213-5057
nicole.mendoza.broder@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Svava Brooks <svavabb@everyactioncustom.com> Thu, Nov 15, 2018 at 10:23 AM
Reply-To: svavabb@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs. Svava Brooks
1025 SE 11th Ave Apt 521 Portland, OR 97214-2482
svavabb@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Courtney Brown <courtney@everyactioncustom.com> Thu, Nov 15, 2018 at 12:16 PM
Reply-To: courtney@sixbrowns.net
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust. I have family, students, and friends who have beehn abused so this is very important to me.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Courtney Brown
8235 SW 165th Ave Beaverton, OR 97007-5873
courtney@sixbrowns.net

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

William Burt <williamburt@everyactioncustom.com> Thu, Nov 15, 2018 at 10:10 AM
Reply-To: williamburt@greencloaks.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr. William Burt
3237 Sunset Dr Hubbard, OR 97032-9635
williamburt@greencloaks.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Mackenzie Burton <mackenzie.amber.m@everyactioncustom.com> Wed, Nov 14, 2018 at 5:40 PM

Reply-To: mackenzie.amber.m@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs. Mackenzie Burton
5703 NE Alberta St Portland, OR 97218-2618
mackenzie.amber.m@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re:Rule 16B

1 message

Erika Carpenter <ec24@pdx.edu> Sat, Nov 17, 2018 at 9:30 AM
To: ccp@lclark.edu

Please see my comments below regarding Rule 16B:

- The amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.
- Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.
- This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.

Thank you,
Erika

--
Erika Carpenter, M.S.
Pronouns: She, Her, Hers
Graduate Teaching Assistant
Department of Sociology at Portland State University
Cramer Hall - Room 217W

Portland State UNIVERSITY

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Das Chapin <das@everyactioncustom.com> Wed, Nov 14, 2018 at 5:22 PM
Reply-To: das@daschapin.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. Male survivors, like myself can take on an average of over 20 years to come forward because of that shame. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
MM Das Chapin
2414 SE Madison St Portland, OR 97214-3932
das@daschapin.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

David And Ann Cordero <corderoa@everyactioncustom.com> Fri, Nov 16, 2018 at 1:14 PM
Reply-To: corderoa@teleport.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr. David And Ann Cordero
2814 Lilac St Longview, WA 98632-3529
corderoa@teleport.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Ray Dackerman <raydackerman@everyactioncustom.com> Fri, Nov 16, 2018 at 1:27 PM
Reply-To: raydackerman@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr. Ray Dackerman
2156 Reis Run Rd Pittsburgh, PA 15237-1425
raydackerman@gmail.com

Council on Court Procedures
December 8, 2018, Meeting
Appendix C-13

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

TERRY DION <emailterryd@everyactioncustom.com> Wed, Nov 14, 2018 at 6:19 PM
Reply-To: emailterryd@yahoo.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
As an LCSW, I work with many survivors of child sexual abuse. Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms TERRY DION
4308 SE Ash St Portland, OR 97215-1048
emailterryd@yahoo.com

Shari Nilsson <nilsson@lclark.edu>

Rule 16

1 message

Victoria Dolby Toews, MPH <victoriatoews@comcast.net> Thu, Nov 15, 2018 at 9:18 AM
To: ccp@lclark.edu

Council Members,

I support the use of pseudonyms to be used by victims of certain crimes (i.e., sexual abuse). It's important for survivors to feel safe and supported. Please support Rule 16.

Thank you,

Victoria Dolby Toews, MPH

Oregon Law Center
522 SW Fifth Ave., Suite 812
Portland, OR 97204
(503) 295-2760

Legal Aid Services of Oregon
520 SW Sixth Ave., Suite 1100
Portland, OR 97204
(503) 224-4094

November 30, 2018

Dear Members of the Council on Court Procedures:

These comments are submitted on behalf of Oregon Law Center and Legal Aid Services of Oregon in support of the proposed amendment to Rule 16 of the Oregon Rules of Civil Procedure to formalize the use of pseudonyms in civil cases. This amendment will ensure survivors of domestic and sexual violence can access the civil legal system without fear of compromising their safety and privacy.

At the same time, the amendment would allow judges to maintain discretion in deciding whether parties should be permitted to file under a pseudonym in a specific case. It would provide judicial districts with the flexibility to establish Supplemental Local Rules (SLRs), as some counties already have, to manage the practice. The proposed change will not interfere with the operation of the courts and will establish a clear protection for some of the most vulnerable Oregonians.

I. Introduction to the Oregon Law Center and Legal Aid Services of Oregon.

The Oregon Law Center and Legal Aid Services of Oregon are sister non-profit legal services firms that represent low income Oregonians in a variety of civil lawsuits and administrative proceedings. Our organizations represent and advise tenants facing eviction from rental housing, employees whose employers do not pay their wages, victims of domestic violence who need a restraining order or custody order to achieve safety for themselves and their families, and people who are denied health care or public benefits that they need during times of economic hardship. We have twenty offices throughout the state of Oregon, in urban and rural communities, and we work closely with judges, the government, the private bar, and other nonprofits to assist low income Oregonians. A significant number of our clients are victims of domestic or sexual violence, for whom safety and privacy concerns are of the utmost importance. It is from this perspective that we support the proposed amendment to ORCP 16.

II. The proposed amendment will protect survivors' safety and their legal rights.

The proposed amendment would allow survivors of domestic and sexual violence to assert their legal rights without jeopardizing their safety and privacy. Filing under a pseudonym allows a survivor to pursue or defend civil legal claims on their merits, rather than being scared away from the process.

Domestic violence and stalking pose serious risks to survivors, even after they flee an abusive situation. Stalkers make regular use of technology to track and harass their victims. While court records and the Oregon eCourt Case Information system provide important information access to practitioners and the public, they can also be tools for abusers to locate their victims. The option to file under a pseudonym makes it possible for survivors to avail themselves of the legal system without making their personal information readily available to abusers. Absent this protection, survivors are forced to choose between protecting their legal rights and protecting their safety.

Domestic and sexual violence can cause or exacerbate poverty, and this proposal would help survivors protect their legal rights. Survivors must often flee their homes or leave their jobs in order to protect themselves and their children, putting them at risk for economic hardship. Indeed, domestic and sexual violence are leading causes of homelessness among women and children nationally.[1] Our organizations routinely speak with survivors who worry that filing cases will allow their abusers to locate them. Survivors may have employment law, housing, or other claims, or they may face eviction or other suits against which they have viable defenses. If these survivors are shut out of the legal system, they are unable to assert claims or defenses that could help them stay afloat financially and limit reliance on social safety net programs.

The proposed amendment furthers the objectives of both the U.S. and Oregon constitutions. This proposal supports the First and Fourteenth Amendments by ensuring survivors can assert their legal rights just like the rest of the population. Moreover, it upholds Oregon's constitutional protections for the privacy rights of crime victims. *See* Or. Const. art. I § 42(1). The change would create no new substantive rights, but would make it possible for survivors to assert their existing rights without fear for their safety.

III. The proposed amendment contains protections against procedural abuse and allows judicial districts to tailor the process to their needs.

The proposal contains procedural protections to ensure litigants do not abuse it, and the change would not impede the transparent operation of the courts. The proposed amendment would require a litigant to secure judicial approval in the particular case at issue. A judge would be able to weigh the added protections against any perceived impediment to the process in the context of the individual case. Nothing in the proposal would limit opposing litigants' legal rights. All Oregonians have the right to view court records and observe proceedings, *see* Or. Const. art. I § 10, and this proposal would not interfere with that right because it would neither prevent the public from reviewing filings or attending hearings.

The proposal also allows judicial districts to structure the process for filing under a pseudonym as they see fit through promulgation of SLRs. These rules can streamline the process for litigants to apply for and the courts to rule on these protections. The Circuit Courts in both Multnomah and Clackamas Counties have already adopted SLRs, and their rules can provide a template for other counties to build on.

The proposed amendment to Rule 16 is a common sense solution that will protect some of Oregon's most vulnerable citizens while preserving the integrity of the judicial system. We strongly encourage you to support its adoption. Please do not hesitate to contact us should you have questions about any of our comments. Thank you for your consideration.

Sincerely,

Debra Dority
Support Unit Attorney
Oregon Law Center

Colin D. A. MacDonald
Staff Attorney
Legal Aid Services of Oregon

[1] Yumiko Aratani, *Homeless Children and Youth, Causes and Consequences*, (National Center for Children in Poverty 2009), available at: http://www.nccp.org/publications/pdf/text_888.pdf.

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Stephany Eckart <stephany@everyactioncustom.com> Fri, Nov 16, 2018 at 1:40 PM
Reply-To: stephany@oregonatty.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Stephany Eckart
401 E 10th Ave Ste 540 Eugene, OR 97401-3367
stephany@oregonatty.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Beth Eylet <beatvamp@everyactioncustom.com> Thu, Nov 15, 2018 at 7:29 AM
Reply-To: beatvamp@msn.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Beth Eylet
3525 SE 64th Ave Portland, OR 97206-2741
beatvamp@msn.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Caryn Gillen <caryngillen@everyactioncustom.com> Fri, Nov 16, 2018 at 3:44 PM
Reply-To: caryngillen@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

I support things staying the same.

It's hard enough to come forward when you feel safe. These people don't feel safe. We have to protect them, it's our job.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs. Caryn Gillen
25 Knoop Ln Eugene, OR 97404-3186
caryngillen@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Amelia Hard <ameliah@everyactioncustom.com> Wed, Nov 14, 2018 at 8:40 PM
Reply-To: ameliah@europa.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
It is unimaginably difficult and stressful for sexual abuse survivors to come forward publicly. Many people never disclose their stories or hold abusers or facilitating entities accountable because of shame and the fear of retaliation and harassment for speaking out. Child sexual abuse thrives in the shadow of secrecy. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

I beg you to support the proposed amendment to Rule 16.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Amelia Hard
1214 SE Sellwood Blvd Portland, OR 97202-5944
ameliah@europa.com

Shari Nilsson <nilsson@lclark.edu>

Re: Amendment to ORCP 16 and fictitious party pleading in Oregon

1 message

jrhdks@gmail.com <jrhdks@gmail.com> Fri, Sep 28, 2018 at 6:57 PM
To: Mark Peterson <mpeterso@lclark.edu>
Cc: Shari Nilsson <nilsson@lclark.edu>

Resignation would probably be the right word; acceptance would certainly not be. I was raised in the law profession when it was still a discipline and attorneys and judges took pride in their ability to competently navigate the requirements of the law. I simply cannot imagine practicing law in today's world. I continue to silently research and write in assistance to a few more-or-less retired attorneys who now do pro bono work on matters of civic importance. I am continually appalled by the sloppiness and incompetence of so many attorneys, and the willingness of so many judges to put up with it. A very sad state of affairs as far as this old geezer is concerned.

_____
"I came into the world to live out loud" Emile Zola

Jim Hargreaves
Fulbright Specialist in Law
Legal Observer and Commentator
Amicus Curiae Consulting
2533 Lawrence Street
Eugene, Oregon USA 97405
1-541-913-6519

On Sep 28, 2018, at 5:31 PM, Mark Peterson <mpeterso@lclark.edu> wrote:

> Judge Hargreaves,
>
> I cannot open your attachment on this computer but I will later. I will pass along this e mail exchange and your attachment to members of the Council as feedback regarding a published rule. I sense some resignation, or acceptance of a reality with which you disagree, in your remarks. It is clear that the practice of pleading under a name other than the name of the party is occurring and a literal reading of the current ORCP would indicate that it should not. If parties are going to file pleadings in this manner, and judges are going to approve of the filing of such documents, it seems that the rules should at least delineate a procedure for the practice. A motion, an affidavit or declaration, and points and authorities or a memorandum in support of the motion indicates that there are procedures and that those procedures must be satisfied. I understand the desire to proceed under a pseudonym but I express no support or opposition to the practice. The proposed amendment does not make new law; it provides a procedure for those that wish to see if they can pursue their right to relief without disclosing their names.
>
> Mark
> --
> Mark A. Peterson
> Executive Director
> Council on Court Procedures
> Clinical Professor of Law
> Lewis & Clark Law School
> 10015 SW Terwilliger Blvd
> Portland OR 97219
> mpeterso@lclark.edu
> (503) 768-6505

On Fri, Sep 28, 2018 at 3:43 PM Jim Hargreaves <jrhdks@gmail.com> wrote:

Hi Mark

I have reviewed the amendment that has been proposed by the Council on Court Procedure as to Rule 16 requiring the use of the real name of the parties in pleadings, I have had three thoughts about this.
1. While I believe the amendment will be viewed by some as an indication that the Council thinks there is some law in Oregon that might support fictitious party pleading, the amendment at least tells attorneys and judges that there needs to be a court order before they can resort to fictitious party pleading and, attorneys will have to come up with **some** legal authority to get an order allowing this. That is probably a good thing.
2. Courts and judges who currently allow fictitious party pleading and ignore the requirements of Rule 16 will continue to do so even if this amendment is approved by the legislature.
3. Since, as far as I have been able to discern, there is no law in Oregon that would support fictitious party pleading--and ORCP clearly prohibits it--tit is my belief that those attorneys who even bother to comply with the amended Rule 16 will resort to claiming that the court has "inherent power" to ignore Rule 16 for a variety of reasons that have nothing to do with the law, but will, instead, focus on the claimed hardship on parties if they use their true names in embarrassing or otherwise sensitive matters.

From following the discussions of the Council regarding this proposed amendment over the last year or so, it is clear to me that there is at least one judge and maybe a couple of attorneys on the Council who would not hesitate to go down the road of inherent power to get a court order. Given that, I have spent a little time putting together the attached short essay on the proper application of the concept of inherent power in Oregon. It is my conclusion that this doctrine is completely inapplicable in this situation and cannot form the basis for an order that allows the circumvention of Rule 16, amended or not. Even though the Council has apparently finished its work on Rule 16 I would appreciate it if you would pass this essay along to the group for what ever deterrent effect it might have at least on those on the Council who appear to have an erroneous understanding of the inherent power of the courts.

Regards

Jim

Jim Hargreaves
Fulbright Expert in Law
Legal Observer & Commentator
Amicus Curiae Consulting
2533 Lawrence Street
Eugene, Or 97405
541.913.6519

INHERENT POWER

A Doctrine of Judicial Necessity, Not Judicial Preference

While inherent power is technically a constitutional concept stemming from the need for a judge to be able to solve legal problems when no constitutional or statutory direction is provided, in Oregon the legislature has weighed in on this concept as well. This paper provides a brief survey of the relevant Oregon law.

Inherent Powers of Judges in Oregon

From my fifty years as a member of the Oregon State Bar, including two decades of experience on the trial bench, it has been my observation that the concept of "inherent power" when used in relation to a judge's authority to perform some act, seems to roll somewhat trippingly off the tongue of some judges. Unfortunately, it is also a concept whose application and limitations appear to be little understood by many in the judiciary, as well as many members of the Bar. In this essay I hope to bring some clarity to the use of this concept so that judges and members of the Bar have a better understanding of when this concept can properly be applied. What follows is not intended as a law review article or an exhaustive review of the Oregon case law, but rather as a brief guide for judges and attorneys as to the proper application of the doctrine of inherent power and its limitations.

Introduction

Inherent power, is technically a constitutional concept stemming from the need for a judge to be able to solve legal problems when no constitutional or statutory direction is provided as to how to proceed. However, in Oregon, the legislature has weighed in on this concept as well. I will first address the Oregon case law around this concept, followed by a discussion of the legislature's contribution.

Inherent Power as a Constitutional Concept

Even though the Oregon appellate courts from time to time refer to this or that as an inherent power of the court, there are only a relatively few cases where a meaningful analysis of the application of this concept has been set forth. I have selected three key cases that I believe give a clear picture of the doctrine and it appropriate application.

The seminal case in Oregon regarding the inherent power of judges and under what circumstances a judge may resort to the use of this power is, *Ortwein v. Schwab, 262 Or. 375, 498 P.2d 757, (1972)*. In that case the plaintiff attempted to file a matter with the Supreme Court without paying the required filing fee. In rejecting a petition for a writ of mandamus to compel the court to accept the filing without the fee, the Oregon Supreme Court said: "We look upon the doctrine of inherent judicial power as the source of power to do those things necessary to perform the judicial function, for which the legislative branch has not provided, and, in rare instances, to act contrary to the dictates of the legislative branch." In reference to the "rare instances" where courts may exercise inherent power to act contrary to the dictates of the legislative branch the Court said this may only be done when the legislative branch has placed "such a restriction upon the performance of the judicial function that the court can ignore the legislative command".

The case of *Springer v. State, 50 Or. App. 5, 621 P.2d 1213 (1981)* was a case where the trial court was asked to seal court records in a case where the defendant had not been convicted. On appeal, the Court of Appeals stated: "We do not perceive why a court's power to provide this

particular relief is any more necessary to its ability to perform the judicial function (see Ortwein v. Schwab, 262 Or. 375, 498 P.2d 757 (1972), aff'd 410 U.S. 656, 93 S. Ct. 1172, 35 L.Ed.2d 572 (1973)), than is its ability to afford other kinds of relief which are beyond its jurisdiction or powers."

Finally, in the case of Cox v. M.E.I, 239 Or. App. 351, 244 P.3d 828 (2010), the Oregon Court of Appeals, in a case where the plaintiff was seeking to have a court record in a civil stalking case sealed and was relying on the doctrine of inherent power of the court to support that request, the Court said, "...the crucial question is whether court authority to seal records in such cases is necessary to enable courts to perform their judicial functions." The Court continued, "respondent has not explained why court authority to seal the court file and other records in a civil stalking order case after it has been adjudicated is necessary to enable courts to perform their judicial functions, and, hence, he has not given us any basis to conclude that courts have inherent power to do so."

What can be gleaned from these three case is that, before the a court can exercise its inherent powers, 1) it must be clearly shown that doing so is "*necessary*" for it to be able to carry out some function that is within its jurisdiction to perform; 2) the legislature has not provided a process to be followed in performing that function; and 3) to exercise its inherent power in derogation of some act of the legislative branch, the legislative act must have placed such a substantial restriction on the function of the court that it is essentially a violation of the constitutional doctrine of separations of powers.

