

CIVIL PROCEDURE

USE OF FORMS IN FILINGS

UTCR 1.160, UTCR 15

UTCR 1.160 rule is amended to require a judicial district to accept a filing that is substantially in the form of documents made available on the Oregon Judicial Department website, so long as the filing is otherwise in accordance with law.

The proposal is intended to allow the Oregon Judicial Department to better manage printable forms and, if applicable, interactive electronic forms. The proposal facilitates moving existing small claims forms from the UTCR to the Oregon Judicial Department website.

UTCR 15 was changed in several places to delete forms that were contained in the rules and instead direct the reader to the Oregon Judicial Department website to find the forms.

Effective date: August 15, 2015.

eFILING REQUIREMENTS

UTCR 21

Numerous changes were made to UTCR 21 in order to facilitate the ongoing implementation of the Oregon eCourt Program. These changes were adopted out of cycle and most went into effect on September 29, 2014. Mandatory eFiling under UTCR 21.140 went into effect on December 1, 2014. Some highlights are presented below, but practitioners should consult the current UTCRs in order to familiarize themselves with all current eFiling requirements.

UTCR 21.040 was amended in several respects, including requiring that a single electronic filing be submitted as a single PDF file rather than as several individual electronic documents.

UTCR 21.070 was updated to add additional documents that must be filed conventionally rather than electronically. Chief among these are the filing of a petition or motion for waiver of mandatory eFiling rules and any filings required by Supplemental Local Rule to be filed conventionally.

UTCR 20.080 was updated with language addressing filing requirements when the eFiling system is temporarily unavailable, or if a technical problem prevents the system from receiving a document. In general, this rule will allow the court to permit a later filing date of a document to relate back to the date the filer attempted to file the document electronically. This rule change is intended to address bone fide problems with the eFiling system, not problems with the filer's computer equipment, and the rule states that technical problems on the filer's end will generally not excuse an untimely filing.

UTCR 21.140 provides that an active member of the Oregon State Bar, with some exceptions, must file documents electronically using the eFiling system instead of filing documents conventionally.

Some specific documents are exempted from the rule, and UTCR 21.140(3)

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provides for a waiver process in order to be exempted from eFiling a document. Some counties have exempted certain documents from eFiling by Supplemental Local Rule, and practitioners should familiarize themselves with the rule in their practice area.

This rule only applies in those counties that have implemented the new eCourt eFiling system. However, it is anticipated that all Oregon counties will have eFiling available by mid-2016 and that mandatory eFiling will be the default rule statewide at that time.

Effective date: December 1, 2014.

ORCP CHANGES PROMULGATED BY THE COUNCIL ON COURT PROCEDURES DECLARATION UNDER PENALTY OF PERJURY IN LIEU OF AFFIDAVIT ORCP 1

The amendment reorganizes section E and now provides practitioners with the different placement (after the declarant's signature) and the required language for foreign declarations.

Effective date: January 1, 2016.

SUMMONS ORCP 7

Rule 7 is amended in four respects that may affect lawyers and litigants. First, at paragraph C(3)(b), the "notice" language for that variety of a summons used to join a party to respond to a counterclaim under Rule 22 D(1) has been amended to also encompass joining a party to respond to a Rule 22 D(1) cross-claim. Second, service on individuals is amended in subparagraph D(3)(a)(i) to make clear that service may be had on the defendant or on a person authorized to receive service. Third, references to Rule 27 (guardians ad litem) for service of the summons on minors or incapacitated persons in subparagraphs D(3)(a)(ii) and D(3)(a)(iii) are amended to direct practitioners to the correct section of the concurrently amended Rule 27. Fourth, the certificate of service provisions at subparagraphs F(2)(a)(i) and F(2)(a)(ii) are amended to now require a listing of the specific documents that were served on the defendant.

Effective date: January 1, 2016.

