AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

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COUNCIL ON COURT PROCEDURES

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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 1987 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1988, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1985-87 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; subdivisions of sections are called subsections and are indicated by Arabic numerals 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 expresses its appreciation to the bench and the bar for the comments and suggestions it has received. The Council held public meetings on December 14, 1985 in Portland; February 22, 1986 in Salem; April 12, 1986 in Eugene; June 14, 1986 in Portland; July 16, 1986 in Bend; September 13, 1986 in Portland; November 8, 1986 in Portland, and December 13, 1986 in Portland.

Special thanks are due, once again, to the Oregon State Bar Committee on Practice and Procedure for its helpful suggestions. Additionally, proposals of the Legislative Task Force on Liability Insurance required the Council to consider closely the rules regarding discovery, summary judgment, and third party practice. That consideration has led to rule changes reflected herein.

TABLE OF CONTENTS

SCOPE; CONSTRUCTION;
APPLICATION; RULE; CITATION
RULE 1

* * *

E. Citation. These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D[.], subsection (3), paragraph (a), subparagraph (i), as ORCP 7 D[.](3)(a)(i).

COMMENT

When citing the ORCP, proper citation form does not require a period following the capital letter designation of sections.

SERVICE AND FILING
OF PLEADINGS AND
OTHER PAPERS
RULE 9

* * *

C. Filing; proof of service. Except as provided by section D. of this rule, [All] all papers required to be served upon a party by section A. of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rules 7 and 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers.

D. When filing not required. Notices of deposition, requests made pursuant to Rule 43, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial.

[D]E. Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or paper the time of day, the day of the month, month, and the year. The clerk or person exercising the

duties of that office is not required to receive for filing any paper unless the name of the court, the title of the cause and the paper, and the names of the parties, and the attorney for the party requesting filing, if there be one, are legibly endorsed on the front of the document, nor unless the contents thereof are legible.

COMMENT

The amendment to Rule 9 would halt the filing of notices of deposition and requests for production with the court. If some court action becomes necessary (for instance, a motion to compel discovery or a motion for protective order), the document could be used as an exhibit or as evidence on the motion.

The purpose of this amendment is to avoid cluttering the court file with papers for which the court really has no need. The proposed amendment is modeled on Rule 120-4 of the local rules of the United States District Court for the District of Oregon.

FORM OF PLEADINGS
RULE 16

A. Captions; names of parties. Every pleading shall 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 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. Concise and direct statement; paragraphs; separate statement of claims or defenses. Every pleading shall consist of plain and concise statements in paragraphs consecutively numbered throughout the pleading with Arabic numerals, the contents of which shall 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 be separately stated. Within each claim alternative theories of recovery shall be identified as separate counts.

C. 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 legal or

equitable grounds or upon both. All statements shall be made subject to the obligation set forth in Rule 17.

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

COMMENT

Denominating alternative theories of recovery within a claim as "counts" is currently considered good pleading. The rule change to ORCP 16 B is designed to codify and make uniform what is widely practiced.

[SIGNATURE OF PLEADINGS]
SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; SANCTIONS
RULE 17

[A. Signature by party or attorney; certificate. Every pleading shall be signed by each party or by that party's attorney who is an active member of the Oregon State Bar. If a party is represented by an attorney, every pleading of that party shall be signed by at least one attorney of record in such attorney's individual name. Verification of pleadings shall not be required unless otherwise required by rule or statute. The signature constitutes a certificate by the person signing: that such person has read the pleading; that to the best of the person's knowledge, information, and belief, there is a good ground to support it; and that it is not interposed for harassment or delay.]

[B. Pleadings not signed. Any pleading not duly signed may, on motion of the adverse party, be stricken out of the case.]

A. Signing by party or attorney; certificate. Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion, or other paper and state that party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature constitutes a certification that the person signing has read the

pleading, motion, or other paper; that to the best of that person's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

B. Pleadings, motions, and other papers not signed. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.

C. Sanctions. If a pleading, motion, or other paper is signed in violation of this rule, the court upon motion or upon its own initiative shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee.

COMMENT

Rule 17 has been substantially rewritten. A modified rendition of FRCP 11 has been substituted for the old ORCP 17. The amended rule applies to motions and other papers filed by a party, as well as pleadings. To this extent, it expands the numbers and types of documents to which the rule applies. The new rule applies sanctions in the form of reasonable expenses and attorney fees against a party or that party's attorney when a document is filed in violation of the rule.

It is the intent of the new Rule 17 to apply sanctions when pleadings, motions, or other papers are used to abuse the rules of civil procedure. The Council on Court Procedures is of the opinion that procedures established under the ORCP provide for an efficient and cost-effective method of resolving disputes. Any set of rules or procedures, however, is subject to abuse. When abused, the effect can be an increase in costs of litigation. The application of sanctions is viewed by the Council as the most effective means of halting those abuses and assuring the prompt, efficient, and cost-effective resolution of disputes.