Inherent Power as a Legislative Construct

ORS 1.160 provides as follows: "When jurisdiction is, by the Constitution or by statute, conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by the procedural statutes, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the procedural statutes."

The language above has been in the legal code in Oregon at least as far back as Lord's Oregon Laws, the predecessor legal code to Oregon Revised Statutes. As can be seen by comparing the statutory language to that definition of inherent power adopted by the Oregon appellate courts as discussed above, it is clear that the legislature meant to incorporate the judicially defined concept of inherent power into the statute. Oregon appellate court cases dealing with this statute seem to clearly confirm this conclusion.

A good place to begin this discussion is with the case of *Black v. Arizala 182 Or. App. 16, 48 P.3d 843 (2002)*. The issue on appeal was the enforceability of a forum selection clause in a contract. The facts in this case are not really relevant to the current discussion, however the discussion of ORS 1.160 provides a good overview of the reach of that statute. The Court of Appeals, after reciting the text of ORS 1.160, pointed out, "...the statute authorizes a court to exercise its jurisdiction by implementing its own procedure only when there is no adequate existing procedure already available. In *K. v. Health Division*, 26 Or. App. 313, 319-20, 552 P.2d 840

(1976), *rev'd on other grounds* 277 Or. 371, 560 P.2d 1070 (1977), the court "consider[ed] * * * whether this is an appropriate case for it to provide procedures under ORS 1.160." It examined *Wulff v. Sprouse Reitz Co., Inc.*, 262 Or. 293, 313, 498 P.2d 766 (1972), and *Amer. Timber/Bernard v. First Nat'l*, 263 Or. 1, 500 P.2d 1204 (1972), and found that ORS 1.160 was intended to provide authority for creating new procedures only when there was no available procedure already established." The Court then went on to point out that in *Amer. Timber/Bernard*, 263 Or. at 10, 500 P.2d 1204 "...the Supreme Court observed that, "[T]raditionally, the formation of procedural rules in this state has been considered to be a function of the legislature. Where a procedure at law has been provided for the vindication of a claim, we do not believe it to be our function under [ORS 1.160] to provide another procedure[.]"

Following the above discussion, the Court then concluded, "Here, the ORCP provide a procedure to determine the enforceability of a forum selection clause. Depending on the specific facts of each case, such an issue can be decided on the pleadings, on summary judgment, or at trial. Moreover, ORCP 53 B permits the bifurcation of issues for trial. The availability of those procedures obviates the need for the court to create a different procedure, and where the legislature has provided adequate procedures, this court should not create a different procedure pursuant to ORS 1.160."

In the case of *Law v. Zemp 362 Or. 302, 408 P.3d 1045 (2018)*, the Oregon Supreme Court took up the issue of the proper application of ORS 1.160 in a complex piece of litigation regarding a judgment creditor's attempt to charge the defendant's interest in some limited partnerships to satisfy the judgment. In a discussion of the validity of the trial court's order charging defendant's interest, they discussed the application of ORS 1.260. The Court explained: "Plaintiff first asserts that courts have broad inherent authority to enforce their own orders and judgments, and that the orders at issue fall within the scope of that inherent authority. We accept the former proposition, but are less certain about the latter. It is true that courts have broad inherent powers, sometimes also recognized by statute, to do those things that are necessary to perform their judicial function, *Ortwein v. Schwab*, 262 Or. 375, 385, 498 P.2d 757 (1972), *aff'd*, 410 U.S. 656, 93 S. Ct. 1172, 35 L.Ed.2d 572 (1973), and that those powers include the power to compel obedience to a court's own orders and judgments. *State ex rel. Oregon State Bar v. Lenske*, 243 Or. 477, 492-93, 407 P.2d 250, *cert. den.*, 384 U.S. 943, 86 S.Ct. 1460, 16 L.Ed.2d 541 (1966); ORS 1.010(4).[3] It is even true that, to the extent that courts' inherent powers are essential to the courts' work, those powers cannot be eliminated (or excluded) by legislative fiat. *See Lenske*, 243 Or. at 492-93, 407 P.2d 250 (legislature cannot eliminate court's authority to impose sanctions for contempt)."

The Court then stated: "But, whether or not courts have inherent authority of that kind, they appear to have been granted something akin to it by one of the statutes that plaintiff has cited. ORS 1.160 provides that, "[w]hen jurisdiction is, by the Constitution or by statute, conferred on a court ***, all the means to carry it into effect are also given." Although ORS 1.160 primarily has been understood as authorizing courts to devise procedures to carry out a statutory charge when none have been provided by the relevant statute, it at times has been given a more substantive slant—of authorizing courts to take whatever steps are necessary to *effectively*

carry out their statutory obligations. *See, e.g.*, *Grayson v. Grayson*, 222 Or. 507, 352 P.2d 738 (1960) (although neither divorce statutes nor receivership statutes provided divorce courts with authority to appoint a receiver, divorce courts had authority to do so under ORS 1.160, to make effective the express authority conferred on such courts by statute to enjoin husband and wife from encumbering or disposing of any property during pendency of proceeding); *Kelley v. Kelley*, 183 Or. 169, 191 P.2d 656 (1948) (although court lacked general authority to decide validity of a divorce in a foreign jurisdiction, such authority existed under ORS 1.160 to the extent that it was necessary to effectuate its statutorily-conferred authority to grant legal separations and divorces). However, to the extent that the power granted to courts by ORS 1.160 is "the power to make effective jurisdiction expressly conferred," *Esselstyn v. Casteel*, 205 Or. 344, 354, 286 P.2d 665 (1955), it necessarily is defined by the statutory or constitutional provision that confers "jurisdiction." In other words, a court's authority under ORS 1.160 is the authority to take whatever additional steps are necessary to carry out the task that the legislature assigned to the court in the underlying statute or constitutional provision."

Finally, to close this discussion, it is important to read what the Oregon Supreme Court had to say in *Lessig v. Conboy 219 Or. 373, 347 P.2d 98 (1959)*. In a discussion of whether the filing of a cross-complaint was authorized by Oregon law under the facts of that particular case, the Court turned to ORS 1.160 and had this to say: "Where the procedure is pointed out by statute, ... the trial court would have no authority to change that legislative enactment, simply because a change might seem more appropriate in a certain case."

Conclusion

The concept of inherent power in relation to the judiciary in Oregon has both a constitutional and statutory basis. The appellate courts of Oregon have drawn no meaningful distinction between these two bases. When a court is confronted with whether or not it has inherent power to do a particular thing, the first question a judge should ask is, "Is invoking inherent power, based either on a constitutional or statutory basis, *necessary* for me to be able to carry out a specific, articulable power I have been given by the legislature or the Oregon Constitution?" Or, put another way, the question is, "Is there any other way under existing law that I can carry out the power I have without resorting to the invocation of the doctrine of inherent power?" Resorting to the inherent power of the court is always the last resort.

It is also important to remember that just because a judge does not like the way the law requires that an issue within the judge's power is to be resolved, that is not a basis for invoking inherent power. As long as the law provides a path, the court is required to follow that path, like it or not.

---0---

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re:Rule 16B

1 message

Jenna Harper <jennaharper@gmail.com> Sun, Nov 18, 2018 at 9:57 AM
To: ccp@lclark.edu

Good morning,

The amendment to Rule 16 recognizes Oregon's longstanding practice allowing judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.

Procedures already exists for implementing this amendment in Supplemental Local Rules in Multnomah and Clackamas Counties. This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.

This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.

Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

Thank you,

Jenna Harper

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re:Rule 16B

1 message

Carolyne Haycraft <carolyne@emerjsafenow.org> Thu, Nov 15, 2018 at 6:22 PM
To: ccp@lclark.edu

Dear Council on Court Procedures:

I am responding to Rule 16B on behalf of EMERJ-SafeNow. As an organization working to prevent violence and often working with survivors, adults and children, we believe it is important that victims of stigmatizing crimes are not be re-traumatized because they are seeking justice.

This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.

This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases and the amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.

Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

'Thank you for accepting our comments.

*Carolyne Haycraft (*pronouns she/her)
EMERJ-SafeNow Team, MFA, M.Ed.
(503) 896-1522

"It is not our differences that divide us. It is our inability to recognize, accept, and celebrate those differences." **Audre Lourde** – African American writer and civil rights activist.

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Tracy Heart <tracyheart.therapy@everyactioncustom.com> Wed, Nov 14, 2018 at 10:25 PM
Reply-To: tracyheart.therapy@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
As you are likely aware, child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Tracy Heart
SW MULTNOMAH Blvd Portland, OR 97219
tracyheart.therapy@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Heather Smith <clkwrkbrd2@everyactioncustom.com> Wed, Nov 14, 2018 at 5:06 PM
Reply-To: clkwrkbrd2@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs. Heather Smith
4515 NE 97th Ave Portland, OR 97220-4212
clkwrkbrd2@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Lauri Henry <lhenrycmc@everyactioncustom.com> Tue, Nov 20, 2018 at 7:02 AM
Reply-To: lhenrycmc@msn.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs Lauri Henry
3053 Edmond Way Medford, OR 97504-9010
lhenrycmc@msn.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Peggy Hess <eternaljoy4me@everyactioncustom.com> Thu, Nov 15, 2018 at 1:04 PM
Reply-To: eternaljoy4me@outlook.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Miss Peggy Hess
10288 SE 43rd Ave Apt A1 Milwaukie, OR 97222-5871
eternaljoy4me@outlook.com

Shari Nilsson <nilsson@lclark.edu>

Comments re: Rule 16B

1 message

Rebecca Hillyer <rebecca.hillyer@chemeketa.edu> Thu, Nov 15, 2018 at 8:52 AM
To: ccp@lclark.edu

I have had the privilege to serve on the Attorney Generals Sexual Assault Task Force for nearly 6 years. Also in my 34 year career I have worked with both criminal defendants and survivors of sexual assault. I want to support the amendment of Rule 16 to codify allowing pseudonyms for plaintiffs in law suits for the following reasons:

- The amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.
- Procedures already exists for implementing this amendment in Supplemental Local Rules in Multnomah and Clackamas Counties. This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.
- This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.
- Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

Thank you in advance for your time and consideration.

Rebecca L. Hillyer, JD
General Counsel
Chemeketa Community College
4000 Lancaster Dr. NE
Salem, Oregon 97309-7070
503.399.8677
(*pronouns: she, her, hers)*

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Susan Humphrey <susan.e.humphrey@everyactioncustom.com> Thu, Nov 15, 2018 at 3:56 PM

Reply-To: susan.e.humphrey@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Susan Humphrey
8801 SW Stono Dr Tualatin, OR 97062-7161
susan.e.humphrey@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Mary Janowski <marypat_j@everyactioncustom.com> Thu, Nov 15, 2018 at 3:09 PM
Reply-To: marypat_j@yahoo.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Mary Janowski
10355 SW 141st Ave Beaverton, OR 97008-9389
marypat_j@yahoo.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

John Smith <nope@everyactioncustom.com> Wed, Nov 14, 2018 at 3:54 PM
Reply-To: nope@no.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr. John Smith
NOPE Portland, OR 97201
nope@no.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Johnnie Burt <johnnie@everyactioncustom.com> Thu, Nov 15, 2018 at 7:12 AM
Reply-To: johnnie@capstonecounseling.net
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms Johnnie Burt
3237 Sunset Dr Hubbard, OR 97032-9635
johnnie@capstonecounseling.net

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re:Rule 16B

1 message

Kennedy, Elizabeth <elizabeth.kennedy@oregonstate.edu> Fri, Nov 16, 2018 at 11:54 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Oregon Council on Court Procedures,

The amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.

Procedures already exists for implementing this amendment in Supplemental Local Rules in Multnomah and Clackamas Counties. This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.

This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.

Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

Kindly,

Elizabeth Kennedy

Oregon Attorney General's Sexual Assault Task Force

Campus Committee Co-Chair

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Kristi Kernal <kristi.kernal@everyactioncustom.com> Fri, Nov 16, 2018 at 8:31 AM
Reply-To: kristi.kernal@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Kristi Kernal
18985 NW Rock Creek Blvd Apt A Portland, OR 97229-3233
kristi.kernal@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Rule 16B Comments on Published Rules re: Rule 16B

1 message

Ben Litton <Benners76@hotmail.com> Tue, Nov 27, 2018 at 8:30 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

November 27, 2018

Dear Members of the Council on Court Procedures:
My name is Ben, and I am writing to support the proposed amendment to Rule 16 to continue to allow
pseudonyms (like "Jane Doe") to be used in civil cases. This rule is important because it would empower
survivors of sexual assault and other stigmatizing crimes to seek civil justice without having to share their
identities with the whole world.
I am a brother to a sexual assault survivor, and I know from experience
just how difficult it is for survivors to come forward and report what happened to them. Although the
#metoo movement has helped shed light on these issues in the public sphere, the world remains a hostile
place for many victims of sexual and domestic violence. Retaliation, reprisal, harassment, intimidation
and abuse are real and true risks for any victim who summons up the courage to come forward.
Granting survivors the option to request a pseudonym on civil court documents would provide them with
more options to secure their privacy and personal safety, which in turn would encourage more survivors
to come forward. Their reports keep our communities safe and contribute to accountability for predators
and predatory organizations.
For all of these reasons and more, I ask that you vote YES to pass the amendment to Rule 16. Thank you
for your consideration of this important issue.

Sincerely,
Ben

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Jodie Loeks <jodie.loeks@everyactioncustom.com> Fri, Nov 16, 2018 at 11:58 AM
Reply-To: jodie.loeks@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms Jodie Loeks
44835 NW Star St Banks, OR 97106-8866
jodie.loeks@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re: Rule 16B

1 message

Barb Long <barb@vogtlong.com> Mon, Nov 12, 2018 at 1:29 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Members on the Council on Court Procedures:

I am writing to support to the proposed amendment to Rule 16. This is an issue of utmost importance to my clients as nearly 100% are survivors of sexual abuse.

For many of my clients, I am the first person they have told about the abuse. Shame, guilt, self-blame, and fear of stigmatization often leads to a fear of disclosing what happened. The statute of limitations for a criminal prosecution has often passed and a civil remedy is the only option.

When deciding whether to move forward with a lawsuit, one of the greatest concerns my clients have is over privacy. Will my name end up in the paper? Will the lawsuit come up in a background check? Can other people find out what happened to me? What will my co-workers or clients think if they find out I was abused?

The current procedure employed by Multnomah and other counties gives these clients a way to proceed that protects their privacy. For many, this is the decisive factor in deciding whether to file. I have represented counselors, people in law enforcement, and other professionals who were very concerned about colleagues and learning of their sexual abuse victimization.

The current practice also makes our communities safer. Sex abuse survivor litigants already face many hardships going forward in a civil case. I am concerned that if this amendment does not pass, it will discourage victims from reporting.

Finally, it's worth noting that the proposed amendment is party neutral. In at least two cases, my office has allowed the defendant to proceed via pseudonym. Both were cases involving the transmission of a sexually transmitted disease. This is thus not a practice that only favors plaintiffs. The amendment reflects the current practice in Multnomah County, which lets a judge determine whether a pseudonym is appropriate.

Thank you for the work the Council has done to create a balanced amendment that allows judicial discretion to grant pseudonyms.

Sincerely,

Barb Long

Barbara C. Long
Vogt & Long PC
1314 NW Irving St, Suite 207
Portland, OR 97209
(503) 228-9858 (T)
(503) 228-9859 (F)
www.vogtlong.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

pat matthews <patmatthews@everyactioncustom.com> Wed, Nov 14, 2018 at 10:42 PM
Reply-To: patmatthews@cmug.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms pat matthews
13505 SE River Rd Apt 245 Portland, OR 97222-8232
patmatthews@cmug.com

November 29, 2018

Re: Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

Dear Members of the Council on Court Procedures:

First, I want to thank you for your work creating and revising our court procedures. The work you do is critical to the equitable administration of justice in Oregon.

Second, on behalf of the Victim Rights Law Center (VRLC) I write to express my support for the proposed amendment to Rule 16. The VRLC provides free legal services to sexual assault survivors in Oregon, in both the civil and criminal arenas. In Oregon (and Massachusetts), the VRLC has represented thousands of sexual assault survivors. As lawyers for survivors, we are all too familiar with the courage survivors must summon - and the safety risks they confront – when pursuing justice through our courts.

Perpetrators of gender-based violence (sexual assault, domestic violence, stalking, and dating violence) typically target individuals who are marginalized. This includes but is not limited to survivors who are undocumented, LGBTQ, minors, survivors of human trafficking, and others. For many, if not most, of these survivors privacy is a critical consideration to their willingness and ability to come forward and pursue justice through our courts. As Victim Rights Law Center founder Susan Vickers explained, for "sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery."

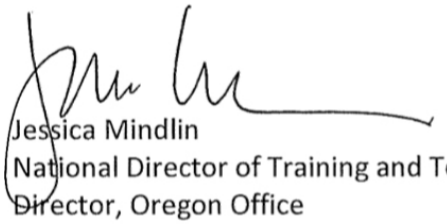
Oregon has had both an enduring commitment to protecting victims' privacy and to advancing judicial discretion as appropriate. While Oregon needs a statute to best protect victim privacy, the proposed amendment helps to advance these two important goals.

Allowing judges to decide whether a victim qualifies to file under a pseudonym is not a change to Oregon law or practice, and neither does it create new law. Instead, this amendment recognizes a balance already in place and affirms Oregon's recognition of existing laws and procedures that recognize and protect victim privacy. For example, Multnomah and Clackamas counties' Supplemental Local Rules (SLRs) already allow a litigant to proceed with a pseudonym in certain circumstances. The proposed Rule 16 will affirm that other Oregon counties, too, may create similar procedures. We believe that, at a minimum, such SLRs should be established all across Oregon and support any effort that affirms this option.

Affirming judicial discretion to allow victims to proceed in civil cases under a pseudonym advances both individual victim and community safety. It takes no more than reviewing the "Comments" section of any high profile sexual assault case to recognize the emotional and physical threats survivors sustain when they come forward to hold perpetrators accountable. Advancing survivor privacy makes it possible for survivors to access our courts to hold offenders accountable, and to bring their crimes forward into the light of day. Because the possibility of proceeding under a pseudonym makes justice possible, and we are all the better for this.