SERVICE AND FILING OF PLEADINGS ORCP 9

Rule 9 is amended in five significant respects. First, the rule defines and authorizes electronic service (see UTCR, chapter 21) in recognition of the county-by-county implementation of eCourt. Related amendments replace the term "papers" with "documents." Second, language relating to facsimile service has been amended to reflect more accurately the changes in facsimile technology, and it is made clear that an automatically generated "out of office" message will not be sufficient to support a certificate of service. Third, in section E, the description of the information that must be included on pleadings and documents to be filed with the court (a caption and the name and contact information of the attorney or the litigant who authored the document) is clarified and made more consistent with UTCR 2.010(7) and (11). Fourth, any attorney who has consented to service by email is now required (in section E) to notify other parties in writing of any changes to the attorney's email address. Fifth, service of any pleading or document (other than a summons) by email is treated (in section G and in Rule 10 B) in the same manner as service by facsimile service or by the postal service; the recipient is entitled to three additional days to respond to the document.

Effective date: January 1, 2016.

MINOR OR INCAPACITATED PARTIES ORCP 27

Rule 27 relating to the appointment of guardians ad litem is substantially rewritten and reorganized, and includes several new sections. Three significant changes are incorporated into the amended rule:

- (1) Absent a waiver authorized by the court, notice of the request for appointment of a guardian ad litem must be provided to the party for whom the guardian ad litem is sought and to other persons or entities (taken largely from ORS 125.060), with the opportunity for objections to be filed and a hearing to be held;
- (2) A new section C authorizes the discretionary appointment of a guardian ad litem for a party who is disabled but for whom the appointment of a guardian ad litem is not required; and
- (3) Direction is provided in section I on the procedures necessary to obtain court approval of any settlement that will involve the receipt of money or property by the party for whom the guardian ad litem was obtained.

Section E's requirement of providing notice to the party and to other listed persons or entities can be waived or modified by the court under section H for good cause shown. The notice and related procedures specified in sections D through G are not applicable when the appointment is made on the court's own motion or pursuant to a statute that provides for a different procedure.

The reorganization of Rule 27 includes changes to section A and section B to make those sections applicable to minors, incapacitated persons, or financially incapable parties; previously, section A pertained to minors and section B pertained to incapacitated and financially incapable persons. The requirement that the court appoint a suitable person (in sections A and B) is now found in section D. The procedures in the former subsections A(1) and A(2) applicable for minors who are plaintiffs or defendants of various ages are now found in subsections B(1) and B(2). The procedures applicable for parties who are incapacitated or financially incapable, formerly found in subsections B(1) and B(2), are now found in subsections B(3) and B(4).

The list of those persons who may apply for appointment of a guardian ad litem in subsections B(1) and B(2) now includes other interested persons, consistent with case law. The terms "plaintiff" and "defendant" are amended to include their equitable counterparts "petitioner" and "respondent" for clarity.

Section D requires the filing of a motion supported by one or more affidavits or declarations that will provide the court with a factual basis to determine whether the appointment is appropriate. Section E identifies persons or entities, taken from ORS 125.060, in addition to the party for whom the appointment is sought, to be served with notice of the motion. Unless the court waives or modifies the required notices, service must occur within seven days of the filing of the motion for the appointment of a guardian ad litem. Section F describes the content of the notice, including a description of the procedure for filing any objection to the appointment within 14 days from the date of the notice. Section G specifies that a hearing on any objection shall be held as soon as practicable. Section H authorizes the court to waive or to modify the requirements and procedures for providing notice. Section I outlines the procedures for obtaining court approval when a proposed settlement will result in the receipt of money or property by the person for whom the guardian ad litem was appointed.

Practice Tip #1: Practitioners seeking the appointment of a guardian ad litem are now required to support their motion with one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the

evidence that the party on whose behalf the motion is filed is a minor or is incapacitated or financially incapable (when appointment is mandatory), or that the party is disabled (when the appointment is discretionary).

Practice Tip #2: The amendment is in response to reported abuses of the guardian ad litem process, providing procedures to ensure that the person for whom the appointment is sought, and other persons or entities that may have an interest in the person or in the object of the civil action, will be apprised of the request for the appointment. The amendment is designed to allow an action that is on the cusp of being time-barred to be filed without a delay due to the need to have a guardian ad litem appointed. Practitioners should identify the persons and entities identified in Section E to arrange for service of the required notice within seven days. Alternatively, if good cause can be demonstrated why some of the listed persons or entities cannot or should not be served within seven days, or should never be served, practitioners should have a motion and an affidavit or declaration prepared and promptly seek a waiver or modification of the rule's notice requirements.

