

T H E
CORSON & JOHNSON
L A W F I R M

DON CORSON, J.D.
Trial Attorney
dcorson@corsonjohnsonlaw.com

LARA C. JOHNSON, J.D.
Trial Attorney
ljohnson@corsonjohnsonlaw.com

BEATRICE GRACE, R.N., J.D.
Trial Attorney
bgrace@corsonjohnsonlaw.com

BRANDON T. MOORE, J.D.
Trial Attorney
bmoore@corsonjohnsonlaw.com

940 Willamette Street - Suite 500
Eugene, Oregon 97401

Bus: (541) 484-2525

Fax: (541) 484-2929

WENDY JO CRAIGMILES
Paralegal
wendy@corsonjohnsonlaw.com

STACY WHIDDON
Legal Assistant
swhiddon@corsonjohnsonlaw.com

JENNIFER MALONEY
Paralegal
jmaloney@corsonjohnsonlaw.com

KARA STANTON
Legal Assistant
kstanton@corsonjohnsonlaw.com

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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 amendments to ORCP 55 on subpoenas

Dear Judge Peterson and Ms. Nilsson:

I am writing to respectfully request that the Council *not* promulgate the proposed amendments to ORCP 55 on subpoenas.

I have great respect for the Council and the hard work of Council members who draft and consider amendments to the rules, so have some hesitation in sending this letter. On the other hand, the purpose of the public comment period is at least in part to point out matters that are worthy of further consideration. I believe this is one such matter.

My primary concerns are with what I assume are likely unintended consequences of the proposed amendments. Consider for example the hypothetical situation where defense counsel suspects that there may be more to the employment records than have

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Attachment E-1

been disclosed, the case does not settle at a pretrial mediation, and shortly before trial defense counsel needs to subpoena the employer's records custodian to trial. Under the proposed amendments, Defense counsel might serve a subpoena ten days in advance for the records custodian to appear and testify and to produce documents. The records custodian, on the morning of trial when the custodian was subpoenaed to testify, serves objections on defense counsel and the clerk. Objections under the amendments would be allowed any time "prior to the time specified in the subpoena to appear and testify." Under the proposed rule as amended, "[s]erving a written objection suspends the time to produce the documents or things," proposed ORCP 55 A(7)(b)(ii), so the witness complies with the rules by showing up to trial without the subpoenaed documents. Perhaps nice for the records custodian, but not so nice for defense counsel, defendant, and the administration of justice.

What if the witness not only does not produce the documents, but simply does not show up for trial after objecting? Does the written objection to the subpoena excuse the witness from appearing? The witness may point to proposed ORCP 55A(7), which allows them to "object, move to quash the subpoena, or move to modify the subpoena," which is written in the disjunctive, and proposed ORCP 55A(1)(a)(v) informs the witness that they have the "option to object or move to quash or modify." Defense counsel may point to ORCP 55A(6)(d), which says that a witness must obey a subpoena, but what would it mean under the proposed rules to "obey" a subpoena?

Consider as a second hypothetical example a deposition in which plaintiff's counsel wishes to have the defendant's former employer testify and bring defendant's employment records to the deposition. It's a full three months before trial, and plaintiff's counsel serves on the former employer a subpoena thirty days in advance for the former employer to appear and testify and to produce documents. Thirteen days later, the witness serves objections on plaintiff's counsel and the clerk of the court. Under the proposed rule as amended, "[s]erving a written objection suspends the time to produce the documents or things," so in the absence of a motion to compel and a court order compelling production, the witness need not produce the documents. It may be unclear to the witness and to counsel if the witness still needs to appear for the deposition (see discussion above). If the witness does appear, the deposition would likely be a waste of time without the documents. Would all this get resolved in time for the deposition to be taken with the documents, the transcript prepared, and for that to be useful before trial? And under the proposed rules, what would be the expense to the parties and the additional time demands on the court?

Any judge or practicing attorney could come up with many other hypotheticals (just think, for example, of when the need for a new subpoena arises during trial). The predictable consequence of the proposed rule change would be to encourage objections, which can be made quickly and cheaply, and force parties seeking legitimate discovery from non-parties to file motions to compel. That would likely increase the burden on our state trial court judges, with no corresponding improvement in the "just, speedy, and inexpensive determination of every action," which should be the touchstone of the rules. See ORCP 1B.

Historically, subpoenas were orders of the court. Under the newly proposed ORCP 55 amendments, a subpoena would effectively no longer serve that historical function, but be something more along the lines of a notice that a party may later bring a motion to compel. The implications of that could be serious, particularly as cases get closer to trial, and in trial itself.

I sincerely hope that the Council does not go forward with the Rule 55 proposed amendments at this time, and respectfully suggest that subpoena issues can be considered further in the next biennium.

Sincerely,

A handwritten signature in black ink, appearing to be 'Don Corson', with a long horizontal stroke extending to the right.

Don Corson

DC:sw

cc: Jennifer Gates