MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 14, 2012, 9:30 a.m.
University of Oregon School of Law, Lewis Lounge, 4th Floor
1515 Agate Street • Eugene OR 97403-1221

Members Present:

John R. Bachofner*
Jay W. Beattie*
Arwen Bird*
Michael Brian*
Eugene H. Buckle*
Brian S. Campf*
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. Rives Kistler*
Leslie W. O'Leary
Mark R. Weaver*
Hon. Locke A. Williams
Hon. Charles M. Zennaché

*Appeared by teleconference

Members Absent:

Hon. Rex Armstrong
Hon. Robert D. Herndon
Maureen Leonard
Hon. Eve L. Miller
Hon. David F. Rees

Guests:

Susan Grabe, Oregon State Bar
Matt Klein, Titanium Legal Services

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 7 • ORCP 9 F, G • ORCP 17 A • ORCP 39 C(6) • ORCP 44 • ORCP 47 • 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 7 • ORCP 45

I. Call to Order (Mr. Cooper)

Mr. Cooper called the meeting to order at 9:35 a.m.

II. Introduction of Guests

Mr. Cooper introduced Susan Grabe, Director of Public Affairs for the Oregon State Bar. She attended the meeting in place of David Nebel, who was unable to fulfill his usual role as Bar liaison to the Council for this particular meeting. The Council also welcomed Matt Klein of Titanium Legal Services, also a past president of the Oregon Association of Process Servers. Mr. Klein indicated that he is already on the Council's interested parties listserve and plans to attend Council meetings in the future to keep himself informed of the Council's work and to provide input where helpful.

III. Approval of March 10, 2012, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft March 10, 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 informed the Council that, due to technical difficulties with Google Analytics, she was unable to complete a website report.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson stated that, by end of the following week, he would have an e-mail prepared for Council members to send to their legislative contacts regarding the work of the Council. Prof. Peterson also noted that there was a brief article about the Council's work in the latest edition of the Oregon State Bar Public Affairs Newsletter, *Capitol Insider*.

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 she had attended by telephone the most recent meeting of the E-Court Task Force and that the service provider for e-court is having some problems with setting up service, and that these technological problems are being worked through. She noted that, in November, the Chief Justice made an

emergency change to Chapter 21 of the Uniform Trial Court Rules [UTCR 21.100(1) and (2)] to address the fact that service would occur by electronic means in the e-court system, and that she suspects that another change will need to be made to this rule between now and this summer when e-court begins in Yamhill County. Ms. David stated that the Council should continue to monitor the situation and that, by the time of the September meeting, a slight change to the ORCP may be necessary.

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

Ms. O'Leary reminded the Council that she had proposed an amendment to ORCP 17 A to address the issue that some courts require an original signature on pleadings. She stated that this requirement puts a hardship on small firms when no lawyer is physically able to sign a pleading that needs to be filed that day because the attorney(s) is/are out of the office for court, depositions, etc. She noted that many courts do not require original signatures and that the requirement is not practical. Ms. O'Leary stated that it was brought to her attention during Council meetings that the e-court system will be rolled out this summer and that, by the time any rule change would take effect, e-court will be widespread. She stated that the UTCR already provide for electronic signatures, and that her committee thought that the Council could simply propose an amendment to make Rule 17 consistent with the UTCR. She noted that the language in the proposed amendment refers specifically to UTCR 21.090(2) rather than citing language from the UTCR itself. Ms. O'Leary pointed out that the committee's concern with cutting and pasting language from the UTCR was that, if the UTCR were to be amended in the future, the ORCP would need to be changed as well.

Ms. O'Leary stated that Judge Holland and Judge Miller had sought feedback from their colleagues and had not heard much objection other than the fact that the UTCR should not be cited in the ORCP. Prof. Peterson observed that Rule 17 does not specifically require an original signature, only a signature that does not need to be verified. He stated that it is his understanding that some Lane County judges have required original ink signatures. Mr. Cooper stated that the Multnomah County Probate Court also requires original ink signatures, and Ms. O'Leary stated that the Multnomah County clerks are also interpreting the rule to require original ink signatures. Ms. Grabe observed that it might be a good idea to communicate with Lisa Norris-Lampe on the Judicial Department's staff, who has been helping to craft the rules on e-court. She stated that everyone will have to have the ability to e-file and will have an e-signature and that, no matter what the current practice may be, it will ultimately have to change. Ms. O'Leary stated that she has been in contact with the State Court Administrator's office, and the feedback was that it would make more sense to refer to the UTCR instead of trying to try to make sure the language of Rule 17 tracks verbatim. Judge Gerking stated that he is reluctant to make reference to a specific UTCR because they are subject to change, and suggested using language such as, "in accordance with the UTCR," rather than

referencing a specific UTCR.