Effective date: January 1, 2016.

FAILURE TO MAKE DISCOVERY; SANCTIONS ORCP 46

Subsection A(2) now specifies that the items sought to be discovered are to be identified rather than "set out" at the beginning of a motion seeking discovery. Numerous other amendments of prior words and punctuation are intended to improve clarity, consistency, and readability but should not affect practice.

Effective date: January 1, 2016.

DISMISSAL OF ACTIONS; COMPROMISE ORCP 54

Amendments of prior words and punctuation are intended to improve clarity, consistency, and readability but should not affect practice.

Effective date: January 1, 2016.

SUBPOENA ORCP 55

Section C is rewritten and reorganized to provide better clarity. See especially subparagraph C(2)(a)(i) describing what information must be added by the attorney or party requesting issuance of the subpoena when the subpoena is

issued in blank. The numerous other amendments of prior words and punctuation are intended to improve clarity, consistency, and readability but should not affect practice.

Effective date: January 1, 2016.

JUDGMENTS ORCP 67

Minor amendments of words and punctuation are made to improve clarity, consistency, and readability but should not affect practice.

Effective date: January 1, 2016.

TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS ORCP 68

Rule 68 is amended in three significant respects:

- (1) A new subparagraph [C(4)(d)(ii)] authorizes the court to exercise discretion to expand the 14-day period for filing and serving statements of attorney fees and objections thereto, and the seven-day period for filing and serving a response to any objection, and the court may in its discretion allow filing or service of those documents after the specified time has expired;
- (2) A new subparagraph [C(5)(b)(ii)] authorizes the court to exercise discretion to award attorney fees or costs and disbursements in the form of a limited judgment after the entry of a limited judgment that affects fewer than all of the parties or fewer than all of the claims or defenses in a case; and
- (3) A new subsection [C(7)] is added to provide a procedure for a party to seek a supplemental judgment for attorney fees or costs and disbursements for those additional attorney fees and costs and disbursements incurred in collecting or enforcing the underlying judgment.

Other changes for clarification or consistency include a change to the title of the rule to more readily identify the rule as the procedure for drafting statements of attorney fees and the related objections and responses, but should not affect practice.

Practice Tip: Despite the amendment [at subparagraph C(4)(d)(ii)] to liberalize the 14-day deadline for filing and serving statements of attorney fees and objections thereto, and the seven-day deadline for filing a response to an objection, the careful practitioner will abide by the stated deadlines. It has become somewhat time-honored that a

statement of attorney fees that is not filed or served within 14 days will be denied. The new subparagraph authorizes the court to exercise discretion, as Rule 15 D authorizes for pleadings or motions. However, seeking the court's discretion to authorize an untimely statement of attorney fees, or an objection or a response, carries significant risk, especially if the reason for the late filing or service is not strong.

Effective date: January 1, 2016.

JUDGMENTS BY CONFESSION ORCP 73

Minor amendments of words and punctuation are made to improve clarity, consistency, and readability but should not affect practice.

Effective date: January 1, 2016.

CLASS ACTIONS ORCP 32

2015 OREGON LAWS CH. 2 (HB 2700)

In House Bill 2700, the former subsections F(2) through (4) are deleted and subsections F(5) through (7) are re-designated. The deleted subsections eliminate the previous requirement that class members wishing to be awarded individual monetary relief opt in (except as provided in the former subparagraph F(2)(iii) for limited situations) by filing claim forms to share in the recovery.

An amendment to section L requires that the judgment generally describe the members of the class and specifically identify any persons who requested to be excluded from the class and who are not bound by the class.

A new section O authorizes the court to approve a process for the payment of damages as a part of a settlement or a judgment. That process may include the use of claim forms.

Effective date: March 4, 2015. The change from class members opting in to the opt-out procedures more commonly found in other jurisdictions will apply only to judgments entered on or after that date.

TIME ORCP 10

2015 OREGON LAWS CH. 212 (HB 2911)

In House Bill 2911, the Legislature deleted section B relating to terms of court, and the former section C is now section B. Rule 10 is amended in section B (previously

section C) to afford recipients of documents that are served by email three additional days to respond. The same three-day extension is afforded for documents that are received via the court's new electronic service. Section B now consolidates in one place the three-day extension for responding to pleadings, motions, and other documents (other than a summons), whether served by regular postal mail, email, facsimile transmission, or the new electronic service. HB 2911 incorporated changes to Rule 10 promulgated by the Council on Court Procedures.

