MULTNOMAH COUNTY JUDGES CIVIL MOTION CONSENSUS STATEMENT

MAY 2023

Periodically, the Judges discuss their prior rulings and the differences and similarities in their decisions. When it appears, Judges have ruled similarly over time on any particular question, it is announced to the bar as a "consensus". The current consensus is set out below. The statements do not have the force of law or Court rule; the statements are not binding on any Judge. A consensus statement is not a pre-determination of any question presented on the merits to a Judge in an action. In every proceeding before a Judge of this Court, the Judge will exercise independent judicial discretion in deciding the questions presented by the parties under the unique facts of that specific case.

I. ARBITRATION

A. **Motions**: Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator, except (1) motions to amend pleadings that will add a party or parties to the case, or (2) where a party shows cause why a motion should not be decided by the arbitrator. (UTCR 13.040(3); SLR 13.035(3)) The party must file such motions in Court pursuant to ORCP 23 and those motions will be heard by the Multnomah County Arbitration Judge.

B. **Punitive Damages**: Where the actual damages alleged are less than the arbitration threshold ($50,000 as of the date of this statement), the pleading of a punitive damages claim which may be in excess of the arbitration threshold does not exempt a case from mandatory arbitration. For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. The arbitrator's decision may be reconsidered by a Judge as part of de novo review under UTCR 13.040(3) and 13.100(1).

II. DISCOVERY

A. **Medical Examinations (ORCP 44)**:

1. **General** – a party who undergoes a physical or mental examination by a physician, psychologist, neurologist, or any other health care professional pursuant to ORCP 44 A, is generally not required to complete general intake forms or provide any oral history absent a showing of good cause.

2. **Vocational Rehabilitation and Psychological/Neuropsychological Exams** – Vocational rehabilitation and neuropsychological exams have been authorized when the exam is performed as part of an ORCP 44 examination by a physician, psychologist, or a neuropsychologist.

3. **Recording Exams and Presence of Third Persons** – Audio recordings have been allowed absent a particularized showing that such recording will interfere with the exam. Videotaping or the presence of a third person in any ORCP 44 examination has been denied absent a showing of good cause or special need (e.g., an especially young plaintiff) by the moving party. For mental health or neuropsychological exams, audio and/or video recordings are generally not permitted absent a showing of good cause.

4. **Pretrial Disclosure** – Pretrial disclosure of the percentage of a medical examiner's income received from forensic work and amount of the examiner's charges has been ordered for the prior three years. The information is permitted to be provided by an affidavit or declaration from the examiner prior to the start of trial, instead of the underlying documentation. The examination itself is not conditioned on the disclosure of the information, however the affidavit must be produced prior to the start of trial. Failure to disclose the affidavit or declaration prior to the start of trial may result in exclusion of the expert witness testimony.

B. <u>Depositions</u>:

1. **Attendance of Experts** – Attendance of an expert at a deposition has generally been allowed but has been reviewed on a case-by-case basis upon motion of a party.

2. **Attendance of Others** – Persons other than the parties and their lawyers have been allowed to attend a deposition, but a party may apply to the Court for the exclusion of witnesses.

3. **Out-of-State Parties**:
   a. *<u>Non-Resident Plaintiff</u>* – Non-resident plaintiff is normally required to appear at plaintiff's expense in Oregon for deposition. Upon a showing of undue burden or expense, the Court has ordered, among other things, that plaintiff's deposition occur by electronic means with a follow-up personal appearance deposition in Oregon before trial.

   b. *<u>Non-Resident Defendant</u>* – Non-resident defendants normally have not been required to appear in Oregon for deposition at their own expense. The deposition of non-resident corporate defendants, through their agents or officers, normally occurs in the forum of the corporation's principal place of business. However, the Court has ordered that a defendant travel to Oregon at either party's expense, to avoid undue burden and expense and depending upon such circumstances as whether the alleged conduct of the defendant occurred in Oregon, whether defendant was an Oregon resident at the time the claim arose, and whether defendant voluntarily left Oregon after the claim arose.

