

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 14, 1996

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 1997 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 1998, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1995-97 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. New language is shown in highlighted boldface, with underlining, and ~~strikeout~~ indicates language to be deleted.

The Council held public meetings at the Oregon State Bar Center in Lake Oswego, Oregon, on the following dates: October 14 and December 9, 1995; January 13, 1996, March 9, 1996, April 13, 1996, May 11, 1996, June 8, 1996, July 13, 1996, September 14, 1996, and December 14, 1996.

The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received.

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**SUMMONS
RULE 7**

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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 summons under section E of this rule. A summons is issued when subscribed by plaintiff or ~~a resident attorney of this state~~ an active member of the Oregon State Bar.

C(1) Contents. The summons shall contain:

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C(1)(c) Subscription; post office address. A subscription by the plaintiff or by ~~a resident attorney of this state~~ 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.

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D Manner of service.

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D(2) Service methods.

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D(2)(b) Substituted service. Substituted service may be made by delivering a true copy of the summons and the complaint at the dwelling house or usual place of abode of the person to be served, to any person over 14 years of age 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,~~ a true copy 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 such 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 a true copy of the summons and ~~the~~ complaint at such 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,~~ a true copy of the summons and ~~the~~ complaint to the defendant at the defendant's dwelling house or usual place of abode or defendant's place of business or such 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 such mailing.

D(2)(d) **Service by mail.** ~~Service by mail, when required or allowed by this rule, shall be made by mailing a true copy of the summons and a true copy of the complaint to the defendant by~~

~~certified or registered mail, return receipt requested. For the purpose of computing any period of time prescribed or allowed by these rules, service by mail shall be complete three days after such mailing if the address to which it was mailed is within this state and seven days after mailing if the address to which it is mailed is outside this state.~~

D(2)(d)(i) Generally. When required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing a true copy of the summons and the complaint to the defendant by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail. For purposes of this section, "first class mail" does not include certified or registered, or any other form of mail which 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 signs a receipt for the mailing, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside of 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 service upon such defendant or an agent authorized by appointment or law to receive service of summons or, if defendant personally cannot be found at defendant's dwelling house or usual place of abode, then by substituted service or by office service upon such defendant or an agent authorized by appointment or law to receive service of summons. Service may also be made upon an individual defendant to whom neither subparagraph (ii) nor (iii) of this paragraph applies by mailing made in accordance with paragraph (2)(d) of this section provided the defendant 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.

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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 other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, and or streets of this state, ~~any defendant who operated such motor vehicle, or caused such motor vehicle to be operated on the defendant's behalf who cannot be served with summons by any method specified in subsection D(3) of this rule, may be served with summons by leaving one copy of the summons and~~

~~complaint with a fee of \$12.50 with the Department of Transportation or at any office the department authorizes to accept summons or by mailing such summons and complaint with a fee of \$12.50 to the Department of Transportation by registered or certified mail, return receipt requested. The plaintiff shall cause to be mailed by registered or certified mail, return receipt requested, 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 at the most recent address as shown by the Department of Transportation's drier records, and at any other address of the defendant known to the plaintiff, which might result in actual notice to the defendant. For purposes of computing any period of time prescribed or allowed by these rules, service under this paragraph shall be complete upon the date of the first mailing to the defendant. if the plaintiff makes at least one attempt to serve the defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(1) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:~~

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

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

(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by (A) and (B) 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 (A), (B) and (C) above 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 (A), (B) and (C) above is made. If the mailing required by (C) is omitted because the plaintiff did not know of any address other than those specified in (A) and (B) above, the proof of service shall so certify.

~~D(4) (a) (ii) The fee of \$12.50 paid by the plaintiff to the Department of Transportation shall be taxed as part of the costs if plaintiff prevails in the action. The Department of Transportation shall keep a record of all such summonses which shall show the day of service.~~ Any fee charged by the Department of Transportation for providing address information concerning a

party served pursuant to subparagraph (i) of this paragraph 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 (i) of this paragraph are as provided in Rule 69.