The new rule is specifically directed to, but not limited to, abuses in the use of rules regarding discovery, summary judgment, and third party practice.

DEPOSITIONS UPON
ORAL EXAMINATION
RULE 39

(NEW SECTION)

I. Perpetuation of testimony after commencement of action.

I.(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I.(2) The notice is subject to subsections C.(1)-(7) of this rule and shall additionally state:

I.(2)(a) a brief description of the subject areas of testimony of the witness; and

I.(2)(b) the manner of recording the deposition.

I.(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. Such objection shall be governed by the standards of Rule 36 C. At any hearing on such an objection, the burden shall be on the party seeking perpetuation to show that the witness may be unavailable as defined in ORS 40.465(1) for the trial or hearing, or that other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the case, subject to the Oregon Rules of Evidence.

I.(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than fourteen days' notice, unless good cause is shown.

I.(5) To the extent that a discovery deposition is allowed by law, any party other than the one giving notice may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I.(6) The perpetuation examination shall proceed as set forth in subsection D. herein. All objections to any testimony or evidence taken at the deposition shall be made at the time and noted upon the transcription or recording. The court before which the testimony is offered shall rule on any objections before the testimony is offered. Any objections not made at the deposition shall be deemed waived.

COMMENT

The amendment to Rule 39 involves the addition of a new section I. to govern the procedure to be used upon taking perpetuation depositions after filing of an action. The proposal, as originally submitted to the Council by the Bar's Practice and Procedure Committee, would have allowed the taking and use of a perpetuation deposition when a showing was made that a witness was unavailable for trial "in a practical sense," and would have allowed the admission of such a deposition. Some concern had been expressed regarding interpretation of the phrase "in a practical sense."

The Council on Court Procedures may not adopt rules of evidence, ORS 1.735. In the Council's view, the original proposal would appear to effect a change in the hearsay rule and would be beyond its jurisdiction.

It was the stated intention of the Council that it was not speaking to the admissibility of a perpetuation deposition, nor was it in any way attempting to effect a change in the rules of evidence. The Council's action merely reflects the Council's desire to establish a procedure for the taking of perpetuation depositions. The question of admissibility, as well as "unavailability" at the time of trial, would be left to the court as governed by the Oregon Evidence Code.

PHYSICAL AND MENTAL
EXAMINATION OF PERSONS;
REPORTS OF EXAMINATIONS
RULE 44

* * *

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 or existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to comply.

* * *

COMMENT

The amendment to Rule 44 was made as a response to rulings out of the Multnomah County Circuit Court. The current language "written reports" has been construed so as not to include office and chart notes. The distinction has been made between reports that are generated for purposes of litigation and notes made contemporaneous with an examination. Adding "or existing notations" is intended to broaden the rule to include office and chart notes.

SUBPOENA
RULE 55

* * *

H.(2) Mode of compliance with subpoena of hospital records.

H.(2)(a) Except as provided in subsection (4) of this section, when a subpoena duces tecum is served upon a custodian of hospital records in an action in which the hospital is not a party, and the subpoena requires the production of all or part of the records of the hospital relating to the care or treatment of a patient at the hospital, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records described in the subpoena within five days after receipt thereof. Delivery shall be accompanied by the affidavit described in subsection (3) of this section. The copy may be photographic or microphotographic reproduction.

H.(2)(b) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and the 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: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) 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; (iii) in other cases, to the officer or body conducting the hearing at the official place of business.

H.(2)(c) 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 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 which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

* * *

COMMENT

The procedure established in ORCP 55 for subpoenaing hospital records allowed the inspection of those records prior to the trial, hearing, or deposition.

The amendment requires giving written notice within a reasonable period of time before inspection takes place.

ORCP 44 E requires that notice be given prior to seeking access to hospital records. This amendment requires an additional notice prior to inspection when access is gained through subpoena.

DEFAULT ORDERS AND JUDGMENTS
ORCP 69

A. Entry of Default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall [enter] order the default of that party.

B. Entry of default judgment.

B.(1) By the court or the clerk. The court or the clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract;

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B.(1)(d) The party against whom judgment is sought is not a minor or an incapacitated person and such fact is shown by affidavit;

B.(1)(e) The party seeking judgment submits an affidavit of the amount due;

B.(1)(f) An affidavit pursuant to subsection B.(3) of this

rule has been submitted; and

B.(1)(g) Summons was personally served within the State of Oregon upon the party, or an agent, officer, director, or partner of a party, against whom judgment is sought pursuant to Rule 7 D.(3)(a)(i), 7 D.(3)(b)(i), 7 D.(3)(e) or 7 D.(3)(f).