4. **Videotaping** – Videotaping of discovery depositions has been allowed with the requisite notice. The notice must designate the form of the official record. There is no prohibition against the use of BOTH a stenographer and a videographer, as long as the above requirements are met.

5. **Remote Depositions** – Remote video depositions held via zoom, WebEx or any other secure video platform are permitted upon stipulation of the parties.

   a. *<u>Notice Requirement</u>* – The parties must provide the requisite notice advising the deposition will be taken via remote means by identifying the platform and providing all login information. The notice must designate the form of the official record. There is no prohibition against the use of BOTH a stenographer and a videographer, as long as the above requirements are met.

b. *Individuals in Attendance* – At the outset of the remote video deposition, the record should correctly identify all individuals logged into the remote deposition, regardless of whether those individuals' display screens are turned on or off. The record should also reflect all individuals who are in the room with the deponent, even if those individuals are off screen.

c. *Display Screen* – Unless the witness being deposed is being shown a demonstrative exhibit on the screen, the display screen must display the attorney conducting the deposition, the witness being disposed, and the witness' attorney, if the witness is represented. The parties and witness participating in the remote depositions are required to use appropriate backgrounds/backdrops during the entire deposition.

6. **Explanatory or Argumentative Objections** – Attorneys should not state anything more than the specific legal grounds for the objection to preserve the record. Objection should be made without further comment. Objections as to form during deposition serve the purpose of allowing counsel to correct the objectionable question during the deposition. Accordingly, objections should be specific enough to allow the questioning party to rephrase and ask a non-objectionable question and sufficiently specific so that a Judge can rule on the objection later. Such specific objections include for example, "objection, hearsay" or "objection, compound" or "objection, argumentative" etc. Although a generic "objection as to form" may be sufficient in some circumstances, it may not be sufficient to preserve the objection in other circumstances.

7. **Protective Orders** – Protective orders that purport to bind the Court or Court staff, for example to treat documents as confidential, that require sealing before the Court has seen a particular document, or follow particular administrative processes, will be rejected.

8. **Failure to Appear** – In response to the failure of a party to appear for deposition after being served with proper notice, the Court may issue orders pursuant to ORCP 46 D, such as orders establishing facts, prohibiting use of certain evidence, striking pleadings or parts thereof, or dismissal of the action.

C. **Experts**: The scope of discovery under ORCP 36 B(1) generally has not been extended to the identity of nonmedical experts.

1. **Expert Files** – Prior to any expert witness being called to testify at trial, the expert witness shall make their complete file (including but not limited to, all notes, chart notes, emails, medical records, medical bills, photographs, reports, charts, graphs, etc. regarding the subject of the expert witness testimony) available for review by opposing counsel. Failure to produce a complete copy of the expert file may result in exclusion of the expert witness testimony.

2. **Electronic or Digital Expert Files** – If the parties arrange for the expert file to be produced electronically or in a digital format, the party calling the expert witness must ensure that the expert file is produced in an electronic or digital format that is easily readable or viewable by opposing counsel within the time agreed by the parties or imposed by the Court. If the attorney calling the witness is not able to produce the expert file in a readable/viewable electronic format, the attorney must produce a complete hard copy of the expert file for review by opposing counsel.

3. **Preservation of Expert File** – All expert witnesses who are hired and will be called to testify at trial must preserve the complete contents of their expert files. The attorney who has retained the expert witness must instruct the expert witness of their obligation to preserve the complete contents of their expert files.

D. **Insurance Claims Files**: An insurance claim file "prepared in anticipation of litigation" has been held to be protected by the work product doctrine regardless of whether a party has retained counsel. Upon a showing of hardship and need pursuant to ORCP 36 B(3) by a moving party, the Court has ordered inspection of the file in camera and allowed discovery only to the extent necessary to offset the hardship (i.e., not for production of entire file). If a file is ordered to be produced in discovery or for in camera inspection, the file must be produced in a format, digital or otherwise, that is easily readable or viewable by opposing counsel or the Court.

