

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 9, 2000

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 2001 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2002, unless the Legislative Assembly by statute modifies the action of the Council.

During the 1999-2001 biennium, the Council has taken action to correct problems relating to rules promulgated during previous biennia. 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 October 30, 1999 and on the following dates in the year 2000: January 8, February 12, April 8, May 20, June 10, July 15, August 12, September 9, and December 9.

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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D Manner of service.

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D(2)(d) Service by mail.

* * * * *

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, or other person authorized by appointment or law, 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] delivery of a true copy of the summons and the complaint to such defendant or [an agent] other person authorized by appointment or law to receive service of summons on behalf of such defendant [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 agent]. 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.

* * * * *

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, [and] streets, or premises open to the public; 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, [or] streets, or premises open to the public as defined by law, of this state, if the plaintiff makes at least one attempt to serve [the] a 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)(i) 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: * * *.

* * * * *

D(4)(b) **Notification of change of address. [Every**

motorist or user of the roads, highways or streets of this state] **Any person** who, while operating a motor vehicle upon the roads, highways, [or] streets, **or premises open to the public as defined by law,** 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, collision or event.

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**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, counter-claim, 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.]* **If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment pursuant to subsection B(3) of Rule 54.**

* * * * *

COMMENT

The new sentence at the end of section A describes the options available to the court upon dismissal of a complaint pursuant to subsection A(3). When it appears that subsequent disposition of a prior action pending between the same parties might not preclude further proceedings in the action in which the complaint is dismissed on that ground, the court should consider whether, in the interest of justice, that action should be ordered stayed in lieu of entry of judgment of dismissal. One appropriate reason for ordering a stay rather than a judgment of dismissal would be to avoid the action becoming time-barred in the event disposition of the prior pending action does not fully adjudicate the merits. Another reason would be to avoid the result necessitated in *Weller v. Weller*, 164 Or App 25, 988 P2d 921 (1999). While stayed an action is not subject to dismissal pursuant to subsection B(3) of Rule 54.

CLASS ACTIONS
RULE 32

* * * * *

N Attorney fees, costs, disbursements, and litigation expenses.

N(1)(a) Attorney fees for representing a class are subject to control of the court.

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N(1)(e)(v) Appropriate criteria in [OR] DR 2-106 of the Oregon Code of Professional Responsibility.

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TRIAL PROCEDURE
RULE 58

A [Order] Manner of proceedings on trial by the court. Trial by the court shall proceed in the [order] manner prescribed in subsections [(1)] (3) through [(4)] (6) of section B of this rule, unless the court for [special reasons] good cause stated in the record, otherwise directs.

B [Order] Manner of proceedings on jury trial. [When the jury has been selected and sworn, the trial, unless the court for good and sufficient reason otherwise directs, shall proceed in the following order] Trial by a jury shall proceed in the following manner unless the court, for good cause stated in the record, otherwise directs:

B(1) The jury shall be selected and sworn. Prior to voir dire, each party may, with the court's consent, present a short statement of the facts to the entire jury panel.

B(2) After the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions to witnesses if permitted, and the legal principles that will govern the proceedings.

[B(1)] B(3) The plaintiff shall concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, shall state defendant's case based upon any defense or counterclaim.

[B(2)] B(4) The plaintiff shall [then] introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant shall do likewise.

[B(3)] B(5) The parties respectively [then] may introduce rebutting evidence only, unless the court in furtherance of justice permits them to introduce evidence upon the original cause of action, defense or counterclaim.

[B(4)] B(6) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff shall commence and conclude the argument to the jury. The plaintiff may waive the opening argument, and if the defendant then argues the case to the jury, the plaintiff shall have the right to reply to the argument of the defendant, but not otherwise.

[B(5)] B(7) Not more than two counsel shall address the jury [in] on behalf of the plaintiff or defendant; the whole time occupied [in] on behalf of either shall not be limited to less than two hours.

[B(6) *The court then shall charge the jury.*]

B(8) After the evidence is concluded, the court shall instruct the jury. The court may instruct the jury before or after the closing arguments.

B(9) With the court's consent, jurors shall be permitted to submit to the court written questions directed to witnesses or to the court. The court shall afford the parties an opportunity to object to such

questions outside the presence of the jury.

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