D(4)(b) **Notification of change of address.** Every motorist or user of the roads, highways and or 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 other event giving rise to liability, shall forthwith notify the Department of Transportation of any change of such defendant's address occurring within three years after such accident or collision or event.

~~D(4)(e) **Default.** No default shall be entered against any defendant served under this subsection unless the plaintiff submits an affidavit showing:~~

~~(i) that summons was served as provided in subparagraph D(4)(a)(i) of this rule and all mailings to defendant required by subparagraph D(4)(a)(i) of this rule have been made; and~~

~~(ii) either, if the identity of defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to plaintiff, that the plaintiff not less than 14 days prior to the application for default caused a copy of the summons and complaint to be mailed to such insurance carrier by registered or~~

~~certified mail, return receipt requested, or that the defendant's insurance carrier is unknown; and~~

~~(iii) that service of summons could not be had by any method specified in subsection D(3) of this rule.~~

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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 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 which 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, ~~return receipt requested, deliver to addressee only~~ by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

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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. Such

publication shall be four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county where the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in the affidavit required by paragraph (a) of this subsection, and the court may order publication in a comparable manner at such location in addition to, or in lieu of, publication in the county where the action is commenced.

D(6)(d) Mailing summons and complaint. ~~If service by publication is ordered and defendant's post office address is known or can with reasonable diligence be ascertained~~ 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 a copy of the summons and the complaint to the defendant at such address by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail. ~~When the address of any defendant is not known or cannot be ascertained upon diligent inquiry,~~ If the plaintiff does not know and cannot upon diligent inquiry ascertain the current address of any defendant, a copy 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 present defendant's current or and last known addresses ~~of the defendant,~~ mailing of a copy of the summons and the complaint is not required.

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D(7) ~~D(6)(g)~~ Defendant who cannot be served. ~~Within the meaning of this subsection.~~ A defendant cannot be served with summons by any method specified ~~authorized in by~~ subsection 7 D(3) of this rule ~~section~~ if: (i) ~~service pursuant to subparagraph (4)(a)(i) of this section is not authorized, and~~ if the plaintiff attempted service of summons by all of the methods specified ~~authorized in by~~ subsection 7 D(3) ~~of this section~~ and was unable to complete service, or (ii) if the plaintiff knew that service by such methods could not be accomplished.

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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 the defendant cannot be found. The summons may be returned by ~~first class~~ mail.

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G Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of summons, issuance of summons, and ~~or the person~~ who may serve summons shall not affect the validity of service of 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, or affidavit or certificate of service of summons, and ~~The court~~ shall disregard any error in the content

of ~~or service of~~ summons that does not materially prejudice the substantive rights of the party against whom summons was issued.

If service is made in any manner complying with subsection D(1) of this section, the court shall also disregard any error in the service of summons that does not violate the due process rights of the party against whom summons was issued.

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COMMENT TO RULE 7

Section B and paragraph C(1)(c) are amended to provide that summonses may be subscribed by an active member of the Oregon State Bar, regardless of residence. This amendment achieves consistency with subsection 17 A regarding subscription of pleadings.

Paragraphs D(2)(b) and (c) are amended to clarify that the follow-up mailing required with substituted and office service may be made by first class mail, and to provide that the date of this mailing is the date of completion of service by such methods for purposes of any statute requiring service of summons on or before a specified time, see, e.g., ORS 12.020, as well as for calculating any time period prescribed or allowed under the ORCP.

Former paragraph D(2)(d) is divided into subparagraphs D(2)(d)(i) and (ii). The former changes the method of effecting service by mail by requiring that, except as otherwise permitted, the summons and complaint be mailed to the defendant both by first class mail and by one of the following: certified mail (return receipt requested), registered mail (return receipt requested), or express mail. All of the foregoing categories of mail refer to mailing by means of the U.S. Postal Service.

New subparagraph D(2)(d)(ii) retains the rule that service by mail is complete 3 days after mailing if to an address in Oregon, or 7 days after mailing if to an address outside Oregon, but adds an alternative rule that, if the defendant signs a receipt for the mailing prior to 3 or 7 days thereafter, service by mail is complete on the date of such signature. Whichever rule applies, this completion date is the date on which service by mail is effected for purposes of any statute requiring service on or before a specified time, as well as for computing any time period prescribed or allowed under the ORCP.

