



Shari Nilsson <nilsson@lclark.edu>

Re: Comment on Court Procedure Changes

1 message

Rebecca Cambreleng <rebecca@employmentlaw-nw.com>
To: "ccp@lclark.edu" <ccp@lclark.edu>

Mon, Dec 7, 2020 at 10:53 AM

Hon. Mark A. Peterson, Executive Director

Shari C. Nilsson, Executive Assistant

Council on Court Procedures

[10101 S. Terwilliger Blvd](#)[Portland, OR 97219](#)

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Thank you,

Rebecca

Rebecca Cambreleng**Crispin Marton Cambreleng**[1834 SW 58th Avenue](#)**Suite 200****Portland, OR 97221****(503) 293-5770**rebecca@employmentlaw-nw.comwww.employmentlaw-nw.com

[COCP Meeting Packet](#)
[December 12, 2020](#)
[Attachment D-1](#)

She/Hers

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December 12, 2020
Attachment D-2

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December 4, 2020

Via email and mail

Hon. Mark A. Peterson, Executive Director
Shari C. Nilsson, Executive Assistant
Council on Court Procedures
10101 S. Terwilliger Blvd
Portland, OR 97219

Re: Council on Court Procedures; proposed amendment to ORCP 21 E(3)

Dear Judge Peterson and Ms. Nilsson:

I was pleased to read the Council's proposed amendment to ORCP 21 E(3) (providing for a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires"), and write to encourage the Council to formally promulgate this proposed amendment to the Oregon Rules of Civil Procedure.

As you know, plaintiffs commonly must amend their complaints before trial, often shortly before trial, and to do so must either have the written consent of the adverse party or must move for leave of the court to make the amendments. In my experience, at least, most complaints need to be amended before trial, if for no other reason than to update the amount of damages based on the evidence that has developed since the case was filed. When a plaintiff seeks leave of the court to amend, the court may consider whether the amendment would cause undue prejudice to the defendant. When the amended complaint is filed, the defendant may then answer. There is no comparable rule for the court to consider whether new matters raised by the defendant would cause undue prejudice to the plaintiff. The proposed amendment to ORCP 21 E(3) would help to remedy this procedural imbalance.

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I have had the experience many times of a defendant raising entirely new matters on the eve of trial because the current rules allow them to do so. For one example of many, I vividly recall a defendant raising for the first time shortly before trial a defense of comparative fault in a product liability case involving serious burn injuries. The defense could have been raised at the start of the case, but was not. Allowing last-minute new defenses of this sort works unfair prejudice to a plaintiff, who has gone through discovery, developed the evidence, and scheduled witnesses based on the case as previously plead.

One might imagine a rule that would not allow substantive late amendments to an answer if the plaintiff merely deletes claims or allegations or modifies the allegations of the amount of damages. Short of that, the proposed amendment to ORCP 21 E(3) would provide a mechanism for the court to consider whether raising new issues late in the process is unfair such that justice should require that the new matters not be part of the case. The mere existence of that mechanism should discourage "sandbagging," and encourage parties to get issues on the table earlier, so that everyone has a fair opportunity to prepare for trial or settlement.

Thank you for your consideration of these comments.

Sincerely,



Don Corson

DC:sw



Shari Nilsson <nilsson@lclark.edu>

proposed amendment to ORCP 21 E(3)

Ben Falk <ben@benfalklaw.com>
To: ccp@lclark.edu

Fri, Dec 4, 2020 at 2:22 PM

Hon. Mark A. Peterson, Executive Director

Shari C. Nilsson, Executive Assistant

Council on Court Procedures

[10101 S. Terwilliger Blvd](#)

[Portland, OR 97219](#)

ccp@lclark.edu

12/4/20

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

Benjamin Falk

Falk Law Office

[COCP Meeting Packet](#)
[December 12, 2020](#)
[Attachment D-5](#)

Benjamin O. Falk

Attorney at Law

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December 12, 2020
Attachment D-6



Shari Nilsson <nilsson@lclark.edu>

Comment on Proposed Amendments to ORCP

1 message

Julia Fraser <julia@juliafraserlaw.com>
To: ccp@lclark.edu

Sun, Nov 29, 2020 at 9:11 AM

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

Julia Fraser

Law Office of Julia M. Fraser

--



Julia M. Fraser
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Ph. (503) 974-8392 | www.juliafraserlaw.com

(Pronouns - She, Her, Hers)

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ORCP Meeting Packet
December 2, 2020
Attachment D-7

COCOP Meeting Packet
December 12, 2020
Attachment D-8



Shari Nilsson <nilsson@lclark.edu>

Proposed Amendments to ORCP 21 E(3)

1 message

Rhett Fraser <rhett@hueglifraserlaw.com>

Sat, Dec 5, 2020 at 10:26 AM

To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

I have personally experienced numerous "late hour" attempts by defendants to amend their answers. For instance, in one case that I tried in late 2019, defense counsel actually filed an amended answer on the Friday before trial (at call in Multnomah County) with trial to start on Monday. That answer was filed in response to an amended complaint that merely modified the amount of damages. The amended answer asserted new affirmative defenses that could have been raised during the entire year we were litigating the case.

