

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 12, 1998

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 1999 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2000, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1997-1999 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 reflect the intent of the Council, but 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 boldface, with underlining, and language to be deleted is italicized and bracketed.

The Council held public meetings at the Oregon State Bar Center in Lake Oswego, Oregon, on November 15, 1997, January 10, 1998, February 14, 1998, March 14, 1998, June 13, 1998, July 11, 1998, August 15, 1998, September 12, 1998, and December 12, 1998.

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

* * * *

D Manner of service.

* * *

D(2) Service Methods.

* * *

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 or older 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(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

* * *

D(3)(a)(iv) Tenant of a mail agent. Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of

ORS 646.221 by delivering a true copy of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

(B) the plaintiff, as soon as reasonably possible after delivery, causes a true copy of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copy of the summons and the complaint.

Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

* * * *

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. However, service pursuant to subparagraph D(2)(d)(i) of

this rule may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

* * * *

Council on Court Procedures, Staff Comment, 1998

New subparagraph D(3)(a)(iv) authorizes a method of serving individual defendants, apart from minors or incapacitated persons, who are "tenants" of "mail agents" as those terms are defined by ORS 646.221. This method may be used only when the party making service has been unable to find the party upon whom service is to be made despite having made diligent inquiry in an effort to do so.

Service by this method is complete on the latest date resulting from application of subparagraph D(2)(d)(ii) of this rule or the date on which the party served receipts for the mailing required by (B) of subparagraph D(3)(a)(iv) of this rule, whichever is later.

DEPOSITIONS UPON ORAL EXAMINATION
RULE 39

* * * *

[D Examination and cross-examination; record of examination; oath; objections. Examination and cross-examination of witnesses may proceed as permitted at the trial. The person described in Rule 38 shall put the witness on oath. The testimony of the witness shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until the final disposition of the action. If requested by one of the parties, the testimony shall be transcribed upon the payment of the reasonable charges therefor. All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted upon the record. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions on the party taking the deposition who shall propound them to the witness and see that the answers thereto are recorded verbatim.]

D Examination; record; oath; objections.

D(1) Examination; cross-examination; oath. Examination and cross-examination of deponents may proceed as permitted at trial.

The person described in Rule 38 shall put the deponent on oath.

D(2) Record of examination. The testimony of the deponent shall be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition shall retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. Upon request of a party or deponent and payment of the reasonable charges therefor, the testimony shall be transcribed.

D(3) Objections. All objections made at the time of the examination shall be noted on the record. A party or deponent shall state objections concisely and in a non-argumentative and non-suggestive manner. Evidence shall be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

(a) when necessary to present or preserve a motion under section E of this rule;

(b) to enforce a limitation on examination ordered by the court; or

(c) to preserve a privilege or constitutional or statutory right.

D(4) Written questions as alternative. In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who shall propound

them to the deponent on the record.

[E Motion to terminate or limit examination. At any time during the taking of a deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted or hindered in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court in which the action is pending or the court in the county where the deposition is being taken shall rule on any question presented by the motion and may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 36 C. Those persons described in Rule 46 B(2) shall present the motion to the court in which the action is pending. Non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.]

E Motion for court assistance; expenses.

E(1) Motion for court assistance. At any time during the taking of a deposition, upon motion and a showing by a party or a deponent that the deposition is being conducted or hindered in

bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion shall be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it shall be resumed thereafter only on order of the court in which the action is pending. Upon demand of the moving party or deponent, the parties shall suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) Allowance of expenses. Subsection A(4) of Rule 46 shall apply to the award of expenses incurred in relation to a motion under this section.

* * * *

Council on Court Procedures, Staff Comment, 1998

In addition to being reorganized in subsections for greater clarity, Section D is amended in response to a suggestion by the OSB Procedure and Practice Committee that, in addition to their long established authority to deal with violations of this rule by deposing parties or their attorneys, courts be given more explicit authority to provide relief against certain kinds of misconduct on the part of attorneys for deponents or other parties.

Specifically, the amendments to Section D provide that objections must be stated concisely, non-suggestively, and non-argumentatively, and prescribe the limited circumstances in which a deponent may properly be instructed not to answer a question.

Section E is reorganized in subsections for greater clarity and its title is changed from "Motion to terminate or limit examination" to "Motion for court assistance" to reflect its being expanded to authorize a motion for appropriate judicial relief when an oral deposition is being "hindered in bad faith, or in a manner not consistent with these rules [emphasis added]." The court has broad discretion in fashioning appropriate relief.

Subsection 46 A(4) applies to the award of expenses of a motion under subsection E(1) of this rule.

SUBPOENA
RULE 55

* * * *

I Medical records.

* * *

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 15] not less than 14 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] 14-day period. Service on the attorney for a patient or health care recipient under this section may be made in the manner provided by 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 15] not less than 14 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] 14-day period. Service on a patient or health care recipient under this section must be made in the manner specified by Rule 7 D(3)(a) for service on individuals.

* * * *

Council on Court Procedures, Staff Comment, 1998

Subsection 55 I(2) is amended to change from 15 to 14 the minimum number of days before being served on the records custodian a medical records subpoena must be served on the

patient or health care recipient to whom the records pertain, or on his or her attorney. This amendment makes this subsection consistent with the 14 days required for hospital records subpoenas by paragraph H(2)(b) of this rule.

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

* * * *

C(4)(c) Hearing on objections.

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C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. *[No findings of fact or conclusions of law shall be necessary.]*

* * *

C(4)(e) Findings and conclusions. On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements or objections filed pursuant to paragraph (a) or (b) of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

* * * *

Council on Court Procedures, Staff Comment, 1998

The rule previously provided that: "No findings of fact or conclusions of law shall be necessary." In recent years appellate courts have increasingly experienced the need to remand rulings on attorney fee awards to the trial court for supplementation of the record by inclusion of findings and conclusions material to

such rulings because of the difficulty or impossibility of conducting meaningful review in their absence. *See, e.g., Mattiza v. Foster*, 311 Or 1, 10, 803 P2d 723 (1990).

A new paragraph C(4)(e) is added requiring the trial court to make special findings of fact and state its conclusions of law regarding issues material to any ruling on a statement of attorney fees or objections thereto, which make clear the factual and legal basis for the denial of requested fees or the amount in which they are awarded. However, this requirement is conditional upon a request for special findings of fact and conclusions of law being timely made. In the absence of a timely request the court may make only a general finding of fact and need not state its conclusions of law separately. A request under this paragraph is timely only if included in the title of the statement filed pursuant to paragraph C(4)(a) of this rule or in the title of any objections filed pursuant to paragraph C(4)(b) of this rule.