Subparagraph D(3)(a)(i) is amended to provide that, as an alternative to personal delivery and substituted service, an

individual who is neither a minor as defined in subparagraph D(3)(a)(ii), nor an incapacitated person as defined in subparagraph D(3)(a)(iii), may be served by mailing in the manner prescribed by subparagraph D(2)(d)(i). This amendment codifies the core holding in *Lake Oswego Review, Inc. v. Steinkamp*, 298 Or 607, 695 P2d 565 (1985). Service by this method is effective only if the defendant signs a receipt for the certified, registered, or express mail, on the date of which signing it is complete for purposes of any statute requiring service of summons on or before a specified time, as well as for computing any time period prescribed or allowed under the ORCP. The alternative rule for determining the completion date--3 or 7 days after the date of mailing, as provided in subparagraph D(2)(d)(ii)--is not pertinent to service by mail on an individual defendant.

Subparagraph D(4)(a)(i) is amended to remove the former requirement of mailing or delivering a copy of the summons and complaint to the ODOT as serving no purpose. This amendment also adds a new alternative method of serving defendants in actions arising out of the operation of a motor vehicle on the roads, highways, or streets of this state. This alternative method may be used only if one of the primary methods of service authorized by subsection D(3), apart from mail service pursuant to subparagraph D(3)(a)(i), is first unsuccessfully attempted. It requires that the mailings prescribed by (A), (B), and (C) each be made by first class mail and by one of the following: certified mail (return receipt requested), registered mail (return receipt requested), or express mail. However, the mailing prescribed by (C) need not be made if, at the time of making the other mailings, the plaintiff knows of no address, other than those prescribed in (A) and (B), mailing to which might reasonably provide actual notice to the defendant, and so certifies in the return of service.

Regardless of whether the defendant signs a receipt for any of the mailings prescribed by (A), (B), or (C) if applicable, service pursuant to this alternative method is complete, for purposes of any statute requiring service of summons on or before a specified time and for computing any time period prescribed or allowed under the ORCP, on the latest date on which any such mailing is made, not either 3 or 7 days thereafter, and not on the date on which any receipt might be signed. This is believed warranted by the legal obligation of motorists, pursuant to ORS 811.700(a)(C) 811.705(c), to exchange current residence addresses at the scene of an accident.

Subparagraph D(4)(a)(ii) is amended to transfer the provision--that any fee charged by ODOT for providing address information regarding defendants served pursuant to D(4)(a)(i)--to subsection 68 A(2), where it more appropriately belongs. The requirement that the ODOT maintain a record of summons and complaints served pursuant to subparagraph D(4)(a)(i) is

discontinued, since copies of summonses and complaints need no longer be delivered or mailed to that agency.

New subparagraph **D(4)(a)(iii)** transfers to new subsection **69 A(2)** the requirements for obtaining a default when the defendant is served pursuant to subparagraph **D(4)(a)(i)**, so that Rule 69 deals comprehensively with the subject of default orders and judgments. Former paragraph **D(4)(c)** is therefore deleted from Rule 7.

Paragraph **D(4)(b)** is reworded for greater clarity, but with no intent to change its meaning.

Paragraph **D(6)(a)** is amended to add a requirement that, when summons is served by court-ordered mailing, the mailing must, consistently with subparagraph **D(2)(d)(i)** as amended, be by first class mail and by one of the following: certified mail (return receipt requested), registered mail (return receipt requested), or express mail.

Paragraph **D(6)(c)** is amended to add a requirement that, if the plaintiff knows of a specific location other than the county where the action is pending where publication might reasonably give the defendant notice of the action, the plaintiff must so state in the affidavit required by paragraph **D(6)(a)**. In this event, the court has discretionary authority to order publication at that specific location, in lieu of, or in addition to, publication in the county where the action is pending.

Paragraph **D(6)(d)** is amended to clarify its requirements regarding the mailings that must supplement court-ordered publication regardless of whether the order itself requires mailings.