B.(2) By the court. In all other cases, the party seeking a judgment by default shall apply to the court therefor, but no judgment by default shall be entered against a minor or an incapacitated person unless they have a general guardian or they are represented in the action by another representative as provided in Rule 27. [If the party against whom judgment by default is sought has appeared in the action or if the party seeking judgment has received notice that the party against whom judgment is sought is represented by an attorney in the pending proceeding, the party against whom judgment is sought (or, if appearing by representative, such party's representative) shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.] If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearing, or make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper. The court may determine the truth of any matter upon affidavits. **In the event**

that it is necessary to receive evidence prior to entering judgment, and if the party against whom judgment by default is sought has appeared in the action, the party against whom the judgment is sought shall be served with written notice of the application for judgment at least 10 days, unless shortened by the court, prior to the hearing on such application.

B.(3) Amount of judgment. The judgment entered [by the clerk] shall be for the amount due as shown by the affidavit, and may include costs and disbursements and attorney fees entered pursuant to Rule 68.

B.[(3)](4) Non-military affidavit required. No judgment by default shall be entered until the filing of an affidavit on behalf of the plaintiff, showing that affiant reasonably believes that the defendant is not a person in military service as defined in Article 1 of the "Soldiers' and Sailors' Civil Relief Act of 1940," as amended, except upon order of the court in accordance with that Act.

C. Setting aside default. For good cause shown, the court may set aside an order of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 71 B. and C.

[C.] D. **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the provisions of

Rule 67 B.

[D.] E. "Clerk" defined. Reference to "clerk" in this rule shall include the clerk of court or any person performing the duties of that office.

COMMENT

It is the custom among Oregon attorneys to provide notice of an intent to take an order of default to an opposing party when they are aware that the opposing party is represented by counsel. This notice is an outgrowth of professional courtesies among members of the Bar. It is not uncommon for one attorney to grant an extension of time for making an appearance to another attorney and to then notify that attorney when extensions of time will no longer be granted. It is believed that the extension of these professional courtesies assists in the efficient handling of disputes and fosters the professionalism of the Bar.

ORCP 69 has long been read to require the provision of notice prior to seeking an order of default. The Oregon Supreme Court in Denkers v. Durham Leasing, 299 Or. 544 (1985), analyzed ORCP 69 and concluded that notice prior to taking an order of default is not required. Notice is required only when making application for a default judgment when the party in default has either appeared or is represented by counsel. It was suggested to the Council on Court Procedures that ORCP 69 should require notice of intent to take a default order when a party has either appeared or is represented by counsel. The Council was concerned that disparate treatment of represented and non-represented litigants in the ORCP presented problems of constitutional dimension.

This amendment requires that notice be given to all parties who have appeared but against whom a default order has been taken prior to application for judgment only in the event that it is necessary to receive evidence prior to entering judgment.

Litigants receive notice of the time within which they must appear to avoid default in the summons, ORCP 7. The extensions of courtesies among members of the Bar are not subject to regulation by the ORCP, and such attempts could make the procedural right of litigants rise or fall, depending on whether they are represented by counsel.

The Council supports these extensions of courtesy among members of the Bar and recognizes the responsibility of all lawyers to abide by established custom and practice, Code of

Professional Responsibility, DR 7-106(C)(5), and Ainsworth v. Dunham, 235 Or. 225 (1963). The Council does not believe, however, that such courtesies can or should be the subject of procedural requirement.

ORDER OR JUDGMENT
FOR SPECIFIC ACTS
RULE 78

A. Judgment requiring performance considered equivalent thereto. A judgment requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply with the judgment, be deemed to be equivalent thereto.

B. Enforcement; contempt. The court or judge thereof may enforce an order or judgment directing a party to perform a specific act by punishing the party refusing or neglecting to comply therewith, as for a contempt as provided in ORS 33.010 through 33.150.

C. Application. Section B. of this rule does not apply to [a] an order or judgment for the payment of money, except orders and judgments for the payment of [suit money, alimony,] sums ordered pursuant to ORS 107.095 and ORS 107.105(1)(i), and money for support, maintenance, nurture, education, or attorney fees, in:

C.(1) Actions for dissolution or annulment of marriage or separation from bed and board.

C.(2) Proceedings upon support orders entered under ORS chapter 108, 109, 110 or 419 and ORS 416.400 to 416.470.

D. Contempt proceeding. As an alternative to the independent proceeding contemplated by ORS 33.010 through 33.150, when a contempt consists of disobedience of an injunction or other judgment or order of court in a civil action, citation

for contempt may be by motion in the action in which such order was made and the determination respecting punishment made after a show cause hearing. Provided however:

D.(1) Notice of the show cause hearing shall be served personally upon the party required to show cause.

C.(2) Punishment for contempt shall be limited as provided in ORS 33.020.

D.(3) The party cited for contempt shall have right to counsel as provided in ORS 33.095.

COMMENT

"Suit money" and "alimony" have no meaning in Oregon law. The sums ordered under ORS 107.095 and 107.105(1)(i) would seem to cover what is understood by the bench and bar as suit money or alimony, and the proposed amendment would clarify the rule.