Thank you for the work the Council has done to create a balanced amendment that continues the practice of allowing judicial discretion to grant pseudonyms where appropriate. This amendment should be passed.

Sincerely,



Jessica Mindlin
National Director of Training and Technical Assistance
Director, Oregon Office
Victim Rights Law Center

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Jon Molenkamp <molenkamp@everyactioncustom.com> Thu, Nov 15, 2018 at 3:43 AM
Reply-To: molenkamp@me.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr Jon Molenkamp
9730 SW 52nd Ave Portland, OR 97219-5043
molenkamp@me.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Michael Morey <mickeym51@everyactioncustom.com> Thu, Nov 15, 2018 at 12:05 AM
Reply-To: mickeym51@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
I am a retired Oregon Lawyer. For my entire career, I worked for victims of sexual abuse. As a deputy district attorney for Multnomah County, I prosecuted more than a hundred rape and child sexual abuse cases. After leaving the DA's office, I represented hundreds of victims of sexual abuse in civil litigation, for the next 30 years. I fully understand the shame, retaliation, fear and many other difficulties survivors face in coming forward to break the silence of their abuse, and to hold their abusers accountable. I filed many dozens of lawsuits using pseudonyms, because without that, the survivor would not have felt safe enough to come forward. In a number of cases, I successfully fought each defense motion to name the survivor, before many different judges, as there is no legitimate basis to require the survivor to be named publicly. The defense is given the full name and other identifying information immediately after filing so there is no prejudice to the defendants. The only real basis for the defense to attempt to require the survivor to be named publicly is intimidation, a reason that should not be allowed in a fair court system.
I strongly support the proposed amendment to Rule 16 and urge the members of the council to adopt it.

Michael S. Morey
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr. Michael Morey
PO Box 871147 Vancouver, WA 98687-1147
mickeym51@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Margaret Morris <haymaggiemay@everyactioncustom.com> Thu, Nov 15, 2018 at 12:57 PM
Reply-To: haymaggiemay@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

The hatred of women and (especially of women seeking justice regarding their sexual predators) is palpable in this country. Until the distant future where that situation is improved women MUST be protected when defending themselves against said predators. It is reprehensible that women should have to live in fear of retaliation for seeking justice. In order to help end cycles of abuse, we need to protect women and create a safe space for them to come forward about their abusers.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Margaret Morris
2545 N Watts St Portland, OR 97217-6367
haymaggiemay@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Faith Morse <faith.morse@everyactioncustom.com> Mon, Nov 19, 2018 at 5:23 AM
Reply-To: faith.morse@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Faith Morse
1270 Albion Ln Medford, OR 97501-4350
faith.morse@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Cathy Mounts <andthensome63@everyactioncustom.com> Fri, Nov 16, 2018 at 6:00 AM
Reply-To: andthensome63@yahoo.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Cathy Mounts
25 NW 23rd Pl Portland, OR 97210-5580
andthensome63@yahoo.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

klarissa oh <klarissa.oh@everyactioncustom.com> Thu, Nov 15, 2018 at 8:29 AM
Reply-To: klarissa.oh@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. klarissa oh
11065 SW 79th Ave Portland, OR 97223-8734
klarissa.oh@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Marc Otto <mfotto@everyactioncustom.com> Fri, Nov 16, 2018 at 3:36 PM
Reply-To: mfotto@mac.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

As a therapist, I have personal experience with people who have experience sexual abuse and childhood and you do not seek legal action specifically due to fear of having their identity publicly known.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr Marc Otto
5509 SE 22nd Ave Portland, OR 97202-5146
mfotto@mac.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re: Rule 16B

1 message

David Paul <dp@davidpaullaw.com> Tue, Nov 27, 2018 at 11:22 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Hi Council:
I understand there are proposed changes to Rule 16B regarding pseudonyms in civil cases. The rule changes are a bad idea and here's why.
The present rule works. Judicial discretion allows the right balance for protecting the privacy of victims. I have seldom, but occasionally litigated challenges to the use of this rule. A learned local judge is a fair way to resolve any potential disagreements.
Multnomah and Clackamas Counties have appropriate SLR's to implement the ORCP. These local rules can serve as models.
There is nothing unfair about the present rule. It protects plaintiffs and/or defendants. There can be great harm in not allowing pseudonyms. Victims won't come forward, or if they do, they will likely be stigmatized, ostracized and bullied.
Oregon courts have already ruled that privacy of parties can be preserved in appropriate cases on appeal without violation of the Open Courts Clause of the Oregon Constitution. See Chief Justice Order 10-060 .
In sum, removing a parties' stigma and preserving access to justice is worth any potential problems. There are no abuses. Judges can administer this process. The risk of real harm is far greater than any perceived fear of using this rule.
Thank you for the work you do on this council.

David Paul
DAVID PAUL, PC
dp@davidpaullaw.com

210 SW Morrison Street, Ste. 500
Portland, OR, 97204
Phone: 503.224.6602
FAX: 503.719.5542

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16

1 message

Rep Piluso <Rep.CarlaPiluso@oregonlegislature.gov> Fri, Nov 16, 2018 at 11:55 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>
Cc: WOLF John <John.Wolf@state.or.us>, "D.Charles.BAILEY@ojd.state.or.us" <D.Charles.BAILEY@ojd.state.or.us>, "Curtis.CONOVER@ojd.state.or.us" <Curtis.CONOVER@ojd.state.or.us>, GERKING Tim <Tim.Gerking@state.or.us>, "Norm.R.Hill@ojd.state.or.us" <Norm.R.Hill@ojd.state.or.us>, "David.E.Leith@ojd.state.or.us" <David.E.Leith@ojd.state.or.us>, "Susie.L.NORBY@ojd.state.or.us" <Susie.L.NORBY@ojd.state.or.us>, "Leslie.Roberts@ojd.state.or.us" <Leslie.Roberts@ojd.state.or.us>, "douglas.l.tookey@ojd.state.or.us" <douglas.l.tookey@ojd.state.or.us>, "lynn.r.nakamoto@ojd.state.or.us" <lynn.r.nakamoto@ojd.state.or.us>

Attached is a statement of support from Representative Piluso for Rule 16B. I have also pasted its contents below.

Thank you,

Zoe

November 16, 2018

RE: Proposed Amendment to Rule 16

I am writing in support of the proposed Rule 16B, which would continue allowing parties to a court action to file with a pseudonym. To my understanding, this rule clarifies existing practice and is a common-sense method of protecting survivors of domestic violence and abuse.

As Chief of Police in Gresham, I witnessed the many barriers domestic violence survivors face when deciding whether to come forward and place their trust in the criminal justice system. By recognizing Oregon's longstanding practice, this proposed amendment reaffirms our existing treatment of victims who may feel unsafe or stigmatized in our courtrooms. At the same time, it strikes a balance by recognize judicial discretion; in the past, courts have granted the use of a pseudonym to both plaintiffs and defendants.

Thank you for your consideration.

Sincerely,

Carla C. Piluso

Oregon State Representative, House District 50

Zoe Klingmann *(pronouns: she/her/hers)*

Staff to State Representative Carla Piluso

House District 50, the great city of Gresham

Salem office: 503-986-1450

Gresham office: 503-489-7291

Cellular telephone: 971-612-0051

Rule16A_Piluso comment.pdf
126K

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re:Rule 16B

1 message

Ann Rad <theannrad@gmail.com> Thu, Nov 15, 2018 at 9:46 AM
To: ccp@lclark.edu

- The amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.
- Procedures already exists for implementing this amendment in Supplemental Local Rules in Multnomah and Clackamas Counties. This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.
- This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.
- Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

--
Ann Rad

"I **am no longer accepting the things I cannot change**. I **am changing the things I cannot accept**." -Angela Davis

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Kathy Rasmussen <kathryn.ras@everyactioncustom.com> Mon, Nov 19, 2018 at 11:29 AM
Reply-To: kathryn.ras@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms Kathy Rasmussen
3950 Goodpasture Loop Eugene, OR 97401-1578
kathryn.ras@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re:Rule 16B

1 message

Michele Roland-Schwartz <michele@oregonsatf.org> Thu, Nov 15, 2018 at 3:28 PM
To: ccp@lclark.edu

Thank you for the opportunity to submit comments on the Published Rules regarding Rule 16B, to continue to allow victims and other parties to a court action to file with a pseudonym.

SATF fully supports the amendment which would expressly codify a survivor's right to elect to file a civil suit under a pseudonym in Oregon Circuit Court. Survivors of sexual and domestic violence may not disclose abuse because they feel ashamed and are afraid of retaliation and harassment for speaking out. Providing survivors the option to use a pseudonym on civil court documents allows survivors greater safety and confidentiality.

Additionally,

- The amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.
- Procedures already exists for implementing this amendment in Supplemental Local Rules in Multnomah and Clackamas Counties. This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.
- This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.
- Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

Thank you for your consideration,

Michele Roland-Schwartz (pronouns she/her)
Executive Director
Oregon Attorney General's Sexual Assault Task Force
3625 River Rd N, Suite 275
Keizer, OR 97303
503-990-6541 x102
www.oregonsatf.org

Are you on Oregon SATF's general mailing list? Receive training announcements and news.
Sign up HERE.

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Lezley sanders <lezleysanders@everyactioncustom.com> Wed, Nov 14, 2018 at 11:23 PM
Reply-To: lezleysanders@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms Lezley sanders
752 Amhurst Way Medford, OR 97504-9457
lezleysanders@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Mitzi Sandman <mitzi@everyactioncustom.com> Thu, Nov 15, 2018 at 1:32 PM
Reply-To: mitzi@alongcamemitzi.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Pseudonyms are crucial to getting justice for victim of crimes such as sexual abuse, which all too often go unreported.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Mitzi Sandman
3140 SW Raleighview Dr Portland, OR 97225-3151
mitzi@alongcamemitzi.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re: Rule 16B

1 message

Shapiro Joel <joel@joelshapirolaw.com> Fri, Nov 30, 2018 at 5:00 PM
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures:

I support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes. In many cases, it would be against the interests of justice if the victims were not allowed to proceed by filing their case using pseudonyms.

I represent victims of sex trafficking in civil litigation, including two victims who were minors, whose case were filed in Washington County. These victims were very fearful for their safety and concerned about their privacy and the stigma that would attach if their real names were disclosed at any point in the litigation. The use of pseudonymous filings gives the courts the ability to enforce accountability for perpetrators and to protect the safety of our communities by allowing victims to access the justice system without exposing their privacy themselves beyond reasonable limits.

A rule that prohibited the use of pseudonyms would run counter to these interests, and would be a negative change to a system that allows for judicial discretion in determining whether parties qualify to file under a pseudonym. This flexibility is both appropriate and vital in some instances, and should not be abrogated.

The proposed amendment to Rule 16B is in keeping with the procedure that works through SLRs in Multnomah & Clackamas Counties. The amendment would afford other counties the flexibility to follow the successful model of those SLRs.

The proposed amendment is workable and balanced, and I hope it will be adopted. Thank you for your consideration of my comments.

regards,
Joel Shapiro

Law Office of Joel Shapiro, PC
1312 SW 16th Ave, 2nd Floor
Portland, OR 97201
503-224-5950

Shari Nilsson <nilsson@lclark.edu>

comments for proposed rule

1 message

mshirtcliff@bakercounty.org <mshirtcliff@bakercounty.org> Thu, Nov 15, 2018 at 9:53 AM
To: ccp@lclark.edu

Oregon Council on Court Procedures:

The Oregon District Attorneys Association respectfully submits the following comments in support of proposed Rule 16B:

- The amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.
- Procedures already exists for implementing this amendment in Supplemental Local Rules in Multnomah and Clackamas Counties. This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.
- This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.
- Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in State v. Macbale, the Oregon Supreme Court held that an in camera hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

Matt Shirtcliff
Baker County District Attorney
ODAA President

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Evelyn Shoop <evshoop@everyactioncustom.com> Thu, Nov 15, 2018 at 12:26 PM
Reply-To: evshoop@yahoo.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

It's hard enough for a survivor to come forward and go through the judicial process. Name protection allows for them to feel some security and safety within a process that is difficult for victims to bear emotionally and psychologically in a culture that promotes victim-shaming.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Evelyn Shoop
345 NW 95th Ave Portland, OR 97229-6307
evshoop@yahoo.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

R. Silva <elitezu@everyactioncustom.com> Thu, Nov 15, 2018 at 3:57 PM
Reply-To: elitezu@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of abuse, especially sexual violence, continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs. R. Silva
1943 SW 144th Ave Beaverton, OR 97005-2356
elitezu@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Gail Smiley <gailsmiley1@everyactioncustom.com> Wed, Nov 14, 2018 at 7:18 PM
Reply-To: gailsmiley1@comcast.net
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Gail Smiley
1730 19th St West Linn, OR 97068-4432
gailsmiley1@comcast.net

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re: Rule 16B

1 message

Deanna St Germain <deanna@kidsfirstcenter.net> Thu, Nov 15, 2018 at 9:53 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

As a physician practicing child abuse medicine and an expert in Adverse Childhood Experiences and the effect of trauma on the brain, I strongly support allowing victims of stigmatizing crimes the use of a pseudonym in civil court filings. They should not be re-traumatized just because they are seeking justice.

- The amendment to Rule 16 recognizes Oregon's longstanding practice. It allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.
- Procedures already exists for implementing this amendment in Supplemental Local Rules in Multnomah and Clackamas Counties. This amendment provides the flexibility to allow other counties to model after those SLRs or draft their own as appropriate to that county's procedure. Any concern about implementation can be easily resolved by looking to the Multnomah or Clackamas procedures.
- This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.
- Allowing judicial discretion in this matter does not violate the Open Courts Clause of the Oregon constitution. The Oregon Supreme Court has held that the Open Courts Clause only applies to adjudications, which are proceedings to determine legal rights based on presentation of evidence. For example, in *State v. Macbale*, the Oregon Supreme Court held that an *in camera* hearing to determine admissibility of evidence under Oregon's Rape Shield Law is not an adjudication because it involves determination of the admissibility of evidence, not presentation of evidence itself and determination of legal rights. Likewise, pleadings and pre-trial court filings are not adjudications and do not implicate the Open Courts Clause. Chief Justice Order 10-060 for the Oregon Appeals Courts reflects this and provides a system for protecting privacy of parties in appropriate cases on appeal.

Thank you for your attention to this matter.

Deanna St. Germain, DO

Member of Oregon Sexual Assault Task Force

Medical Director

Kids' FIRST

541-682-3938 X 215 office phone

541-682-8743 fax

2675 MLK Jr. Blvd | Eugene, OR 97401

kidsfirstcenter.net

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Jessica Standifird <wordmule@everyactioncustom.com> Fri, Nov 16, 2018 at 2:43 PM
Reply-To: wordmule@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

As a survivor of sexual abuse, I know at a personal level the fear of my name being used publicly, and have experienced some of the ramifications of having my case made public.

I hate the thought of others suffering the way I did. Please support the proposed amendment to Rule 16.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Jessica Standifird
2700 W Powell Blvd Apt 1114 Gresham, OR 97030-6592
wordmule@gmail.com

Council on Court Procedures
December 8, 2018, Meeting
Appendix C-69

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Elizabeth Steiner <easteiner85@everyactioncustom.com> Fri, Nov 16, 2018 at 2:26 PM
Reply-To: easteiner85@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms Elizabeth Steiner
1679 SE Liberty Ave Gresham, OR 97080-1023
easteiner85@gmail.com

Council on Court Procedures
December 8, 2018, Meeting
Appendix C-70

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re:Rule 16B

1 message

Chuck Stepping <chuckstepping@gmail.com> Thu, Nov 15, 2018 at 9:09 AM
To: ccp@lclark.edu

I believe in providing victims of domestic violence and abuse, and/or sexual assault, any protections we cam from further abuse from their abusers or our justice system. There is already excessive shame and guilt placed on the victims by society, we don't need more from the judicial process.

I have been working with both perpetrators and victims for 30+ years, I am also a State of Oregon qualified non-scientific "expert witness" in domestic violence and sexual assault cases - I have been approved to testify on several cases by Coos County judges.

One of my primary purposes in this role is explaining to the courts and jury members how counter intuitive victim behavior works. When victims are so damaged, both physically and emotionally by their perpetrators, they sometimes lose track of the events, or the timeline of the events and that often negatively effects their testimony. Persons involved, but not familiar with DV, judges, juries, witnesses and the public then start to think the victim just made that part up, or they embellished the situation.

We have 'no contact' orders and 'protection orders' to try and provide some separation between the victims and their perpetrators - why not allow anonymity at this level as another tool of protection.

--
Chuck Stepping
The SAFE Project

BIP Director

(541) 888-1048 Ext 106
FAX (541) 888-1359

Mission Statement: The mission of The SAFE Project is to create a society where domestic violence and sexual assault are not tolerated; to promote a culture that respects, supports, and empowers survivors while holding abusers accountable.

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Paul Stretch <paulstretch@everyactioncustom.com> Wed, Nov 21, 2018 at 9:44 AM
Reply-To: paulstretch@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

I am a psychotherapist who specializes in treating victims of violence, specifically sexual assault. I strongly believe that the ability to bring forth a lawsuit using a pseudonym is an important option for survivors of violence, primarily because the anxiety associated with Posttraumatic Stress Disorder can be dramatically increased by making one's claim public. Fears of retaliation and just fear of exposure may drive some who would bring legal action against their perpetrators to silence. Please consider the needs of victims in assessing this issue.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr. Paul Stretch
4549 N Kerby Ave Portland, OR 97217-3090
paulstretch@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Mary Vest <maryv@everyactioncustom.com> Thu, Nov 15, 2018 at 6:33 AM
Reply-To: maryv@cwsor.org
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms Mary Vest
3033 SE 10th Ave Portland, OR 97202-2517
maryv@cwsor.org

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Judith Vial <vial.judy@everyactioncustom.com> Sun, Nov 25, 2018 at 3:07 PM
Reply-To: vial.judy@gmail.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

Recently a current student filed a lawsuit against her college, Oregon State University. She felt safe to report how her University discriminated against her because she had the option of using the pseudonym Jane Doe to protect her identity as the rape victim in a criminal case. Had it been mandatory she use her real name in the lawsuit, she couldn't have filed the lawsuit against OSU and protected the criminal case and her identity.

