MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, March 10, 2012, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Jay W. Beattie
Arwen Bird*
Michael Brian
Brooks F. Cooper
Kristen S. David
Jennifer L. Gates
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson
Hon. Lauren S. Holland*
Robert M. Keating
Hon. Eve L. Miller
Hon. David F. Rees
Mark R. Weaver*
Hon. Charles M. Zennaché*

Members Absent:

Eugene H. Buckle
Brian S. Campf
Hon. Robert D. Herndon
Hon. Rives Kistler
Maureen Leonard
Leslie W. O'Leary
Hon. Locke A. Williams

Guests:

David Nebel, Oregon State Bar

Council Staff:

Shari C. Nilsson, Administrative Assistant
Mark A. Peterson, Executive Director

*Appeared by teleconference

Oregon Rules of Civil Procedure (ORCP)/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 9 D • ORCP 9 F • ORCP 17 A • ORCP 27 • ORCP 43 • ORCP 45 • ORCP 55 • ORCP 57 • ORCP 68	• ORCP 1 E • ORCP 7 • ORCP 18 A • ORCP 21 • ORCP 21 G • ORCP 24 A • ORCP 46 • ORCP 47 D • ORCP 53 • ORCP 54 E • ORCP 69 • ORCP 69 A • ORCP 81-85 • ORCP 87 A		*ORCP 45

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at 9:30 a.m.

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of February 4, 2012, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft February 4, 2012, minutes (Appendix A) which had been previously circulated to the members. A motion was made to approve the minutes, the motion was seconded, a voice vote was taken, and the minutes were unanimously approved.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Ms. Nilsson described the inquiries received by the Council and the activity on the website since the last Council meeting. She noted that the statistics were consistent with those from the previous month.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson reported that he had edited Ms. David's prior draft e-mail and sent it out to the Council listserve. He stated that he hoped that all Council members had a chance to send an e-mail update to legislator contacts. Prof. Peterson also stated that he will draft another update to report the events of today's meeting.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

1. ORCP 9 F, G: Service of Pleadings and Correspondence Via E-mail (Ms. David)

Ms. David reported that there has not been a great deal of activity regarding this issue. She noted that the Uniform Trial Court Rules (UTCR) Committee is still working on this issue, and that the latest meeting of the E-Court Task Force was cancelled. Prof. Peterson observed that e-court did receive funding from the Legislature. Mr. Nebel stated that e-court had received $13 million in new bonding authority in addition to the $6 million in bonds held from 2011. He stated that these funds are adequate to roll out e-court according to the schedule that is already set. Mr. Nebel observed that e-court will be fully implemented in Yamhill County in June of 2012. Prof. Peterson asked if Ms. David was aware of when any

rule changes will be made by the UTCR Committee. Ms. David stated that UTCR 21 and 22 will govern procedures for e-court, and that the UTCR Committee is still making changes and accepting comments. She noted that the question is whether there will be anything in the ORCP that needs to be amended or changed as a result of changes to the UTCR. She stated that the committee is monitoring that issue and that she anticipates that a small change may need to be made to ORCP 9 F or D in September.

2. ORCP 17 A: Original Signature on Pleadings (Ms. O'Leary)

Ms. O'Leary was unable to attend the meeting. Judge Holland stated that the committee had met and wanted to bring the issue to the full Council for its feedback. She noted that all committee members are in agreement that, once e-filing becomes *de rigeur*, electronic signatures will be standard. She stated that the amendment the committee is considering states: "The form of signature for conventional filings may be electronic, consistent with the provisions for electronic signatures set forth in UTCR 21.090(2)." Judge Holland noted that she had asked the Lane County bench for input on the issue and had received a wide variety of responses. She stated that some concerns raised were whether there is a precedent for an ORCP to refer to a specific UTCR, as well as issues of proof of identity and intent. Judge Miller stated that she also sent the proposed draft to the Clackamas County bench and received just two responses: one which approved the amendment without hesitation; and one asking questions about how it related to e-court. She observed that she is in favor of the draft language, but that she wants to address all of the concerns raised by the Lane County bench.

Prof. Peterson stated that, two biennia ago, the Council had included a reference to UTCR 2.010 in the amendment of ORCP 69 A. He stated that the Council did this because that particular UTCR has been around for a while and is not likely to materially change, and that referring to the UTCR was an easy way to emphasize that the document needs to be in the form of a pleading. He stated that, to his knowledge, this is the only place that a UTCR is referenced in the ORCP. Judge Holland wondered whether the questions raised by her bench are unique or whether others have the same concerns. Judge Miller noted that one concern that was raised was about maintaining an original signature somewhere. Judge Holland replied that the federal rules only address maintaining an original signature for parties who are not registered users of the system.

Judge Holland concluded by saying that the committee welcomes input from Council members, and would be happy to include any members in its next meeting.

3. ORCP 19 B, 24: Affirmative Defenses and Compulsory Counterclaims (Ms. Leonard)

Prof. Peterson noted that there is a proposal for amendment for ORCP 19 B, but

that the Council had decided at its last meeting to table discussion regarding compulsory counterclaims. Mr. Cooper stated that the proposed amendment to ORCP 19 is ready to be voted on at the September meeting.

4. ORCP 27 B: Guardians Ad Litem (Mr. Cooper)

Mr. Cooper shared his committee's draft rule change (Appendix B) with the Council. He noted that it is a major change and that the impetus for the amendment was that the bench is seeing frequent abuses of the rule. Mr. Cooper stated that sections A and B are the same as the current rule but that, starting with section C, there is a wholesale revision. He noted that there is a notice, a waiting period, and an opportunity to object and to have a hearing. He stated that he imported the language regarding those who are entitled to notice from Chapter 125 of the Oregon Revised Statutes. Judge Miller observed that, if the concern is dissipation of funds by a bad actor, the rule should include the ability to freeze the assets on a provisional process, restraining order basis. She also noted that, if someone objects, there should be an expedited hearing. Judge Miller explained that, while this puts a lot of pressure on the courts, there is a need to be particularly sensitive to timelines in these cases. Mr. Cooper stated that he had included a new section F which states that a court shall hold a hearing as soon as practicable after objections are filed. Judge Miller stated that, in her opinion, this is not specific enough. She stated that docket clerks do not always recognize the need for an expedited hearing and sometimes cases are unnecessarily scheduled many months later. Mr. Cooper asked members of the bench to weigh in on whether it would cause problems in their dockets if language such as, "as soon as practical but not fewer than 21 days," were to be used.

Judge Zennaché stated that he is concerned about setting a mandatory time frame, since court budgets continue to be cut and it is becoming harder to get things done in a timely fashion. He suggested talking to the Oregon Judicial Department (OJD) and asking whether twenty-one days would be a reasonable time frame and what the cost would be to try to meet this need. Judge Zennaché noted that the "as soon as practicable" language might allow each judicial district to adopt an SLR (supplemental local rule) that might prioritize certain types of actions vs. other cases. Mr. Cooper stated that he will talk to the OJD about budget numbers, as well as e-mail the presiding judge of every judicial district to ask whether a mandatory timeline or individual SLRs would work better.

Mr. Brian stated that he often has no idea how long it will take once he files a motion to appoint a guardian ad litem. Mr. Cooper noted that section G includes the ability to waive or modify the scheduling of a hearing, or to make a temporary appointment, for good cause shown. He observed that, in cases where a statute of limitations is close to expiring, a party may present an ex parte motion and ask that a guardian be appointed right away with notice to be given later. He stated that this will allow cases to be commenced without delay if the statute of limitations is about to run.

Ms. David wondered about the Council's policy regarding cross-referencing statutes in the ORCP. She noted the list of entities copied and pasted from the statute in section D, and expressed concern that these references may not remain accurate due to name changes and/or agency reorganizations. She observed that the Council does reference certain entities in ORCP 7 and 69, but asked whether there is a policy which would provide that the ORCP are succinct but yet direct attorneys to do what they need to do. Prof. Peterson stated that, when amendments are drafted, Council staff does a search to see if any other ORCP will be impacted and also does a search for statutory references. He stated that name changes or reorganizations of agencies would not necessarily be caught during this process. Judge Armstrong observed that language could be included which states, "or its successor or equivalent."

Judge Miller asked whether just referencing the statute would be appropriate. Mr. Cooper stated that he did not do that because the existing statute does not read well grammatically and is confusing. Ms. David stated that it is important to help guide practitioners, but she has a concern that citing language from statutes might make the ORCP lengthy and unwieldy. Mr. Beattie asked whether the persons identified are entitled to receive notice under a statute. Mr. Cooper stated that they are. Mr. Beattie asked whether the problem could be remedied by using language such as, "any person entitled to receive notice under state and federal statute." Mr. Cooper reiterated that ORS Chapter 125 is not the most cogently written statute and that this is why he chose to list the parties who are required to receive notice. He suggested that the committee draft two different versions with different language for this section for the next Council meeting, and also provide the Council with ORS Chapter 125 so that the Council can see the language from which he drew his changes.