Ms. David suggested that a different way to solve the issue may be to make a broad-brush rule change in ORCP 1 to deal with the electronic issues. Judge Zennaché asked what the language "the form of signature for conventional filings can be electronic" means. Mr. Cooper stated that, in federal court, it is accepted that "s/" followed by the filer's name on the signature line constitutes an electronic signature. Judge Zennaché stated that this is not an electronic signature; an electronic signature means that the document is being filed electronically by using a password, and UTCR 21.090 also states that the use of the filer's login constitutes the signature. Mr. Cooper noted that many in federal court will not accept a document electronically filed that does not have the "s/Name" included. Judge Zennaché asked for clarification on what the amendment means by a conventional filing can have an electronic signature – whether a paper copy can be filed with no signature but, rather, "s/Name" or a signature that has been scanned in or stamped? Mr. Cooper stated that, in his experience, the Court of Appeals' electronic filing system has required that a signature be scanned in rather than using "s/Name." Ms. David stated that she has had the opposite experience. Judge Zennaché observed that the issue is trying to solve a problem for people who are not electronically filing, not for people who are logging in and filing electronically. He asked for clarification of the term "conventional filings." Ms. O'Leary stated that conventional filings are pleadings and motions.

Judge Zennaché asked whether this term applies to electronically filed documents or to documents that an attorney walks in and hands to a clerk. Justice Kistler stated that "conventional filing" is defined in the UTCR to mean a paper filing. Mr. Cooper asked whether the word "conventional" should be removed from the amendment. He noted that, since something called a signature is still required, he can envision problems arising from an attorney claiming not to have been served since the document only contained "s/Name" and not a true signature. Mr. Cooper stated that, to the extent we can avoid that confusion, we should.

Judge Holland asked whether ORCP 1 can deal with all of this in terms of an overview or whether it must be handled in ORCP 17. Mr. Cooper stated that the purpose of Rule 17 is to hold a human being accountable for the pleading. Ms. O'Leary expressed concern that, when someone is looking through the rule book to see how to get things done, they may not look at Rule 1. Judge Holland observed that attorneys should know better than to only look at one rule. Judge Williams asked whether the term "s/" is defined somewhere. No Council member thought so. Mr. Cooper stated that the way that the problem of accountability has been solved in the federal courts is that each filer has a login and password, and the filer is in control of who has that information and uses it. Mr. Campf stated that "s/" indicates that there is a signed document elsewhere and that federal court requires that an attorney sign such documents and keep them in his or her own files. Prof. Peterson asked whether "s/" indicates a conformed copy. Judge Williams confirmed this. Prof. Peterson stated that, if he is not in the office and a

pleading needs to be filed, another attorney in the office will sign his name with the other attorney's initials so that there is original ink and someone is taking responsibility. Ms. O'Leary stated that, in federal court, most attorneys do not keep original signed documents.

Mr. Cooper reiterated his concern that, apart from Ms. O'Leary's concern, the word "signature" in Rule 17 has a potential for problems with the advent of e-filing. Judge Zennaché stated that, even if this issue were fixed, it does not address the original concern about everyone in the office being on assignments and no one being available to sign a paper document. Ms. O'Leary asked whether there will even be such a thing as paper filing in the future. Prof. Peterson stated that paper filing will be here forever because there will always be unrepresented litigants who will file paper which will then be scanned by the court. Mr. Cooper stated that there is some security in requiring an ink signature on a paper pleading because, in the case of a fraudulent signature, a judge can compare the pleading to a known example of an attorney's handwriting. Prof. Peterson noted that there are three ways to affix a non-ink signature: the "s/" method; having another attorney sign the trial attorney's name and his or her initials; and using a rubber signature stamp. He observed that using a signature stamp is a bit like having a login and password, if it is kept in a safe and only certain people are authorized to use it. He wondered if clerks would accept a signature-stamped document if it is stamped with blue ink.