New paragraph **D(6)(g)** replaces former subsection **D(7)** to clarify that the definition of "a defendant [who] cannot be served" applies only to service pursuant to subsection **D(6)**.

Subsection **F** is amended to clarify that a summons may be returned by first class mail.

Section **G** is amended to correct any inference possibly suggested by its former language that actual notice to the defendant necessarily validates service regardless of any errors occurring in the method of service. This section is not authority for the court's disregarding any error in the method of service causing it to fall below the "reasonably calculated . . . to apprise the defendant" standard of subsection **D(1)**, which is also the standard required by the due process clause of the fourteenth amendment, even if the defendant receives actual notice of the action. See, e.g., *Baker v. Foy*, 310 Or 221, 797 P2d 349 (1990).

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

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D Sanctions.

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D(4) Sanctions under this section must be limited to amounts sufficient to reimburse the moving party for attorney fees and other expenses incurred by reason of the false certification, including reasonable attorney fees and expenses incurred by reason of the motion for sanctions, and upon clear and convincing evidence of wanton misconduct amounts sufficient to deter future false certification by the party or attorney and by other parties and attorneys. The sanction may include monetary penalties payable to the court. The sanction must include an order requiring payment of reasonable attorney fees and expenses incurred by the moving party by reason of the false certification.

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COMMENT

Subsection D(4) is amended to provide that, when sanctions are awarded for the purpose of deterring future false certification, and exceeding in amount the amount necessary to reimburse a party for expenses incurred by reason of a false certification and expenses relating to the sanction motion, such award should be only be made on the basis of clear and convincing evidence of wanton misconduct by the sanctioned party, his or her attorney, or both. This amendment is intended to achieve consistency between the standard for awarding punitive sanctions and the standard for awarding punitive damages set forth in ORS 18.537(1).

DEPOSITIONS UPON ORAL
EXAMINATION
RULE 39

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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.

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I(4) Any perpetuation deposition shall be taken not less than seven days before the trial or hearing on not less than 14 days' notice, ~~unless.~~ ~~However,~~ the court in which the action is pending ~~allows~~ ~~may allow~~ a shorter period ~~for a perpetuation deposition before or during trial~~ upon a showing of good cause.

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COMMENT

Subsection I(4) is amended to clarify that the discretionary authority it confers extends both to the time during or before trial when perpetuation depositions may be taken, and to the required notice period.

**POSTPONEMENT OF CASES
RULE 52**

A Postponement. When a cause is set and called for trial, it shall be tried or dismissed, unless good cause is shown for a postponement. At its discretion, the court may grant a postponement, with or without terms, including requiring the ~~party securing the postponement~~ any party whose conduct made the postponement necessary to pay expenses incurred by an opposing party.

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COMMENT

Section A is amended to resolve the doubt noted, but not resolved, in *Gottenberg v. Westinghouse Electric Corp.*, 142 Or App 70, 74-5, 919 P2d 521, 524 (1996), whether the phrase "the party securing the postponement" refers to the party requesting it or the party whose conduct is the basis for the court granting it. The latter party is the intended reference.

SUBPOENA
RULE 55

I Medical records.

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I(2) **Manner of service.** If a patient or health care recipient is represented by an attorney, a true copy of a subpoena duces tecum for medical records of a patient or health care recipient must be served on the attorney for the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on a custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 15-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by ORCP Rule 9 B. If the patient or health care recipient is not represented by an attorney, service of a true copy of the subpoena must be made on the patient or health care recipient at least ~~24 hours~~ 15 days before the subpoena is served on the custodian or other keeper of medical records. Upon a showing of good cause, the court may shorten or lengthen the 15-day period. Service on a patient or health care recipient under this section must be made in the manner specified by ORCP Rule 7 D(3)(a) for service on individuals.

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COMMENT TO RULE 55

Subsection I(2) is amended to change from 24 hours to 15 days the minimum advance period a copy of a medical records subpoena must be served on the patient, health care recipient, or his or her attorney, before such subpoena is served on the custodian or other keeper of such records. This amendment is prompted by concern that requiring only 24 hours advance notice to the patient, etc., could often afford an inadequate opportunity for objection to a medical records subpoena, in the absence of which waiver of the patient-physician privilege might inappropriately be inferred. This subsection is not intended to modify or affect the patient-privilege provided for in the Oregon Rules of Evidence 504, 504-1, 504-2, 504-4, and 507.