Mr. Brian asked about subsection (c) of section E, which states that the person for whom the guardian ad litem is sought may object by telephoning the clerk. Mr. Cooper replied that this is not a new provision and that ORS Chapter 125 already provides for objections by telephone for guardianships and conservatorships since the respondent may be so sufficiently impaired that he or she is unable to respond in writing. Judge Holland stated that it is only the person who is the subject of the protective proceeding who is entitled to do this by telephone and, in such cases, the court will appoint an attorney. Both Mr. Cooper and Judge Holland emphasized that court clerks are familiar with this procedure and that it will not be placing any additional burden on clerks.

5. ORCP 39 C(6): Require Designations of the Deponent in Advance of the Deposition (Ms. Gates)

Ms. Gates reported that the two versions of revised drafts for ORCP 39 C(6) were not included in the meeting packet. Ms. Nilsson apologized for the oversight and stated that the drafts will be included for the next meeting so that they may be discussed and a preliminary vote on whether to publish an amendment can be taken.

6. ORCP 43: Electronic Discovery (Ms. David)

Ms. David reported that her committee still has not heard any comments about the Council's amendment to Rule 43 which became effective January 2, 2012. She noted that there continue to be numerous continuing legal education seminars on e-discovery and that one of the issues currently being discussed is the new ethical rule regarding metadata in electronic documents. She stated that, if an attorney produces an electronic document to the other side and it contains metadata, the presumption is that the attorney intended to provide that information. She noted that the Professional Liability Fund (PLF) presented a seminar regarding e-discovery, with the first 30 minutes devoted to explaining metadata, the next 30 minutes explaining what an attorney's duty is now, and the last 30 minutes teaching staff how to scrub this metadata from documents prior to producing them. Ms. David observed that the presumption is that attorneys bear the burden of knowing what they are doing, and that this can be daunting for attorneys who are unversed in technology.

Ms. Gates stated that she attended the PLF seminar and that her take-away was that an attorney needs to evaluate whether the sender of the metadata was technologically savvy and, if it is determined that he or she was, the attorney can assume that the opposing counsel intended to send the data and use it. However, if the attorney evaluates that the sender was not savvy, he or she cannot use the metadata. She stated that she believes that this is a poor standard and feels that, if an attorney receives something that looks like it may be work product or protected under attorney-client privilege, the attorney should call the opposing attorney. Judge Armstrong observed that this may have an effect on PLF premiums. Mr. Bachofner stated that he is concerned because the metadata issue may not be limited to producing documents electronically but, rather, attorneys may start examining e-mails for metadata also. He stated that he does not feel that this is the way attorneys in Oregon want to do business. Mr. Cooper noted that e-mail programs can be set to send plain text only and this would eliminate that concern. Judge Miller stated that not everyone knows about this. She raised the concern that, if an attorney does scrub a document of metadata and then produces it, the attorney may not be fulfilling his or her duty under the e-discovery rules. She noted that, in criminal cases, this is not permitted because it would be

removing information. She wondered about whether a rule change specifying that attorneys need to ask for the metadata or else it will not be provided.

Ms. Gates observed that documents being filed in the federal system are not being automatically scrubbed of metadata, even though attorneys may assume that they are. Mr. Cooper stated that his practice is to print to PDF before sending. Ms. David stated that the presumption for e-filing is that attorneys will print to PDF. She noted that problems arise when attorneys send documents in Word or Word Perfect format. Ms. David observed that it may be that, for example, in a contract case the entire case will fall on whether a word was changed from the draft version to the final version and the attorneys will need to go to the court to ask specifically for the version of the contract which contains the metadata so that the changes can be seen. She noted that, more and more, attorneys do not send paper letters but, rather, send e-mails with documents attached, and that we will see more of these issues arising in the near future. Mr. Cooper stated that he recently received a complaint from an attorney which included metadata, and that he could see from that metadata that the attorney had included unflattering personal comments about Mr. Cooper while drafting the complaint. He asked whether it is worth considering whether the default should be that metadata is produced unless an objection is made, or whether an attorney should produce only what is asked for. In the request for production. Mr. Beattie stated that the Council may wish to address metadata as a work product issue. Mr. Cooper stated that in many cases he is interested in internal notes and documents which were created pre-filing and pre-litigation and contain no work product. He posited that the rule should presume that a party will only get what the party asks for and, if the party wants metadata, it needs to specify that. Judge Holland agreed. Ms. David stated that she believes that ORCP 43 E already allows attorneys to specify the format in which information should be produced, but stated that the committee will have a teleconference and discuss the issue further.

7. ORCP 44/55: Medical Examinations/Medical Records (Mr. Keating)

Mr. Keating reported that, due to his involvement in a lengthy trial, he had been unable to arrange a committee meeting. He stated that he will do so before the next Council meeting.

Mr. Bachofner stated that an issue had arisen on the Oregon Association of Defense Counsel's listserve regarding ORCP 44 and that he agreed to bring the issue to the Council. He stated that the issue was a defense attorney subpoenaing medical records to trial less than fourteen days before trial and the records custodian refusing to comply because there was no order and the custodian did not receive fourteen days' advance notice. He observed that the plaintiff's attorney refused to waive the fourteen days. Ms. David suggested moving for an ex parte order to shorten or enlarge the time. Mr. Bachofner noted that some

courts would not be able to issue such an order before the trial. Mr. Keating stated that he has never experienced this problem and that, in the vast majority of cases, the parties agree on what records are coming in and stipulate to their authenticity. Mr. Cooper stated that it seems that those in the bar are hearing from records custodians that they are reading the rule to require non-compliance without an order or proof of a fourteen day waiting period that has elapsed for trial subpoenas. He stated that, upon further reading, the rule does not say what he always thought it said and that perhaps the Council needs to consider making it explicit that trial subpoenas are different from discovery subpoenas. Mr. Beattie noted that the problem comes up with some frequency when it is discovered at the last minute that there is a doctor or care provider of whom counsel was previously unaware. Mr. Keating stated that the committee will look into this issue.

8. ORCP 47: Summary Judgment - Multiple Issues (Mr. Keating)

Mr. Keating again reported that, due to his involvement in a lengthy trial, he had been unable to arrange a committee meeting. He stated that he will do so before the next Council meeting.

9. ORCP 54 A: Amend to Conform with FRCP 41(a) (Mr. Weaver)

Mr. Weaver noted that the issue under consideration is whether to make the rule concerning voluntary dismissal track more with the federal rule. He stated that the committee has found that the issue was extensively considered when the Council initially drafted the ORCP. Mr. Weaver stated that, prior to the inception of the ORCP, there was an Oregon statute which governed voluntary dismissal, and that the newly formed Council voted to make Rule 54 A consistent with the statute and rejected proposals to federalize the rule. Prof. Peterson stated that he will research the minutes and memoranda regarding the history of the Council's decision so that the committee can decide whether this issue is worthy of reconsideration.

10. ORCP 57 F: Alternate Jurors (Ms. O'Leary)

Ms. O'Leary was not present at the meeting. Judge Zennaché reported that the draft provided to Council members (Appendix C) was not the most recent committee draft and that there was a more recent draft which incorporated some changes suggested by Judge Armstrong. He stated that he will provide that draft for the Council. Judge Zennaché stated that the draft is intended to address the issue of giving the trial court the discretion to not necessarily discharge alternate jurors at the beginning of the jury's deliberation and to allow the court to appoint an alternate juror to replace a juror who is unable to complete the deliberations before the jury reaches a verdict or is deadlocked. Judge Zennaché asked about

the correct spelling of the word "impanelled." Ms. Nilsson stated that she has seen it spelled "impaneled" as well as "empanelled" and "empaneled." Ms. Nilsson also noted that she and Prof. Peterson have found some grammatical and punctuation issues with the existing language of the rule which they will inform the committee about so that the rule can be improved overall when the amendment to section F is made.

Mr. Beattie asked whether the intent is to have alternate jurors go home and call them at home if they are needed. Judge Zennaché stated that this is his current practice. Judge Miller noted that Judge Susie Norby's original proposal was to allow alternate jurors to sit quietly during jury deliberations and not to participate. She stated that the committee decided that either having the alternates be present in the courthouse or stay in the jury deliberation room were impractical ideas. Judge Miller stated that she has some hesitation about asking the jurors to begin their deliberations anew when an alternate replaces a juror because it may be asking too much of them. Judge Zennaché disagreed and stated that he is absolutely advocating for this. Mr. Bachofner wondered how it would be possible not to have the jury go through the deliberative process again in order to preserve the nine out of twelve jurors necessary to reach a verdict. Judge Armstrong stated that he does not see any way not to have the jury begin deliberations anew when an alternate joins, however awkward it might be, and stated that it is not too different from what would happen if the jury needed to be re-instructed and begin deliberating again.

Mr. Cooper asked whether the proposal is ready to have a preliminary vote on whether to publish next month. Judge Zennaché stated that the problem was that only three committee members were able to attend the last meeting, so he would like to have another meeting first and reach a clear consensus, but he thinks the committee can do that by April. Judge Miller asked that those Council members who are members of the Oregon Trial Lawyers Association and Oregon Association of Defense Council circulate the draft to their members for comment. Judge Zennaché asked that Council members wait until he sends them the draft with Judge Armstrong's changes. Ms. Nilsson asked him to send it to her for formatting and circulation to members.

Judge Gerking asked how judges choose which alternate to use in replacing a juror who is no longer able to serve. Judge Miller stated that she would pick the first alternate, or number thirteen. She asked what would happen if there were nine jurors who agreed on liability, all nine continued to be ready to serve and agreed on damages, but one of the three others was not able to serve. Judge Rees stated that the whole idea of the deliberative process is that you put twelve heads together. He observed that it may not take the jury very long because the 9-3 split may still exist, but that the new juror might have a view of the evidence that no one else thought of, or a different spin on an issue, so deliberations should be re-

opened. Mr. Brian stated that the goal is to avoid a mistrial, and to make the system more efficient. Judge Miller stated that she would be very sensitive to whether both sides wanted a mistrial or if only one side felt strongly about it. She stated that she would accept the amendment as long as there was no prohibition on declaring a mistrial. Judge Armstrong stated that one of his revisions was to remove the word "required." Mr. Bachofner agreed with Judge Miller and stated that judges are in the best position to determine whether someone has received a fair trial.

Mr. Keating stated that his preference would be that the judge make the decision. He stated that he has issues with having a deliberation where a juror was not present for a portion of it. He stated that there are practical problems when there are exactly nine jurors who have found liability and, in the middle of damage discussions, one of those nine jurors is lost. Mr. Keating noted that, whatever is decided, it is most efficient to give the trial judge the discretion to make the final decision. Mr. Bachofner agreed that there is a big difference between a juror being unable to serve three hours into a trial vs. three days into a trial, and a judge is in the best position to consider whether the trial can continue with an alternate.

Judge Rees noted that his procedure, if both lawyers agree, is to not designate an alternate before trial but, rather, to seat thirteen jurors and then draw the name of the alternate after closing arguments. Judge Gerking stated that he does the same thing. Judge Rees noted that this procedure is technically outside of ORCP 57 F because each side gets a certain number of peremptory challenges per alternate juror and can only use those peremptory challenges on alternate jurors. He stated that he likes his approach because he does not like creating two classes of jurors. He asked whether the committee had considered an amendment which would allow judges discretion in how they choose alternate jurors. Judge Miller stated that the committee had discussed this idea but had decided against it. Judge Rees noted that, technically speaking, his approach is not allowed because of the last sentence of ORCP 57 F but stated that, if that sentence were to be eliminated, his approach would be authorized. Judge Holland warned against eliminating that sentence without careful thought. She stated that she lets the alternates know they are alternates and that, in her experience, there has been no issue. She stated that she is reluctant to eliminate that sentence and have attorneys tell her during voir dire that they can carry over their peremptory challenges for the original twelve jurors. Judge Hodson stated that he uses the same procedure as Judge Holland, but that he has no problem with revising the rule to allow judges flexibility without having to get a stipulation from the parties. Judge Gerking agreed that it would be good to make the rule flexible enough to allow either method. Judge Zennaché also liked the idea of revising the rule to make it more flexible.

Prof. Peterson wondered whether it would be possible for an alternate juror to

watch deliberations from another room via video feed in order to avoid participating in deliberations, yet avoid the need for beginning deliberations completely anew if a juror needed to be replaced. Mr. Bachofner raised the issue of the privacy of jury deliberations and concern that the video feed could somehow be tapped into. Judge Armstrong worried that this would be a distortion of the deliberation process, with the jury knowing that someone is watching. He also expressed concern that the alternate, knowing that he or she is watching and not participating, would see his or her role as very different. Judge Rees suggested that the committee could contact a jury research firm to check on what the group dynamic is when a new person is put in the jury room. He stated that he does not necessarily feel that it is a bad process to begin deliberations anew, even though it feels somewhat artificial, because re-examining what the remaining jury members have already gone over may cause them to look at the facts in a different way. Mr. Beattie observed that litigants can also make a to whether to proceed with 11 jurors or to accept the alternate.

11. ORCP 59 H(1): Exceptions to Jury Instructions (Ms. Leonard)

Ms. Leonard was unable to attend the meeting. Judge Armstrong stated that the committee will meet and report at the next Council meeting.

12. ORCP 68: Cost Bills - Multiple Issues (Ms. David) (Appendix D)

Ms. David reported that the committee is not yet done with draft amendments to the rule. She stated that the committee has so far created a more steady process: a prevailing party files a statement for attorney fees and costs; the other party may object and present affidavits, declarations, and supporting information; and the prevailing party can file a response to those objections and include affidavits, declarations, and supporting information. Ms. David also noted that the amendment makes clear that a request for oral argument must be made somewhere in the objection or the response, and that no hearing may be held unless a party requests one in the caption. She observed that there was some concern about taking away the court's discretion to order a hearing on its own motion in the event of any irregularities that the court may wish to examine, so the committee added language which allows the court to do this. Prof. Peterson pointed out that the rule change would require parties to file their objection or response with supporting materials so that a party does not arrive at a hearing and get confronted with material never before seen. He noted that material may still be supplemented, but that this would require approval of the court. Ms. David stated that the committee will likely address two more issues with the rule: the difference between costs and disbursements; and the difference between general and special findings.

Mr. Cooper stated that Mike Schmidt of the Oregon State Bar's Elderlaw Section

has proposed a significant revision to ORS 125.097, which governs probate and protective proceedings. He stated that both he and Judge Holland believe that ORCP 68 is a poor fit for probate and protective proceedings, and would likely recommend that language be added to the end of ORCP 68 which clarifies that ORCP 68 does not apply to requests for fees under ORS 125.097 and its companion probate statute. Judge Holland stated that she believed the Council should wait until the ORS change has been finalized so that we can be certain whether the statute and ORCP conflict. Mr. Cooper stated that, before the April Council meeting, he will talk to Mr. Schmidt regarding the timeline for his legislation and how likely it is to have political support. Mr. Nebel stated that the Elderlaw Section's proposal is due at the Bar by April 2, 2012, so it should be in final form by then.

Mr. Beattie asked whether it would be worthwhile to have a definition of prevailing party because, in cases where there are cross claims and counterclaims and parties who win and lose these, it can be confusing. Judge Miller stated that she believes there is a case which clarifies this. Judge Armstrong stated that this is a confusing issue and he is not sure there is any way to clarify it. Judge Rees stated that attempting to insert these definitions into the ORCP would lead us into an area of substantive change.

Ms. David stated that the current proposal by the Elderlaw Section specifically includes language regarding"notwithstanding ORCP 68 C (4)" about hearings and "notwithstanding ORCP 68 C(2)(a)" about alleging a basis for the award. She noted that, since the Elderlaw Section seems to be selective in what it does not want to exclude, there may be some other aspects of ORCP 68 that the Section still does wish to maintain. She stated that the committee hesitated to make an ORCP change first but, rather, wants to see the proposed amendments to ORS Chapter 125. Mr. Cooper stated that both committees have the same goal of making that area of law efficient, and that we need to determine the best way of doing it while causing the least amount of inconvenience. Prof. Peterson observed that ORCP 68 C(4)(d) gives the court discretion on whether to award fees and in what amount. He stated that this may be useful in curbing the abuses which judges are reporting in the probate and protective proceedings arena, whereas the proposed changes to ORS Chapter 125 would not necessarily be as helpful in this regard. Mr. Cooper asked the committee to wait to hear back from him after his discussion with Mr. Schmidt before making any changes to ORCP 68 regarding probate and protective proceedings.

VI. New Business (Mr. Cooper)

A. ORCP 45: Requests for Admission (Mr. Bachofner)

Mr. Bachofner stated that attorney Tom Spooner had asked him to bring an issue to the Council. He stated that Mr. Spooner has had the experience of attorneys sending out requests for admissions with the summons and complaint, and that the request for production and request for admissions are being drafted as one document. Mr. Bachofner stated that there are often delays before people get an attorney and that, by the time an attorney is obtained, the time in which to object to or respond to requests for admission may have already passed. Mr. Cooper stated that the rule provides that requests for admission cannot be propounded or served until after commencement of an action. He noted that a civil action is not commenced until it is filed and served and that the time does not start to run until service occurs. Mr. Bachofner stated that, for whatever reason, by the time a defense attorney gets the file, the time for responding to requests for admission may be close to expiring or may have already passed. Ms. David observed that, at that point, the larger issue is that the defendant had 30 days to file an appearance and that this time has also passed.

Mr. Bachofner stated that Mr. Spooner had asked him to bring up to the Council whether there should be some kind of rule stating that the time for responding to or objecting to requests for admission should be measured after a party is represented by counsel or after they have indicated they are going to be representing themselves pro se. He stated that this would avoid a trap for the unwary. Mr. Cooper observed that ORCP 45 B states that a defendant has 45 days after service in which to answer requests for production. He stated that a defendant can serve Rule 45 requests on a plaintiff on the day the defendant knows a lawsuit has been commenced, and that a plaintiff has 30 days in which to respond. By contrast, a defendant always has 45 days, which is 15 days beyond the default time. So, if a defendant gets served and does not tender to the insurer, would the issue not be setting aside a default and then dealing with the Rule 45 issue? Mr. Beattie stated that an insured defendant may know about a suit and get some portion of the suit documents to insurance counsel, who will then send out a Rule 69 A letter asking opposing counsel not to take a default, so time is ticking and the insurance counsel does not even know about the request for admissions. Ms. David stated that, theoretically, the Oregon Judicial Information Network (OJIN) would show that a request for admissions had been filed. Mr. Beattie observed that OJIN is not always up to date, especially given the current lack of court funding.

Ms. David stated that, if the Council is going to look at changing the time increments in the ORCP to multiples of seven next biennium, it might think about changing the time in this rule from 15 to 21 days to give a little more time. She noted that, practically speaking, as the court system becomes busier, there may be a few other rules where some additional time can be given to get things done by changing time increments. She stated that she is not aware of any other way to solve the problem at hand. Mr.

Bachofner asked if there is something the Council can do to make the time run from when counsel gets involved, since the goal is not to trap people but, rather, to move cases toward resolution. He asked whether there is a downside to waiting until the plaintiff knows that a defendant is represented or knows that the defendant wants to represent himself or herself.

Mr. Cooper observed that this issue has generated enough interest that the Council believes that it is worth further exploration but, given the biennium schedule and the late point in that schedule, we likely do not have enough time to give it proper consideration. Mr. Bachofner will let Mr. Spooner know that the Council will keep the issue on its agenda for next biennium.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:20 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 4, 2012, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, OR 97224

Members Present:

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Hon. Charles M. Zennaché*

*Appeared by teleconference

Members Absent:

Jay W. Beattie
Leslie W. O'Leary
Hon. David F. Rees
Mark R. Weaver

Guests:

David Nebel, Oregon State Bar

Council Staff:

Shari C. Nilsson, Administrative Assistant
Mark A. Peterson, Executive Director

Oregon Rules of Civil Procedure (ORCP)/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
• ORCP 19 B • ORCP 24 • ORCP 39 C(6) • ORCP 44 • ORCP 55 • ORCP 68	• ORCP 1 E • ORCP 7 • ORCP 18 A • ORCP 21 • ORCP 21 G • ORCP 24 A • ORCP 46 • ORCP 47 D • ORCP 53 • ORCP 54 E • ORCP 69 • ORCP 69 A • ORCP 81-85 • ORCP 87 A		

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at 9:30 a.m.

II. Introduction of Guests

There were no guests present who required introduction.

III. Approval of January 7, 2011, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft January 7, 2012, minutes (Appendix A) which had been previously circulated to the members. Ms. David requested that a change be made on page two to reflect that it is Mr. Cooper who is a member of the Oregon Trial Lawyers Association and not she. A motion was made to approve the minutes as corrected, the motion was seconded, a voice vote was taken, and the corrected minutes were unanimously approved.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly went over the website report (Appendix B) and described the inquiries received by the Council and the activity on the website since the last Council meeting. She noted that the statistics were slightly higher than those from the previous month.

B. Legislative Contacts (Ms. David)

Ms. David stated that, due to her busy schedule and active participation on other Council committees, she would like another Council member to take over the responsibility of drafting e-mails to legislators after each Council meeting. Judge Gerking emphasized the importance of reaching out to legislators now, while they are in session. Prof. Peterson stated that, since no other Council member was currently available to volunteer, he and Ms. Nilsson can temporarily take over this responsibility. Mr. Cooper noted that the issue can be revisited at the next Council meeting in March.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

1. ORCP 9 F, G: Service of Pleadings and Correspondence Via E-mail (Ms. David)

Ms. David stated that the committee is still reviewing the issues in question in conjunction with the Uniform Trial Court Rules (UTCR) committee and the implementation of e-court in Oregon.

2. ORCP 17 A: Original Signature on Pleadings (Ms. O'Leary)

Ms. O'Leary was not present at the meeting. Judge Holland stated that the committee had not met since the last Council meeting, but that the committee members had generally felt that the issue would be dealt with by the UTCR Committee during the transition to e-court and that the Council should wait until that time to make any corresponding changes to the ORCP. She stated that the committee will report to the Council at the next meeting.

Prof. Peterson reminded the Council that he had suggested adding language to the ORCP this biennium, similar to the change made to ORCP 1 last biennium, because he feels that it is important that the ORCP and UTCR are not in conflict in any way, and that the ORCP should be flexible enough for whatever requirements the e-court may bring.

3. ORCP 19 B, 24: Affirmative Defenses and Compulsory Counterclaims (Ms. Leonard) (Appendix C)

Ms. Leonard stated that the committee is recommending making one change to ORCP 19 B: to change the phrase *res judicata* to "claim preclusion and issue preclusion." She noted that one concern of the committee was that *res judicata* may carry a broader meaning than just those two issues. Mr. Cooper stated that there is case law from the Supreme Court that states that those terms should be used rather than "*res judicata*."

Ms. Leonard stated that the committee still wished to hear from the full Council about whether to pursue sending a survey to bench and bar regarding the compulsory counterclaim issue. She observed that the issue will likely create some excitement. Ms. David noted that a positive aspect of requiring compulsory counterclaims is that it treats plaintiffs and defendants the same in requiring that all claims be filed. Ms. David stated that some concerns the committee has are: defense coverage issues in attorney negligence (and other) claims; whether the issue is substantive v. procedural; the appearance that the Council is federalizing the ORCP.

Judge Miller asked how attorneys who are representing an insurance company handles a situation where he client wishes to bring additional claims. Mr. Bachofner clarified that the attorney is representing the client, but is being paid by the insurance company. Ms. David explained that she encourages clients to obtain their own counsel, and that she meets with them to discuss the pros and cons of bringing all claims at once. She stated that sometimes she would prefer to keep certain issues separate and that it is a strategic determination as to whether to bring them together. Judge Gerking remarked that it can be ethically hazardous to do so. Judge Miller observed that it runs counter to what she thinks is in the best interests of an individual who has an insurance policy to make them bring a claim at a later time. Ms. David emphasized that no attorney is forcing a client to make

that decision. Mr. Bachofner stated that this is why he feels that it is important to *not* have a compulsory counterclaim, because clients can either choose to bring additional claims immediately or down the line after the insurance company has incurred the cost of having the liability determined. Judge Miller stated that she can see the advantages to bringing multiple claims at once, but that the client would have to hire separate counsel. Ms. David stated that the client would have to do that anyway. She noted that she never tells a client that they cannot bring a claim, but that she does make recommendations. Ms. David raised the example of a case with a one-year statute of limitations being required to be filed concurrently with another case that has a six-year statute of limitations and wondered whether this requirement would turn the issue into a substantive rather than a procedural one by effectively shortening the longer statute of limitations.

Mr. Bachofner noted that, if liability is established in the insurance company case, a client may have an easier time finding an attorney to take their additional claim because it will be just a matter of determining what the damages are. He stated that, if the client loses, they know they do not have to pay the costs, and they have not incurred the expense to make their own claim. Mr. Bachofner explained that, in essence, the client gets the benefit of seeing how everything turns out without incurring their own costs. Judge Herndon stated that state government and courts are likely to get smaller, and there is some advantage to having issues resolved in fewer cases rather than more cases. He noted, however, that he is concerned about the notion that the issue may become substantive by perhaps shortening the statute of limitations of some claims. Ms. David addressed Judge Herndon's first concern by stating that a number of claims get resolved through settlement anyway, so whether these additional claims are filed or whether they are retained to file separately may not prove to be too much of a strain on the judicial system.

Mr. Cooper asked whether anyone had ever had the circumstance where they were willing to segregate claims and work for both the insurance company and the client on a separate claim. Ms. David stated that there are a lot of ethical considerations and that she had never done it herself. Mr. Keating expressed the opinion that making counterclaims compulsory creates many unnecessary problems, and that the client has every right the client would have had if the client had not purchased the insurance policy to bring in a private lawyer. Mr. Cooper asked Mr. Keating whether, if he had a physician-client who had the means to retain private counsel, would compulsory counterclaims put him in the position where the physician might make an abuse of civil process claim or something similar which he, as a defense lawyer, believes will muddy the picture he would like to present to the jury. Mr. Keating agreed that this could muck things up. Mr. Bachofner noted that another problem with representing a client for both cases is how to bill, since the insurance company will ask which claim applies to each charge. Ms. David stated that she has been brought in on malpractice cases where an attorney has sued a client for fees and the client has filed a malpractice counterclaim. She stated that the attorney in such cases has to be very careful and structured about co-representing the attorney-client and separating out the

attorney fees case and the malpractice claim. She stated that it can be done but that, when it is a straight malpractice case, she generally does not want to bring attorney fees or any other issue into it, but that is just her preference. Mr. Cooper noted that, with a mandatory counterclaim, in some cases we may be forcing attorneys to drop years off of a statute of limitations, or to make a tactical call that changes the facts that are relevant and admissible in front of the jury. He worried that this was substantive. Ms. David stated that this is also her concern. She also wondered what the remedy would be if an attorney failed to bring a compulsory counterclaim. Judge Gerking expressed concern that requiring compulsory counterclaims would expand attorney exposure to malpractice. Judge Herndon felt that such an amendment would be too substantive and suggested tabling the consideration of the issue. He made a motion to table the issue. The motion passed by voice vote.

4. ORCP 27 B: Guardians Ad Litem (Mr. Cooper)

Mr. Cooper stated that he has a draft of language for an amendment which he has given to the committee for review. He will bring the language to the Council at the March meeting.

5. ORCP 39 C(6): Require Designations of the Deponent in Advance of the Deposition (Ms. Gates)

Ms. Gates reiterated one concern that was brought to the committee: that some officers and directors of corporations are using the language "other persons who consent to testify" in ORCP 39 C(6) to attempt to avoid testifying by stating that no one consented. She noted that the language in the federal rule is clearer, but that the committee felt that the problem is not occurring enough to warrant a change. A brief survey of judges present at the meeting revealed that this is not a problem that occurs with any regularity on their dockets.

Ms. Gates stated that the other issue with which the committee was dealing was whether there should be a time requirement for the party to be deposed to designate which officer will testify as to what specified topics. She stated one con to this is that it is sometimes hard to know in advance who will testify on each specified topic because it is a short two week window. She stated that the other con was that the rule clearly provides for this anyway and that the insertion of a time requirement may deprive the noticing party of what they are entitled to under the rule. Mr. Bachofner noted, however, that sometimes non-parties are being subpoenaed and to force them to identify the identity of the deponent well ahead of the deposition can be onerous. He also stated that there may be situations in which an attorney may not know, for some reason, who is going to agree to do it, or that someone who has agreed to do it may become unavailable at the last moment, so the committee wanted to leave some opening for that. Ms.

Gates stated that the committee had brought proposed draft language to the Council as outlined in Appendix D. She stated that the language encourages parties to provide more than 24 hours' notice but that the floor is 24 hours. Ms. Gates observed that the committee had discussed time periods between 24 hours and 3 days.

Mr. Campf asked whether the rule change contemplates providing notice of the deponent's name, to which Ms. Gates replied yes. Mr. Campf stated that he felt that the proposed rule change is not clear that it requires disclosure of the name. He suggested making the language clearer. Mr. Campf also noted that 24 hours is probably not enough time, in his opinion, since many times attorneys are taking depositions out of town and it does not help in those cases to get the name the day before. Judge Gerking stated that he believed that the deposing attorney would already have a list of questions but it would be efficient to know who will testify to avoid needlessly repeating questions. Mr. Campf stated that, when he is deposing a witness, he sometimes learns that the witness has knowledge in areas other than the subject which is designated in the subpoena, and he will make an agreement with the opposing attorney to allow personal knowledge questions to be asked. He observed that knowing the name of the deponent in advance might be helpful in this situation, and he stated that he feels that five days is a more appropriate time frame.

Mr. Keating stated that his problem with requiring designation of the name is that every time he has done a deposition he ends up fighting with the lawyer taking the deposition over what questions can be asked and that, from a defense point of view, this is important so that the witness can be prepared. He stated that it is his practice to give the name of the person who will testify, but that often that person is then served with a general subpoena a few days before the corporate deposition. Mr. Keating reiterated that he does not feel that it is necessary to require that the name be revealed. Mr. Bachofner stated that the attorney is taking the deposition of the corporate entity, and that the identity of the person who is doing the talking is irrelevant, because the attorney would prepare the Rule 39 C(6) questions the same way regardless of the identity of the deponent. He noted that he has no problem giving the opposing attorney some notice so that they know beforehand, but that knowing the name should not change the questions asked. Mr. Brian stated that knowing who is being deposed always helps, since it is helpful to know the background of the person in the context of the questions. He noted that, by agreement between counsel, at the end of the corporate deposition personal knowledge questions can be asked. He observed that knowing who will testify may also influence how he approaches certain topics. Judge Miller stated that there is nothing to stop an attorney from re-deposing a person regarding personal knowledge subsequent to the corporate deposition. Mr. Brian stated that this can be a costly prospect and that there are often discovery deadlines to meet.

Prof. Peterson reminded the Council that this amendment was suggested by former Council member Don Corson, who thought that it was troubling that an attorney for a corporation could say, "I do not have to tell you who will testify, even though I know." He stated that there are steps an attorney can take, including Googling and looking at a company's organizational chart to get the context of where the person who is to testify fits into the company, and still limit deposition questions to the context of what the corporation knows. Ms. Gates stated that she felt that 24 hours is not enough time. She stated that, even if someone is testifying on behalf of the corporation, it is still helpful to know the context of how he or she has that knowledge. She observed that, in some cases, there may be tens of thousands of documents from corporate officers and that, rather than wade through all of those documents when dealing with tight timelines, it is more helpful to be able to go directly to the documents from the person who will testify. Mr. Keating reiterated that an ORCP 39 C(6) deposition is about what the *corporation* knows, and that personal knowledge should not be mixed with corporate knowledge. Ms. Gates pointed out that looking at a person's e-mails does not mean that questions are going to be asked about personal knowledge, but that an attorney needs to have context to know how the person who is testifying obtained his or her knowledge. She stated that it is helpful to know whether the person was just educated to provide this testimony, or whether he or she has some involvement and that is why he or she is prepared to testify on behalf of the corporation.

Mr. Cooper related his experience in a products liability case in which he is involved where the main trial lawyer noticed the 39 C(6) deposition of a corporation, the manufacturer of the product in question, about a design. He stated that, because of the existing language in ORCP 39 C(6), the deposing attorney did not receive the name of the person who was to testify but, rather, appeared at the corporate office in the Midwest and discovered the name of the person at that time. Mr. Cooper stated that the person who testified was not an engineer, did not work in the design department, and had no personal knowledge of the facts that he had specified in his notice that he wanted to talk about. He stated that this is clearly not the purpose of the rule and that, with the proposed rule change, he would have had the name and would have obtained the resume and then realized that the person worked in the IT department. He noted that this would have been an easy chance to talk to a judge about the designation and say that, if he takes the designated person's deposition, no one else from the company should be allowed to testify claiming superior knowledge regarding these matters other than the ORCP 39C(6) deponent and, if the company wants to do that, that is fine. Mr. Cooper emphasized that he does not feel we need to change the rule for bad actors, but that his case is another example of why revealing the name with enough time to prepare is often very useful and can speed and simplify the process for the bench and bar. Judge Miller asked what harm there is in being required to give the name. Mr. Keating stated that he always gives the name of

the person who will testify, but that he has had lawyers abuse the limits of ORCP 39 C(6) when he does this. He stated that he would feel more comfortable if language could be added to state that attorneys cannot take a personal deposition during an ORCP 39 C(6) deposition. Mr. Brian stated that he is not willing to say that ORCP 39 C(6) states that it is always improper for an attorney to stray into the area of personal knowledge. He suggested changing the time period to three judicial days.

Mr. Bachofner stated that he has no problem designating the name and that he agrees with Mr. Keating. He stated that, from a defense perspective, he also needs to prepare the person to be deposed and that, if the opposing attorney is going to go beyond the ORCP 39 C(6) topic, he is entitled to notice and his client is entitled to notice so that they can be properly prepared. He stated that the committee's proposal requires the minimum amount of notice, and that most lawyers worth their salt will provide the name ahead of that time, usually as soon as they know. Mr. Bachofner reiterated that there are situations where non-parties are subpoenaed and that it is unfair to put these businesses in the position of being required to give a name three to five days before the deposition. Judge Holland noted that the situation Mr. Bachofner is describing is already addressed in ORCP 39 C(6) with the "absent good cause" language. Mr. Bachofner asked whether that third party will be able to make an informed decision about whether they have good cause. Mr. Cooper stated that corporations are all subject to validly issued subpoenas by parties in litigation, that this is part of being in business, and that he feels this is not a problem significant or repetitive enough to craft a separate fix. Mr. Bachofner agreed that it should not be a separate fix and that the language should stay as proposed.

Mr. Brian suggested changing the time to 36 hours. Judge Herndon stated that, if the time is kept at 24 hours, attorneys will say that it is not enough time and it will get crammed on to the court's dockets. He suggested that 36 hours is more appropriate and allows enough time to get onto a docket if necessary. Judge Armstrong suggested the grammatical change of the phrase "less than 24 hours" to "fewer than 24 hours." Mr. Bachofner also noted that any time period less than seven days is automatically considered judicial days, so that there is no need to include the word "judicial." A straw poll was held to see which time period Council members preferred: 24 hours or three days. More members preferred three days than 24 hours, with a few members preferring five days. Mr. Cooper suggested keeping the language of the amendment the same, with the addition of Mr. Campf's and Judge Armstrong's friendly amendments, and creating two versions with two separate time periods: 24 hours and three days.

Mr. Keating asked that language be added to limit the deposition to the topic designated in the notice. Ms. Gates noted that the point of the rule already states that and, while she agrees that some lawyers do drift, intentionally or

unintentionally, she envisioned such an amendment creating huge arguments among the bench. Mr. Keating observed that he was referring to the topic, not the basis of a person's knowledge. Judge Gerking asked what happens if a witness drifts while answering a question. Mr. Campf stated that there is case law that talks about what happens at an organizational deposition when a witness talks about personal topics or things outside of the scope of the deposition that does allow the examiner to question on those topics. He stated that he would encourage the committee not to stray into that because the rule, by its terms, is fine on that point. Prof. Peterson stated that all of these rules will be used by lawyers, and that it is difficult to make people do things exactly the way you intend because lawyers are creative. However, he stated that he is sure that, if an examiner drifts over into something that is not within the scope of the deposition, the other attorney will direct his or her client not to answer the question; and that, if a client starts to stray into non-related matters, the attorney would cut him or her off. Mr. Keating agreed, but noted that it is not always that simple. He reiterated that he always gives the name in a timely fashion but that, when the opposing attorney receives the name, the temptation to negotiate their way into the personal knowledge of the deponent is there.

Ms. Nilsson stated that she will create two versions of draft language, one with 24 hours and one with three days and both including the aforementioned friendly amendments, and forward them to the committee. Prof. Peterson suggested changing the phrase "the matters" to "those specific matters" to help address Mr. Keating's concern. Mr. Keating stated that he thought this might help. Ms. Gates and Mr. Brian stated that they did not feel that it would change anything. Judge Zennaché stated that the rule already says "the responding party shall set forth for each person designated the matters on which that person will testify." He stated that he felt that this means that the corporation may designate more than one person to talk about a specific matter, and the corporation will set forth which matters to which each of those persons will testify.

6. ORCP 43: Electronic Discovery (Ms. David)

Ms. David stated that she has not heard about any problems with regard to the changes to ORCP 43 that became effective January 1, 2012. She stated that this is either a testament to how well the rule changes were crafted, or that attorneys have not yet read the new rules.

7. ORCP 44/55: Medical Examinations/Medical Records (Mr. Keating)

Mr. Keating stated that the committee had met but that Ms. O'Leary and Mr. Cooper were unable to be present. He noted that the consensus of the committee was that ORCP 55 should be amended as outlined in Appendix E to require the party objecting to a request for medical records to respond in writing to the party issuing the subpoena, specifying in detail the grounds for each objection. Mr. Keating noted that the other issue the committee discussed was whether the objecting party should be required to seek the court's intervention by filing a motion to quash the proposed subpoena. He observed that this did not get anywhere near a consensus among committee members, and that Mr. Beattie had raised the issue that the Health Insurance Portability and Accountability Act (HIPAA) would give a good basis for a subpoenaed facility or provider to refuse to comply if the requesting attorney only has to say that the plaintiff objected but did not file a motion to quash. Under federal law there would be organizations that would be reluctant to comply with such a subpoena, demanding a court ruling or proof that the plaintiff does not object. So if the plaintiff's lawyer objects, the requesting attorney would need to file a motion for permission to serve the subpoena, but the committee generally agreed that requiring that the plaintiff's attorney respond with a specific objection would facilitate the process.

Ms. Leonard asked whether an attorney who received an objection would now go to court and follow the same procedure as before, but now he or she would know the reason for the objection. Mr. Keating responded that this would be the case. Prof. Peterson wondered why, if a subpoena is drafted and has been served on an attorney but not yet on the health care provider, the rule should not make it incumbent on the objecting attorney to file a motion to quash. Mr. Cooper stated that the committee had discussed this possibility but that members decided that, because of HIPAA, it was a better idea to make it incumbent on the requesting attorney to seek an order requiring a subpoena because a lot of record providers will not provide records based on an order denying a motion to quash. Judge Herndon stated that the process will facilitate discovery and will suggest to lawyers that they need to confer and not come to the court as step number one.

Prof. Peterson noted that Council staff had inserted the proposed language into the existing ORCP 55 and noted that this required some renumbering within the rule. Ms. Nilsson also noted that the staff had also reformatted some other subsections to conform with the standard ORCP format. Mr. Brian mentioned that the ORCP 46 A motion to compel does not tie in to ORCP 55 and that he feels that the language needs to be consistent. Mr. Keating agreed that the motion to compel nomenclature is strange. Mr. Cooper suggested carrying the issue over to next month and, at that time, looking at whether to make a change to ORCP 46 and looking more closely at the technical changes the staff made. Judge Miller stated that she does not feel that it should be a motion to compel but, rather,

something that has a court pronouncement of some kind. Mr. Bachofner noted that ORCP 55 H(2)(a) talks about attaching to the subpoena either a qualified protective order or the affidavit of no objection.

Mr. Keating spoke about the committee's efforts with regard to ORCP 44 C. He noted that, although Ms. O'Leary was unable to attend the committee meeting, she had made it clear through e-mail communications that she does not agree with potential changes to ORCP 44 C. Mr. Keating stated that the consensus of the members present at the meeting, with one strongly held dissent, was to add language to ORCP 44 C as set forth in Appendix F. He stated that the intent was to use language from ORCP 36. Judge Miller asked why import the language at all, since ORCP 36 already governs all discovery. Mr. Bachofner stated that some judges are not allowing this. Judge Miller stated that this would seem to be an education problem. Mr. Cooper asked whether this would be duplicating language that already exists because we think that some judges are not doing their jobs the way we think they should. Mr. Keating observed that there appears to be a growing affection for the "same body part" rule. He discussed a Court of Appeals case [*Duran v. Culver*, 88 Or App 452 (1988)] where the plaintiff claimed a back injury resulting from an automobile accident and was awarded a verdict. He noted that the Court of Appeals reversed because the trial judge had refused to admit the plaintiff's gynecological medical records which showed that she had undergone a hysterectomy three months after the accident. Mr. Keating stated that the gynecological medical records showed that the plaintiff had been suffering from endometriosis, which included back pain, for three years, and that the Court said that it was prejudicial error to not allow admission of that evidence. He stated that, if a trial court construes ORCP 44 C literally to mean the same body part, those gynecological records never would have been discovered because gynecological records would not have been seen as relating to a back injury; however, if the court construes "relating to the injury claimed" using the scope of discovery in ORCP 36, those records should be discoverable.

Mr. Bachofner noted that the committee discussed that the records need to be reasonably calculated to lead to discovery. Judge Miller stated that she would do an in camera review in such a case. Mr. Bachofner replied that a judge would not even get to that point in such a case because the defense attorney would not know such records existed. Mr. Keating reiterated that an attorney would not even know that the records existed, since the plaintiff's attorney would have already decided that they were not relevant. Judge Armstrong noted that bringing all records in to the trial court creates a lot of work. Judge Miller sated that her focus as a judge in such cases is on eliminating potential embarrassment. Ms. David observed that people tell doctors about many personal issues, and that it is probably not a good idea to put the burden on the courts to have to do an in camera review in all cases. Mr. Cooper again noted that the problem is how a defense lawyer would have known to ask for records he or she could not have

known existed. He stated that a prudent defense lawyer would have asked for the entire medical history; however, he wondered how the rule change solves the legitimate problem that has been identified. Mr. Brian stated that he does not understand how this change adds anything of substance to what lawyers are already entitled to under ORCP 36. Mr. Keating explained that 2 E 2 of the Multnomah County Civil Motion Panel Statement of Consensus has stated that the issue deals with a limited waiver of the physician/patient privilege and that, therefore, records dealing with different body parts are not available. He noted that this is a relatively new interpretation.

Judge Zennaché asked whether the answer to this problem should be to appeal the decision to the Court of Appeals. He noted that this modification will not change the decision of the panel in Multnomah County. Mr. Bachofner replied that the change clarifies that requests that are reasonably calculated to obtain records related to the claims made are discoverable. He stated that, as it is written now, it is not clear that those records are available. Judge Zennaché asked whether ORCP 36 B already does this. Judge Armstrong stated that it is a legitimate thought that we should not always depend on courts to explain things if it is possible to write them in a way that avoids the need for further thought in how it is supposed to work. Judge Gerking stated that the committee felt that this was a sufficiently contentious issue that it needed to be clarified. Mr. Keating stated that it is not a question that is easily remedied at the time that an attorney needs the information before going before a jury. He stated that his guess is that trying to obtain a writ of mandamus would be very difficult and that it would be easier to try to fix the issue if the Council thinks that trial courts are drifting away from the intent of the rule. In fact, he observed, the history of the Council shows that the rule was amended in 1986 and the Council's comment noted the following reason for the amendment: "The amendment to Rule 44 was made as a response to rulings out of the Multnomah County Circuit Court. The current language 'written reports' has been construed so as not to include office and chart notes. The distinction has been made between reports that are generated for purposes of litigation and notes made contemporaneous with an examination. Adding 'or existing notations' is intended to broaden the rule to include office and chart notes." Mr. Keating noted that this Council has made amendments in the past to respond to narrow rulings that do not seem to follow the intent of the rule.

Judge Holland observed that this is the Oregon Council on Court Procedures, not the Multnomah County Council on Court Procedures, and that she feels that at times, if it is a matter of judicial education, there is a department to address that rather than modifying an ORCP to deal with a county-specific problem. She noted that it sometimes makes it difficult for the rest of the state to have to deal with problems coming out of specific counties.

Ms. David stated that ORCP 36 gives a broad spectrum of what is discoverable,

except to the extent that certain other rules may limit that spectrum. She stated that she sees ORCP 44 C being interpreted as limiting when it states "relating to injuries for which recovery is sought." She stated that she believes that it is within the Council's scope to further define that and to explain that the Council intends the rule express the broader intent statewide. Ms. David suggested that the committee work with the language a bit more and bringing it back to the Council at the next meeting. Ms. Gates suggested that the committee also consider specific ways to revise the rule as well as the broad way currently proposed. Judge Miller noted that, to the extent that it echoes ORCP 36, she is in favor of the change. Judge Gerking suggested language such as, "the phrase 'relating to injuries for which recovery is sought' shall be construed consistently with ORCP 36." Mr. Keating stated that the committee will meet again, particularly to give Ms. O'Leary the chance to participate in discussion, and will revise the language and report back to the Council.

8. ORCP 47: Summary Judgment - Multiple Issues (Mr. Keating)

Mr. Keating stated a few members of the committee had met via teleconference and that discussions had also taken place via e-mail. One issue discussed was imposing a page limit on the memoranda in support of, or in opposition to, the motion, and Mr. Keating noted that all committee members felt that such a change would not be needed. The second issue was whether to add a requirement to explicitly set forth a formal statement of undisputed facts. Mr. Keating stated that Ms. Gates was not able to attend the teleconference and that she felt strongly about this issue, so the full committee intended to have another teleconference and report back to the full Council at the next meeting.

9. ORCP 54 A: Amend to Conform with FRCP 41(a) (Mr. Weaver)

Mr. Weaver was not present at the meeting. Prof. Peterson stated that he is researching some issues and that the committee will report to the Council at the next meeting.

10. ORCP 57 F: Alternate Jurors (Ms. O'Leary)

Ms. O'Leary was not present at the meeting. Judge Zennaché stated that he had drafted language for the committee and that he expected the committee to report to the Council in March.

11. ORCP 59 H(1): Exceptions to Jury Instructions (Ms. Leonard)

Ms. Leonard stated that the committee is still in the process of drafting language and will report back to the Council at a later date.

12. ORCP 68: Cost Bills - Multiple Issues (Ms. David)

Ms. David stated that Judge Zennaché had drafted some language in ORCP 68 C(2)(a) for the Council's review (Appendix G) which encompasses parties in domestic relations cases who do not really file a pleading but, rather, file a motion or a response to a motion. She noted that the committee is still working on how to incorporate probate proceedings and other areas of the law, and the possibility of adding specific language that ORCP 68 does not apply to probate proceedings. Ms. David stated that the committee is also considering changing the language regarding objections so that, after the party submits the request for attorney fees, the objecting party may present affidavits, declarations, and other evidence for the court to consider all the issues in whether to award or deny attorney fees. She noted that there is also language allowing a response to the objection which mirrors the objection language in terms of presenting additional affidavits, declarations, and evidence.

Ms. David stated that the committee is still grappling with the issue of amendments and whether there is a need to retain the reference to ORCP 23 in ORCP 68. She noted that the committee's proposal changes the default on hearings on objections to no hearing unless the party requests one, so as not to unduly burden the court. She stated that the committee would like to have the input of the full Council on this.

Mr. Cooper stated that there are times when an oral argument would be useful and he would like to preserve the right to a hearing and make sure that the court has discretion to hold a hearing if it has questions. Ms. David observed that there is also a question among committee members about whether ORCP 68 C(4)(b) and C(4)(c) need to be clarified to explain when affidavits, declarations, and other such evidence can be filed and when live testimony can be presented. Judge Miller raised concerns about the volume of attorney fee and cost evidence that is sometimes presented at the end of long family law cases and observed that judges need to know in a nutshell that, for example, an attorney's last settlement proposal was more fair than the result of trial and that he or she should be rewarded for that. Mr. Cooper stated that it should be made clear what the evidence at the hearing needs to look like. He also noted that he would like it absolutely clear that, if there is a statement of attorney fees and there is no objection, the court retains authority to independently evaluate the reasonableness of the fee request. He stated that some of his probate colleagues take the position that if the heirs, whose money will be used to pay the attorney fees, do not object, the judge cannot evaluate the request for attorney fees. Judge Zennaché stated that this language already exists, and the Court of Appeals has made it clear to the trial courts that, when the courts are making a discretionary award of attorney fees, they have to make some findings, even if they are just general findings, of what factors in ORS 20.075 they are relying on in

making that award. He stated that, in all cases, the court has to make an independent finding and the language says the court "may" award fees or costs, not that it has to. Judge Zennaché noted that he has refused to award attorney fees even when no one has objected.

Judge Williams stated that the court only has to make findings if requested by the parties, and would like the committee to consider an addition to the rule that requires that, if the party is requesting that the court make findings, they also must file their proposed findings. Judge Zennaché stated that this issue is being discussed by the committee and that it is doing further research. Judge Gerking suggested incorporating language from the draft amendment of ORCP 68 C(4)(b), "shall be controverted without further pleading," to ORCP 68 C(4)(c) to read: "objections shall be deemed controverted without further pleading; however, parties seeking an award may file a response to the objection." Prof. Peterson stated that the committee was discussing where that language should be located. Judge Holland stated that, in the probate arena, there are two types of proceedings: 1) estate proceedings where people are seeking attorney fees and the court is required to make reasonable findings; and 2) protective proceedings, which are unique because there may be a number of attorneys involved all of whom are attempting to obtain fees from the protected person's estate. She noted that no party objects because they all want their attorney fees to be awarded from the protected person's estate and it is to their benefit not to object to each other. Judge Holland stated that she often will require a hearing because the attorney fees represent such a large portion of the estate of a person who has a limited amount of funds to live on for the rest of his or her lifetime, and that she will then have attorneys object to her requiring a hearing. She noted that it would be nice to clarify that the court may require a hearing. Mr. Cooper observed that, as drafted, the rule states that, without an objection, a hearing may not be held. He suggested adding language to state that the court may hold a hearing at its discretion.

Ms. Leonard asked for clarification regarding the Rule 23 process, as she was not familiar with this. Judge Zennaché stated that the current Rule 68 incorporates the Rule 23 process and that the amendment preserves this. He noted that the committee was concerned that eliminating the process would have unintended consequences. Prof. Peterson observed that no one on the committee is an expert on probate, but that probate and protected persons are covered by statutes and the committee felt that ORCP 1 A and ORCP 69 C(1)(b) may apply to say that Rule 68 applies unless a different procedure is specified by statute or rule. He stated that the committee needed input from people familiar with the probate arena regarding this issue. Mr. Cooper and Judge Holland offered to speak to the committee regarding this issue. Prof. Peterson returned to the question regarding whether fees need to be awarded when no objection is filed. He noted the language of the current ORCP 68 C(4)(c)(ii): "The court shall deny or award in

whole or in part the amounts sought as attorney fees or costs and disbursements." He pointed out the language difference in the current ORCP 68 C(4)(d): "If objections are not timely filed the court may award attorney fees or costs and disbursements sought in the statement." Prof. Peterson stated that the earliest iteration of ORCP 68 did not leave this to the discretion of the court, so there was already a Council change early in the history of Rule 68 to make it clear that the court has discretion as to whether to award any fees at all, and there are appellate court opinions that confirm that. He observed that the "may" language had already been added by the Council many years ago and he believes that this is understood. Ms. David noted that the committee is still working and that they anticipate many more changes, including clarifying for practitioners the areas of costs vs. disbursements and general vs. special findings.

VI. New Business (Mr. Cooper)

A. June Council Meeting

Mr. Cooper noted that the Council meeting currently scheduled for June 2, 2012, will be held in Medford, and asked Council members to think about potential extracurricular activities that they would like our Southern Oregon members to arrange during our visit. Prof. Peterson noted that Ms. Nilsson has a scheduling conflict with the June 2 date and asked whether anyone would object to changing the meeting date to June 9. No objections were raised, but Mr. Cooper suggested sending an e-mail to the listerve to check with members who were not present at the meeting.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:45 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

JURORS

RULE 57

A Challenging compliance with selection procedures.

A(1) Motion. Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) Stay of proceedings. Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk or court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable provisions of ORS chapter 10, the court shall stay the proceedings pending the selection of the jury in conformity with the applicable provisions of ORS chapter 10, or grant other appropriate relief.

A(3) Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial the clerk shall draw names at random from the names of jurors in attendance upon the court until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a

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time from the bystanders or the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) Challenges for cause; grounds. Challenges for cause may be taken on any one or more of the following grounds:

D(1)(a) The want of any qualifications prescribed by ORS 10.030 for a person eligible to act as a juror.

D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D(1)(c) Consanguinity or affinity within the fourth degree to any party.

D(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor, to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of, the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D(1)(e) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, upon substantially the same facts or transaction.

D(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D(1)(g) Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: (i) the action; (ii) either party to the action; (iii) the sex of the party, the party's attorney, a victim or a witness; or (iv) a racial or ethnic group that the party, the party's attorney, a victim or a witness is a member of, or is perceived to be a member of. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.

D(2) Peremptory challenges; number. A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection, except the court, in its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D(3) Conduct of peremptory challenges. After the full number of jurors have been passed for cause, peremptory challenges shall be conducted by written ballot or outside the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before

another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors are in the jury box at the time. The refusal to challenge by either party in the order of alternation shall not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall conclude that party as to the jurors once accepted by that party, and if that party's right of peremptory challenge be not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

D(4) Challenge of peremptory challenge exercised on basis of race, ethnicity or sex.

D(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity or sex. Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge. The objection must be made before the court excuses the juror. The objection must be made outside of the presence of potential jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the potential juror on the basis of race, ethnicity or sex.

D(4)(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not

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violate paragraph (a) of this subsection is rebutted.

D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity or sex, the court shall disallow the peremptory challenge.

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant, and a true verdict give according to the law and evidence as given them on the trial.

F Alternate jurors. The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retired to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged **by the court either** as the jury retires to consider its verdict **or after the jury has reached a verdict or otherwise been discharged**. **Alternate jurors who are not required to replace jurors before the beginning of deliberations and who have not been discharged may be appointed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror is required to replace a juror after deliberations have begun, the jury shall be instructed to begin deliberations anew.** Each side is entitled to one peremptory challenge in addition to those otherwise allowed by these rules or other rule or statute if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules or other rule or statute shall not be used against an alternate juror.

PROPOSED REVISIONS TO ORCP 27 – DRAFT 2

MINOR OR INCAPACITATED PARTIES

RULE 27

A Appearance of parties by guardian or conservator. When a person, who has a conservator of such person's estate or a guardian, is a party to any action, such person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule.

B Appearance of incapacitated person by conservator or guardian. When a person who is incapacitated or financially incapable, as defined in ORS 125.005, is a party to an action and does not have a guardian or conservator the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule. The court shall appoint some suitable person to act as guardian ad litem:

B(1) When the plaintiff or petitioner is a minor, upon application of the minor, if the minor is 14 years of age or older, or upon application of a relative or friend of the minor if the minor is under 14 years of age.

B(2) When the minor is defendant or respondent, upon application of the minor, if the minor is 14 years of age or older, filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor.

B(3) When the person who is incapacitated or financially incapable, as defined in ORS 125.005, is plaintiff or petitioner, upon application of a relative or friend of the person.

B(4) When the person is defendant or respondent, upon application of a relative or friend of the person filed within the period of time specified by these rules or other rule or statute for appearance and answer after service of summons, or if the application is not so filed, upon application of any party other than the person.

C. Method of Seeking Appointment of Guardian ad Litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more

declaration which provide admissible evidence sufficient to prove by a preponderance of the evidence that the proposed protected person is a minor or financially incapable, as defined in ORS 125.005.

D. Notice of Motion Seeking Appointment of Guardian ad Litem. At the time the motion is filed the person filing the motion must provide notice as set forth in this section. Notice shall be given by mailing to the address of each person or entity listed below, by First Class Mail, a true copy of the motion, supporting declaration or declarations and the form of notice prescribed in Section E below.

D(1) If the party is a minor notice shall be given to the minor if the minor is 14 years of age or older and to the parents of the minor and person or persons having custody of the minor, to the person who has exercised principal responsibility for the care and custody of the respondent during the 60-day period before the filing of the petition and if the minor has no living parents, to any person nominated to act as fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.

D(2) If the party is over the age of 18 years notice shall be given to:

(a) The person;

(b) The spouse, parents and adult children of the person.

(c) If the person does not have a spouse, parent or adult child, the person or persons most closely related to the respondent.

(d) Any person who is cohabiting with the person and who is interested in the affairs or welfare of the respondent.

(e) Any person who has been nominated as fiduciary or appointed to act as fiduciary for the person by a court of any state, any trustee for a trust established by or for the respondent, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660 and any person acting as attorney-in-fact for the person under a power of attorney.

(f) If the person is receiving moneys paid or payable by the United States through the Department of Veterans Affairs, a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the protected person.

(g) If the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, a representative of the department.

(h) If the person is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, a representative of the authority.

(i) If the person is committed to the legal and physical custody of the Department of Corrections, the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined.

(j) If the person is a foreign national, the consulate for the person's country.

(k) Any other person that the court requires.

E Contents of Notice The notice shall contain:

(a) The name, address and telephone number of the petitioner or the person making the motion, and the relationship of the petitioner or person making the motion to the respondent.

(b) A statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than 20 days from the date of the notice.

(c) A statement indicating that the person for whom the guardian ad litem is sought may object in writing or by telephoning the clerk of the court in which the matter is pending and stating the desire to object.

F Hearing As soon as practical after objections are filed the Court shall hold a hearing at which the Court will determine the merits of the objection and make such orders as are appropriate.

G Waiver or Modification of Notice For good cause shown the Court may waive notice entirely, permit temporary appointment of a guardian ad litem before notice is given or make such other orders regarding notice are just and proper in the circumstances.

H Settlement Where settlement of the action will result in the receipt of property, or money by the person for whom the guardian ad litem was appointed the guardian ad litem lacks the authority to settle the action or receive the funds. Such settlement must be sought and obtained by a conservator or pursuant to ORS 126.725.

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS

RULE 68

A Definitions. As used in this rule:

A(1) Attorney fees. "Attorney fees" are the reasonable value of legal services related to the prosecution or defense of an action.

A(2) Costs and disbursements. "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; any fee charged by the Department of Transportation for providing address information concerning a party served with summons pursuant to subparagraph D(4)(a)(i) of Rule 7; the compensation of referees; the expense of copying of any public record, book, or document admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The court, acting in its sole discretion, may allow as costs reasonable expenses incurred by a party for interpreter services. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

B Allowance of costs and disbursements. In any action, costs and disbursements shall be allowed to the prevailing party, unless these rules or other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs. If, under a special provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements.

C Award of and entry of judgment for attorney fees and costs and disbursements.

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C(1) Application of this section to award of attorney fees. Notwithstanding Rule 1 A and the procedure provided in any rule or statute permitting recovery of attorney fees in a particular case, this section governs the pleading, proof and award of attorney fees in all cases, regardless of the source of the right to recovery of such fees, except when:

C(1)(a) Such items are claimed as damages arising prior to the action; or

C(1)(b) Such items are granted by order, rather than entered as part of a judgment.

C(2)(a) Alleging right to attorney fees. A party seeking attorney fees shall allege the facts, statute or rule that provides a basis for the award of such fees in a pleading filed by that party. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in this subsection.

C(2)(b) If a party does not file a pleading [*and seeks judgment or dismissal by motion]* **but instead files a motion or response to a motion**, a right to attorney fees shall be alleged in such motion **or response**, in similar form to the allegations required in a pleading.

C(2)(c) A party shall not be required to allege a right to a specific amount of attorney fees. An allegation that a party is entitled to "reasonable attorney fees" is sufficient.

C(2)(d) Any allegation of a right to attorney fees in a pleading or motion shall be deemed denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of the facts, statute or rule that provides a basis for the award of fees shall be waived if not alleged prior to trial or hearing.

C(3) Proof. The items of attorney fees and costs and disbursements shall be submitted in the manner provided by subsection (4) of this section, without proof being offered during the trial.

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C(4) Procedure for seeking attorney fees or costs and disbursements. The procedure for seeking attorney fees or costs and disbursements shall be as follows:

C(4)(a) Filing and serving statement of attorney fees and costs and disbursements. A party seeking attorney fees or costs and disbursements shall, not later than 14 days after entry of judgment pursuant to Rule 67:

C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C; and

C(4)(a)(ii) Serve, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) Objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by **a** written objection[*s*] to the statement. The objection[*s*] **and supporting documents, if any,** shall be served within 14 days after service on the objecting party of a copy of the statement. The objection[*s*] shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. [*Statements and objections may be amended in accordance with Rule 23.*] **The objecting party may present affidavits, declarations, and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.**

C(4)(c) Response to objections. The party seeking an award of attorney fees may file a response to an objection filed pursuant to ORCP C(4)(b). The response and supporting documents, if any, shall be served within 7 days after service of the objection. The response shall be specific and may address issues of law or fact. The party seeking attorney fees may present affidavits, declarations, and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

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C(4)(d) Amendments. Statements and objections may be amended or supplemented in accordance with Rule 23.

C(4)*[(c)]*(e) Hearing on objections. No hearing shall be held and the court may rule on the request for attorney fees based upon the application, objection, response, and any accompanying affidavits or declarations unless a party has requested a hearing in the caption of the objection or response or unless the court sets a hearing on its own motion.

[*C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule],*

C(4)(e)(i) If a hearing is requested the court, without a jury, shall hear and determine all issues of law and fact raised by [*the statement of attorney fees or costs and disbursements and by]* the objection[*s*]. [*The parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.*]

C(4)[*(c)*](e)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements.

C(4)[*(d)*](f) No timely objections. If objections are not timely filed the court may award attorney fees or costs and disbursements sought in the statement.

C(4) *[(e)]*(g) Findings and conclusions. On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party **must** [*shall*] make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements**,** [*or*] objections**, or response** filed pursuant to paragraph (a)**,** [*or*] (b)**, or (c)** of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

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C(5) Judgment concerning attorney fees or costs and disbursements.

C(5)(a) As part of judgment. If all issues regarding attorney fees or costs and disbursements are decided before entry of a judgment pursuant to Rule 67, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C(5)(b) By supplemental judgment; notice. If any issue regarding attorney fees or costs and disbursements is not decided before entry of a general judgment, any award or denial of attorney fees or costs and disbursements shall be made by supplemental judgment.

C(6) Avoidance of multiple collection of attorney fees and costs and disbursements.

C(6)(a) Separate judgments for separate claims. If more than one judgment is entered in an action, the court shall take such steps as necessary to avoid the multiple taxation of the same attorney fees and costs and disbursements in those judgments.

C(6)(b) Separate judgments for the same claim. If more than one judgment is entered for the same claim (when separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or when pursuant to Rule 67 B separate limited judgments are entered against several parties for the same claim), attorney fees and costs and disbursements may be entered in each judgment as provided in this rule, but satisfaction of one judgment bars recovery of attorney fees or costs and disbursements included in all other judgments.

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