



Information in Support of Council on Court Procedures, HB 5012

Background: The Council and its Mission

In 1977 the Legislative Assembly recognized the need for a comprehensive set of rules of civil procedure proposed by a body that could conduct a deliberative, careful review of the rules governing litigants and the public in civil actions in Oregon's court system. As a result, the Legislature formed the Council on Court Procedures. In 1980, the Council proposed and the Legislature adopted the Oregon Rules of Civil Procedure (ORCP). The Legislature authorized the Council to make biennial revisions to the ORCP as necessary to respond to an increasingly complex environment of statutes, case law, rules and regulations, and technology. As the Legislature has already recognized, a coherent set of procedural rules, and a consensus regarding any changes to them, is critical to the efficient functioning of the courts.

Review of the ORCP is time-consuming and highly technical. Council members perform their duties on a volunteer basis, contributing hundreds of hours of their time to the process. The task can be challenging for non-lawyers who have no personal experience with the way the rules work in a courtroom setting. For these reasons, the Legislature determined that it would be better for this process to be undertaken by those who are experts in the field. The Legislature has retained the authority to amend or repeal Council proposals and to amend the ORCP by statute as it deems appropriate.

The Council is a balanced group, representative of the geography of the state as well as the practice areas of the bar. Its membership consists of:

- one Supreme Court justice;
- one Court of Appeals judge;
- eight circuit court judges from around the state;
- 12 Oregon lawyers appointed by the Oregon State Bar (chosen equally from firms that typically represent defendants and those that typically represent plaintiffs); and
- a public member chosen by the Oregon Supreme Court.

The Council's work is primarily performed when the Legislature is not in session, so that any proposed rule changes can be presented to the Legislature when the session begins in odd-numbered years. During the legislative session, the Council is available to assist legislators with questions about proposed changes to the rules, and with changes that may be proposed in the legislative process that did not go through the Council.

Oregon has one of the most efficient court systems in the nation. Efficient civil court rules are important to a well-functioning economy. The rules must be updated regularly to reflect changes in technology, practice, and federal and state statutes, as well as new appellate court decisions that indicate that amendments to existing rules may be desirable.

The Council's Performance

Hundreds of thousands of Oregonians use and rely on, and are affected by, the ORCP each year. According to Oregon Judicial Department statistics, 109,961 civil cases (excluding small claims cases) were filed in 2020, each of which would involve at least two parties and, not infrequently, multiple parties. Further, a number of rules promulgated by the Council are by statute used in misdemeanor and felony criminal cases, 64,426 of which were filed in 2020.

During the 2019-2021 biennium, the Council promulgated the following rule changes:

ORCP 15

- Adding language warning users that the deadline for filing some pleadings and motions cannot be extended as a matter of substantive law, and that some research should be undertaken prior to assuming that the court can permit a late filing in some instances.
- Clarifying 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

- Amending section E of the rule to authorize the court to exercise its discretion to allow responsive pleadings that are filed shortly before trial that raise entirely new matters, or to strike them. 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.
- Reorganizing section A and section G of the rule to be consistent with the rest of the ORCP and to allow for more accurate citation to a specific provision in the rule. This reorganization is not intended to affect the meaning or operation of the rule.

ORCP 27

- Adding a description of a guardian ad litem (GAL) so that self-represented litigants and non-lawyer court staff can differentiate between a GAL and a court-appointed guardian (*see* ORS 125.300, *et seq.*) who has broader responsibilities that extend well beyond a single case.
- Reorganizing section A of the rule for clarity
- Adding the word "unemancipated" before "minor" to improve accuracy, as an emancipated minor would not require a GAL.
- Amending the lead line for section B 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

- Clarifying that the interpleader procedure is available to all parties: plaintiffs and defendants. Making 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.
- Making the award of attorney fees discretionary (rather than mandatory, as was previously in the rule) 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. This will be helpful in instances where parties that are not blameless and who would keep the funds or property in a lawsuit but, when confronted by claimants, seek refuge in the interpleader device.

ORCP 55

- Adding a requirement to the form of a subpoena that alerts the person subpoenaed that attendance is contingent on payment of witness fees and mileage. This will be helpful information for occurrence witnesses with no interest in the case in which they are being compelled to provide testimony, and will also help prevent self-represented litigants, including prisoners, arguably abusing the use of subpoenas to seemingly compel attendance of witnesses without tendering any attendance or mileage fees.
- Amending subsection B(5) to eliminate payment of witness and mileage fees when one party is subpoenaing another party in the case. This will make 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.
- Amending the rule to allow service of such party subpoenas by first class U.S. mail or other methods approved for service of documents on existing parties, as provided in Rule 9.