This is not an isolated example. By way of background, I primarily practice medical malpractice. Before every trial, we will usually file an amended answer amending the damages alleged (typically the economic damages, like the final medical bills since these are usually incurred right up until (and after) the day of trial). What then happens is the defense will file an answer, but will habitually assert new affirmative defenses that have nothing to do with the amendments, and leave us with only days to respond. This happens over and over again. As discussed, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. On two different occasions the only remedy available to the trial judge was to offer us either a reset, or to proceed to trial. In personal injury cases, when months of preparation and tens of thousands of dollars have been spent already and experts' flights and hotel rooms are booked, this is no choice at all. We simply have to proceed forward despite being last minute sandbagged.

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party. There is a need for this amendment and it is important.

Thank you.

Rhett G. Fraser

Huegli Fraser PC

Attorney | Huegli Fraser P.C.

101 SW Main Street, Suite 1900 | Portland, Oregon 97204

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rhett@hueglifraserlaw.com | www.hueglifraserlaw.comCOCP Meeting Packet
December 12, 2020
Attachment D-9

COCF Meeting Packet
December 12, 2020
Attachment D-10



Shari Nilsson <nilsson@lclark.edu>

ORCP 12 E(3)

1 message

Talia Guerriero <talia@oregonworkplacelaw.com>
To: ccp@lclark.edu

Tue, Nov 24, 2020 at 2:25 PM

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. The amendment simply gives the court an opportunity to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice. In this way, the amendment would provide balance in the justice system.

Thank you,

Sincerely,

Talia

Talia Y. Guerriero
Meyer Stephenson - Employment Law
1 SW Columbia St., Suite 1850
Portland, OR 97204
Office: (503) 459-4010

Direct: (971) 339-7552
talia@oregonworkplacelaw.com
www.oregonworkplacelaw.com
Pronouns: She/Hers/Her

Like many others, I am working from home for the foreseeable future. Please email me a courtesy copy of any documents you are serving by mail. Thank you.

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December 12, 2020
Attachment D-11

COCOP Meeting Packet
December 12, 2020
Attachment D-12

James D. Huegli*
Rhett G. Fraser*†
Jason V. Cohen*

*admitted in Oregon and Washington
†also admitted in Idaho



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November 29, 2020

Shari C. Nilsson, Executive Assistant

Council on Court Procedures

10101 S. Terwilliger Blvd

Portland, OR 97219

ccp@lclark.edu

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue

raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

James D. Huegli

Very truly yours,

James D. Huegli

Enclosures



Shari Nilsson <nilsson@lclark.edu>

RE: ORCP Amendments

James Huegli <jim@hueglifraserlaw.com>

Sun, Nov 29, 2020 at 7:57 PM

To: Shari Nilsson <nilsson@lclark.edu>

Cc: "ccp@lclark.edu" <ccp@lclark.edu>, Rhett Fraser <rhatt@hueglifraserlaw.com>

Thank you Shari. I have pretty strong feelings on this one. The judge is given a lot of discretion, but before he can exercise that discretion he first needs authority to look at the issue. Justice requires flexibility when technical issues allow for justice to be thwarted. I honestly see no downside to this amendment and great upside for both parties.

Can you pass this note along as well.

Thanks

James D. Huegli

Attorney at Law

Huegli Fraser PC

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ORCP Meeting Packet
December 12, 2020
Attachment D-15

Consult an attorney prior to making or responding to any legal claim or taking any legal action.

From: Shari Nilsson <nilsson@lclark.edu>
Sent: Sunday, November 29, 2020 7:28 PM
To: James Huegli <jim@hueglifraserlaw.com>
Cc: ccp@lclark.edu; Rhett Fraser <rhett@hueglifraserlaw.com>
Subject: Re: ORCP Amendments

Dear Mr. Huegli,

Thank you for your comments regarding what I assume from context are the proposed amendments to Rule 21 E(3). I will be sure to pass them along to the Council for consideration prior to the promulgation meeting on December 12, 2020. If you are interested in attending that meeting, you can find information here:

http://counciloncourtprocedures.org/Content/2019-2021%20Biennium/2020-12-12_agenda.pdf

Best regards,

Shari

Shari Nilsson
Executive Assistant
Council on Court Procedures

c/o Lewis and Clark Law School
[10101 S Terwilliger Blvd](#)
Portland OR [97219](#)

(503) 768-6505
nilsson@lclark.edu



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On Wed, Nov 25, 2020 at 3:35 AM James Huegli <jim@hueglifraserlaw.com> wrote:

Please see attached. Even though this is a form letter, it expresses my thoughts very well. I have run into this issue more than once and this correction is very necessary. It also is not oppressive as it give the court discretion. I believe it is well drafted.