Because, under some circumstances, a party issuing a medical records subpoena might be unduly delayed by having to wait a full 15 days for production, courts are given discretionary authority to shorten the waiting period for good cause shown.

ALLOWANCE AND TAXATION OF
ATTORNEY FEES AND COSTS AND
DISBURSEMENTS
RULE 68

A. Definitions. As used in this rule:

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A(2) Costs and disbursements. "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; any fee charged by the Department of Transportation for providing address information concerning a party served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7; the compensation of referees; the expense of copying of any public record, book, or document admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

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COMMENT TO RULE 68

Subsection A(2) is amended to transfer to it the provision formerly contained in subparagraph 7 D(4)(a)(ii) for taxation as costs any fee charged by the ODOT for providing to the plaintiff address information pertinent to a defendant served pursuant to subparagraph 7 D(4)(a)(i).

DEFAULT ORDERS AND JUDGMENTS
RULE 69

A Entry of order of default.

A(1) In general. 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, the party seeking affirmative relief may apply for an order of default. If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance to the party seeking an order of default, then the party against whom an order of default is sought shall be served with written notice of the application for an order of default at least 10 days, unless shortened by the court, prior to entry of the order of default. These facts, along with the fact that the party against whom the order of default is sought has failed to plead or otherwise defend as provided in these rules, shall be made to appear by affidavit or otherwise, and upon such showing, the clerk or the court shall enter the order of default.

A(2) Certain motor vehicle cases. Notwithstanding subsection A(1) of this section, no default shall be entered against a defendant served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7 unless the plaintiff submits an affidavit showing:

A(2)(a) that the plaintiff has complied with subparagraph D(4)(a)(i) of Rule 7; and

A(2)(b) either, if the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff, that the plaintiff not less than 30 days prior to the application for default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified or registered mail, return receipt requested, or express mail; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

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COMMENT

Section A is divided into subsections A(1) and A(2). Subsection A(1) in no way changes the requirements under former section A for obtaining default orders generally, i.e., against defendants served by any method other than pursuant to subparagraph 7 D(4)(a)(i). Regarding the latter, new subsection A(2) transfers from former paragraph 7 D(4)(c) requirements, in addition to those contained in amended subsection A(1), which must be complied with to obtain a default order against a defendant served pursuant to subparagraph 7 D(4)(a)(i).

Those requirements are changed in two respects: First, if the plaintiff knows the identity of the defendant's liability insurance carrier, or can ascertain it from ODOT records accessible to the plaintiff, the latter must mail to such carrier a copy of the summons and complaint, by first class mail and by one of the following: certified mail (return receipt requested), registered mail (return receipt requested), or express mail, at least 30 days before applying for a default order, rather than 14 days as formerly provided. Secondly, in addition to a copy of the summons and of the complaint, the mailing to the insurance carrier must include a notice of intent to apply for a default order. Note that this mailing to the insurance carrier is a form of notice, not service.

STAY OF PROCEEDINGS
TO ENFORCE JUDGMENT
RULE 72

A Immediate execution; discretionary stay. Execution or other proceedings to enforce a judgment may issue immediately upon the entry of the judgment, unless the court directing entry of the judgment, in its discretion and on such conditions for the security of the adverse party as are proper, otherwise directs. ~~No stay of proceedings to enforce judgment may be entered by the trial court under this section after the notice of appeal has been served and filed as provided in ORS 19.023 through 19.029 and during the pendency of such appeal.~~ The court shall have authority to stay execution of a judgment temporarily until the filing of a notice of appeal and to stay execution of a judgment pending disposition of an appeal, as provided in ORS 19.040 or other provision of law.

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COMMENT

Section A is amended, at the suggestion of the OSB Appellate Practice Section, to achieve consistency with ORS 19.140, and with what appears to be currently accepted practice, by clarifying that trial courts have discretionary authority to stay execution of their judgments both before and after a notice of appeal is filed.