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January 12, 2023

By E-Mail Only

Hon. Rob Wagner, President
Senate of the State of Oregon
900 Court Street, N.E. S-223
Salem, OR 97301
Sen.RobWagner@oregonlegislature.gov

Hon. Dan Rayfield, Speaker
House of Representatives of the State of Oregon
900 Court Street, N.E. H-271
Salem, OR 97301
rep.danrayfield@oregonlegislature.gov

Re: 2022 Promulgated Amendments to the Oregon Rules of Civil Procedure

Dear President Wagner and Speaker Rayfield:

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 10, 2022. This action is taken pursuant to ORS 1.735(1), which provides that the enclosed amendments will go into effect on January 1, 2024, 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 82nd 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 82nd Legislative Assembly, to explain the work of the Council or any of the enclosed promulgated ORCP amendments.

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, Jackson County, Lane County, Linn County, Marion County, Multnomah County, Polk County, and Washington 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 10, 2022, including all of its decision making, has been conducted at its regularly scheduled meetings. For this biennium, the COVID-19 pandemic continued to make in-person meetings inadvisable, so the Council's meetings were conducted virtually via video conferencing, 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 2021, and in January through June, as well as in August, of 2022, before voting to publish amendments at the Council's September 17, 2022, 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 17, 2022 (Volume 21), as well as on the Oregon Judicial Department's website:

<https://www.courts.oregon.gov/publications/other/MiscellaneousNotifications/RULE265.pdf>

They are also enclosed here for your review (*2022 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 10, 2022, 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 10, 2022*). 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. In addition, a new Rule 35 to provide uniform procedures for handling alleged vexatious litigants was published and received comments in opposition to its promulgation. The proposed new rule garnered a majority of the Council's votes but, failing to gain the required super majority, Rule 35 is not promulgated.

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 82nd Legislative Assembly.

Rule 7. Rule 7 governs the form and service of the summons. The Council's biennial survey to the bench and bar generated a question as to the reasoning in treating service of the summons and complaint on registered agents, officers, or directors of corporations; registered agents, managers, or members of limited liability companies; and registered agents and general partners of limited partnerships differently depending on whether that person happened to be served in the county in which the action was commenced, or in some other county. *See*, ORCP 7 D(3)(b), (c), and (d). Some courts were treating personal service of the summons and complaint in a county other than where the action was commenced as the first step in obtaining personal jurisdiction over that defendant by substituted service. The question would arise as to whether service had been completed by a follow up mailing of the summons and complaint, and potential statute of limitations problems that could be raised if the follow up mailing did not occur.

It would seem that a significant percentage of registered agents are located in Marion County or in Multnomah County and that fact would appear to have little bearing on whether a defendant had received proper notice of a pending lawsuit, wherever filed. This venue-like verbiage had been in Rule 7 as originally promulgated and had, likewise, been in the statute (ORS 15.080) that preceded ORCP 7 D(3)(b). Of course, due process requires that the plaintiff serve the defendant in a "manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend." ORCP 7 D(1).

A number of amendments (52), modernized the language of Rule 7, changing "upon" to "on," to be consistent with the other ORCP. Finally, parts D(3)(c)(ii)(C) and D(3)(d)(ii)((B) received an added "if any" to be consistent with treatment of corporate entities' registered agents, or lack thereof. The amendments identified in this paragraph are not intended to change the meaning or operation of the rule. All parts of the published rule received the unanimous vote of the Council to be promulgated.

Rule 39. Rule 39 relates to the procedures for taking depositions. The COVID-19 pandemic has taught lawyers and courts that many proceedings can be handled remotely, rather than requiring travel to and an in-person appearance at a physical location. Rule 39 C(7) authorized depositions to be conducted by telephone by agreement of the parties or by court order. We have come some distance from handling depositions and hearings by telephone and are

routinely using WebEx, Zoom, and other platforms for these events. Paragraph C(7) is rewritten to move remote testimony from telephonic testimony to current electronic means. "Remote testimony" is defined. The amended paragraph makes clear that the provisions for such remote testimony must ensure that it is taken accurately and is preserved.

Section A, Subsection C(1), and paragraph I(3) have been reformatted to allow for more precise citation to the specific provisions of the rule, and to standardize citation with the other ORCP. Other amendments to modernize, make uniform, add clarity, or improve grammar include changing "upon" to "on" 15 times; changing the directive "shall" to a more accurate "must" or "will" 47 times and avoiding the word on two occasions; using Arabic numerals on two occasions; and making internal references uniform in five instances. The amendments noted in this paragraph are not intended to change the meaning or operation of the rule. All parts of the published rule received the unanimous vote of the Council to be promulgated.

Rule 55. Rule 55 relates to the form, service, and function of subpoenas. A published amendment to section A would have required the subpoena to notify the recipient that attendance is mandatory but, if a valid reason for not appearing or otherwise complying with the subpoena existed, that the recipient could seek a modification or to be excused from compliance. A form of motion would be required to accompany the subpoena. That proposed amendment received comments in opposition to its promulgation. The proposed amendment garnered a majority of the Council's votes but, failing to gain the required super majority, the proposed amendment of subparagraph A(1)(a)(vi) is not promulgated.

That said, two amendments did receive the required super majority of the Council and are promulgated. An internal reference to one of the rule's provisions requiring payment of a witness fee and mileage was omitted in error and is added in paragraph A(1)(a)(v). Another use of "upon" in paragraph B(1)(a) is excoriated. While the first change adds clarity, neither amendment is intended to change the meaning or operation of the rule. These two amendments to Rule 55 received the unanimous vote of the Council to be promulgated.