Thanks. Happy Thanksgiving.

COCP Meeting Packet
December 12, 2020
[Attachment D-16](#)

Jim Huegli

James D. Huegli

Attorney at Law

Huegli Fraser PC

[101 SW Main St. Suite 1900](#)

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Consult an attorney prior to making or responding to any legal claim or taking any legal action.

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[December 12, 2020](#)
[Attachment D-17](#)



Shari Nilsson <nilsson@lclark.edu>

2020 Proposed ORCP Amendments

1 message

Scott Pratt <scopratt@aim.com>
Reply-To: Scott Pratt <scopratt@aim.com>
To: "ccp@lclark.edu" <ccp@lclark.edu>

Tue, Nov 24, 2020 at 12:29 PM

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Scott O. Pratt
Attorney at Law
503 241-5464

COCOP Meeting Packet
December 12, 2020
Attachment D-18



Shari Nilsson <nilsson@lclark.edu>

Proposed Changes to ORCP 21 E(3)

Quinn Kuranz <quinn@kuranzlaw.com>

Fri, Dec 4, 2020 at 2:46 PM

To: ccp@lclark.edu

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

[Quinn E. Kuranz](#)

Attorney at Law

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Se Habla Español

COCOP Meeting Packet
December 12, 2020
Attachment D-19



Shari Nilsson <nilsson@lclark.edu>

Proposed Change to ORCP 12E(3)

1 message

Aaron Reichenberger <aaron@rosenbaumlawgroup.com>

Thu, Dec 3, 2020 at 10:18 AM

To: ccp@lclark.edu

Good morning, Judge Peterson and Ms. Nilsson:

I support the proposed amendment to ORCP 12 E(3), which permits a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment brings some balance to ORCP 12. As you both know, the current rules require the court to consider whether proposed amendments to a complaint unduly prejudice a defendant. But there is no consideration that occurs when a defendant (in response to an amended complaint) raises new defenses. This is currently the case even if the new defense is raised days before trial or go outside the amendments to the complaint.

Defendants can abuse this current lack of consideration in multiple ways. A simple example is when a plaintiff amends their complaint to eliminate claims and narrow the focus for a trial. Ordinarily, this is what we'd want: a focused and efficient trial that is a good use of everyone's resources. Currently, though, in response to this, a defendant can weaponize this step by raising a wholly new substantive defense that the plaintiff would have no opportunity to prepare for absent requesting a reset of a scheduled trial date. This, of course, creates inefficiencies and waste for everyone.

I support this amendment. Thank you for your time and consideration.

Best,

Aaron D. Reichenberger
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[Fax: 503.288.8046](#)
[www.rosenbaumlawgroup.com](#)

COCOP Meeting Packet
December 12, 2020
Attachment D-20



Shari Nilsson <nilsson@lclark.edu>

ORCP 21

1 message

Sarah-Ray Rundle <sarahrayrundle@gmail.com>
To: ccp@lclark.edu

Sat, Nov 21, 2020 at 5:31 AM

Dear Council on Court Procedures,

I commend you for attempting to make ORCP 21 more clear by reorganizing it and breaking up the formerly unwieldy paragraph A into subsections. While it may take some time to get used to the new numbering, I don't foresee it being an issue because I believe the legal community can easily adapt to a minor change, especially when it makes the rule so much easier to read. Thank you!

May I also recommend that you make it clear in the rule that a party may not submit affidavits, declarations, and other evidence when filing a motion to dismiss based on A(1)(h) failure to state ultimate facts sufficient to constitute a claim (and A(1)(g)). I think it is clear from the language but I can tell you, based on my experience, that it is not. I work as a judicial clerk in Multnomah County and ORCP 21 motions are filed in almost every civil case so this is a rule I work with often. During my year and a half at the court, I have seen far too many motions to dismiss for failure to state a claim with affidavits, declarations, and other evidence attached. If opposing counsel does not point out that the Court may not consider extrinsic evidence under the rule, the Court is forced to explain it to the moving party. Either way, it must be embarrassing for newer attorneys who thought they understood the rule but didn't quite catch the significance of A(2)(b). And if attorneys cannot understand the rule, imagine how difficult it must be for pro se parties to understand it.

If you are editing the rule for clarity, I implore you to go further and provide complete clarity in A(2)(b) on the issue of when a party may not submit extrinsic evidence in support of their motion to dismiss. I believe this change would limit the number of frivolous motions to dismiss, which in turn would reduce litigation costs for clients on all sides and reduce the burden on the courts.

Thank you for taking my concern seriously.

Sincerely,

Sarah-Ray Rundle OSB#184388

COCP Meeting Packet
December 12, 2020
Attachment D-21