AMENDMENTS

to

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 4, 1982

COUNCIL ON COURT PROCEDURES
1981-83

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 1983 Legislative Assembly. Pursuant to ORS 1.735, they will become effective after the legislative session to the extent that the Legislative Assembly does not, by statute, modify the action of the Council.

During the 1981-83 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. The comment which follows each rule was prepared by Council staff. Those comments represent staff interpretation of the rules and the intent of the Council, and are not officially adopted by the Council. Subdivisions of rules are called sections and are indicated by capital letters, e.g., A.; subidivisions of sections are called subsections and are indicated by Arabic numberals in parentheses, e.g., (1); subdivisions of subsections are called paragraphs and are indicated by lower case letters in parentheses, e.g., (a), and subdivisions of paragraphs are called subparagraphs and are indicated by lower case Roman numerals in parentheses, e.g., (iv).

The amended rules are set out with both the current and amended language. Underscoring denotes new language while bracketing indicates language to be deleted.

The Council included as a part of its September 11, 1982 tentative draft the Proposed Rules of Juvenile Court Procedure submitted by the Juvenile Services Commission, pursuant to ORS 417.490(h), and which were the subject of testimony at the Council's public hearings in Bend, on September 11, 1982, and in Eugene on September 30, 1982. The Council decided that because of ambiguity surrounding the Council's authority, it is not clear that the Council has the power to promulgate juvenile court rules. If the legislature would pass appropriate enabling legislation, the Council expressed its willingness to consider and promulgate rules of procedure for juvenile courts. Those proposed rules are included, for information purposes, in Section II of this submission to the legislature, together with a letter from the Chairman of the Council stating the Council's position.

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Section I.

Amendments to Oregon Rules of Civil Procedure

SUMMONS

RULE 7

D.(3)(d) 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, [*clerk, or*] secretary, or attorney thereof. [*When a county is a party to an action, in addition to the service of summons specified above, an additional copy of the summons and complaint shall also be served upon the district attorney of the county in the same manner as required for service upon the county clerk.*]

* * * *

D.(4) Particular actions involving motor vehicles.

D.(4)(a) Actions arising out of use of roads, highways, and streets; service by mail.

D.(4)(a)(i) In any action arising out of any accident, collision, or liability in which a motor vehicle may be involved while being operated upon the roads, highways, and streets of this state, any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf, except a defendant which is a foreign corporation maintaining a registered agent within this state, may be served with summons by personal service upon the Motor Vehicles Division and

mailing a copy of the summons and complaint to the defendant and the defendant's insurance carrier if known.

D.(4)(a)(ii) Summons may be served by leaving one copy of the summons and complaint with a fee of $12.50 in the hands of the Administrator of the Motor Vehicles Division or in the Administrator's office or at any office the Administrator authorizes to accept summons. The plaintiff, as soon as reasonably possible, shall cause to be mailed a true copy of the summons and complaint to the defendant at the address given by the defendant at the time of the accident or collision that is the subject of the action, [*and*] the most recent address as shown by the Motor Vehicles Division's driver records, and any other address of the defendant known to the plaintiff, which might result in actual notice and the defendant's insurance carrier if known. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon such mailing.

D.(4)(a)(iii) The fee of $12.50 paid by the plaintiff to the Administrator of the Motor Vehicles Division shall be taxed as part of the costs if plaintiff prevails in the action. The Administrator of the Motor Vehicles Division shall keep a record of all such summonses which shall show the day of service.

D.(4)(b) Notification of change of address. Every motorist or user of the roads, highways, and streets of this state who, while operating a motor vehicle upon the roads, highways, or streets of this state, is involved in any accident, collision, or liability, shall forthwith notify the Administrator of the Motor Vehicles Division of any change of such defendant's address within three years after such accident or collision.

