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January 22, 2021

Hon. Peter Courtney, President
Senate of the State of Oregon
900 Court Street, N.E. S-201
Salem, OR 97301

Hon. Tina Kotek, Speaker
House of Representatives of the State of Oregon
900 Court Street, N.E. H-269
Salem, OR 97301

Re: Promulgated Amendments to the Oregon Rules of Civil Procedure

Dear President Courtney and Speaker Kotek:

In my capacity as Chair of the Oregon Council on Court Procedures, I hereby submit the enclosed amendments to the Oregon Rules of Civil Procedure (ORCP), as promulgated by the Council at its meeting on December 12, 2020. This action is taken pursuant to ORS 1.735(1), which provides that the enclosed amendments will go into effect on January 1, 2022, unless the Legislative Assembly by statute amends, repeals, or supplements any amendment. The ORCP comprise the rules of procedure that govern civil actions in Oregon's circuit courts. These amendments are respectfully submitted through your good offices to the 81st Legislative Assembly by enclosure with this letter.

The chairs and vice chairs of the Senate Judiciary Committee and the House Judiciary Committee will receive copies of this letter and its enclosures. Upon request, the members of the Council on Court Procedures' Legislative Advisory Committee will be happy to meet with appropriate committee members or staff, or with the leadership of the 81st Legislative Assembly, to explain the work of the Council or any of the enclosed promulgated ORCP amendments.

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By way of background, the Council was established by the Legislature in 1977 to modernize the then largely statutory provisions governing civil procedure in Oregon's trial courts. Council members include one associate justice of the Oregon Supreme Court appointed by the Chief Justice, one judge of the Oregon Court of Appeals chosen by the presiding judge of the Court of Appeals, eight circuit court judges chosen by the Circuit Court Judges' Association, 12 attorneys appointed by the Board of Governors of the Oregon State Bar Association, and one public member chosen by the Supreme Court. The current circuit court judges represent Clackamas County, Gilliam County, Hood River County, Lane County, Linn County, Marion County, Multnomah County, Polk County, Sherman County, Wasco County, Washington County, and Wheeler County. The attorney members are appointed in equal numbers from law firms that predominantly represent plaintiffs and law firms that predominantly represent defendants.

All Council members donate the considerable time and effort required to review the Oregon Rules of Civil Procedure and to prepare amendments to address problems and inefficiencies that have been encountered with the existing rules, as well as to respond to new case law and new technologies that impact civil cases.

The Council's work on the amendments promulgated on December 12, 2020, including all of its decision making, has been conducted at its regularly scheduled meetings that were held at the Oregon State Bar Center in Tigard and at the Lewis and Clark Law School in Portland. When the COVID-19 pandemic made in-person meetings unavailable, the Council's meetings originated at the Lewis and Clark Law School and were conducted virtually via live stream, with public access available. In accordance with Oregon's public meeting laws, public notice of each monthly meeting, together with an agenda, was published well in advance of each meeting. Committees of the Council were formed to do research and to prepare and review proposals for the Council prior to its monthly meetings.

The promulgated amendments are the product of extensive consideration, initially by committees of the Council and then by the 23 members of the Council. They are the product of literally hundreds of hours volunteered by the Council's public member and lawyers and judges from across the state over the last two years.

The Council held meetings in September, October, November, and December of 2019, and in January through June of 2020, before voting to publish amendments at the Council's September 26, 2020, meeting. Those amendments were published for comment by the bar, bench, and public, as required by statute, on both the Council's website (www.counciloncourtprocedures.org), in the bound volume of the Oregon Appellate Courts Advance Sheets dated October 14, 2020 (Volume 22), as well as on the Oregon Judicial Department's website:

<https://www.courts.oregon.gov/publications/other/MiscellaneousNotifications/RULE255.pdf>

They are also enclosed here for your review (*2020 Proposed Amendments to Oregon Rules of Civil Procedure*).