It is vital for Oregon to keep the pseudonym rule to protect the privacy of the vulnerable victims. This must be protected in order to combat these heinous crimes.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mrs Judith Vial
1205 NW 11th St Corvallis, OR 97330-4616
vial.judy@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Harriet Watson <harriet@everyactioncustom.com> Wed, Nov 14, 2018 at 5:01 PM
Reply-To: harriet@harrietwatson.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Ms. Harriet Watson
PO Box 12699 Portland, OR 97212-0699
harriet@harrietwatson.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Robin Will <robin@everyactioncustom.com> Fri, Nov 16, 2018 at 11:53 AM
Reply-To: robin@robinwill.com
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).

Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.

At this point in our history, judges are no doubt as acquainted as anyone else with the realities of phone-, text- and social media harassment of public figures. We should do everything possible to protect plaintiffs, and not to victimize them again, in the process of seeking justice.

This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Mr. Robin Will
29700 SW Courtside Dr Apt 27 Wilsonville, OR 97070-7483
robin@robinwill.com

November 26th, 2018

Oregon Council on Court Procedures
ccp@lclark.edu

Subject: Comments on Published Rules re: Rule 16B

Dear Members of the Council on Court Procedures:

My name is Elizabeth Willson , and I am writing to ***support*** the proposed amendment to Rule 16 to continue to allow pseudonyms (like "Jane Doe") to be used in civil cases. This rule is important because it would empower survivors of sexual assault and other stigmatizing crimes to seek civil justice without having to share their identities with the whole world.

I am a friend of a sexual assault survivor and now work for a non-profit that helps sexual assault survivors come out and speak up, and I know from experience just how difficult it is for survivors to come forward and report what happened to them. Although the #metoo movement has helped shed light on these issues in the public sphere, the world remains a hostile place for many victims of sexual and domestic violence. Retaliation, reprisal, harassment, intimidation and abuse are real and true risks for any victim who summons up the courage to come forward. After my friend came out about being gang raped, she was threatened, told by the public that she didn't have a case and still till this day after ten years is called a liar.

Granting survivors the option to request a pseudonym on civil court documents would provide them with more options to secure their privacy and personal safety, which in turn would encourage more survivors to come forward. Their reports keep out communities safe and contribute to accountability for predators and predatory organizations.

For all of these reasons and more, I ask that you vote **YES** to pass the amendment to Rule 16. Thank you for your consideration of this important issue.

Sincerely,
Elizabeth Willson

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules re: Rule 16B

1 message

Mary Zelinka <mary.zelinka@cardv.org> Sun, Nov 18, 2018 at 2:39 PM
To: ccp@lclark.edu

The amendment to Rule 16 allows judges to maintain judicial discretion to decide whether parties qualify to file under a pseudonym and is not a change to Oregon law or practice. This amendment strikes a balance of continuing to acknowledge that Oregon recognizes laws protecting privacy of victims who have experienced stigmatizing crimes, without creating new law.

Victims should not be re-traumatized because they are seeking justice.

This is not a plaintiff's issue or a defendant's issue. Courts have granted both sides the use of a pseudonym in appropriate cases.

Providing survivors the option to use a pseudonym on civil court documents allows survivors greater safety and confidentiality.

Sincerely,
Mary Zelinka

Pronouns: she/her/hers
Facilities Manager
Center Against Rape and Domestic Violence
(541) 758-0219, ext. 300

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to Rule 16 to Continue Recognizing Pseudonyms

1 message

Mary Zinkin <mary@everyactioncustom.com> Thu, Nov 15, 2018 at 7:08 AM
Reply-To: mary@thectss.org
To: ccp@lclark.edu

Dear Members of the Council on Court Procedures,

I am writing to support the proposed amendment to Rule 16 to reflect Oregon's longstanding practice of judicial discretion and recognition of laws protecting privacy of victims of stigmatizing crimes (like sexual abuse).
Child sexual abuse thrives in the shadow of secrecy. Many people never disclose or hold abusers or facilitating entities accountable because of the shame and the fear of retaliation and harassment for speaking out. When survivors don't feel safe and supported to disclose abuse, the secret epidemic of sexual violence continues unchecked in our schools, churches, youth serving organizations, and other institutions of trust.
This amendment allows judges to maintain discretion, avoiding conflicting decisions among counties; will clarify procedures in counties where judges are recognizing pseudonymous filings but there are no current SLRs to provide guidance; and will keep our communities safer.

This amendment is balanced and should be passed. Thank you for your consideration. I hope you'll join me in supporting the proposed amendment to help keep survivors safe.

Sincerely,
Dr Mary Zinkin
2075 Hillcrest Dr West Linn, OR 97068-1803
mary@thectss.org

ROGUE LAW FIRM
A PROFESSIONAL CORPORATION

November 21, 2018

Council on Court Procedures
Sent via email to: ccp@lclark.edu

Re: Comments on Published Rules

Dear Council Members:

I write to urge you to reject the proposed change to ORCP 22 C(1). I have the perspective of representing usually modest income people in civil litigation primarily in southern Oregon, usually plaintiffs in personal injury litigation. In 38 years of practice I have yet to see a circumstance where any defendant has needed more than 90 days after suit to identify other potentially liable parties. This is a solution in search of a problem.

But the proposed solution has great potential to harm people such as my clients. This will substantially increase the expense and time required for my clients to get access to justice. The rule will inevitably spawn additional motion practice, delay trials, increase discovery costs, and expose plaintiffs to the jeopardy of multiple depositions.

Our Oregon State Bar is committed to access to justice. I take that commitment seriously. Enacting this proposed change to the rule will pose additional barriers to individual litigants seeking justice in our state courts. I urge you to reject this proposal.

Very truly yours,

Richard D. Adams
RDA/ css

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules: Opposition to Proposed Changes to ORCP 22C

1 message

tom@roguelawfirm.com <tom@roguelawfirm.com> Tue, Nov 27, 2018 at 3:50 PM
To: ccp@lclark.edu

Council on Court Procedures,

I am writing to express opposition to the proposed changes to ORCP 22C (third-party practice). The proposed rule would permit third parties to be added to cases even *after* discovery and dispositive motions have been completed. New parties could be added on the eve of trial.

By allowing new parties to be added late in the case, the new rule necessarily would increase the costs of litigation, create redundancies, and create more barriers to trial. Moreover, will likely increase the risk of postponement of trial dates as new parties are added to on-going litigation. Further, the proposed amendment also creates an opportunity for mischief. For example, if a defendant wants a second opportunity to depose the plaintiff, then it need only plead in a late third-party defendant who will be entitled to its own deposition of the plaintiff, no matter if the plaintiff has already been deposed. Or, a defendant could invoke the rule to obtain a trial delay.

This is not the first time that this change has been proposed. In 1999-2001 the defense bar proposed the same change to ORCP 22C. Professor Maurice Holland, then Executive Director of the Council on Court Procedures, questioned such expansion of third party practice due to the costs and burdens of adding parties to a case already in progress. He even suggested that the 90-day right to plead in third parties potentially should be reduced to 30 days. He explained:

> "Isn't . . . 30 days from service of the complaint preferable to the 90 days allowed by ORCP 22 C? Third-party complaints inevitably prolong litigation to a greater or lesser extent. Shouldn't other parties, particularly plaintiffs, be entitled to know whether such prolonging is going to occur more promptly than as much as 90 days after service of the complaint?"
>
> Professor Maurice Holland, Memo to the Council on Court Procedures at 5 (October 20, 1999).

Judge Richard Barron chaired the subcommittee that specifically considered the proposed change and thereafter recommended that it not be adopted. Likely recognizing the added resource burdens, costs, and uncertainty created in discovery, motions practice, scheduling, and trial preparation by adding more parties months after the case had been initiated, he explained:

> "The subcommittee does not recommend changing the part of the rule allowing a defendant 90 days in which to file a third party complaint as a matter of right. The 90-day period is a reasonable time to allow a defendant to decide whether to file a third party complaint."
>
> Hon. Richard Barron, Letter to the Council (May 15, 2000).

These arguments against the rule are as valid today as they were eighteen years ago. I urge the Council to reject the proposed rule change to ORCP 22C.

Thank you for your consideration.

Tom

Thomas R. Adams

Attorney At Law

ROGUE LAW FIRM
A PROFESSIONAL CORPORATION

3723 North Williams Ave. Suite 201

Portland, Oregon 97227

(503)445-2103 Fax: (888)474-5684

tom@roguelawfirm.com

Shari Nilsson <nilsson@lclark.edu>

RE: Weekly Compilation of Rule Comments

1 message

Kelly Andersen <kelly@andersenlaw.com> Fri, Nov 16, 2018 at 2:32 PM
To: Shari Nilsson <nilsson@lclark.edu>

Shari and Council,

I am very much opposed to the proposed change to Rule 22. To understand why, please note the differences between Federal Rule 14 and State Rule 22.

Federal Rule 14(a)(1) provides that "a defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, **obtain the court's leave** if it files the third-party complaint **more than 14 days after serving its original answer**."

The Oregon counterpart, Oregon Rule 22(C)(1), states that "a defending party, as a third-party plaintiff, may cause a summons and complaint be served on 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 plaintiff's summons and complaint on the defending party. **Otherwise the third-party plaintiff must obtain agreement of parties who have appeared and leave of court**."

The proposed amendment to Rule 22 would delete the underlined words.

It appears to me that when Oregon adopted its rule in 1978, the Council of Court Procedures made a compromise that satisfied both plaintiffs and defendants. Whereas the federal rule only allowed 14 days to add the third-party defendant as a matter of right (after which the defense could apply for "the court's leave"), the Oregon rule extended defendant's absolute right more than six times as long (from 14 days to 90 days) but with the provision that the plaintiff could veto adding a third-party defendant after 90 days.

This rule has worked well for the last 40 years. I am unaware of any "parade of horribles" to justify a change now.

But history repeats itself. The defense bar requested this very change back in 1999 - 2001, and the Council voted it down.

> “The subcommittee does not recommend changing the part of the rule allowing a defendant 90 days in which to file a third party complaint as a matter of right. The 90-day period is a reasonable time to allow a defendant to decide whether to file a third party complaint.” - Hon. Richard Barron, Letter to the Council (May 15, 2000).

The proposed change to Rule 22 presents a subtle yet devastating potential to harm plaintiffs. For example, a defendant wishing to add a third-party defendant after depositions and discovery have been substantially completed, would have a second chance to depose a plaintiff, as would the newly-added third-party defendants. In such circumstances, adding a new third-party defendant would burden a plaintiff with enormous duplicative costs and delay. This assumes the proposed Rule would always be applied in good faith.

But not all rules are applied in good faith. When one considers the potential mischief that the proposed Rule could be put to, then there is all the more reason to oppose it. For example, what is to be said of an attorney who wishes to add a third-party defendant at a late date in order intentionally to increase a plaintiff's costs? Or intentionally to delay the trial? Or intentionally to re-depose witnesses? While this seldom would happen with upright and ethical attorneys, it is not a stretch to say that it wouldn't happen at all.

Some may say that any such mischief under the proposed Rule can be prevented because judges still have the right to deny a defendant's motion to add a third-party defendant. While this is true, two additional problems present themselves. The first is that motion practice itself adds greatly to the cost of litigation, especially in cases of substantial size where legal research and brief writing could take days or weeks, and oral argument could consume a whole day when the venue is at the other end of the state. Further, many of our newer judges shockingly lack any civil trial experience and may be unaware of the subtleties and mischief that can masquerade under the guise of what can be made to appear as a good faith request under the proposed Rule.

For these I urge the Council to vote "no" to the proposed change in Rule 22 when it comes up for vote in our next Council meeting in December.

Kelly L. Andersen

Andersen Morse & Linthorst

1730 E. McAndrews Road, Suite A

Medford, OR 97504

Telephone: (541) 773-7000.

Facsimile: (541) 608-0535

Web: www.andersenlaw.com

ANDERSEN MORSE & LINTHORST
ATTORNEYS AT LAW

From: Shari Nilsson [mailto:nilsson@lclark.edu]
Sent: Friday, November 16, 2018 1:28 PM
To: cocp-list@lclark.edu
Subject: Weekly Compilation of Rule Comments

All,

Attached are two documents:

- Compilation of comments received this week regarding Rule 16
- Compilation of comments received this week regarding Rule 22

It's appears that someone set up an advocacy page at the following site regarding Rule 16:

https://act.everyaction.com/advocacy-overview

This site and others like it allow people to easily send form e-mails to organizations, legislators, etc. While it got a bit tedious to read (largely) the same e-mail over 40 times, it's clear that there are passionate advocates in favor of the proposed amendment to Rule 16.

It is also clear that there's at least a handful of passionate opponents to the proposed change to Rule 22.

My non-legal mind finds it to be an interesting juxtaposition, because those in favor of Rule 16 are arguing passionately for judicial discretion and those opposed to Rule 22 appear to be arguing against it. We live in interesting times.

I will continue to forward you weekly summaries until the December 8 meeting. Please let me know if you have any questions.

Best,

Shari

Shari Nilsson
Executive Assistant
Council on Court Procedures

c/o Lewis and Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219

(503) 768-6505
nilsson@lclark.edu

Shari Nilsson <nilsson@lclark.edu>

Proposed Change to ORCP Rule 22

1 message

Megan Annand <megan.annand@gmail.com> Wed, Nov 28, 2018 at 9:34 AM
To: ccp@lclark.edu

Dear Colleagues:

The Oregon civil procedure rules already allow for defendants to repeatedly amend their answers. Now defendants propose to add to the uncertainty of litigation by allowing third party litigation at any time. This will cause more delays and potentially prejudice to the parties who have been doing their homework and are prepared for trial. The current rule allows the parties to add a third party within 90 days or at any time with the consent of the opposing party and permission of the court. The current rule forces the parties to look carefully at the case in the beginning. That is what the court and other parties should expect.

In a recent experience I represented a family in a wrongful death action. The litigation was acrimonious. If ORCP 22 had been changed to the proposed rule, I suspect that the defense would have tried to bring in as a third party a person the defense named in a "Fault of Others" last minute amendment to its Second Amended Answer. There was nothing new or unknown in that Second Amended Answer from the time the case was filed two years before. Nonetheless, the court allowed the amendment to add "fault of others" because "amendments are freely given." With this proposed amendment I see the potential for the same kind of last minute strategies to add third parties principally for delay or at the very least causing delay.

The current rule allows third party practice on a timely basis or when the parties and the court agree it is appropriate. The rule satisfies the need for judicial and litigant economy.

I oppose the proposed amendment.

Sincerely,

Megan B. Annand

Megan B. Annand
Law Office
6101 Griffin Lane
Medford, OR 97501
541 779-7131 T
866 777-0323 F
megan.annand@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Proposed Changes to ORCP 22C DON'T DO IT!

1 message

Robert Beatty-Walters <rbw@beattywalterslaw.com> Tue, Nov 27, 2018 at 9:33 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

It is unclear to me why the CCP would be considering changes to the Third Party practice rules in ORCP 22C, except to give defendants one more mechanism to avoid trial and deflect accountability. The rule is simply not necessary. More importantly, it gives defendants an unfair mechanism to affect trial dates that will increase litigations costs and uncertainty.

As the rule is presently worded defendants who want to add a 3rd party defendant can do so within a reasonable time, and after that, with consent of the plaintiff. No change in this rule is necessary or warranted.

Thank you,

Robert Beatty-Walters

LAW OFFICE OF
ROBERT BEATTY-WALTERS

www.beattywalterslaw.com

Phone (503) 473-8088

Fax (503) 473-8089

3838 SE Franklin Street, Portland, OR 97202

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Thank you.

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendments to ORCP 22

1 message

Steve Berman <SBerman@stollberne.com> Fri, Nov 30, 2018 at 4:24 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Members of the Council on Court Procedures,

Thank you for your service to the Bar and the larger community.

I am writing to express my opposition to the proposed amendments to ORCP 22. I am a civil litigator who practices frequently in Oregon state courts. Although I generally represent plaintiffs in my litigation practice, I also do represent defendants. I respectfully submit that the proposed rule changes would not benefit any parties to civil litigation, regardless of which side of the "v." they are on.

The proposed amendment to ORCP 22 C(1) would eliminate the requirement that a defendant obtain the consent of the plaintiff before filing a third-party claim more than 90 days after service of the initial complaint. I believe that the Amendment should be rejected for several reasons, including the following.

Within 90 days (three months) of the filing of a complaint, a defendant should be well aware of any additional parties it could seek to add. I can conceive of no viable justification for a defendant to need to add third-party or cross-claims three months into a case.

The proposed rule changes offer no standard for a trial court to apply in addressing whether to allow a third-party after 90 days. That would lead to inconsistent results across Oregon's trial courts, resulting in years of litigation to define the grounds for granting or denying such a motion.

Moreover, in any case where a defendant can find a potential third-party defendant late in the case, a plaintiff's ability to have his or her case heard in a reasonable time will be undermined. The proposed amendment gives no standards for identifying and weighing the interests of the litigants in the case, especially in cases where there are already multiple defendants. On the other hand, the current rule makes litigation far more predictable and manageable by joinder of third-party defendants at the outset of the litigation.

For the same reasons listed above, the proposed amendment will make management of trials more difficult for the courts, especially in the larger counties.

Finally, the proposed change would greatly disadvantage late-added third parties, who would be brought into a case long after discovery and key depositions have occurred. The proposed change could lead to increased discovery costs for all parties, by extending discovery, leading to re-opened depositions and resulting in pushing back trial dates.

For all of these reasons, I oppose the proposed amendments to Rule 22 and respectfully request that you reject them.

Very truly yours,

Steve Berman
sberman@stollberne.com

Stoll Berne 209 SW Oak St., Suite 500
Portland, OR 97204
Exceptional lawyers | Extraordinary results (503) 227-1600 | www.stollberne.com

Shari Nilsson <nilsson@lclark.edu>

Amendments to ORCP 22

1 message

Paul Bovarnick <pbovarnick@rsblaw.net> Fri, Nov 30, 2018 at 12:59 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

I am writing concerning the proposed amendment to ORCP 22. I oppose the amendment.