D.(4)(c) Default. No default shall be entered against any defendant served by mail under this subsection who has not either received or rejected the registered or certified letter containing the copy of the summons and complaint, unless the plaintiff can show by affidavit that the defendant cannot be found residing at the address given by the defendant at the time of the accident or collision, or residing at the most recent address as shown by the Motor Vehicles Division's driver records, or residing at any other address actually known by the plaintiff to be defendant's residence address, if it appears from the affidavit that inquiry at such address or addresses was made within a reasonable time preceding the service of summons by mail, and that a copy of the summons and complaint was mailed by registered or certified mail, or some other designation of mail that provides a receipt for the mail signed by the recipient, to the defendant's insurance carrier or that the defendant's insurance carrier is unknown.

* * * *

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 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 a copy of the summons and complaint was left or describe in detail the manner and circumstances of service. If the summons and complaint were mailed, the certificate may be made by the attorney for any party and shall state the circumstances of mailing and the return receipt shall be attached.

COMMENT

7 D.(3)(d). The rule would be amended to specifically allow service on a public body by serving the attorney for the public body. Since "clerk" may be ambiguous, reference to service on a clerk is deleted. It would no longer be necessary to serve the district attorney when a county is a party to an action.

7 D.(4) This subsection would be amended to provide for service of a copy of the summons and complaint on a defendant's insurance carrier before a default judgment may be taken when the identity of the insurance carrier is

known to the plaintiff. The purpose of the amendment is to avoid the result of Harp v. Loux, 54 Or. App. 840 (1981).

7 F.(2)(a)(i) The rule would be amended to specifically allow certification of mailing by the attorney for any party.

SERVICE AND FILING OF
PLEADINGS AND OTHER
PAPERS

RULE 9

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party or by mailing it to such attorney's or party's last known address. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. A party who has appeared without providing an appropriate address for service may be served by placing a copy of the pleading or other papers in the court file. Service by mail is complete upon mailing. Service of any notice or other paper to bring a party into contempt may only be upon such party personally.

COMMENT

To cure an ambiguity, the proposed amendment would make it clear that it applies to all parties, represented by an attorney or not. In addition, ORCP 9 would be amended to allow service on a party who has appeared by placing a copy of the document in the court file when that party has not provided an address for service.

DEFENSES AND OBJECTIONS;
HOW PRESENTED; BY
PLEADING OR MOTION;
MOTION FOR JUDGMENT ON
THE PLEADINGS

RULE 21

A. How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with

particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present evidence and affidavits, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. When a motion to dismiss has been granted, judgment shall be entered in favor of the moving party unless the court has given leave to file an amended pleading under Rule 25.

COMMENT

To cure any ambiguity in the ability of the court to allow leave to amend after a motion to dismiss has been granted, Rule 21 A. will be amended to specifically refer to leave to amend under ORCP 25. The amendment would also make it clear that judgment may be entered if leave to amend is not granted.

COUNTERCLAIMS,
CROSS-CLAIMS, AND THIRD
PARTY CLAIMS

RULE 22

C. Third party practice.

C.(1) [*At any time after*] After commencement of the action, a defending party, as a third party plaintiff, may cause a summons and complaint to be served upon 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. [*The third party plaintiff need not obtain leave to make the service if the third party complaint is filed not later than 10 days after service of the third party plaintiff's original answer. Otherwise the third party plaintiff must obtain leave on motion upon notice to all parties to the action. Such leave shall not be given if it would substantially prejudice the rights of existing parties.*] 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 assert any defenses to the third party plaintiff's claim

as provided in Rule 21 and counterclaims against the third party plaintiff and cross-claims against other third party defendants as provided in sections A. and B. of this rule. The third party defendant may assert against the plaintiff any defenses which 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. The plaintiff may assert any claim against the 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 assert the third party defendant's defenses as provided in Rule 21 and 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 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 to be brought in under circumstances which would entitle a defendant to do so under

subsection C.(1) of this section.

COMMENT

The time for filing and serving a third party complaint will be changed from not later than 10 days after service of the third party plaintiff's original answer to not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Within the 90 days, third parties may be pled in as a matter of right. After 90 days, third parties may only be pled in by agreement of the parties who have appeared and leave of court.