Comments received in response to the publication of the amendments were carefully considered before the Council voted to promulgate the enclosed amendments at its December 12, 2020, meeting. The promulgated rules are enclosed for your review (*Amendments to the Oregon Rules of Civil Procedure promulgated by the Council on Court Procedures, December 12, 2020*). You will note that, based on comments received and discussion at the promulgation meeting, the Council made changes to the previously published version of ORCP 55, as outlined in the introduction to the promulgated rules.

The enclosed ORCP amendments illustrate the Council's ability to respond to the ever-changing challenges that confront Oregon's civil justice system. What follows is a brief summary of the recently promulgated ORCP amendments that the Council is now submitting to the 81st Legislative Assembly.

ORCP 15

Rule 15 prescribes the time frames for filing pleadings and motions and responses thereto. Section D was amended to signal to users of the rule that, while a court can exercise its discretion to extend the deadlines for filing some pleadings and motions, as a matter of substantive law certain deadlines cannot be extended. For example, a motion for a judgment notwithstanding the verdict under Rule 63 or a motion for a new trial under Rule 64 must be filed not later than ten days after entry of the judgment. A judge has no authority to extend those deadlines.

The existing language of section D afforded no warning that a litigant may make an outcome-determinative error in assuming that all deadlines may be extended. The first clause in the amended section D warns users that some extensions are not available and some research should be undertaken prior to assuming that the court can permit a late filing in some instances.

The amended language also clarifies that the rule applies to all pleadings, not just to an answer or a reply and, also, applies to all motion practice, including responses and replies. These changes reflect the manner in which most courts interpret the language in section D but makes the section's reach more apparent to a person relying on the words as written.

ORCP 21

Rule 21 governs significant pretrial motions such as motions to dismiss. In Oregon, cases generally are expected to go to trial within one year of the case being filed. Plaintiffs' lawyers particularly pointed out a problem that the Council addressed in an amendment to Rule 21. Shortly prior to trial, plaintiffs occasionally find it appropriate to amend the complaint, sometimes to update the amount of damages claimed, but sometimes to delete a claim the plaintiff for various reasons no longer wishes to pursue. The amended complaint can only be filed if a judge approves a motion for leave to amend or by stipulation. After the amendment is filed, the opposing party is permitted—actually required—to file a responsive pleading. Occasionally, the opposing party will file a pleading responsive to the amended pleading that raises entirely new issues—issues that could have been raised in that party's initial response. If

the trial date is fast approaching and depositions and discovery have closed, this amended responsive pleading can present significant problems for the party who merely wished to clean up or update the complaint. Some judges believe that they have authority to strike such case-expanding responsive pleadings, but there is no rule that clearly authorizes curtailing the practice. Other judges question whether they have authority to take action against such late-filed responsive pleadings and suggest that the only relief they can offer the amending party would be to delay the trial and re-open discovery.

An amendment to section E of Rule 21 authorizes the court to exercise its discretion to allow the newly expansive responsive pleading or to strike it. The amendment is intended to level the playing field and to provide the court with an important tool to use in keeping cases on track for trial.

Rule 21 had not been extensively amended in recent years and the organization of sections A and G were not consistent with the other rules and presented difficulty in accurately citing to a specific provision in the rule. Those two sections have been reorganized and, particularly section A, are now less challenging to follow. These changes are not intended to affect the meaning or operation of the rule

ORCP 27

Rule 27 governs the procedures for appointing a guardian ad litem for civil cases. A guardian ad litem (GAL) is a competent adult appointed by the court to act in the best interest of a party to a case who is a minor, is incapacitated, or is financially incapable. The problem that presented itself is that, while a GAL is a commonly understood term among lawyers, self-represented litigants who are attempting to use the ORCP, and even non-lawyer court staff, are often mystified by the term. Even worse, the uninitiated equate a GAL with a court-appointed guardian (see ORS 125.300, *et seq.*) who has broader responsibilities that extend well beyond a single case. The amendment reorganizes section A of the rule for clarity, and includes a description of a GAL. The title of Rule 27 and the lead line of section B are each amended to include the word “unemancipated” to improve accuracy, as an emancipated minor would not require a GAL. Finally, the lead line for section B is amended to distinguish the appointment of a GAL for unemancipated minors and incapacitated and financially incapable parties, which is required, from the discretionary appointment of a GAL for a party with a disability, as provided for in section C.