Effective date: June 2, 2015.

DECLARATIONS UNDER PENALTY OF PERJURY ORS CH. 46, 107, 109, 124, 153, 163, 419B

2015 OREGON LAWS CH. 121 (SB 375)

Senate Bill 375 amends 25 statutes that currently allow the use of affidavits and authorizes the use of a declaration under penalty of perjury, usually in the form required by ORCP 1 E. The amended statutes include ORS 46.425 (small claims); ORS 107.095, 107.097, 107.138, 107.139, 107.434, 107.437, and 107.840 (dissolution of marriage); ORS 107.705, 107.710, 107.720, 107.725, and 107.730 (family abuse restraining orders); ORS 109.767 (jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act); ORS 124.005, 124.010, 124.020, and 124.030 (Elderly Persons and Persons with Disabilities Abuse Prevention Act); ORS 153.080 (affidavits in trials of violations); ORS 163.741 (stalking); ORS 163.760, 163.763, 163.773, and 163.775 (sexual abuse restraining orders); and ORS 419B.367 (juvenile guardian's reports).

ORS 419B.367 deletes "verified" and uses the declarative language from Rule 1 E without referencing the rule. ORS 107.710 through 107.728; ORS 124.010 and 124.030; and ORS 163.760 through 163.775 simply refer to a "declaration under penalty of perjury." The amendment to ORS 107.730 deletes a redundant "affidavit."

Effective date: May 20, 2015. The amendments became operative on September 1, 2015.

MINORITY TOLLING STATUTE ORS 12.160

2015 OREGON LAWS CH. 510 (HB 2333)

House Bill 2333 clarifies that Oregon's Minority Tolling Statute applies to claims brought under the Oregon Tort Claims Act. In 2007, HB 2366 amended the statute to bring the statutes of limitations (SOLs) for claims brought by parents of injured children in line with the SOLs for the claims of the children themselves. In so doing, the wording

of the Minority Tolling Statute was subtly changed from referencing "actions mentioned in" to "actions that are subject to" various relevant statutes. This resulted in at least some courts concluding that the Minority Tolling Statute no longer applied to claims against the state because claims under the Tort Claims Act – having separate statutes of limitations – are not "subject to" the statutes listed.

HB 2333 corrects this unintended consequence by reverting to the pre-2007 phrasing of the statute.

Effective date: June 22, 2015. The amendment applies to all causes of action arising on or after January 1, 2008. If the amendment revives a claim that was barred under ORS 12.160 immediately before the effective date, the person asserting the claim must commence the cause of action within the time prescribed for commencing the action under ORS 12.160, as amended by this bill, or within one year after the effective date, whichever is later.

NOTICES OF APPEAL

ORS 19.260

2015 OREGON LAWS CH. 80 (HB 2336)

House Bill 2336 amends ORS 19.260 relating to the filing of notices of appeal to the Court of Appeals or to the Supreme Court to clarify when a notice of appeal, however delivered to the court, is deemed to be timely filed. HB 2336 more clearly authorizes delivery of notices of appeal by the U.S. Postal Service or by a commercial delivery service. Notices sent via the U.S. Postal Service no longer must be sent by registered or certified mail; whether entrusted to the U.S. Postal Service or to a commercial delivery service, the class of service selected by the party must be calculated to achieve delivery within three calendar days. If the notice of appeal is not received by the court by the required date, the party filing the notice of appeal must file a certificate of the date of mailing or dispatch.

Practice Tip: Clearly the appellant (or cross-appellant) will want to be able to provide the "record of the mailing or dispatch" which would be sufficient proof of the date of mailing or dispatch.

Service of copies of the notice of appeal on opposing parties, the transcript coordinator, and the trial court administrator by commercial delivery services is now authorized. First-class, certified, and registered mail are retained as appropriate service methods. An appellant is now required to certify the method of service as well as the date of service.

Effective date: May 18, 2015. The amendment applies only to notices of appeal filed on or after the effective date.