DEPOSITIONS UPON WRITTEN QUESTIONS

RULE 40

A. Serving questions; notice. Upon stipulation of the parties or leave of court for good cause shown, and [*After*] after commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 55. The deposition of a person confined in prison may be taken only as provided in Rule 39 B.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify such person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 39 C.(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with

cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

B. Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 39 D., F., and G., to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

COMMENT

The amendment would require stipulation or leave of court before taking a deposition on written questions.

PHYSICAL AND MENTAL
EXAMINATION OF PERSONS;
REPORTS OF EXAMINATIONS

RULE 44

E. Access to hospital records.

Any party [*legally liable or*] against whom a [*claim*] civil action is [*asserted*] filed for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment by the hospital of the injured person within the scope of discovery under Rule 36 B. Any party seeking access to hospital records under this section shall give written notice of any proposed action to seek access to hospital records, at a reasonable time prior to such action, to the injured person's attorney or, if the injured person does not have an attorney, to the injured person.

COMMENT

The rule will be amended to allow access to hospital records to one against whom a "civil action" has been filed, rather than a "claim."

SUMMARY JUDGMENT

RULE 47

A. For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move, with or without supporting affidavits, for a summary judgment in that party's favor upon all or any part thereof.

B. For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move, with or without supporting affidavits, for a summary judgment in that party's favor as to all or any part thereof.

C. Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party, prior to the day of the hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the

issue of liability alone although there is a genuine issue as to the amount of damages.

D. Form of affidavits; defense required. [*Supporting*] Except as provided by section E. of this rule, supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or further affidavits. When a motion for summary judgment is made and supported as provided in this rule an adverse party may not rest upon the mere allegations or denials of that party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue as to any material fact for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

E. Affidavit of attorney when expert opinion required. Motions under this rule are not designed to be used as discovery devices to obtain the names of potential expert witnesses or to obtain their facts or opinions.

If a party, in opposing a motion for summary judgment, is required to provide the opinion of an expert to establish a genuine issue of material fact, an affidavit of the party's attorney stating that an unnamed qualified expert has been retained who is available and willing to testify to admissible facts or opinions creating a question of fact, will be deemed sufficient to controvert the allegations of the moving party and an adequate basis for the court to deny the motion. The affidavit shall be made in good faith based on admissible facts or opinions obtained from a qualified expert who has actually been retained by the attorney who is available and willing to testify and who has actually rendered an opinion or provided facts which, if revealed by affidavit, would be a sufficient basis for denying the motion for summary judgment.

[E] F. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot, for reasons stated, present by affidavit facts essential to justify the opposition of that party, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

[F] G. Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the

court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

[G] H. Multiple parties or claims; final judgment. In any action involving multiple parties or multiple claims, a summary judgment which is not entered in compliance with Rule 67 B. shall not constitute a final judgment.

COMMENT

When, in opposing a motion for summary judgment, it would be necessary to provide the opinion of an expert to raise a material issue of fact, an affidavit of counsel that a qualified expert is willing to testify to facts and opinions which raise a material issue of fact will be an adequate basis for the court to deny the motion.

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

D.(1) Service. Except as provided in subsection (2) of this section, 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 for one day's attendance. 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 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)(d), D.(3)(e), or D.(3)(f).

D.(2) Service on law enforcement agency.

D.(2)(a) Every law enforcement agency shall designate individual or individuals upon whom service of 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 subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law

enforcement agency.

D.(2)(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency which employs the officer not later than 10 days prior to the date attendance is sought. A subpoena may be served in this manner only if the officer is currently employed as a peace officer and is present within the state at the time of service.

D.(2)(c) When a subpoena has been served as provided in paragraph (b) of this subsection, 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) 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) The attorney certifies in connection with or upon the return of service that the attorney, or his/her 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) The attorney, or his/her agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness and the attorney has satisfied the agreement with respect thereto; and

D.(3)(c) The subpoena was mailed to the witness more than ten days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D.[3](4) Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons.

COMMENT

Service of a subpoena by mail when certain conditions are met has been provided under new subsection D.(3). Proof of service, formerly subsection D.(3), is now subsection D.(4).