Mr. Cooper asked whether all Council members were in agreement that, despite any changes needed for e-filing, the rule should be kept as-is for filing pieces of paper. No one expressed disagreement. Ms. David expressed concern that, if changes were made to the rule regarding requiring original signatures for paper documents, misunderstandings could arise regarding the need for original signatures on subpoenas and other such documents. She noted that, once the e-court system is in place, which we happen by the time any rule change the Council makes would be in effect, the problem will be solved. Judge Zennaché asked whether this modification could be simplified by using language such as, "a signature consistent with UTCR 20.090 satisfies this rule." Judge Holland noted that the Council on Court Procedures is the preeminent body in terms of civil procedure and that the ORCP should not reference the UTCR. Ms. David stated that ORCP 1 F does broadly reference that any document except a summons shall be construed to include electronic images and other digital information in addition to printed versions of such documents. She noted that the Council had attempted to keep the last amendment to Rule 1 open-ended so that, if the Chief Justice makes a specific rule regarding e-court, ORCP 1 would allow that rule to work. Ms. David stated that she believes that ORCP 1 F encompasses part of this issue but that, if another change is needed in September, that can be done. Judge Gerking asked whether the word "conventional" is necessary. Mr. Cooper stated that he believes that it is confusing. Prof. Peterson suggested language such as, "the form

of the signature shall be any form of signature that is approved by these rules or any other rule of court." He stated that he feels that broadening the understanding of the definition of the word signature is good and that, when e-court is fully implemented, Rule 17 should be ready for it. Ms. David suggested, "the form of signature for filings may be electronic, consistent with the provisions of these rules or any other rules of court." Mr. Cooper and Mr. Keating liked this language. Mr. Cooper asked Ms. O'Leary to redraft the amendment and to present it to the Council at the May meeting.

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

Mr. Cooper reported that he has received some input from judges, but not as much as he would like. He stated that he will bring a redraft of the proposed amendment to the Council in May.

4. ORCP 39 C(6): Require Designation of the Deponent in Advance of the Deposition (Ms. Gates) (Appendix C)

Ms. Gates reminded the Council that the problem her committee is addressing is that, in the case of organizational depositions, attorneys for corporations fail to designate who is to testify until the last minute. She stated that, after the Council's discussion at the February meeting, the committee had created two versions of a proposed amendment of ORCP 39 C(6). Those two versions, one requiring 24 hours' notice and the other requiring three days' notice, were before the Council now for its consideration.

Mr. Cooper asked whether the Council wished to have more discussion on the matter now or to move to vote on the proposals in September. Mr. Campf suggested amending the first proposal to read "three business days." Ms. Gates pointed out that, if the time period is less than seven days, weekends and non-court days are already excluded by ORCP 10 A.

Prof. Peterson brought up the issue of the phrase "consent to testify on its behalf" and the reported cases of attorneys using that phrase to object to anyone from the corporation testifying because they do not consent to do so. He suggested perhaps using the word "will" instead of the word "consent." Ms. Gates stated that the committee felt that this was such an isolated problem that the rule did not necessarily need to be changed. Mr. Keating stated that he had never read the rule that way. Judge Gerking also suggested replacing the word "consent" with the word "will" or, perhaps, the word "intend." Judge Williams stated that he felt the sentence clearly showed that the word "consent" only applies to the phrase "other persons." Judge Holland stated that this issue has never arisen in her court. Mr. Cooper stated that he presumes that a judge would deal with this interpretation of the rule if it came up.

A motion was made to vote on the two versions of the proposed amendment at the September meeting. The motion was seconded and passed unanimously.

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

Ms. David stated that, after the Council's discussion at the last meeting, the committee exchanged e-mails and determined that the rule change made last biennium does encompass metadata, so no additional rule changes should be necessary. She noted that the Oregon State Bar's civil pleading and practice book has been updated with an entire chapter devoted to e-discovery.

6. ORCP 44/55: Medical Examinations/Medical Records (Mr. Keating) (Appendix D)

Mr. Keating stated that the committee brought a proposed draft rule change to ORCP 55 H(2)(b) for the Council's consideration. He stated that the committee had agreed to this language after several meetings, and that Mr. Cooper had also suggested that this change would likely require some amendment to ORCP 46 A(2). Ms. Nilsson noted that she had failed to include the Rule 46 amendment in the meeting materials, but read the draft amendment as follows (new language bolded and underlined): "A(2) Motion. If a party fails to furnish a report under Rule 44 B or C, **or if a party fails to comply with the requirements of Rule 55 H,** or if a deponent fails to answer a question...."