As you know, the proposed amendment to ORCP 22 C(1) eliminates the requirement that a defendant obtain the consent of the plaintiff before filing a third-party claim more than 90 days after service of the initial complaint. The Amendment should be rejected for several reasons.

First, the Rule provides no standard for a trial court to apply in granting or denying a motion to add a third-party complaint. That makes it certain that there will be wildly inconsistent results across Oregon's trial courts, resulting in years of litigation to define the grounds for granting or denying such a motion.

Second, in any case where a defendant can find a potential third-party defendant late in the case, a plaintiff's ability to have his or her case heard in a reasonable time will be undermined. The proposed amendment gives no standards for identifying and weighing the interests of the litigants in the case, especially in cases where there are already multiple defendants. On the other hand, the current rule makes litigation far more predictable and manageable by joinder of third-party defendants at the outset of the litigation.

Finally, for the same reasons listed above, the proposed amendment will make management of trials more difficult for the courts, especially in the larger Circuits.

For all of these reasons, I urge rejection of the amendment to Rule 22.

Paul S. Bovarnick

Of Counsel

Rose Senders and Bovarnick

1205 NW 25th Ave.

Portland, Oregon 97210

Tel: 503 227 2486

Tel: 800 998 9776

Cel: 503 704 8102

Fax: 503 226 3131

www.rsblaw.net

Council on Court Procedures
December 8, 2018, Meeting
Appendix D-12

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Christopher Brown <Chris@kinneybrown.com> Tue, Nov 27, 2018 at 12:07 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Good morning,

I write to oppose the change proposed to ORCP 22. My biggest concern is that the lifting the deadline provided as a matter of right prevents orderly administration of trial procedures and discovery. Ninety days (after service no less) is plenty of time for a defendant to identify potential third-party defendants and bring a case against them. There is no reason to open the timeline for potential abuse when a third-party defendant can be added as a matter of right on a timeline that does not interrupt trial schedules.

Sincerely,

Chris

CHRISTOPHER W. BROWN | ATTORNEY AT LAW

Please note our new email address and website

KINNEY & BROWN PC

ADDRESS | 2913 PORTLAND RD, NEWBERG, OR 97132

PHONE | **503.538.8318** FAX | **503.537.0591**

WEB | www.KINNEYBROWN.COM

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Steven Burke <steve@case-dusterhoff.com> Tue, Nov 13, 2018 at 5:37 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

I have the following comments regarding the proposed changes to ORCP 22 C(1). While I would welcome an extension to the 90-day limitation to add third parties to any given case, the proposed rule change that would allow adding a third party any time in a case is a terrible idea. I have been working in litigation my entire career, including the years I worked as a paralegal, and see the 90-day limit is not long enough in multi-party cases, most notably construction defect and lien disputes. In those cases it is frequently not possible to identify all interested parties within the 90-day time limit. This is most notably so for defendants that are served and then need to obtain discovery before they know what other parties may be necessary to the case. It is bad enough most defense attorneys will procrastinate to file an answer until they are forced to, but even the most diligent attorney cannot reasonably act before the 91st day.

In the event the proposed rule change is made to allow the addition of third parties at any time in a case, I can guarantee the rule will be horribly abused and lead to egregiously unfair, if not unconstitutional situation. In cases where a trial date is weeks away, an aggressive attorney could, and would, add parties at the last minute for tactical reasons. There are a growing number of courts that will not move trial dates, even where a party has been added to the case weeks and even days before a trial date. You may doubt this, but it happens. This is growing problem in Washington County, which is where discretion does to die. Cases get consolidated, and the trial dates are not moved, regardless of the inequity that occurs. This proposed rule change would easily create situations where a party cannot possibly defend itself due to a lack of time to prepare, but can't get a delay from the trial court, regardless of the circumstances. It is no consolation to tell a client their only remedy is to file an appeal.

If the rule is going to change, I would limit the extension of time to add a party without consent or court order to 120 days. Any more is a recipe for disaster. Any more and I can guarantee the rule will be used as a tactical tool to abuse late-arrival third party defendants in cases. Anyone that says otherwise is naïve in my opinion. We can't count on professionalism and reason to govern the practice of law. Those days are gone, if they were ever here in the first place.

Thank you,

Steven C. Burke

Admitted in Oregon, Washington, and Federal Courts

Case & Dusterhoff, LLP

9800 SW Beaverton-Hillsdale Hwy., Ste. 200

Beaverton, Oregon 97005

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http://www.facebook.com/CaseDusterhoff

Shari Nilsson <nilsson@lclark.edu>

Opp to ORCP 22 C

1 message

Joel Christiansen <joel@oremploymentlawyer.com> Tue, Nov 27, 2018 at 11:29 AM
To: ccp@lclark.edu

Dear CCP,

I oppose the amendments to ORCP 22 C.

Joel Christiansen | **VOGELE & CHRISTIANSEN**
Raley Building, 29 SE Court Ave. #215, Pendleton, OR 97801
(503) 841-6722 | joel@oremploymentlawyer.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Erin Christison <erin@paynesgrey.law> Wed, Nov 14, 2018 at 4:12 PM
To: ccp@lclark.edu

I wanted to voice me concern regarding the proposed ORCP 22 C amendment. The current rule is fair, it gives defense attorneys a set amount of time to bring in third parties into a suit, without an undue burden on the Plaintiff in the form of surprise on the eve of trial, the need for endless extensions of trial dates and discovery. Current law gives benefit as well as compromise to both sides, while the proposed amendment leaves plaintiffs without remedy if the third party is unfairly allowed to join the case.
Sometimes the saying still applies if its not broken don't fix it especially when the fix substantially benefits one side and substantially hurts the other.

As always I very much appreciate the time and effort eveyone on the committee puts into these rules, and I appreciate there is a group of much wiser attorneys than myself willing to tackle these continuing evolving issues.
Thank for your service.
-Erin Christison

--
Erin R. Christison, Managing Member
Paynes Grey Injury Law Group
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Keizer, OR 97307

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Travis Mayor <travis@mayorlaw.com> Fri, Nov 9, 2018 at 1:11 PM
To: ccp@lclark.edu

To Whom It May Concern,

Regarding the proposed amendment to ORCP 22, I believe this would be a huge mistake and is unnecessary. The rule, as it currently exists, works well. For instance, here are some likely outcomes and issues:

- The amendment would create severe inefficiencies in discovery, motion practice, scheduling, and trial preparation. There is no reason a new party should be added well into litigation to start discovery and motion practice over again.
- The amendment could greatly increase the costs of litigation, potentially making some cases economically unfeasible. The litigants need to know and include all potential parties early in the case.
- The rule change would create another procedural barrier to efficient and timely trials in a civil justice system that needs fewer barriers to trial, not more. Defendants would likely bring in a third party at the end of the case to get trial delays and postponements for purposes of delay.
- Parties to the litigation should have a right to know the identity of all other parties early in the case.
- This is a solution without a problem: The defense bar has not provided the Council any examples of unfair harms caused by the 90-day deadline.
- The current rule is fair; defendants have three months to identify and plead in other parties. Defendants should not be able to force the redundancies, inefficiencies, delays, and burdens of late addition of new parties on the other parties, simply because they failed to exercise due diligence and timely plead them into the case.

Thank you for your consideration.

Travis Mayor

Mayor Law, LLC

7157 SW Beveland St., Suite 100

Tigard, OR 97223

Ph: (503) 444-2825, ext. 109

Fx: (503) 223-6827

Shari Nilsson <nilsson@lclark.edu>

Rule 22 Proposed Amendments

1 message

Jim Coon <jcoon@tcnf.legal> Tue, Nov 27, 2018 at 1:41 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

I write to oppose the amendment to ORCP 22C that would remove the requirement for party consent to add a third party defendant more than 90 days after the filing of the complaint. Diligent investigation by a defendant should, in all cases, reveal the existence of responsible parties within the present 90-day window, and adding parties late in the case carries the certainty of unpredicted discovery and motion practice and the likelihood of delay in getting to trial. The rule works as is, and the amendment should be rejected.

Thank you,

James S. Coon

THOMAS, COON,

NEWTON & FROST

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Legal Assistant
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November 28, 2018

Via mail and email (ccp@lclark.edu)

Council on Court Procedures
10015 SW Terwilliger Blvd
Portland OR 97219

Re: Proposed amendment to ORCP 22 C

Dear Council on Court Procedures,

The undersigned former Chairs of the Council on Court Procedures respectfully recommend a "no" vote on the proposed change in third party practice (ORCP 22 C). The proposed amendment would predictably add unnecessary costs, inefficiencies, and uncertainty to Oregon trial practice.

The proposed amendment would allow the addition of new parties to a case (without the consent of the other parties) at any time during the litigation. The proposal is a solution in search of a problem. There are no real harms from application of the current rule. A defendant already has 90 days to add parties as a matter of right, and the parties, acting jointly, can always add new parties after that with leave of the court. The current rule leads to timely identification of all parties, so that everyone can approach discovery, motions, case scheduling, and trial preparation in a thorough, efficient, and planned manner.

The proposed amendment could lead to unfair prejudice against both plaintiffs and existing co-defendants, and creates needless opportunities for tactical gamesmanship. For example, a defendant could seek to add a new party in order to get a second deposition of a plaintiff or a co-defendant.

One of us (Don Corson) recently had an experience with delayed third party practice in a federal court case that illustrates some of the problems with the proposed amendment. In that case, the defendant obtained leave to add third parties eleven months after the case was filed, and after thousands of pages of discovery had been exchanged and all of the key depositions had been

taken. Thereafter, at mediation, the plaintiff was understandably affected by the prospect of re-opening discovery and delaying resolution of his case. The mischief of late third party practice was underscored when the defendant, after settling with the plaintiff, simply dismissed the third party defendants without further proceedings. The late third party practice gave a tactical advantage to the defendant, but was not necessary to resolve any supposed dispute between the defendant and the belatedly added parties. Furthermore, as in the great majority of cases, the defendant was well aware of the key facts and the role of the third parties well before the case was ever filed; nothing new on that score came to light more than 90 days after commencement of the case.

As you know, the same proposed amendment was suggested in 1999-2001, and rejected. In response to the suggestion, Professor Maury Holland, then Executive Director of the Council, wrote in an October 20, 1999 memo to the Council, "Isn't . . . 30 days from service of the complaint preferable to the 90 days allowed by ORCP 22 C? Third-party complaints inevitably prolong litigation to a greater or lesser extent. Shouldn't other parties, particularly plaintiffs, be entitled to know whether such prolonging is going to occur more promptly than as much as 90 days after service of the complaint?"

Judge Richard Barron chaired the Council subcommittee that considered the proposed change and thereafter recommended that it not be adopted. Judge Barron wrote in a May 15, 2000 letter to the Council, "The subcommittee does not recommend changing the part of the rule allowing a defendant 90 days in which to file a third party complaint as a matter of right. The 90-day period is a reasonable time to allow a defendant to decide whether to file a third party complaint."

What was true then is still true now: 90 days is a reasonable time to allow a defendant to decide whether to add new parties to a case. If all of the parties agree that additional parties are needed after that, the current rule allows them to obtain leave of the court to add those additional parties. There is no need for the proposed amendment, and there are solid reasons not to pass it.

ORCP 1 B calls for the "just, speedy, and inexpensive determination of every action." The proposed changes to ORCP 22 C would not improve justice, would slow down cases, and make them more expensive. We urge you to reject the proposed change to ORCP 22 C.

Sincerely,

William Gaylord
Chair, 1995-1997

Kathryn Clarke
Chair, 2003-2005

Don Corson
Chair, 2007-2009

Brooks Cooper
Chair, 2011-2013

Michael Brinn
Chair, 2016

Henry Kantor
Chair, 1991-1993

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Keith Dozier <keith@wkd-law.com> Tue, Nov 13, 2018 at 9:14 AM
To: ccp@lclark.edu

To whom it may concern:

I have become aware of the proposed amendments to ORCP 22C, as it relates to third party practice. I am actually shocked that such a proposal would garner any serious consideration.

It is difficult (at best) to get civil cases to trial in many Oregon Circuit Courts due to unfortunate limitations in judicial resources as it is. Providing parties the ability to unilaterally add new litigants to a case up to the eve of trial will create further delay, increase litigation costs for all parties, and allow the potential for abuse. It will create havoc in terms of docketing civil trials (especially complex matters) as the discovery process will have to start over again any time parties are added at a late date. It simply makes no sense.

The current rule has functioned just fine for a very long time. I genuinely struggle to find any merit to the proposed amendment. I rarely speak (or write) in such absolute terms. However, this proposal is simply a bad idea.

Sincerely,
Keith Dozier

Wm. K | WM. KEITH DOZIER
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(f) 503.697.0841

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Shari Nilsson <nilsson@lclark.edu>

Opposition to Proposed Amendment to ORCP 22

1 message

Dan Dziuba <DanD@tdinjurylaw.com> Fri, Nov 30, 2018 at 3:44 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Colleagues,

I am writing in opposition to the proposed amendment to ORCP 22 which would allow a defendant to seek to name a third party at any time subject only to trial court discretion. I am concerned that the proposed amendment would allow a change in third party practice that could fundamentally alter the nature of a case late in an action, even shortly before trial. Not only would this create a possible delaying tactic; it would require plaintiffs and other parties to scramble to undertake additional discovery when they should focus on trial preparation. Just dealing with the motion would be time consuming and distracting at a time when there are substantively more important things to do on a case. Litigation is expensive and continuing trials because of the addition of third parties late in a case will make it more so. I urge you not to adopt the proposed amendment. Thank you for your consideration.

Daniel C. Dziuba

Shari Nilsson <nilsson@lclark.edu>

Comments on Proposed change to Rule 22

1 message

Mike Esler <Esler@eslerstephens.com> Mon, Nov 19, 2018 at 10:30 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>
Cc: "shenoa@richardsonwright.com" <shenoa@richardsonwright.com>

I am writing to voice my opposition to the proposed change to Rule 22 that would permit addition of third parties in litigation at any time after filing the Complaint.

Complex litigation from the Plaintiffs side is very difficult to manage, even when the parties are known early in the case. Addition of new parties at a later stage would potentially mean discovery would have to be repeated or rescheduled. Setting discovery and trial dates with multiple attorneys is very difficult as it is and adding parties later would only compound this difficulty.

Since most parties who are added are parties whom the defendants believe should be liable for a part or all of the damages the defendant adding them is exposed to, asking the defendants to make the decision of whether to add them within 90 days or bring a separate action for contribution is not an unreasonable burden and it eliminates the risk that strategic timing of the addition might become a tool for the defendants to use against the plaintiff. In an appropriate case, defendants who do start parallel contribution or indemnity cases can ask the court to consolidate the cases for discovery or trial, if the 90 day deadline is missed so it is not fatal.

Most of the complex cases I have handled since I began practicing in 1971 have been contingent fee cases so the addition of costs and delay impact not only the parties but the attorneys and could effectively impair plaintiffs access to justice..

Michael Esler

Ste 700

121 SW Morrison St.

Portland, Or. 97204

Main 503-223-1510

Cell 503-750-9660

Shari Nilsson <nilsson@lclark.edu>

Proposed changes to ORCP 22C

1 message

dave@sokolfoster.com <dave@sokolfoster.com> Tue, Nov 27, 2018 at 11:08 AM
To: ccp@lclark.edu

I am very concerned about the proposed changes to ORCP 22C. The language of the rule in its current form ensures that any third party is timely added to the case. The language of the proposed change would allow a third party defendant to be added at any time, including up to days before a trial. The practical effect of that rule would be to force trials to be reset months out to allow the third party defendant to conduct discovery, allow the Plaintiff discovery into the third party defendant, etc. It would delay justice and add to the costs of litigation. All of these outcomes would only serve to further reduce jury trials.

I encourage the Council to reject the amendments to ORCP 22C.

Thank you.

David S. Foster

Sokol & Foster, P.C.

Strowbridge building

735 s.w. first avenue

Portland, oregon 97204

(503) 228-6469

Fax (503) 228-6551

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Salem, Oregon
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JOHN GEAR
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503-569-7777

John@JohnGearLaw.com
voice 503-569-7777
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JohnGearLaw.com

21 Nov 2018

Council on Court Procedures

Sent via E-Mail Only to ccp@lclark.edu

Re: Proposed Change to ORCP 22(c)(1)

I write to oppose the proposed change to Rule 22(c)(1) as both unnecessary and unwise.

I note also that it directly conflicts with the recent report to the Chief Justice by the Civil Justice Improvements Task Force, which places a great deal of emphasis on adherence to scheduling for civil cases. I attach the task force summary for your convenience.

The proposed change to ORCP 22 is not just a solution in search of a problem, it is a biased solution at that. Instead of a neutral proposal for solving a real problem, it is a change that would reward and create incentives for exactly the wrong conduct by defendants, while greatly hampering plaintiffs seeking prompt resolution of their disputes and burdening plaintiffs with duplicative discovery costs. The proposed change is ideal for defendants who seek to win through exhaustion of the plaintiff.

I urge you to reject the proposal.

Cordially,

s/ John Gear

Attached:

OJD Civil Justice Improvements Task Force Report to the Chief Justice (Executive Summary)

Oregon Judicial Department's

Civil Justice Improvements Task Force

Report to the Chief Justice
Executive Summary

June 20, 2018

OREGON JUDICIAL DEPARTMENT
CIVIL JUSTICE IMPROVEMENTS TASK FORCE

REPORT TO THE CHIEF JUSTICE

EXECUTIVE SUMMARY

The mission of the Oregon Judicial Department (OJD) Civil Justice Improvements Task Force was to review the recommendations set out in a report submitted to the Conference of Chief Justices, entitled *Call to Action: Achieving Civil Justice for All* (July 2016),[1] and to make recommendations to OJD, to the extent feasible, necessary, and appropriate, to implement improvements to Oregon's civil justice system. Oregon Supreme Court Chief Justice Order (CJO) 17-046 (2017).