In addition to improving the ORCP, the Council continues to provide a robust website with archived materials available to attorneys, and increasingly to self-represented litigants, who do not have easy access to the seven law libraries that hold Council materials, all of which are located on the I-5 corridor. (See www.counciloncourtprocedures.org) The website makes readily accessible the amendments promulgated by the Council in every biennium since its inception in 1977, as well a history of all Council promulgations for each specific Oregon rule of civil procedure. Legislative history information has been posted for the first two biennia of the Council (1977 through 1983) as well as from 1993 to the present. Organizing, scanning, and including the remaining five biennia is an ongoing process. Once that material has been added to the website, anyone needing to do legal research on an ORCP will be able to obtain the full history of the Council's actions and deliberations. The website has a search engine that allows users (primarily lawyers and judges) to enter any keyword (e.g., rule number, case name, subject matter) and be directed to minutes, promulgated rules, or any other documents containing the keyword. Users are also able to suggest new amendments, comment on promulgations, and follow the

work of the Council. So far during the 2020-2021 biennium, the Council's website has had over 1,000 unique visitors from Oregon, and more than 5,000 individual page views. In addition to the expected visitors from the Portland metropolitan area and major cities along the I-5 corridor, the website has received visitors from cities as widespread as Ashland, Astoria, Boardman, Hermiston, Florence, Klamath Falls, La Grande, La Pine, Pendleton, Redmond, Scappoose, and Waldport.

The Council consistently receives high marks for the quality of its work. Here are some results from the Council's 2019 survey of bench and bar, which was completed by 304 Oregon lawyers and judges:

- Quality of Council's Work
 - 78% of those expressing an opinion rated the Council's overall quality of work as excellent or good;
 - Responsiveness
 - 62% of those expressing an opinion rated the Council's responsiveness to the needs of litigants as excellent or good;
 - 63% of those expressing an opinion rated the Council's responsiveness to the needs of lawyers as excellent or good;
 - 78% of those expressing an opinion rated the Council's responsiveness to the needs of judges as excellent or good;
 - Website
 - 70% of those expressing an opinion rated the content of the Council's website as excellent or good;
 - 66% of those expressing an opinion rated the organization of the Council's website as excellent or good;
 - 65% of those expressing an opinion rated the navigability of the Council's website as excellent or good; and
 - Authority to Enact/Amend the ORCP
 - 88% of those expressing an opinion believed that either the Council or the Council together with the Legislature should have authority to enact or amend the ORCP.

Council Funding

The Council thanks the Legislature for its longstanding support. In the last biennium, the Legislature provided funding for the Council in the amount of \$51,710, which was included in the Judicial Department budget bill.

The General Fund allocation funds administrative support that enables the Council's appointed volunteers to proactively update and improve the ORCP and to respond to suggestions for amendments to the rules.

Under the Council's proposed 2021-2023 budget, most of the General Fund allocation would be for the Council's part-time executive assistant's wages and the executive director's stipend. The remainder of administrative services would be donated by the Lewis and Clark Law School.

The Council does this vital work at a remarkably low cost to the State. It is able to do so much with so little for the following reasons:

- the volunteer contribution of approximately 1,500 hours per biennium in Council meetings and travel, and another 1,500 hours in committee work, research, and meeting preparation;
- the Oregon State Bar's generous contribution of meeting space and conference calling services at no charge, as well as \$8,000 per biennium to reimburse Council members' travel expenses; and
- the in-kind contribution of the following from the Lewis and Clark Law School:
 - office space and archive storage space;
 - office furniture and equipment, including computer hardware and software, maintenance, and repairs;
 - a telecommunication system, high-speed internet connection, and storage space on Lewis and Clark's server for file storage and e-mail;
 - information technology services;
 - library and electronic research services;
 - business services and human resources including payroll and benefits administration for the part-time executive assistant and the executive director's stipend; and
 - some insurance coverage.

In addition to these generous donations, the Council does require the services of a part-time director and executive assistant, as well as office supplies, postage, and specialized software in order to perform its legislatively mandated functions. Continued state General Fund support, as proposed in HB 5012 in the modest amount of \$53,934, is critical to the successful functioning of the Council.

It is doubtful that the Council can continue its work of keeping the ORCP modern and effective, much less maintain its website and the archiving of its records, without continued support from the State. Failure to have a functioning Council would mean that the job of keeping the ORCP current would revert to the Legislature, adding to the workload of both legislators and staff, and politicizing the process of amending the rules of procedure. Although the Legislature retains ultimate control over the rules, a functioning Council comprised of experts in civil litigation will continue to allow Oregon to avoid the friction between the legislative and judicial branches that is not infrequently seen in other states.