Ms. David raised a concern about the title of Rule 46 being slightly misleading. She stated that new attorneys trying to get discovery might not think about looking at a rule entitled "Failure to Make Discovery, Sanctions" because he or she is not yet at the point of a failure to make discovery but, rather, is still at the point of trying to obtain it. Judge Gerking suggested that the word "provide" could be used. Ms. David stated that she would not necessarily think to look at ORCP 46 A to get a discovery dispute before the court. Mr. Cooper noted that the titles of the rules are just titles. Ms. David observed, however, that accurate titles are helpful for those trying to find information in the rules. She asked that the committee consider a name change to something like "Compelling Discovery, Sanctions." Mr. Cooper stated that he believes that Legislative Counsel controls the names of the rules. Prof. Peterson replied that this is under the Council's control. He suggested the title "Providing Discovery, Sanctions." Mr. Cooper stated that the committee will discuss a title change. Mr. Keating asked if Council members are generally satisfied with the language proposed by the committee. There was general assent. Mr. Brian stated that he has no objections to the changes in 55 H and 46 A and feels that they are appropriate.

Mr. Keating reported that some members of the committee seemed to be moving

toward the concept of adopting language in ORCP 44 C to clarify that the rule is not to be narrowly construed, but not everyone on the committee agrees with this concept. He noted that Oregon is one of four states in the U.S. that does not waive the physician/patient privilege upon the filing of a claim putting the plaintiff's physical or mental condition at issue. Mr Keating observed that a compromise was made in the predecessor statute to the ORCP which granted a limited waiver of the physician/patient privilege upon the filing of a claim and that this limited waiver carried over to the ORCP. He stated that, in his 35 years of experience, this waiver has been construed broadly, and that a change was made to ORCP 44 in the late 1980s that was specifically adopted to address rulings by some trial courts that were narrowing the meaning of the language as it existed at the time. The change was made so that there would be no question that, if there were pre-existing notations by the doctor, those were also discoverable, along with physical examination records. Mr. Keating stated that the phrase used was "relating to the injuries for which recovery is sought," and he observed that, in the last few years, this phrase has begun to be narrowly construed to mean relating to the same body part, when in fact other medical records not relating to the same body part may be relevant in a claim for permanent injury.

Mr. Keating stated that the committee has proposed two versions, and that either version would deal with the concern about a narrow reading of the provision. He submitted that this is not so much a rule change but, rather, a clarification like the prior amendment to ORCP 44. He noted that some on the committee feel that potential plaintiffs may be discouraged from filing claims if they feel they will need to reveal certain medical information they feel is irrelevant. Mr. Keating stated that the solution to this is for the attorney to seek a protective order and to submit the records to a judge for an in camera review. Mr. Keating stated that, in his experience, when situations like this have arisen, he will not use the irrelevant and potentially embarrassing information. He reiterated that he has heard concerns about bad actors, but stated that he does not know that preventing the discovery of evidence which would be discoverable under ORCP 36 B can be justified on the basis that there may be bad people who may do bad things with it. He observed that there are tools available to seek agreement with an opponent and then to go to the court for resolution.

Mr. Brian stated that he does not believe that the proposed changes add anything to the current state of the law, and that these changes are being requested because defense attorneys have received rulings by judges that they do not like. His concern is that these changes will also be used in the future to further erode the privacy of plaintiffs and their medical records as it relates to medical records having nothing to do with injuries for which recovery is sought.

Mr. Buckle expressed concern regarding the inability to receive medical records about other conditions which contribute to a plaintiff's personal limitations in a

personal injury case due to the large number of recent rulings that say records are not discoverable because they do not relate to the same body part when, in fact, that information is very relevant to the claim of permanent injury.

Mr. Bachofner stated that he feels that we need to include the language from ORCP 36 B(1), rather than just referring back to ORCP 36 B(1), because ORCP 44 itself is a limited exemption to the privilege, so we end up in a loop. He maintained that simply referring to ORCP 36 B(1) in Rule 44, when Rule 36 B(1) includes the phrase "not privileged," adds nothing.

Mr. Beattie stated that Rule 44 is not dealing with the admissibility of evidence but, rather, its discoverability. He noted that he does not see a horrendous imposition on plaintiffs, and that he has never seen potentially embarrassing medical information disseminated willy-nilly in 20 years of practice.

Judge Hodson noted that this rule change has been proposed because of the "body part rule" in Multnomah County, which is not a rule but, rather, a statement about rulings made by judges in the past. He stated that, from his perspective, the current rule allows both types of rulings, and that sometimes it makes sense to allow discovery of records relating to other body parts and sometimes it does not. He stated that he does not believe that a rule change is needed because the current rule allows what is being argued for by certain committee members.