ORCP 31

Rule 31 details the procedure for using interpleader as a method of resolving claims where a party may be exposed to serial and multiple liability on a single claim by different claimants. Frequently, the party pleading in interpleader has no claim to the funds or property and is merely a stakeholder; however, even a stakeholder would endeavor to only be required to deliver up the funds or property one time.

Rule 31 was not clear that the interpleader procedure was available to all parties: plaintiffs and defendants. The amendment makes it clear that a complaint, cross-claim, or counterclaim can use Rule 31 to resolve conflicting claims to the same corpus in one lawsuit and, thus, avoid multiple and serial liability.

The party prevailing in interpleader is generally considered to be blameless, an innocent stakeholder surrounded by multiple competing claimants. Therefore, the existing rule, in section C, mandated that the party filing the claim in interpleader is entitled to an award of attorney fees, payable out of the corpus. However, there are instances of parties that are not blameless and would keep the funds or property but, when confronted by claimants, seek refuge in the interpleader device. The amendment makes the award of attorney fees discretionary using the familiar ORS 20.075 criteria supplemented by three additional factors gleaned from interpleader literature to determine whether an attorney fee should be awarded and, if so, the amount of the fee.

ORCP 55

Rule 55 details the procedures for issuing, serving, and responding to subpoenas. Although the ORCP govern pleading and practice for civil cases in the circuit courts, certain of the ORCP have a wider application. Rule 55 is an example; it is the procedure used in administrative and other agency proceedings.

In order to explain the Rule 55 amendments promulgated this biennium, some history from the 2017-2019 biennium is helpful. The rule was long and amendments had, over time, resulted in a rule that had little organizational flow and contained redundancies. In the 2017-2019 biennium, the Council rewrote Rule 55, creating a logical, almost flowchart-like, recitation of the procedures. In a conscious effort to maintain all of the elements of the prior rule, and to avoid changing what parties relied on Rule 55 to accomplish, certain gaps, uneven treatments, and potential improvements were deferred. In that regard, the Council was successful, as no negative feedback was received during the public comment period and the reorganized rule became effective. This biennium, certain refinements were considered. Two amendments are noteworthy.

An issue regarding witness fees was addressed. A subpoenaed witness is not required to obey the subpoena and appear or produce documents unless witness and mileage fees are tendered when the subpoena is served. Many times, the person subpoenaed is an occurrence witness who has no interest in the case in which they are being compelled to provide testimony. How would the witness know that payment of witness and mileage fees is required? There have been examples of self-represented litigants, including prisoners, arguably abusing the use of subpoenas to seemingly compel attendance of witnesses without tendering any attendance or mileage fees. In subparagraph A(1)(a)(v), the form of the subpoena is now required to alert the person subpoenaed that attendance is contingent on payment of these fees.

The other improvement is an amendment (subsection B(5)) making service of the subpoena on a party that has already appeared in the case (a plaintiff or a defendant who has already been served with a summons) efficient and inexpensive. The Council borrowed from rules in Illinois and Washington to eliminate payment of witness and mileage fees when one party is subpoenaing another party in the case. Also, service of the subpoena on such parties can be by first class U.S. mail or other methods approved for service of documents on existing parties, as provided in Rule 9. Clearly, the cost or efficiency of litigation is not improved by requiring parties to pay a process server to make service of a subpoena, and to pay that party witness and mileage fees, when the subpoenaed party may be the plaintiff who initiated the lawsuit.

Pursuant to ORS 1.735(1), I can advise you that no statutory sections are affected or superceded by the promulgated amendments.

