



## Information in Support of Council on Court Procedures, HB 5512

### 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. 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.

Council members perform their duties on a volunteer basis, contributing hundreds of hours of their time to the process. 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, 104,585 civil cases (excluding small claims cases) were filed in 2021, 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, 59,033 of which were filed in 2021.

During the 2021-2023 biennium, the Council promulgated the following rule changes:

### ORCP 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.

### ORCP 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.

#### ORCP 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 exorcized. 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.

#### ORCP 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 exorcized, 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.

#### ORCP 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.

#### ORCP 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.

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](http://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. Council legislative history information has been posted for the entire history of the Council, so anyone needing to do legal research on an ORCP is able to obtain the full history of the Council's actions and deliberations. A project is currently underway to include a history of the Legislature's amendments to the ORCP, making the Council's website a true one-stop-shop for the history of the ORCP. The website has a search engine that allows users 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. Over the last year, the Council's website has had over 5,000 unique visitors, and more than 9,000 individual page views.

The Council consistently receives high marks for the quality of its work. Here are some results from the Council's 2021 survey of bench and bar, which was completed by 384 Oregon lawyers and judges:

- Quality of Council's Work
  - 68% of those expressing an opinion rated the Council's overall quality of work as excellent or good;
    - Responsiveness
      - 55% of those expressing an opinion rated the Council's responsiveness to the needs of lawyers as excellent or good;
      - 61% of those expressing an opinion rated the Council's responsiveness to the needs of lawyers as excellent or good;
      - 75% of those expressing an opinion rated the Council's responsiveness to the needs of judges as excellent or good;
    - Website
      - 77% of those expressing an opinion rated the content of the Council's website as excellent or good;
      - 79% of those expressing an opinion rated the organization of the Council's website as excellent or good;
      - 76% of those expressing an opinion rated the navigability of the Council's website as excellent or good; and
  - Authority to Enact/Amend the ORCP
    - 91% 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 \$53,934, 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 2023-2025 budget, \$57,343, 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 5512 in the modest amount of \$57,343, 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.