

AMENDMENTS

TO

OREGON RULES OF CIVIL PROCEDURE

promulgated by

COUNCIL ON COURT PROCEDURES

December 11, 2004

COUNCIL ON COURT PROCEDURES

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Gilma J. Henthorne, Executive Assistant

Mailing Address:
1221 University of Oregon School of Law
Eugene, OR 97403-1221
Telephone:(541) 346-3834 346-3990
FAX: (541) 346-1564

INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 2005 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2006, unless the Legislative Assembly by statute modifies the action of the Council.

During the 2003-2005 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 on October 11, 2003 and on the following dates in 2004: January 10, February 14, March 13, April 10, May 8, June 12, September 11, and December 11. All meetings, except the February 14 meeting, were held at the Oregon State Bar Center in Lake Oswego, Oregon. The February 14 meeting was held at the University of Oregon School of Law in Eugene, Oregon. The Council expresses its appreciation to the bench and the Bar for the comments and suggestions it has received.

Amendments to Oregon Rules of Civil Procedure

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SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

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F Service by telephonic facsimile communication device. 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 may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made. Service in this manner shall be equivalent to service by mail for purposes of Rule 10 C.

FAILURE TO MAKE DISCOVERY; SANCTIONS

RULE 46

A Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

* * *

(A)(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before

applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 36 C.

* * * * *

DISMISSAL OF ACTIONS;

COMPROMISE

RULE 54

* * * * *

E Compromise; effect of acceptance or rejection.

E(1) Except as provided in ORS 17.065 through 17.085, the party against whom a claim is asserted may, at any time up to 10 days prior to trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified.

E(2) If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as a stipulated judgment. [*Unless agreed upon otherwise by the parties, costs, disbursements, and attorney fees shall be entered in addition as part of such judgment as provided in Rule 68.*] **If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.**

E(3) If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim

fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

INSTRUCTIONS TO JURY

AND DELIBERATION

RULE 59

* * * * *

[H Necessity of noting exception on error in statement of issues or instruction; all other exceptions automatic. No statement of issues submitted to the jury pursuant to subsection C(2) of this rule and no instruction given to a jury shall be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception shall be particularly stated and taken down by the reporter or delivered in writing to the judge. It shall be unnecessary to note an exception in court to any other ruling made. All adverse rulings, including failure to give a requested instruction or a requested statement of issues, except those contained in instructions and statements of issues given, shall import an exception in favor of the party against whom the ruling was made.]

H Necessity of noting exception on error in statement of issues or instructions given or refused

H(1) Statement of issues or instructions given or refused. A party may not obtain review on appeal of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party who seeks to appeal identified the

asserted error to the trial court and made a notation of exception immediately after the court instructed the jury.

H(2) Exceptions must be specific and on the record. A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.

JUDGMENTS RULE 67

* * * * *

C Demand for judgment. Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled[, *even if such relief has not been demanded in the pleadings, except: C(1) **Default.** A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. However, a default judgment granting equitable remedies may differ in kind from or exceed in amount that prayed for in the demand for judgment, provided that reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered. C(2) **Demand for money damages.** Where a demand for judgment is for a stated amount of money as damages, any judgment for money damages shall not exceed that amount.*]. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

* * * * *

PROVISIONAL PROCESS

RULE 83

A Requirements for issuance. To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits or declarations requesting specific

provisional process and showing, to the best knowledge, information, and belief of the plaintiff, affiant or declarant that the action is one in which provisional process may issue, and:

* * *

[A(9) If provisional process is based on notice of a bulk transfer, a copy of the notice;]

*[A(10)] **A(9)*** Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser;

*[A(11)] **A(10)*** Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

*[A(12)] **A(11)*** Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

*[A(13)] **A(12)*** That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B Provisional process prohibited in certain consumer transactions. No court shall order issuance of provisional process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction. Provisional process authorized by Rule 85 may issue in consumer transactions.

C Evidence admissible; choice of remedies available to court.

C(1) The court shall consider the affidavit, declaration or petition filed under section **A** of this rule and may consider other evidence including, but not limited to, an affidavit, a declaration, a deposition, an exhibit, or oral testimony.

C(2) If from the affidavit, declaration or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider whether it shall order issuance of

provisional process, as provided in section **D** [*or E*] of this rule, or a restraining order, as provided in section [**F**]**E** of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

[D Effect of notice of bulk transfer. Subject to section B of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.]

[E] D Issuance of provisional process where damage to property threatened. * * *

[F] E Restraining order to protect property. * * *

[G] F Appearance; hearing; service of show cause order; content; effect of service on person in possession of property. * * *

[H] G Waiver; order without hearing. If after service of the order issued under subsection [**G**(1)]**F**(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section **B** of this rule without hearing shall order issuance of provisional process.

[I] H Authority of court on sustaining validity of underlying claim; provisional process; restraining order.

[I(1)]**H**(1) Subject to section **B** of this rule, if the court on hearing on a show cause order issued under section [**G**]**F** of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82 A has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

[I(2)]**H**(2) Subject to section **B** of this rule, if the court on hearing on a show cause order

issued under section [G]F of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered, and if Rule 82 A has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section [F]E of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79 D. A restraining order under this subsection does not create a lien.