The Task Force has submitted a Report to Chief Justice Thomas A. Balmer, setting out a wide variety of recommendations for OJD and the Oregon circuit courts. Key among them are the following:

- Each court should consistently apply all provisions of UTCR 7.020 -- which establishes a series of deadlines intended to ensure that civil cases move toward appropriate resolution timelines -- in all cases in which that rule applies. (Recommendation 6.1.1.1)

- Relatedly, OJD should demonstrate an institutional commitment to using UTCR 7.020(2) and (3) as the primary tool for managing uncontested cases. (Recommendation 6.12.1.1)

- Courts should set firm trial dates and adhere to them, with only limited exceptions. (Recommendation 6.1.2.1)

- Applying the practices recommended in the Task Force Report, courts should utilize the following case management pathways: Streamlined, Complex, and General. (Recommendation 6.3.1)

- Courts should adopt procedures for resolving, and encourage litigants to resolve, discovery disputes informally, so as to reduce the cost of litigation in Complex Pathway cases. (Recommendation 6.5.1.5) Relatedly, each court should have a system for quickly resolving minor discovery disputes in General Pathway cases that do not require a party to file a motion. (Recommendation 6.6.2.2)

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[1] The full CCJ *Call to Action* report and recommendations, together with an Executive Summary, appendices, and related materials, are available at http://www.ncsc.org/Microsites/Civil-Justice-Initiative/Home/CCJ-Reports.aspx.

- Current Uniform Trial Court Rule (UTCR) 5.150 (Expedited Civil Jury Trials) should be revised to provide for a "streamlined" civil jury trial pathway and should otherwise be amended to increase flexibility, while retaining its general structural framework and some limited mandatory disclosure requirements. (Recommendations 6.4.2.2 to 6.4.2.11)

- A new UTCR 5.180 (Consumer Debt Collection) should be adopted, applying to consumer debt collection actions filed under ORS 646A.670 (plaintiff is a debt buyer or a collector for a debt buyer), and also other consumer debt collection actions, when the plaintiff is a debt collector; and adopt conforming business processes. (Recommendations 6.11.5.1 to 6.11.5.10)

The Task Force Report sets out many other recommendations, relating to a "right-sized" pathway approach to civil case management; statewide and court business processes and programs; effective use of Oregon eCourt system ticklers and reports; judicial and staff training, as well as court information sharing; educational opportunities for judges and lawyers; best practices for the courts and litigants; and ensuring procedural fairness.

As a whole, the Task Force Report is intended to recommend court-focused civil justice improvements, within the confines of existing OJD resources. In the view of the Task Force, the recommendations will benefit the courts statewide in moving forward with effective right-sized case management. They also should help to reduce cost and delay that can occur in civil cases, improve access to justice for civil litigants, and improve procedural fairness in the courts.

Shari Nilsson <nilsson@lclark.edu>

ORCP 22C

1 message

Charles Hathaway <chathlaw@gmail.com> Tue, Nov 27, 2018 at 1:25 PM
To: ccp@lclark.edu

To Whom It May Concern:
I believe that the proposed amendments to the above-stated rule should not be implemented and are counter-productive.
There are a number of issues that effect our procedural system that could be improved. These amendments will only cause more disruption in terms of time for trial and cost to involved parties. I would ask that you vote in opposition to the proposed amendments.
Thank you for your consideration in this matter.
Charles Hathaway

--
Law Office of Charles R. Hathaway
10121 SE Sunnyside Rd. Ste. 300
Clackamas, Oregon 97015
(503) 477-6894
chathlaw@gmail.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Marilyn Heiken <mheiken@justicelawyers.com> Tue, Nov 27, 2018 at 10:15 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear CCP,

I am writing to voice my opposition to the proposed amendments to ORCP 22 to allow defendants to add third parties at any time. A new party could be added on the eve of trial. That would require a trial delay. The new party would have a whole new set of discovery and motions rights, which would trigger additional discovery and motion rights of the parties already in the case. Costs and delays to trials would increase. There must be a limitation on when new parties may be added.

Marilyn Heiken

MARILYN HEIKEN ATTORNEY

541-484-2434 | Fax: 541-484-0882

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PUBLIC JUSTICE 2018 MEMBER

https://www.publicjustice.net/

Council on Court Procedures
December 8, 2018, Meeting
Appendix D-31

Shari Nilsson <nilsson@lclark.edu>

Comment

1 message

Greg Kafoury <kafoury@kafourymcdougal.com> Fri, Nov 30, 2018 at 11:52 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

The proposed gutting of the joinder rule would be a great mistake. It would another blow to the system of trial by jury, because so many obstacles to getting to a just verdict have piled up I recent years that the jury trial is at risk of going the way of the dodo. The numbers are declining each year; we need to make it easier to get to justice, not harder. Greg Kafoury

Shari Nilsson <nilsson@lclark.edu>

Rule 22 change

1 message

Keating, Robert <rkeating@keatingjones.com> Mon, Dec 3, 2018 at 9:43 AM
To: "dkm@miller-wagner.com" <dkm@miller-wagner.com>
Cc: "cocp-list@lclark.edu" <cocp-list@lclark.edu>

David,

As a member of the Council on Court Procedure I just read your letter to the Council on Rule 22. The proposed change does not eliminate the 90 days to file a third party complaint as a matter of right. It does remove the plaintiff's veto power over any attempt to add a third party defendant after 90 days. Filing a third-party complaint still requires approval of the court, just as a late amendment by the plaintiff to add a defendant requires leave of court. So if one of your feared situations arises, you can oppose the motion to add and make each case-specific argument to the court. That way the court can conclude in each case whether that defendant's motives and intentions are as you contend. I think that is preferable to a determination by the Council that all defendants have such motives and intentions and/or there is no such thing as a valid and justifiable reason to add a third-party defendant after 90 days.

And the suggestion that 90 days is adequate to determine the need to add a third party ignores the rules and current practice of discovery. As you know, my practice is the defense of medical malpractice cases. It is not uncommon for the service of a complaint to be first notice of a claim. It can take days to weeks to move the complaint to the defense attorney. The defense attorney must interview the client and then seek to identify the other treaters including what they did. A prompt request for production for records can be responded to by stating "we will provide" or "protected by physician-patient privilege." A motion to compel can take weeks to be heard. Depositions of known other treaters is not allowed in Oregon absent waiver. A subpoena for the medical records requires first identifying the other treaters so we know whom to serve. It also includes a 14 day delay waiting for any objection by the plaintiff to be lodged before service can be made. Commonly, plaintiff's counsel interjects an objection requiring that he or she is allowed to review the records for privileged information before disclosing to the defense attorney. If a defendant chose to litigate that issue, it would eat up a fair portion of the 90 days. Then, assuming the subpoena is served and the records timely sent to the plaintiff's attorney who then sends the portions he or she deems discoverable to the defense attorney, the records must be reviewed, usually by experts, before a defendant can conclude whether a third-party complaint is appropriate.

If that process takes more than 90 days, as it most commonly would, what is the harm in permitting a judge to decide whether allowing the addition of a third-party defendant would work an unfair disadvantage to the plaintiff under all of the circumstances of the case?

Bob

Robert M. Keating

Keating Jones Hughes, PC

200 SW Market Street, Suite 900

Portland, OR 97201

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Fax: (503) 796-0699

Shari Nilsson <nilsson@lclark.edu>

Proposed Rule Change 22(c)(1)

1 message

Dylan Lawrence <drlaw1@yahoo.com> Wed, Nov 21, 2018 at 1:41 PM
To: ccp@lclark.edu

Dear Wise Rule People, Please dont adopt the proposal, it does nothing but encourage bad behavior on the part of defendants by making last minute changes to almost completed litigation, thus effectively denying plaintiffs to a fair due process procedure. It will create chaos, deny adequate trial preparation for the plaintiff, at the best it will greatly hinder efficiency of the Judiciary and drive costs up for all, including the already overburdening Court system.

Thank you,

Dylan R Lawrence OSB# 011794

Sent from my iPhone

Shari Nilsson <nilsson@lclark.edu>

Opposition to proposed ORCP 22C amendment

1 message

Scott Lucas <slucas@justicelawyers.com> Tue, Nov 27, 2018 at 9:41 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council:

I oppose the proposed ORCP 22C amendment because it is unnecessary and would open the door to substantial inefficiencies, expenses, and trial delays. Defendants already have a mechanism for adding additional parties when necessary. This has worked well for decades, and prior attempts to change the rules have correctly been rejected by the Council.

If the current Council feels that an amendment is necessary, then a much less drastic change should be considered. The current proposal, which includes no deadline at all for adding additional parties (which would necessarily require additional discovery, perhaps repeat depositions of parties and other witnesses, and substantial cost to all parties) should be rejected.

Thank you for your consideration of my comments.

Scott Lucas

SCOTT C. LUCAS ATTORNEY
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975 Oak Street, Suite 1050
Eugene, Oregon 97401
justicelawyers.com

Shari Nilsson <nilsson@lclark.edu>

Third Party Practice; Amendments to ORCP's

1 message

Brady Mertz <Brady@bradymertz.com> Tue, Nov 27, 2018 at 11:12 AM
To: ccp@lclark.edu, Brady Mertz <Brady@bradymertz.com>

Dear OCCP,

I object to the proposal to eliminate the requirement that a defendant obtain agreement of parties who have appeared in order to add a third-party defendant to a lawsuit after 90 days. This provides enormous power to defendants to game the system. It will certainly increase litigation costs and create uncertainty for the appearing parties. It will create one more barrier to jury trials and we already have enough barriers.

As a lawyer who represents plaintiffs, defendants and other designated parties in litigation, I don't see any positive outcomes from this change. Defendants already have plenty of time to join others and have numerous options if they fail to do so. I call on the OCCP to vote against this unnecessary change.

Sincerely,

Brady Mertz, OSB #970814

Shari Nilsson <nilsson@lclark.edu>

Council on Court Procedures Proposed change to ORCP 22

1 message

David Miller <DKM@miller-wagner.com> Tue, Nov 27, 2018 at 3:47 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

To Whom It May Concern: I understand a proposed amendment to ORCP 22 is before your committee. I further understand the proposed changes would a.) eliminate the long-standing deadline (90 days from service) for a defendant to file a third-party complaint as a matter of right; and b.) eliminate the long-standing provision requiring consent of all parties whom have appeared in the action AND court approval for a third party action to be filed after the 90 day deadline.

I write to voice my strong opposition to these proposed changes to ORCP 22 C.

I have a unique perspective. I have practiced civil litigation (specifically, medical malpractice litigation) exclusively for over 36 years. My first 18 years were exclusively as a defense lawyer (Partner, Schwabe, Williamson, Wyatt; Executive Partner, Hoffman, Hart and Wagner) and the last 18 years have been spent exclusively as a plaintiff's lawyer (Miller and Wagner). I have, literally, worked with the ORCP on a daily basis for nearly 40 years. I am a Fellow in the American College of Trial Lawyers, have tried over 250 medical malpractice trials and, to my great benefit, I learned the ORCP from the law professor who is credited with the original enactment of the ORCP, Fred Merrill.

The delays and resulting increased costs the proposed amendment would cause in civil litigation, generally, and in my field of med mal litigation, specifically, would be substantial and prejudicial to both plaintiffs and defendants. Not too many years ago our Supreme Court directed our trial courts to create a docket that required civil cases to be tried no more than 12 months from the date they were filed. Only a few counties still loosely adhere to that rule (eg. Lane County). As hard as our courts tried, the goal of a one year trial date gradually evaporated due to clogged courts, the inherent nature of the defense/insurance industry to delay and, frankly, the overscheduling of experienced defense attorneys. I know this all too well because I was one of them. To put this in context: If I were to schedule a trial with one of the few defense counsel who defend med mal cases, the earliest available date I would be given would likely be well over a year from now, at the earliest. Trial dates are not assigned in many counties until a case is "at issue," meaning appearances filed by all defendants. This occurs months after filing. As a result, my clients currently cannot get their cases to trial for nearly 24 months after filing of the case, sometimes longer. This is a problem that is growing worse each year.

If third party defendants were allowed to be added to a case late in the case, after a trial date has been assigned, the following would most certainly occur: the added defendant would take at least 30 days to appear; there may be motion practice before an Answer is filed to the Third-Party Complaint; then discovery, which can last a bare minimum of 3 months. Scheduling depositions on the calendars of the limited experienced defense counsel is a very time-consuming process. Thus, the amount of time required to actually get to trial would be lengthened by a minimum of 6 months and more likely a full year. The amount of "late game" discovery required by the newly added third-party defendant(s) would

also greatly increase costs for all parties. This combination of inevitable delays and increased costs is guaranteed to occur if ORCP 22 is changed in the manner which is proposed.

My suspicion is the defense bar wants to eliminate the current deadline for filing a third-party complaint as a matter of right because of the pressure it puts on the defense to quickly do some essential discovery, assess potential liability and, frankly, timely process a case. Those should be goals promoted by our rules, not discouraged by our rules. Allowing the defense to seek a discretionary order which adds parties to a case with a trial date approaching will frustrate the efficiency of litigation, not promote it, because it will ultimately lead to case postponement and a much more lengthened docket in all courts.

The delays and added expenses is particularly prejudicial to plaintiffs whose lives are disrupted by their injuries. Delaying their justice in the courts should be avoided, not promoted.

Dave Miller

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Faith Morse <faith@andersenlaw.com> Tue, Nov 13, 2018 at 10:43 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

To whom it may concern,

I am concerned about the changes proposed to ORCP 22. I believe this amendment would create severe inefficiencies in discovery, motion practice, scheduling, and trial preparation. The new changes would allow new defendants to be added right on the eve of trial, which would cause delay, expense, and ultimately, a very negative view of the civil justice system from the plaintiff's perspective. The current rule requires that litigants act promptly and not sit on their rights or facts, which is something that the rules ought to encourage. Parties to the litigation should have a right to know the identity of all other parties early in the case so discovery can happen all together. This avoids duplication of depositions, site visits, and other time and resource consuming discovery.

Basically, I am concerned that this amendment would cause delay and duplication of discovery efforts, which could greatly increase the costs of litigation, potentially making some cases economically unfeasible. At a time when the number of jury trials is dramatically low and we are putting much effort into finding ways to encourage cases to get to trial, this rule change would create another procedural barrier to efficient and timely trials when we need fewer barriers to trial, not more.

Further, I've never seen a case where the current 90 deadline caused a problem in a case. From what I have heard, there are no examples of unfair harm caused by the current rule. That alone counsels against changing the rule. The current rule is fair—defendants have three months to identify and plead in other parties.

In short, this rule would allow the redundancies, inefficiencies, delays, and burdens of late addition of new parties to be forced on the other parties simply because one party failed to exercise due diligence and timely plead a defendant into the case.

I hope this rule change is declined.

Best,

Faith M. Morse
1730 E. McAndrews, Suite A
Medford, OR 97504
(541) 773-7000
www.andersenlaw.com

ANDERSEN MORSE & LINTHORST
ATTORNEYS AT LAW

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to ORCP 22C

1 message

Todd Newlin <toddnewlin@gmail.com> Tue, Nov 27, 2018 at 10:52 AM
To: ccp@lclark.edu

I am writing to express my opposition to the proposed amendment to ORCP 22C. As it stands defendants have 90 days to add a third-party defendant, which is ample time. Eliminating the requirement to obtain agreement of the parties is contrary to the interests of justice. This proposal would create more barriers to justice and jury trials.

I fail to see how this change does anything but provide defendants with an opportunity to game the system. Leaving the decision to the discretion of the trial court can have drastic outcomes. Defendants can move to add a third party on the eve of trial, creating unnecessary delays and costs for those seeking to have their day in court.

Oregon seeks to provide access to justice to all. This proposal adds a significant barrier to justice and should be rejected.

Thanks,

--
Todd Newlin

Please note that our office address has changed:

Newlin Law Offices, PC
819 SE Morrison St., Ste. 215
Portland, OR 97214
Phone: 503.405.8273
Fax: 503.961.7218
http://www.portlandoregoninjurylawyer.com/

Shari Nilsson <nilsson@lclark.edu>

Comment on Proposed Rule Change - ORCP 22C

1 message

Leslie O'Leary <loleary@justicelawyers.com> Tue, Nov 27, 2018 at 1:32 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council,

I am writing to oppose the proposed amendment to ORCP 22C, which would allow defendants to add a new party *at any time* before trial, and *without* consent of the other parties or the court. This is an unnecessary rule change, and it will certainly result in prejudice in the form of added delay and expense getting to trial. I see absolutely no benefit to this provision. Under the existing rules, if there is good cause to name a party beyond the deadline, the defendant can apply to the court for relief from the deadline and the court will likely grant it. The existing rule is also consistent with other ORCPs, such as motions to amend the complaint after responsive pleading, which require consent of the parties or -- if opposed -- permission from the court for leave to amend.

This amendment will invite defendants to use it as yet another method of postponing trial at the last minute, after the parties (and the court) secured a trial date, scheduled their witnesses, and spent valuable time and money gearing up for trial. Besides undermining the circuit courts' policy to get cases to trial within a year, the proposal is contrary to the "just, speedy, and inexpensive determination of every action." ORCP 1B.

Thank you for your consideration.

Sincerely,

Leslie O'Leary

LESLIE O'LEARY ATTORNEY

541-484-2434 | Fax: 541-484-0882

JOHNSON JOHNSON LUCAS & MIDDLETON

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Eugene, Oregon 97401

loleary@justicelawyers.com

Shari Nilsson <nilsson@lclark.edu>

ORCP 22

1 message

David Paul <dp@davidpaullaw.com> Tue, Nov 27, 2018 at 10:45 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear People:
There are proposed changes to ORCP 22C. They are bad and here's why:
1. The parties to a case need to be identified well before trial .
2. Trial by ambush is bad. Having late amendments to the cast of characters will foster longer waits till trial and increase uncertainty. Delay and uncertainty are two of the most obvious problems with our civil justice system. Reforms that increase these problem areas are not well advised.
3. The late addition of parties will be costly. Additional motion practice is not necessary. The other most obvious problem of the civil justice system is costliness. "Reforms" such as this one that increase the problem areas are not well advised.
The three most obvious problems with the civil justice system would be made worse by the proposed rule change. Defeat it.

Defense lawyers have few time deadlines. The present rule allows time for discovery and investigation and then the naming of additional third party defendants. The parties to a case should be known well in advance of trial.
dp

David Paul
DAVID PAUL, PC
dp@davidpaullaw.com

Please note, effective January 28, 2017, our address is:
210 SW Morrison Street, Ste. 500
Portland, OR, 97204
Phone: 503.224.6602
FAX: 503.719.5542

Shari Nilsson <nilsson@lclark.edu>

Opposition opinion to proposed amendment to ORCP 22

1 message

Stephen Piucci <steve@piucci.com> Tue, Nov 27, 2018 at 10:08 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>, Joe Piucci <joe@piucci.com>

To the distinguished members of the Council on Court Procedures.