Rule 57. Rule 57 governs the selection and use of juries in civil trials and, by operation of ORS 136.230(4), also in criminal trials. There has been an ongoing national debate on how jury selection might be made more fair, with a focus on peremptory challenges. The Oregon Court of Appeals in *State v Curry*, 298 Or App 377 (2019), requested that the Council review Rule 57 D and address concerns as to how objections to peremptory challenges might be handled to allow trial judges to better determine whether a peremptory challenge is based on impermissible discriminatory grounds. You are encouraged to review the Recommendation that accompanies these promulgations for additional background, the process utilized, and the considerations involved.

Other changes to Rule 57 include replacing "shall" and "may" 27 times with more accurate terms, usually "must" or "will," and avoiding one such usage to improve clarity. Two internal citations are rephrased to make them uniform with the ORCP. Three uses of "upon" are excoriated, as well as four archaic uses of "such." Three sentences are modified to improve

grammar or clarity. These other changes, other than the amendments to Section D, are not intended to change the meaning or operation of the rule.

All amendments to Rule 57 received the unanimous vote of the Council to be promulgated.

Rule 58. Rule 58 pertains to trial procedure. Section F is new and facilitates remote testimony. (See discussion of Rule 39.) The Council promulgated this amendment to make a more uniform provision for the use of remote testimony in appropriate circumstances in hearings and trials as well as in depositions.

Additional amendments to Rule 58 include changing an internal reference to be uniform with the ORCP and avoiding "shall" in eleven instances with more accurate terms, usually "will," "may," or "must." Six sentences are modified to improve grammar or clarity. None of the amendments other than the addition of section F is intended to change the meaning or operation of Rule 58. All amendments to Rule 58 received the unanimous vote of the Council to be promulgated.

Rule 69. Rule 69 governs judgments entered by default. The impetus for an amendment to Rule 69 was a reference in the rule to the federal Servicemembers Civil Relief Act. There exists a tension in drafting the rules between inclusion of internal references to other provisions in a rule or to other rules or statutes. If the law to which the reference is made is amended, the reference to that law within the rule may become inaccurate. It is deemed helpful to users of the ORCP to direct them to the provisions of the rules and laws that are required of them by the rule. Accordingly, the reference to the Servicemembers Civil Relief Act is amended to that Act's current citation in the United States Code.

Additionally, as modernization and clean up measures, additional changes were made. Two imprecise uses of "shall" were clarified. One internal reference was made uniform with the ORCP. Two sentences are modified to improve clarity or grammar. Other than directing users to the federal law requirement contained in the rule, the amendments are not intended to change the meaning or operation of the rule. The amendments to Rule 69 received the unanimous vote of the Council to be promulgated.

Pursuant to ORS 1.735(1), I can advise you that no statutory sections are affected or superseded by the promulgated amendments. However, I would like to add that the Council has proposed an amendment to ORS 45.400 that I believe will be included within the Oregon State Bar's law improvement package or in the Oregon Judicial Department's proposed legislative package. The discussion in Rule 39 and Rule 58 makes clear that Oregon's lawyers and courts have learned how to utilize remote testimony. ORS 45.400 currently requires 30 days' notice if a party is seeking to present remote testimony. Although the statute provides for shortening the 30 day advance notice, clearly 30 days is generally excessive and encourages motions when a more practical time frame could be specified. Until a bill carrying this idea is generated, the proposed language is:

“. . . sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow for the non-movant to challenge those

factors specified in (3)(b) and to advance those factors specified in (3)(c).”

The Council is also recommending that the Legislature make an amendment to ORS 136.600 to update references to Rule 55 as follows:

“Certain civil procedures applicable in criminal context. The provisions of ORS 44.150 and [ORCP 39 B and 55 E and G] **ORCP 39 B, 55 A(6)(d), and B(4)** apply in criminal actions, examinations and proceedings.”

Finally, in the Rule 57 jury workgroup discussions, it was clear that a significant impediment to having more diverse juries is directly related to the juror compensation as provided in ORS 10.061. The judges from the various counties that participated in the workgroup, in particular, expressed the view that the compensation, \$10 per day, is such that lower-income jurors may be ignoring the subpoena, and many potential jurors that answer the call are entitled to be excused on the basis of hardship. Such jurors simply cannot give up a day's wages in exchange for the \$10 afforded them by the law. Enabling a party to have a jury of his or her peers requires that juror compensation be substantially improved. The Council unanimously supported the Oregon Judicial Department's proposal, currently in LC 270.

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.

In accordance with ORS 1.760, I hereby report that the following Council members have been elected to comprise the 2023-2025 Legislative Advisory Committee:

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The purpose of the Legislative Advisory Committee is to provide, on 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 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 (503) 947-4700.

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 2023 legislative session.

Respectfully submitted,

Kenneth L. Crowley
Chair

KLC:scn

Enclosures

CC (by e-mail only):

- Hon. Floyd Prozanski, Chair, Senate Judiciary Committee
- Hon. Kim Thatcher, Vice Chair, Senate Judiciary Committee
- Hon. Tom Anderson, Vice Chair, House Judiciary Committee
- Hon. Jason Kropf, Chair, House Judiciary Committee
- Hon. Kim Wallan, Vice Chair, House Judiciary Committee
- Gillian Fisher, Judiciary Counsel
- Patricia Pascone, Judiciary Counsel
- Amie Fender-Sosa, Judiciary Counsel
- Whitney Perez, Judiciary Counsel
- Dexter Johnson, Legislative Counsel
- Marisa James, Senior Deputy Legislative Counsel
- Hon. Ellen Rosenblum, Attorney General
- Hon. Meagan Flynn, Chief Justice, Oregon Supreme Court
- 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