INSTRUCTIONS TO JURY AND
DELIBERATION

RULE 59

B. Charging the jury. In charging the jury, the court shall state to them all matters of law necessary for their information in giving their verdict. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, who are bound to accept it as conclusive. If either party requires it, and at commencement of the trial gave notice of that party's intention so to do, or if in the opinion of the court it is desirable, the charge shall either be reduced to writing, and then read to the jury by the court or recorded electronically during the charging of the jury. The jury shall take such written instructions or recording with it while deliberating upon the verdict and then return [*them*] the written instructions or recording to the clerk immediately upon conclusion of its deliberations. The clerk shall file the written instructions or recording in the court file of the case.

COMMENT

The amendment would allow the submission of jury instructions by electronic recording as well as in written form.

JUDGMENT NOTWITHSTANDING THE VERDICT

RULE 63

A. Grounds. When a motion for a directed verdict, made at the close of all the evidence, which should have been granted has been refused and a verdict is rendered against the applicant, the court may, on motion, render a judgment notwithstanding the verdict, or set aside any judgment which may have been entered and render another judgment, as the case may require.

COMMENT

The rule will be amended to make it clear that the motion for directed verdict referred to in ORCP 63 A. is a motion made at the close of all the evidence, not one made at the close of the plaintiff's case-in-chief.

Section II.

Proposed Rules of Juvenile Court Procedures (dated 8/30/82) (also included is a letter from the Chairman of the Council on Court Procedures referred to in the INTRODUCTION)

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HERBERT C. HARDY
OF COUNSEL

November 17, 1982

TO: The Honorable Victor Atiyeh
The Honorable Fred Heard
The Honorable Hardy Myers
The Honorable David Frohnmayer

RE: Proposed Juvenile Code

Dear Governor, Mr. President,
Mr. Speaker, and Mr. Attorney
General:

ORS 1.735 empowers and directs the Council on Court Procedures to "promulgate rules governing pleading, practice and procedure, ... in all civil proceedings in all courts of the state which shall not abridge, enlarge, or modify the substantive rights of any litigant." That section also states "The rules authorized by this section do not include rules of evidence ... ." ORS 417.490(h) empowers and directs the Juvenile Services Commission to recommend proposed rules of juvenile court procedure to the Council on Court Procedures.

The Juvenile Services Commission has fulfilled its statutory mandate by submitting to the Council on Court Procedures, on August 30, 1982, proposed Oregon Rules of Juvenile Court Procedure. The Commission apparently assumed that the Council on Court Procedures would review the proposed juvenile code and promulgate a juvenile code. It is the considered judgment of the Council on Court Procedures that it is without the authority to promulgate such rules, and of necessity it must decline to act upon the submission of the Juvenile Services Commission.

The Council has taken this action for a number of reasons. First, no statute or appellate court decision in Oregon has identified juvenile procedures as "civil" in

nature. Second, the code as proposed by the Juvenile Services Commission contains many matters which are evidentiary and thus clearly outside the scope of the Council's authority. Third, the code proposed by the Juvenile Services Commission contains much which is substantive in nature and thus completely outside the Council's authority.

In considering this matter, the Council has been made aware of the urgent need for the adoption of uniform rules of procedure for the juvenile courts of the state. It also recognizes that procedures in juvenile courts are a matter of some controversy and that a body such as the Council on Court Procedures, which is somewhat removed from direct interest in the matters addressed in juvenile courts, may be an appropriate body to address these issues. I have been authorized by the Council to state its willingness, with the appropriate enabling legislation, to consider the promulgation of rules of procedure for juvenile courts.

Yours very truly,

Donald W. McEwen, Chairman
Council on Court Procedures

DWM:lam

cc: Douglas A. Haldane, Executive Director
Council on Court Procedures

NOTE: Due to the cost of duplicating, the 8/30/82 draft of the proposed Oregon Rules of Juvenile Court Procedure is not being furnished with this submission for distribution to the Bar and public. If you wish to have a copy, please send your written request, together with a check in the amount of $3.00 (which includes mailing costs), to:

Kinko's Graphics
860 East 13th Street
Eugene, Oregon 97403