Our firm handles perhaps more construction related injury litigation than any other and has for many years. The current state of 3rd party practice as it is defined currently in ORCP 22, is already one that is fraught with delay and inefficiency. Now, , for example, when a general contractor is sued by an injured worker for failing to comply with the Oregon Employer's Liability Law, (654.305-310), subcontractors are often added as 3rd party defendants pursuant to ORCP 22. Of course, this is less a problem if the 3rd party defendants are added early after the service of the original complaint. But that is not how it usually goes. Either they are added late in the 90-day period described in ORCP 2 (C), or even after, with approval of the parties or through court order.

As the months go by, discovery is delayed to let counsel get up to speed. Of course, the "12 month to trial" goal takes some serious "hits" when this happens. Often, the result is that the trial is postponed to the 15th month, or later.

To change the current rule, which has been operative for decades, would be wrong on many fronts. On the administration of justice angle alone, delays would be very long if a 3rd party defendant was allowed into the case at a very late date.

Additional expense to all parties would flow, and often, the return of a formerly productive worker to the workforce (from post-verdict or settlement funds to obtain retraining) is further delayed. This is bad for families and Oregon's economy (not just from the benefits they may be entitled to while off work, such as unemployment or disability benefits).

We are unaware of any problems defendants may claim to have under the longstanding ORCP 22. The current rule already allows for flexibility in 3rd party practice by defendants, in our view. We urge the Council to (again) reject this proposal. Thank you.

Steve

Steve Piucci, attorney

PIUCCI LAW

900 SW 13th Suite 200, Portland, OR 97205

Phone: 503-228-7385 | Fax: 503-228-2571

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendment to ORCP 22C

1 message

Scott Pratt <scopratt@aim.com> Tue, Nov 27, 2018 at 10:46 AM
To: ccp@lclark.edu

Dear OCCP,
I object to the proposal to eliminate the requirement that a defendant obtain agreement of parties who have appeared in order to add a third-party defendant to a lawsuit after 90 days. This provides enormous power to defendants to game the system. It will certainly increase litigation costs and create uncertainty for the appearing parties. It will create one more barrier to jury trials and we already have enough barriers.
As a lawyer who represents plaintiffs, defendants and other designated parties in litigation, I don't see any positive outcomes from this change. Defendants already have plenty of time to join others and have numerous options if they fail to do so. I call on the OCCP to vote against this unnecessary change.

Scott O. Pratt
Attorney at Law
503 241-5464

BEN COX
NORTHWEST ATTORNEY

November 20th, 2018

Council on Court Procedures
Sent via E-Mail Only to ccp@lclark.edu

Re: OSB Procedure & Practice Committee's Comment on Proposed R. 22(c)(1) Change

Dear Council Members:

I chair OSB's Procedure & Practice Committee, and make the following comments on the Committee's behalf (with one dissenter). We have concerns regarding the proposed change to Rule 22(c)(1), and recommend that the amendment be withdrawn for further study.

Our principal concern is that the change does not appear to address a significant problem. R. 22(c)(1)'s language has stood for decades without causing perceptible mischief, and the unintended consequences of this cure could well be worse than any disease it is treating.

Second, if the core issue is that 90 days is not enough time to determine other liable parties, then the solution should be to extend that timeline, e.g. to 120 days. As the wisdom of the existing rule recognizes, it is a good idea to have a reasonably hard deadline on adding additional parties, as it minimizes associated gamesmanship or unfair surprise, and properly incentivizes parties to learn their case promptly and act accordingly.

It seems the only significant scenario the change addresses is where a party, otherwise with good cause, amends her pleading beyond the 90-day deadline in a way that raises a need to involve additional parties that did not exist previously. In that specific scenario, there ought to be a mechanism for adding a party that does not depend on unanimous consent. The proposed change, however, supplies a shotgun where a rifle would be more appropriate.

Finally, if the Council does see fit to change the Rule, the court's discretion should not be left unbounded. Rather, the Rule should provide factors, e.g. R. 53's guidance concerning consolidating or separating trials. In short, it should be clear that adding parties late in the day over the objection of other parties is *not* subject to the same liberal standard that governs amending pleadings. It is instead a major event that should only occur when the moving party has acted diligently, but has no real choice other than to seek leave from the court at that time.

For the foregoing reasons, our Committee recommends withdrawing the amendment. Regardless of the eventual decision, thank you all for your work on these issues.

Respectfully,

Ben Cox

phone (503) 224-1787 fax (503) 906-6575 email INFO@COXLAWPDX.com
3723 N. WILLIAMS AVENUE PORTLAND, OR 97227

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Aaron D. Reichenberger <aaron@rosenbaumlawgroup.com> Tue, Nov 27, 2018 at 4:15 PM
To: ccp@lclark.edu

I am writing in opposition to the proposed amendment to ORCP 22. In short, this is a one-sided proposal that will result in significant and negative consequences to jury trials here in Oregon:

1) The proposed amendment will create inefficiencies in discovery, motion practice, scheduling, and trial practice;
2) It could greatly increase the costs of litigation, potentially creating an economic barrier to justice;
3) It would create a procedural barrier to efficient and timely trials in a system already rife with them;
4) It would create a one-sided opportunity for defendants to join (very close to trial) new parties, when justice (and efficiency) calls for a party knowing early in litigation who the parties are;
5) There is no evidence that defendants are currently harmed under the current rule—this is a "solution" in search of a problem; and
6) ORCP 22 is currently working fine and fairly—under the current rule, defendants have three months to identify and plead in other parties.

In addition to the above, the proposed change directly conflicts with the State Bar's new emphasis on getting cases tried on schedule and in a timely fashion. *See* CJI Task Force Executive Summary.

For all of the reasons, the proposed changes to ORCP 22 should be wholly rejected.

Sincerely,

Aaron D. Reichenberger
Rosenbaum Law Group, P.C.
1826 NE Broadway
Portland, OR 97232
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Fax: 503.288.8046
www.rosenbaumlawgroup.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules: Opposition to Proposed Changes to ORCP 22C

1 message

John Schroedel <john@schroedellaw.com> Tue, Nov 27, 2018 at 3:21 PM
To: ccp@lclark.edu

Council on Court Procedures,

I am writing to express opposition to the proposed changes to ORCP 22C (third-party practice). The proposed rule would permit third parties to be added to cases even *after* discovery and dispositive motions have been completed. New parties could be added on the eve of trial.

By allowing new parties to be added late in the case, the new rule necessarily would increase the costs of litigation, create redundancies, and create more barriers to trial. Moreover, will likely increase the risk of postponement of trial dates as new parties are added to on-going litigation. Further, the proposed amendment also creates an opportunity for mischief. For example, if a defendant wants a second opportunity to depose the plaintiff, then it need only plead in a late third-party defendant who will be entitled to its own deposition of the plaintiff, no matter if the plaintiff has already been deposed. Or, a defendant could invoke the rule to obtain a trial delay.

This is not the first time that this change has been proposed. In 1999-2001 the defense bar proposed the same change to ORCP 22C. Professor Maurice Holland, then Executive Director of the Council on Court Procedures, questioned such expansion of third party practice due to the costs and burdens of adding parties to a case already in progress. He even suggested that the 90-day right to plead in third parties potentially should be reduced to 30 days. He explained:

> "Isn't . . . 30 days from service of the complaint preferable to the 90 days allowed by ORCP 22 C? Third-party complaints inevitably prolong litigation to a greater or lesser extent. Shouldn't other parties, particularly plaintiffs, be entitled to know whether such prolonging is going to occur more promptly than as much as 90 days after service of the complaint?"
>
> Professor Maurice Holland, Memo to the Council on Court Procedures at 5 (October 20, 1999).

Judge Richard Barron chaired the subcommittee that specifically considered the proposed change and thereafter recommended that it not be adopted. Likely recognizing the added resource burdens, costs, and uncertainty created in discovery, motions practice, scheduling, and trial preparation by adding more parties months after the case had been initiated, he explained:

> "The subcommittee does not recommend changing the part of the rule allowing a defendant 90 days in which to file a third party complaint as a matter of right. The 90-day period is a reasonable time to allow a defendant to decide whether to file a third party complaint."
>
> Hon. Richard Barron, Letter to the Council (May 15, 2000).

These arguments against the rule are as valid today as they were eighteen years ago. I urge the Council to reject the proposed rule change to ORCP 22C.

--

JOHN SCHROEDEL
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www.schroedellaw.com
503-419-3013

Shari Nilsson <nilsson@lclark.edu>

Comments on published rules - ORCP 22 changes

1 message

Steve Seal <steve@steveseallaw.com> Wed, Nov 14, 2018 at 6:59 PM
To: ccp@lclark.edu

Good evening,

I'm writing to express strong opposition to proposed changes to ORCP 22. I have been a civil litigator for 10 years and my experience tells me that the changes will increase the cost of litigation, delay trials, and burden the court system. Meanwhile, I cannot recall a single case I have worked on where a defendant/third-party plaintiff was not aware of a third-party defendant within the 90-day period that exists in the current rule. Changing the rule will only allow gamesmanship where defendants can postpone trials or get "mulligans" on discovery if they add parties to their cases.

Please reject the proposed changes to ORCP 22.

Steve Seal

OSB 085384

--

STEVE SEAL

Attorney

LAW OFFICE OF STEVE SEAL, LLC

1235 SE Morrison St. Floor 2

Portland, OR 97214

Phone: 503.577.0137 // Fax: 503.782.4885

Shari Nilsson <nilsson@lclark.edu>

Opposition to proposed ORCP 22C amendment

1 message

Keith Semple <KSemple@justicelawyers.com> Tue, Nov 27, 2018 at 10:17 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council:

I oppose the proposed ORCP 22C amendment because it is unnecessary and will only serve to increase the time and cost involved in litigation. Defendants already have a mechanism for adding additional parties when necessary. This has worked well for decades. It is worth noting that prior attempts to change the rules have correctly been rejected by the Council. The analysis was correct then, and nothing has changed since.

If the current Council feels that an amendment is necessary, then a more limited change should be considered. The current proposal, which includes no deadline at all for adding additional parties (which would necessarily require additional discovery, perhaps repeat depositions of parties and other witnesses, and substantial cost to all parties) should be rejected.

Thank you for your consideration of my comments.

KEITH SEMPLE ATTORNEY

541-484-2434 | Fax: 541-484-0882

JOHNSON JOHNSON LUCAS & MIDDLETON

975 Oak Street, Suite 1050

Eugene, Oregon 97401

ksemple@justicelawyers.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Stu Smucker <slsmucker@yahoo.com> Wed, Nov 21, 2018 at 10:19 AM
Reply-To: Stu Smucker <slsmucker@yahoo.com>
To: ccp@lclark.edu

Dear Sir or Madam:

I am opposed to the proposed changes to ORCP 22.

The current rule -- giving defendants three months to identify and plead in other parties – is fair. The proposed change would create inefficiencies and delays in discovery, motion practice, scheduling and trial preparation.

Thank you for your consideration.

Stuart L. Smucker
Attorney at Law
4230 Galewood St., Ste. 200
Lake Oswego, OR 97035
Telephone: (503) 786-2810
Facsimile: (503) 210-6670
slsmucker@yahoo.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules - ORCP 22

1 message

Christina Stephenson <christina@oregonworkplacelaw.com> Thu, Nov 22, 2018 at 8:12 AM
To: ccp@lclark.edu

I am writing to urge the committee not to adopt the proposed changes to ORCP 22.

As I understand it, there is already time and process to allow adding new parties to a case. The proposed amendment would unnecessarily and unfairly expand the current parameters.

- The amendment would create severe inefficiencies in discovery, motion practice, scheduling, and trial preparation.

- The amendment could greatly increase the costs of litigation, potentially making some cases economically unfeasible -- thereby potentially **denying access to justice.**

- The rule change would create another procedural barrier to efficient and timely trials in a civil justice system that needs fewer barriers to trial, not more.

- Parties to the litigation should have a right to know the identity of all other parties early in the case. **Parties should be incentivized (as they are through the current rule) to prioritize identifying relevant parties as early as possible.**

- I am currently unaware of examples of unfair harms caused by the existing rule.

Thank you for your consideration.

Best,

Christina Stephenson, Attorney
Meyer Stephenson - Employment Law
Tel.: (503) 610-9225
Fax: (503) 512-5022
Email: christina@oregonworkplacelaw.com

****Please Note New Address****
1 SW Columbia St., Suite 1850
Portland, OR 97258

Shari Nilsson <nilsson@lclark.edu>

comments on published rules ORCP 22

1 message

David Sugerman <david@davidsugerman.com> Tue, Nov 13, 2018 at 8:59 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Members of the Council-

I served on the Council a number of years ago and try to stay abreast of proposed changes. I see that ORCP 22 amendments have been proposed, and I am writing to raise concerns about the practical impact of the proposed rule change.

It is already a challenge to get civil cases to trial. Reasons include the expense, risk, and delay. We talk a lot about the disappearing jury trial. This change would accelerate that trend because the proposed rule change creates the risk of making it harder to get to trial.

The proposed change would create significant risks of delay and added expense. A defendant that seeks to delay or avoid trial could repeatedly or belatedly ask to add third parties. The process of doing so—by itself—adds uncertainty, delay, and expense, as one must focus on responding to such late motions.

Late motions that bring in third parties lead inevitably to delays in trial dates, as discovery is required and third-party motion practice pushes things back further and further.

The existing rule gives defendants ample time to investigate third-party claims. The current rule also provides a safety valve for those rare cases in which both sides agree that a late-added third party is appropriate.

I don't see any good reason to change this rule, and I see an awful lot of mischief that can come of doing so. Respectfully, I ask that the Council not promulgate the proposed amendments to ORCP 22.

Please let me know if you have questions about these comments.

David Sugerman

David F. Sugerman | **Attorney, PC**

707 SW Washington Street, Suite 600

Portland, OR 97205

Phone 503.228.6474 | Fax 503.228.2556 | Mobile 503.997.6602

www.davidsugerman.com

Shari Nilsson <nilsson@lclark.edu>

Comments upon CCP Proposed Change to ORCP 22C

1 message

Steve Thompson <steve@kt-lawyers.com> Tue, Nov 27, 2018 at 11:42 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

To whom it may concern—

The CCP's proposed change to third party practice under ORCP 22C is a truly terrible idea. Litigation is Oregon today suffers from a lack of predictability, (especially from the standpoint of the litigants), delay and prohibitive cost. The current proposal to change 22C would worsen every one of these already existing problems. Consider this example—a case is Multnomah County has had a firm trial date in existence for 6 months. The parties have spent $50-100,000 in preparation for trial. Counsel, the parties and experts from around the country have carved time out of schedules and prepared for months to commence trial on the appointed date. 3 weeks prior to trial, defendant then introduces a third party under the proposed rule. Plaintiff is powerless to stop it, save for the discretion of the trial judge. The new third party can't possibly be ready to go to trial in 3 weeks, and so the case is reset. Experts bill for time scheduled and non-refundable travel cost. Counsel need to prepare all over again—a boon for defense lawyers who now double bill for the same work and a bust for plaintiff's counsel who can't bill for either.

In short, the proposal worsens all the presently existing problems exponentially, heightens the public's already sizable skepticism of the justice system, and favors the defense. All this for the sake of helping lawyers and parties who can't or won't look down the pike at the outset and act responsibly in the first place.

This is a disaster of an idea. I'm really surprised that the CCP would even consider it seriously. IN any event, the idea should be rejected and consigned to the rubbish.

Very truly yours,

Steve Thompson

KIRKLIN THOMPSON LLP

TRIAL LAWYERS

1020 SW Taylor St, Suite 450, Portland, OR 97205-2509

(TEL) 503-222-1640 (DIR) 503-226-1151 (FAX) 503-227-5251

steve@kt-lawyers.com www.kt-lawyers.com

Please note NEW email address and website.

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules

1 message

Conrad E. Yunker <Conrad@ceypc.com> Fri, Nov 30, 2018 at 1:38 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Re: Proposed amendment of ORCP 22

I oppose amendment. I try civil cases on both sides, plaintiff and defense. After 31 years of practice and more than 100 jury cases to verdict, I consider it unnecessary and wrongheaded. It would tip the scales of fairness to the defense side. Under the current text defendants have three months to identify and implead other parties. The proposed changes would force redundancy, inefficiency, and delay. It would encourage defendants to game the system by burdening plaintiffs and trial courts with late addition of new parties. It would reward defendants who fail to exercise due diligence and timely plead ostensibly needed parties into the case.

Proponents have failed to identify a need for the change. They've provided no examples of unfairness caused by the present rule since the last time the changes were considered and rejected.

The amendment would aggravate existing inefficiencies in discovery, motion practice, scheduling, and trial preparation. It would increase costs of litigation, likely rendering some cases economically unfeasible for plaintiffs (whether contingency or hourly-fee based). It would erect another procedural barrier to efficient and timely trials. It is contrary to the spirit and quality of civil litigation in Oregon. It should fail.

Conrad E. Yunker

OSB 873740

Conrad E. Yunker, P.C.

Salem, Oregon

(503) 371-0044

conrad@ceypc.com

Shari Nilsson <nilsson@lclark.edu>

Comments on Published Rules: Opposition to Proposed Changes to ORCP 22C

1 message

Gregory Zeuthen <gkz@zlawoffice.com> Tue, Nov 27, 2018 at 3:05 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Council on Court Procedures,

I am writing to express opposition to the proposed changes to ORCP 22C (third-party practice). The proposed rule would permit third parties to be added to cases even *after* discovery and dispositive motions have been completed. New parties could be added on the eve of trial.

By allowing new parties to be added late in the case, the new rule necessarily would increase the costs of litigation, create redundancies, and create more barriers to trial. Moreover, will likely increase the risk of postponement of trial dates as new parties are added to on-going litigation. Further, the proposed amendment also creates an opportunity for mischief. For example, if a defendant wants a second opportunity to depose the plaintiff, then it need only plead in a late third-party defendant who will be entitled to its own deposition of the plaintiff, no matter if the plaintiff has already been deposed. Or, a defendant could invoke the rule to obtain a trial delay.