I would like to add that the Council has proposed an amendment to ORS 12.190 that has been included in the Oregon State Bar's law improvement package. The problem is an inconsistency that works an unfairness on some victims of tortious conduct. Oregon has made a policy choice that civil claims against persons who have died survive, to some degree, the death of the defendant. See ORS 12.190. However, when the death of a potential defendant occurs, there are two classes of victims, those victims who can recover for the defendant's wrongful acts and those who cannot. The lives of victims and wrongdoers commonly intersect at only one discrete point, e.g., a motor vehicle accident. If the victim files suit within the time permitted by the statute of limitations, and learns of the wrongdoer's demise before the statute has run, the civil action can be amended and the victim will have his or her day in court. On the other hand, if the victim timely files his or her case, but does not learn of the wrongdoer's demise until after the statute has run, the case will be dismissed and the victim will never have his or her day in court. See, *Wheeler v. Williams*, 136 Or App 1, rev. den. 322 Or 362 (1995) and *Worthington v. Estate of Davis*, 250 Or App 755 (2012).

The Council spent two biennia wrestling through possible solutions to this problem and, although a fix for this statutory gap appears to be wonkishly procedural, the Council determined that potential amendments to ORCP 23 (pertaining to amendments) or ORCP 34 (pertaining to substitution of parties) were not viable solutions. The Council's enabling statutes, specifically ORS 1.735(1), define the Council's authority to "...promulgate rules governing pleading, practice and procedure...which shall not abridge, enlarge or modify the substantive rights of any litigant." Statutes of limitations are unquestionably substantive, not procedural. Therefore, the problem identified here requires a legislative fix. The Council's original proposal received friendly amendments from Legislative Counsel, became L.C. 308, and likely will be included in a bill proposing improvements to probate procedures. The Council recommends passage of L.C. 308 into law.

As it has done since its creation in 1977, the Council has continued this biennium to use the expertise of its members, as well as the many useful suggestions received from the bench and bar, to make civil litigation in the trial courts of this state as economical and efficient as possible, while preserving fairness to all parties. Each of the enclosed promulgated amendments is believed to be highly conducive to those important purposes.

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In accordance with ORS 1.760, I hereby report that the following Council members have been elected to comprise the 2021-2023 Legislative Advisory Committee:

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The purpose of the Legislative Advisory Committee is to provide, upon the request of any legislative committee's chairperson, technical analysis and advice to the members or staff of any committee regarding any questions or issues that might arise during the course of the session regarding the

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currently promulgated ORCP amendments, other legislation that proposes changes to the Oregon Rules of Civil Procedure, the Oregon Rules of Civil Procedure generally, or the Council. Should any such questions arise, I respectfully suggest that you contact Professor Mark Peterson, the Council's Executive Director, who will notify the members of the Legislative Advisory Committee. Professor Peterson can be contacted at his office as indicated on the letterhead. If you would prefer, you are of course always welcome to call me at (971) 808-5666.

Speaking on behalf of all of its members, I wish to express appreciation for the confidence that the Legislature has demonstrated in the Council since its creation in 1977. All members of the Council join me in extending our very best wishes for a productive 2021 legislative session.

Respectfully submitted,



Jennifer L. Gates

Chair

JLG:scn

Enclosure

c:

- Hon. Floyd Prozanski, Chair, Senate Judiciary Committee
- Hon. Kim Thatcher, Vice Chair, Senate Judiciary Committee
- Hon. Janelle Bynum, Chair, House Judiciary Committee
- Hon. Karin Power, Vice Chair, House Judiciary Committee
- Hon. Ron Noble, Vice Chair, House Judiciary Committee
- Gillian Fisher, Judiciary Counsel
- Michael Lantz, Judiciary Counsel
- Channa Newell, Judiciary Counsel
- Amie Fender-Sosa, Judiciary Counsel
- Dexter Johnson, Legislative Counsel
- Marisa James, Senior Deputy Legislative Counsel
- Susan Evans Grabe, Oregon State Bar Public Affairs Director
- Matt Shields, Oregon State Bar Public Affairs Legislative Attorney
- Members, Council on Court Procedures
- Prof. Mark A. Peterson, Executive Director, Council on Court Procedures