E. **Medical Chart**:

1. **Medical Records for Current Injury** – Medical records, including chart notes and reports, are generally discoverable in personal injury actions. These are in addition to reports from a treating physician under ORCP 44. The party who requests an ORCP 44 report has been required to pay the reasonable charges of the practitioner for preparing the report.

2. **Medical Records for Prior/Other Injuries** – ORCP 44 C authorizes discovery of prior medical records "of any examinations relating to injuries for which recovery is sought." Generally, records relating to the "same body part or area" are discoverable. Records sought must actually relate to the presently claimed injuries.

3. **Mental Health/ Psychological Records** – In personal injury lawsuits, the pleading of garden variety pain and suffering expressed in terms of emotional and mental distress does not generally open the door to counseling and psychological records without the allegation of a specific psychological condition or injury. In some cases, discovery of counseling and/or psychological records has been granted based on particular facts of a claim which distinguish it from what may be considered a "garden variety" general damage claim.

F. **Photographs**: Photographs generally have been discoverable. For digital images, the metadata associated with the original image is also discoverable and should generally be preserved.

G. **Social Media, Instant Messaging, and other similar applications**: Generally, relevant social media and instant messaging content has been discoverable, despite the privacy settings imposed by the account user. Data residing on social media platforms is subject to the same duty to preserve as other types of electronically stored information (ESI). The duty to preserve is triggered when a party reasonably foresees that evidence (ESI or otherwise) may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve. ESI generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access or obtain the ESI.

H. **Tax Returns**: In a case involving a wage loss claim, discovery of those portions of tax returns showing an earning history, i.e., W-2 forms, has been held appropriate, but not those parts of the return showing investment data or non-wage information.

I. **Witnesses**:

1. **Identity** – The Court has required production of documents, including those prepared in anticipation of litigation, reflecting the names, addresses and phone numbers of occurrence witnesses. To avoid having to produce documents which might otherwise be protected, attorneys have been permitted, but are not required to, provide a "list" of occurrence witnesses, including their addresses and phone numbers.

2. **Statements** – Witness statements, if taken by a claims adjuster or otherwise in anticipation of litigation, have been held to be subject to the work-product doctrine. Generally, witness statements taken within 24 hours of an accident, if there is an inability to obtain a substantially similar statement, have been discoverable. ORCP 36 B(3) specifies that any person, whether a party or not, may obtain his or her previous statement concerning the action or its subject matter.

J. **Surveillance Tapes**: Surveillance tapes of a plaintiff taken by defendant generally have been protected by the work-product privilege, and not subject to production under a hardship or need argument.

K. **Updating Admissions**: The Court may impose sanctions when a party fails to update, where appropriate, their responses to any requests for admission before trial. For example, where a party responds to an RFA by denying medical bills are reasonable but at trial does not contest this fact, causing unnecessary expense for the opposing party who prepared to litigate this issue.

L. **Timelines**: All timelines specified within the ORCPs, UTCRs or SLRs must be followed, unless otherwise ordered by the Court. The stipulation of the parties to a different timeline than those specified by rule(s) is not sufficient without prior Court approval.

III. VENUE

A. **Change of Venue**: Generally, the Court has not allowed a motion to change venue from Multnomah to Clackamas, Washington or Columbia counties on the grounds of the convenience of witnesses and the parties (ORS 14.110(1)(c)).

B. **Change of Venue – FELA**: Generally, the Court has followed the federal guidelines regarding choice of venue for FELA cases.

IV. MOTION PRACTICE

A. Conferring and Good Faith Efforts to Confer (UTCR 5.010):

1. **"Conferring"** – Judges have held that "to confer" means to talk in person or on the phone. Generally, sending a text message or email does not constitute adequate conferral.

2. **Good Faith Efforts to Confer** – Because "confer" means to talk in person or on the phone, a "good faith effort to confer" is action designed to result in such a conversation. In various cases, motion Judges have held that a letter to opposing counsel, even one that includes an invitation to call for a discussion, does not constitute a good faith effort to confer unless the moving attorney also makes a follow-up phone call to discuss the matter.

3. **Messages** – The phone call leaving a message must be specific as to the subject matter before it constitutes a good faith effort to confer. Likewise, a message that says simply: "This is Jane. Please call me about Smith v. Jones," is not enough. Last minute phone messages or electronic transmissions immediately before the filing of the motion have been held not to satisfy the requirements of a good faith effort to confer.

B. Complying with the Certification Requirement: UTCR 5.010(3) specifies that the certificate of compliance is sufficient if it states either that the parties conferred or contains facts showing good cause for not conferring. Judges have held that the certificate is not sufficient if it simply says: "I made a good faith effort to confer." It must either state that the lawyers actually talked or state the facts showing good cause why they did not. Failure to comply with the certification requirement will result in denial of the motion.

C. Copy of Complaint: The failure to attach a marked copy of the complaint to Rule 21 motions pursuant to UTCR 5.020(2) or motions for leave to amend pleadings pursuant to UTCR 5.070 has resulted in denial of the motions. UTCR 1.090.

D. Bench Copies: The UTCR permits a Court to require delivery of a copy of any electronic filing to the Judge assigned to hear the motion. Multnomah County SLR's specifically require courtesy copies to be delivered for all motions, responses and replies to the assigned Judge. If a Judge does not receive a copy of the material, the hearing may be cancelled. Parties should contact the Judge's Judicial Assistant to determine in what format the Judge prefers to receive the documents, paper or electronic. (If lengthy exhibits are submitted in support of any motion, for example deposition excerpts, those portions of the exhibit being referenced should be underlined or highlighted in the Judge's copy.)

E. Motion for Expedited Hearing: The Court is likely to deny expedited consideration of: (i) motions to compel brought close to trial that could have been brought earlier or (ii) motions for summary judgment brought after the time set by rule or order unless with the prior consent of the parties and the Court.

F. **Proposed Orders**: As required by Multnomah County SLR 5.035, all judgments, orders, and other documents requiring the signature of a specific Judge shall have the Judge's name in the case caption below the document title. Failure to include the Judge's name in the caption of the document, may result in a delay of the document getting signed.

V. DAMAGES

A. **Non-economic Cap**: The Court has not struck the pleading of non-economic damages over the statutory damages cap on authority of ORS 31.710. Post-trial, the Court will determine whether the amount awarded in excess of any statutory cap violates the Oregon Constitution.

B. **Punitive Damages**:

1. **Motion to Amend** – All motions to amend to assert a claim for punitive damages are governed by ORS 31.725, ORCP 23 A, UTCR Chapter 5, and Multnomah County SLR Chapter 5. Motions for additional time to respond or reply to a request to add punitive damages are governed by ORS 31.725(4), ORCP 15 D, and UTCR 1.100.

2. **Discovery Pending Amendment** – A party may not include a claim for punitive damages in its pleading without Court approval. A party may include in its pleading a notice of intent to move to amend to claim punitive damages. While discovery of a party's ability to pay an award of punitive damages is not allowed until a motion to amend is granted per ORS 31.725(5), the Court has allowed parties to conduct discovery on other factual issues relating to the claims for punitive damages once the opposing party has been put on written notice of an intent to move to amend to claim punitive damages.

3. **Evidence in Support** – All evidence submitted must be admissible per ORS 31.725(3); evidence to which an objection is not made is deemed received. Testimony generally is presented through deposition or affidavit; live testimony has not been permitted at the hearing absent extraordinary circumstances and prior Court order. Although the evidence in support of punitive damages must be clear and convincing, that standard of proof "relates to how a jury weighs the evidence at trial, not to how a trial Court assesses the capability of the evidence to establish facts on the motion to amend."

4. **Subsequent Motion** – If the motion to amend to add punitive damages is denied, the plaintiff may file a subsequent motion based on a different factual record (i.e. additional or different facts) without the second motion being deemed one for reconsideration, which are prohibited by Multnomah County SLR 5.045.

5. **Arbitration** – For cases in mandatory arbitration, the arbitrator has the authority to decide any motion to amend to claim punitive damages. However, the arbitrator's decision may be reconsidered by a Judge as part of de novo review under UTCR 13.040(3) and 13.100(1).