This is not the first time that this change has been proposed. In 1999-2001 the defense bar proposed the same change to ORCP 22C. Professor Maurice Holland, then Executive Director of the Council on Court Procedures, questioned such expansion of third party practice due to the costs and burdens of adding parties to a case already in progress. He even suggested that the 90-day right to plead in third parties potentially should be reduced to 30 days. He explained:

> "Isn't . . . 30 days from service of the complaint preferable to the 90 days allowed by ORCP 22 C? Third-party complaints inevitably prolong litigation to a greater or lesser extent. Shouldn't other parties, particularly plaintiffs, be entitled to know whether such prolonging is going to occur more promptly than as much as 90 days after service of the complaint?"
>
> Professor Maurice Holland, Memo to the Council on Court Procedures at 5 (October 20, 1999).

Judge Richard Barron chaired the subcommittee that specifically considered the proposed change and thereafter recommended that it not be adopted. Likely recognizing the added resource burdens, costs, and uncertainty created in discovery, motions practice, scheduling, and trial preparation by adding more parties months after the case had been initiated, he explained:

> "The subcommittee does not recommend changing the part of the rule allowing a defendant 90 days in which to file a third party complaint as a matter of right. The 90-day period is a reasonable time to allow a defendant to decide whether to file a third party complaint."
>
> Hon. Richard Barron, Letter to the Council (May 15, 2000).

These arguments against the rule are as valid today as they were eighteen years ago. I urge the Council to reject the proposed rule change to ORCP 22C.

Gregory K. Zeuthen

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Shari Nilsson <nilsson@lclark.edu>

Rule 55 - Narrowing the Concerns

1 message

Susie.L.Norby@ojd.state.or.us <Susie.L.Norby@ojd.state.or.us> Fri, Dec 7, 2018 at 5:32 PM
To: cocp-list <cocp-list@lclark.edu>
Cc: Shari Nilsson <nilsson@lclark.edu>

Hello Council Members,

I am taking the bold step of suggesting that the informally discussed OTLA-Lane concerns about the published draft of ORCP 55 come down to these four. The remainder of the lengthy exchanges between him, Kelly and me wound up seeming like context in which these points rose to the surface. So, I offer this message as a much shorter "cheat sheet" on the topics up for discussion tomorrow.

1. Mr. Lane is concerned that we may have purposely removed something from the existing rule in order to streamline it, that he did not find.

My position is that nothing was removed.

2. Mr. Lane is concerned that, in his words:

"New D(3) is different than existing Rule 55(H)(2). The existing rule states that if "any requested records are restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law." Proposed new D(3) states "If a subpoena does not full comply, then the recipient is entitled to disregard the subpoena and withhold the CHI it seeks." The proposed change gives the recipient unilaterally control to "disregard" if it believes the subpoena does not comply with state or federal law. It looks like the right to "disregard" lies with the holding of CHI information. So if you and defense agree to form, holder of CHI information could still disregard if it felt the form did not comply with state or federal law. Similarly, if you seek your own client's information by subpoena for trial, holder of CHI could disregard if it felt the form did not comply with state or federal law. How can the requestor in either case depend on holder to honor the subpoena and how do they (or do they even have to) communicate that they intend to disregard."

My position is that this is semantic, not substantive. This was my earliest response, but we kept debating.

<u>NOT A SUBSTANTIVE CHANGE</u>. Old language: "if any requested records are restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law." New language: "If a subpoena does not fully comply, then the recipient is entitled to disregard the subpoena and withhold the CHI it seeks." According to the current language, "the protected records shall not be disclosed in response to the subpoena unless the requesting party complied with the applicable law." The person or entity who is being vested with the authority to "not disclose" the records in response to the subpoena is the recipient of the subpoena. The reason the recipient is allowed to "not disclose the records" is because the request (i.e. the subpoena) did not comply with the state or federal law.

In the end, I believe both Mr. Lane and Mr. Anderson feel very strongly that the original words "...the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law" are far preferable to, and very different than the new words: "If a subpoena does not full comply [with state and federal law] then the recipient is entitled to disregard the subpoena and withhold the CHI it seeks." They strongly urge a return to the original language, although of course the words "shall not be disclosed" would have to be changed to "must not be disclosed" to comport with the sea change throughout all ORCP from "shall" to "must."

3. Mr. Lane is concerned that, in his words:

"New D(6)(b) conflates inspection and copying requests for information received in response to subpoena. Existing rule distinguished inspection and copying and permitted recovery of expense for copying records received in response to subpoena. New rule is different. It would authorize recovery of expense if a party only requested inspection of "CHI" as opposed to a copy. An argument could be made that if party asks to inspect records received, the requesting party could attempt to recover costs of obtaining records from party requesting inspection."

I agree, and suggest this fix:

GOOD CATCH! I think that this is an oversight in the last sentence. It was unintentional. I am happy to recommend a fix. All we need to do is change the last sentence to read: "On request, the records must be promptly provided by the party who issued the subpoena at the expense oft he party who requested them." (The last word "them" replaces the words "the inspection or copies.") I think that cures the problem. See if you agree.

4. Mr. Lane is concerned that, in his words:

"New D(11) states that "Notwithstanding any other provision of this section, this section does not expand the scope of discovery." Existing ORCP 55(H)(6) states "Notwithstanding any other provisions, this rule does not expand the scope of discovery." That appears huge. The entire Rule 55, not just section D, should be interpreted as not expanding the scope of discovery."

My thoughts on that are:

(Implicit, but not explicit in existing language.)
The language that Mr. Lane quotes here was added to the Rule at the time Section H was drafted. It was perceived to be needed due to concern that the harnessing of HIPPA protected information, and the expansion of the subpoena rule to allow incorporation of HIPPA protections, would somehow alter users' perception of the subpoena Rule as a tool to supersede other restrictions on discovery. In other words, there was concern that a properly crafted and issued subpoena could be perceived to over-ride HIPPA protections for all purposes, not merely as an process for requesting it. When Section H was drafted, it was self-contained, and no provision in Section H was intended to extend to the other Sections of the Rule. In fact, the pre-existing Rule did not instill a fear that the issuance of a subpoena could expand the scope of discovery.

In the re-organized Rule, we endeavored to retain Section H as a self-contained Section, because it originated as one. Mr. Lane's interpretation makes sense, but only because the original Rule was so poorly organized that any part of any section could be interpreted to apply to all Sections, whether or not it was meant to be that broad. If we want to apply the language of D(11) to the remainder of the Rule, we can, but now that the Rule is organized with only Section A being universally applicable, and Sections B, C & D being self-contained, we would have to move the language to Section A.

I think the rest of the correspondence that Shari forwarded is otherwise just context. These are the issues I expect to discuss.

Thanks to all!

Susie Norby

Shari Nilsson <nilsson@lclark.edu>

Re: An issue for the Council to Consider

1 message

Mark Peterson <mpeterso@lclark.edu> Fri, Nov 2, 2018 at 3:01 PM
To: brooks@draneaslaw.com
Cc: Shari Nilsson <nilsson@lclark.edu>

Good to hear from you Brooks! Maybe the rule is meant to hang the attorney out to dry. Your suggestion will be placed on the Council's agenda for the September, 2019, meeting when, as you may recall, the Council will take up items and rules to be considered by committees for implementation and amendment.

Hope that you are doing well,

Mark
--
Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219
mpeterso@lclark.edu
(503) 768-6505

On Fri, Nov 2, 2018 at 2:51 PM Brooks Cooper <brooks@draneaslaw.com> wrote:

> ORCP 17 speaks of sanctions that can be granted against a PARTY or an ATTORNEY.
>
> ORCP D(3) provides a safe harbor of 21 days whereby an alleged false certification can be amended or withdrawn. But it only uses the word PARTY. That could lead to an interpretation that ATTORNEYs facing sanctions motions have no safe harbor to withdraw their alleged false certifications.
>
> I would argue that this is not and should not be a correct interpretation of the rule and that ORCP 17 D(3) should be amended to say “party or attorney” in each place where it now says only “part.”
>
> Hi everybody! I miss our council meetings.
>
> NOTE OUR NEW SUITE NUMBER
>
> Draneas & Huglin, PC
>
> 4949 Meadows Road
>
> Suite 600
>
> Lake Oswego, OR 97035

V: 503-496-5500

F: 503-496-5510

D: 503-496-5511

Shari Nilsson <nilsson@lclark.edu>

Re: Request for OCCP re: GAL from LPWG

1 message

Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us> Wed, Oct 31, 2018 at 11:01 AM
To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Cc: nilsson@lclark.edu

Holly,

I understand and even empathize a bit with the plain English movement in our profession. On the other hand, maybe we are moving in the wrong direction. Why not require the study of Latin as a part of our basic school curriculum? Being in the bottom five per cent of the nation in being able to get our children to graduate from high school tells me that we are doing something wrong. If our standards are too low, maybe it's res ipsa loquitur.

Nonetheless, I will place your request on the Council's possible projects for law improvement for discussion in the coming biennium, The next biennium's first meeting is in September of 2019. Please keep that time frame in mind for any suggestions that you might want to pass along for the Council's consideration. If I have your suggestions by sometime in the summer, I can put them together with appropriate materials for the September, 2019, meeting packet.

Your observations regarding the occasional confusion with the work "guardian" are certainly fair. On the other hand, I think that we all like the term GAL. I tend to agree that the word "representative" is problematic. The Council can identify unintended consequences with virtually any change that we might make.

Best.

Mark

Holly Rudolph ---10/31/2018 10:06:03 AM---Happy Halloween! I'm pinging you with a request from the Law and Policy Workgroup for the ORCPs to r

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 10/31/2018 10:06 AM
Subject: Request for OCCP re: GAL from LPWG

Happy Halloween!

I'm pinging you with a request from the Law and Policy Workgroup for the ORCPs to replace the non-English (let alone PLAIN English) "Guardian ad litem" with something English. Preferably plain.

The group doesn't have any specific recommendations, but I would ask that whatever it becomes not use "guardian" so as not to conflict with chapter 125 guardians.

Perhaps party advocate? Anything using 'representative' gets dicey too with probate "personal representatives" and representing attorneys.
It's just a braindrizzle, but 'party advocate' has some tread with the familiar and similar use of CASA.

Not a thing I'm going to chase – just passing along a request.

Cheers!

Holly C. Rudolph, J.D.
OJD Forms Manager
Executive Services Division
holly.rudolph@ojd.state.or.us
503-986-5400

"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

Shari Nilsson <nilsson@lclark.edu>

RE: Rule 7 inquiry

1 message

Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us> Tue, Nov 13, 2018 at 5:22 PM

To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Cc: nilsson@lclark.edu

Holly,

Fair enough. In the case of substitute service (7 D(2)(b)), office service (7 D(2)(c)), and service on a mail agent (7 D (3)(a)(iv)) the current wording is that the plaintiff "shall cause to be mailed" (or a variant of that phrase in 7 D(3)(a) (iv)(B)). Service by alternate method is by its nature an effort to secure service when ordinary methods fail and is done under the direction of the court. Securing personal jurisdiction is serious business and having a pro se plaintiff be the only source of evidence that service was completed seems to open up a potential for defaults being undone and judgments being set aside when the evidence on service is evenly balanced. I think that you and I have agreed to disagree on this point. Subsection D(6) is a different form of service and is largely self contained within the subsection. The question for the Council is whether writing an explicit exception for alternate service into section E (or writing a section E exclusion into subsection D(6)) makes the rule more or less clear.

Mark

Holly Rudolph ---11/13/2018 02:49:42 PM---(so then does 7E not apply to alternate service at all?) Holly C. Rudolph, J.D.

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/13/2018 02:49 PM
Subject: RE: Rule 7 inquiry

(so then does 7E not apply to alternate service at all?)

Holly C. Rudolph, J.D.
OJD Forms Manager
Executive Services Division
holly.rudolph@ojd.state.or.us
503-986-5400

"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

From: Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>
Sent: Wednesday, November 07, 2018 6:18 PM
To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Subject: RE: Rule 7 inquiry

Holly,

You are correct that the existing language relating to mailing copies of the summons and complaint under subsection D(6) places the burden on the plaintiff to actually perform the act of mailing. (It does seem to me that the plaintiff can delegate or contract with another person to perform that duty so long as that other person can provide evidence of the act of mailing.) The language in the proposed amendment (also at subsection D(6)) retains the direction to the plaintiff to mail the copies but uses the currently approved word "must" in place of "shall". One rationale is that the existing language did not require the plaintiff to find another person and "cause" that person to mail the summons and complaint. A better rationale is that alternate service is only available when the court, in its discretion, authorizes such service and, presumably, the court will give adequate direction to the plaintiff, i.e., the service is performed at the direction of the court. I know that when I approve alternate service, I spell out each step that the plaintiff is required to perform. By the way, your observation caused me to look anew at subsection D(6) and I noticed that, for mailing to alternate addresses of defendant, the language goes from active to passive. We may change that.

The amendment's language on electronic alternative service is silent on who is allowed to send the e mail, text, fax, or whatever. Again, the motion and declaration should specify how the plaintiff expects to effect service and the court's order should spell out exactly what is required. The Council had expert input on electronic service and understands that any kind of electronic message or post from an unknown sender is likely to be blocked or screened by privacy settings whereas a message from one's so-to-be former spouse may be received and read. It will be up to the plaintiff to indicate in the motion and affidavit or declaration why electronic service is the most likely method of getting notice to the defendant and that might include an averment that the other party sends and receives communications to and from the plaintiff (or possibly the plaintiff is blocked but another person is in communication with the defendant via the electronic means mentioned in the motion). This whole new approach still causes me concern but, in many cases it is really the best means available to actually get the message to the defendant and almost anything is likely to be more efficacious than is the case with publication in a newspaper or posting the summons and complaint at the courthouse. Finally, the amended paragraph D(6)(d) now gives defendants served by alternate service, not just publication, an opportunity to come late to the litigation or to set aside a judgment that has been entered.

You are not "hounding" me. You have useful insights on the work product of the Council and it would be nice if the ORCP could mesh with the ODJ's forms.

Best,

Mark

Holly Rudolph ---11/07/2018 11:05:13 AM---Oh I did have one other question for you though. The regular R7 rules use the phrase "plaintiff shal

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/07/2018 11:05 AM
Subject: RE: Rule 7 inquiry

Oh I did have one other question for you though. The regular R7 rules use the phrase "plaintiff shall cause to be mailed" – which we kind of wrangled with a few years ago, ending up with 'plaintiff can't actually mail it because of 7E.

However, R7(D)(6) doesn't use that phrase, it says 'plaintiff must mail', and that's retained in the amendments. Does that mean that the party can actually do the mailing that's associated with alternative service themselves?

And finally … the electronic service section. I had already added an open-ended option to forms for that, so I've given this some thought. I feel strongly that the rule needs to either expressly allow or at least allow discretion for the court to order that the party can perform electronic service themselves. I have reasons.

For any of these methods, it's very common (and wise) for people to set their inbox or phone to screen out unknown numbers or unidentified senders. So the chances of having service blocked by technology is pretty high if 7E still applies and some random person is sending emails or texts. For social media it's even more important since the recipient is likely to have privacy settings in place that would prevent an unknown server from actually contacting them. The 'most reasonably calculated method to apprise recipient' is 100% to allow the party to serve instead of requiring a third party server. This is backstopped by the availability of screenshots to prove what exactly was sent and received, which is an element I included in the instructions. The other-server rule is – as I understand it – a way to insert a neutral party in between litigants to ensure that what NEEDS to be served is what's ACTUALLY served. That factor is negligible in an electronic setting. I advocate for an exception to 7E for service under (new) 7D(6)(b).

Apologies for hounding you – it just so happens that I've been working on the revisions for this packet over the past couple of weeks so it's all front and center for me!

Thank you! I'm excited that electronic service is happening. Going down this little rabbit hole last week made me realize that I don't even know the addresses of some of my best friends! We know how to get to each other's homes, but actual street addresses? No.

Holly C. Rudolph, J.D.
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"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

From: Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>
Sent: Tuesday, November 06, 2018 2:51 PM
To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Cc: nilsson@lclark.edu
Subject: Re: Rule 7 inquiry

Holly,

The "time for response" phrase is captured from the leadline in subsection 7C(2) and means the time to appear, to file an answer or a motion, or to otherwise defend. That phrase is in the last line of paragraph 7D(6)(a) in the current rule and will be found in paragraph 7D(6)(a) in the proposed amendment that can be found on the Council's website--councilonourtprocedures.org. The notice that is required on the summons (see 7C(3) for three versions) is intended to inform defendants as to what they must do to avoid a default. So, the time to respond is the last date before a default may be entered rather than the date on which the 30 days in which to respond begins.

The alternative service provisions as written are likely behind the times and the proposed amendments are intended to be a brave but modest effort to make them more useful in light of current technology and the ways in which many users of the court system communicate. Recall that there is good case law that holds that actual notice of the litigation is not necessarily adequate notice. I take the alternate service amendments to be saying, "If you do not know of a means by which the defendant may be served personally, what method is the most likely process to provide the defendant with notice of the pendency of the litigation and an opportunity to appear and defend. See subsection 7D(1) which is the constitutional standard. One impetus for the amendment is that no one believes that service by publication is at all likely to let a defendant know of pending litigation that is filed against him or her.

Have I made things worse or helped?

Mark

Holly Rudolph ---11/06/2018 09:48:09 AM---Hi! What does the phrase "time for response" mean in Rule 7D(6)(a) - last line?

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/06/2018 09:48 AM
Subject: Rule 7 inquiry

Hi!

What does the phrase "time for response" mean in Rule 7D(6)(a) - last line?

We think it means the time when alternative service is deemed complete and the statutory response time begins to run against the other party.

That's not what the words say though, so we're confused, because none of the other things we think it could mean make any sense.

I generally want to red-line the living daylights out of the alternative service rules ... between you and me it's a lot of words that boil down to "any way you can let them know", bracketed by "and as long as they know it's fine". But that's an effort for another time ... perhaps as part of a concerted effort to make guidelines for service by email and social media?

Yes - that noise you just heard was Pandora's box

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"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell