

JOSEPHINE COUNTY

CIVIL MOTION CONSENSUS STATEMENT

Periodically, the Circuit Court Judges assigned to civil cases in Josephine County will confer regarding their prior rulings on motions in civil cases. These judges have developed a consensus statement on particular issues that regularly come up in motions made in civil cases.

This consensus statement does not have the force of statute or court rule, and the statements are not binding on any judge, but are a good indication of how Judges handling civil cases will rule on similar issues. The following is not a predetermination of any question presented on the merits to a judge in a particular action. The statement may be of assistance in guiding practitioners as to anticipated rulings on a specific question and may eliminate the time and expense of presenting the issues to the court.

1. Arbitration

A. Motions - Once a case has been transferred to arbitration, all matters are to be heard by the arbitrator. UTCR 13.040(3). A party may show cause (by application to the judge assigned to the case) why a motion should not be decided by the arbitrator.

B. Punitive Damages - Where the damages alleged are less than \$50,000, the subsequent pleading of a punitive damages claim, which results in the prayer exceeding \$50,000, will not exempt a case from mandatory arbitration.

2. Motion Practice

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

1. **"Conferring."** We have held that "to confer" means to talk in person or on the phone.

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, 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. We have held that a 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 facsimile transmissions immediately before the filing of a motion have been held not to satisfy the requirements of a good faith effort to confer. If, after hearing the motion, the court finds that efforts to confer have not been made in good faith, the court may decide the motion against the moving party.

3. **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.

B. Copy of Complaint

The failure to attach a marked copy of the complaint to a Rule 21 motion pursuant to UTCR 5.020(2) may result in denial of the motion. UTCR 1.090.

C. Motions for Reconsideration

Motions for Reconsideration on any pre-trial, trial, or post-trial civil or criminal matter generally will not be considered except as set forth below.

All motions for reconsideration will be directed to the judge who decided the matter sought to be reconsidered. That judge will decide whether to entertain the motion, regardless of whether the moving party has asked for oral argument. If the judge allows, docketing will set the matter for a hearing.

This section will not apply to any statutory motion to modify, set aside, vacate, suppress, or rescind; nor will it obstruct the authority of the assigned trial judge to review any previously-filed motions.

D. Timely Responses

Responses not timely received pursuant to UTCR 5.030 will not be considered.

E. Redundant Matters

Irrelevant or redundant matters which are not ultimate facts to a claim will be stricken. (ORCP 21E)

3. Discovery

A. Motions to Compel

A motion to compel discovery will set out at the beginning of the motion the specific items the moving party seeks to compel a party to produce (ORCP 46A(2)). Simply asserting that the party has not complied with the attached request for production will not satisfy this requirement.

B. Medical Examinations (ORCP 44)

1. The court generally authorizes (1) the recording of an examination by audio tape at the examined party's expense, and (2) the presence of a family member or friend of the examined party at the examination.

2. An examiner's qualifications (curriculum vitae) will be promptly provided to the examined party, upon request.

3. As soon as is reasonably possible before the examination, defendant will provide the examined party with copies of all forms the examiner will require the examined party to complete as part of the examination.

4. No later than fourteen days after the examination, defendant will provide the examined party a copy of any report prepared by the examiner.

5. If requested, prior to the testimony of the examiner or cross examination, the party calling the examiner as a witness will provide the opposing party with copies of the examiner's 1099 and W-2 forms showing the examiner's income for the past two years from performing ORCP 44 examinations or medical record reviews. All such documents provided by the examiner will be retained by the examiner after review by the opposing party.

6. When entitled, a party generally may have an ORCP 44 examination performed by a doctor selected by the requesting party. For an examination taking place in Josephine County, the requesting party may schedule the examination at a reasonable time and place without any payment to the other party.

If the examination is to be scheduled outside Josephine County, the requesting party shall pay travel costs at the rate allowed for mileage by the IRS or shall pay air fare. If the entire travel and examination time will take 4 hours or more, the reasonable costs of meals shall be paid. If the entire travel and examination time will take 8 hours or more, the reasonable costs of meals and lodging will be paid.

Reasonable accommodations as to the type of travel and the scheduling needed by the person to be examined shall be made.

C. Depositions

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 the motion of a party.

2. **Attendance of Others** - Persons other than the parties and their lawyers are generally not allowed to attend a deposition. Upon a showing of need, exceptions have been granted.

3. **Out-of-State Parties** - A 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 telephone with a follow-up personal appearance in Oregon before trial. 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 principle place of business. However, the court has ordered that a defendant must travel to Oregon at either party's expense, to avoid an undue burden and expense and depending upon such circumstances as (a) whether the alleged conduct of the defendant occurred in Oregon, (b) whether defendant was an Oregon resident at the time the claim arose, and (c) whether defendant voluntarily left Oregon after the claim arose.

4. **Videotaping** - Videotaping of discovery depositions have 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 video, so long as the notice requirements are met.

D. Experts

Discovery under ORCP 36B(l) has not been extended to the identity of expert witnesses.

E. 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 36B(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).

F. Social Media

Generally, relevant social media 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 may be relevant to issues in litigation. All evidence in a party's "possession, custody, or control" is subject to the duty to preserve. Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it.

G. 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 allowed 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.

4. Trial Continuances

The court takes into consideration the age of the case, nature of the case, number of previous resets, timeliness of the request, the reason for the request, and whether the parties or the court set the trial date when ruling on motions to continue. Stipulation of the parties is not a sufficient reason for a reset.

A. Motion to Continue – Granted

This is a non-exclusive and non-controlling list of factors that will likely have a motion to continue granted:

1. Serious illness or injury of party, attorney or pivotal witness.
2. Funeral of family or close friend of a party, attorney or pivotal witness.
3. Likelihood that a judge or courtroom may not be available on the scheduled date.

4. Factors which could not reasonably have been anticipated until at or near the time of making the motion.
5. Any other factor which the court may, at its discretion, deem to be important.

B. Motion to Continue – Denied

This is a non-exclusive and non-controlling list of factors that will likely have a motion to continue denied (absent showing of good cause):

1. Failure to complete discovery and depositions.
2. Failure to locate and/or schedule witnesses until shortly before trial.
3. Interference with vacations
4. Failure to prepare for trial.
5. Stipulation of the parties.
6. Factors that were known or should have been anticipated but were not brought to the court's attention until shortly before trial.

C. UTCR Chapter 7 (“Rule 7”) Notices, Dismissals, and Continuances

1. General Rule: The court will routinely allow one continuance for a maximum of 60 days; see SLR 7.015(2). Subsequent motions to continue a pending case, if any, must clearly set forth specific facts establishing good cause.
2. Complex Cases/Construction Defect Cases: If the case has been designated as complex per UTCR 7.030, motions to continue will be reviewed on case-by-case basis.