Ms. Bird observed that she can personally relate to this issue and that she has worked with people who have navigated the court system from a medical perspective. She stated that our bodies are very much connected and that an injury to one part can very much affect other parts, and that trying to find liability can be very challenging. She noted that she is not necessarily expressing an opinion one way or another, but that she is enjoying the discussion, and this is part of the reason she chose to be on the Council. Ms. Bird also stated that, if we had access to health care for everyone, we would probably have fewer issues like this, as people would be less likely to have the need to pursue legal recourse for their injuries.

Mr. Bachofner stated that he does not want to incentivize people to have to do a motion to compel in order to get records that are related to claims that are in the lawsuit. He stated that it should be a default that a plaintiff should be obligated to provide records that are related to claims in the lawsuit and that, if for some reason the defense is being too aggressive, the plaintiff can seek a protective order. He stated that he feels that, if the rule is left the way it is now, a defense attorney will never know for certain if there are additional relevant records out there, Mr. Bachofner observed that perhaps the proposed language is not the best way to solve it, but that he believes that it does address the problem and that is why he is advocating for the change.

Mr. Cooper observed that Oregon's legal system is unique in many ways, including the retention of code pleading, lack of expert discovery and interrogatories, and the fact that it does not consider the filing of an injury claim to constitute a full waiver of the physician/patient privilege. He stated that he sees Rule 44 as having been crafted to address the tension created by that uniqueness. We recognize that we cannot fully foreclose the defendant from seeing medical records, but the question is the extent. He expressed a great concern for plaintiffs being told that the cost for seeking recovery for an injury is full revelation of every private medical detail to the defendant and his or her lawyer. He stated that the amendment being proposed does not change the rule other than to give litigants in 2014 a reason to come look at the Council's minutes and search for the reason behind the rule change. Mr. Cooper noted that he is strongly in favor of not changing the rule, but stated that root of the problem is that not every trial judge agrees with every lawyer that appears before them. He agreed that the bench has broad discretion, and that it is a legitimate use of the bench's time to ask judges to spend time on these medical records disputes. He also expressed that he believes the rule works well in its current form and that, if some would like to make a wholesale change of this rule to allow a full waiver of the physician/patient privilege, that should be acknowledged.

Prof. Peterson pointed out that, if the Council does not make some kind of amendment to a rule, its discussion is only interesting but not persuasive. If, however, a rule change is made, the Council's discussion becomes legislative history.

Judge Gerking stated that the Council's discussion reflects a tension between the patient/physician privilege and liberal rules of discovery. He disagreed that the proposed change is an effort to more liberalize the existing rule but, rather, an attempt to clarify the rule in order to assist the bench and the litigants in trying to resolve this tension on a case-by-case basis. He stated that this clarification would provide assistance to the bench in trying to deal with this tension.

Judge Williams agreed with Judge Hodson that these rulings are made on a case-by-case basis and that he does not believe that the proposed change would be a change to the rule but, rather, a clarification for the bench. He expressed concern that it would just be a clarification for the members of the Multnomah County bench who follow the "same body part" rule.

Ms. O'Leary also agreed with Judge Hodson. She stated that she has practiced in state and federal court and has had the same issues arise in both jurisdictions, and in state court the judges are more mindful of the privacy issue. She stated that, when the opposing counsel wants more records, the court does a balancing act and it should remain decided on a case-by-case basis. Ms. O'Leary stated that federal court does not have that type of discretion and she believes that federal

judges would interpret the proposed clarification to mean that the sky is the limit. In her experience, when she thinks a discovery request is a fishing expedition, federal judges have allowed it, and this can be very expensive. She stated that this is not a streamlined, expeditious, economical way to deal with medical records, and she has had so many bad experiences with the federal counterpart to this rule that she would rather trust judges to have discretion.

Mr. Buckle noted that a judge can do in camera inspection of the records to see if they are relevant. Ms. O'Leary stated that the presumption is that the records should be relating to the actual claim, and that records relating to the same body part reflect the claim. She observed that, if opposing counsel thinks there are records that rebut that, the burden should be on that party. She asked why a plaintiff should be required to go to the expense of providing all records and later fight to keep them out. Mr. Keating noted that, if a plaintiff's attorney decides that the only thing truly discoverable are records relating to the same body part and those are the only records that are produced, he does not have anything else to take before the court. He stated that he cannot say he suspects there may be other records that have a bearing on life expectancy or mental health, but he does not know that. Mr. Cooper reiterated that the Council sees the "bad actor" problem in a number of these rules and, much as we might like to have one, there is no rule that just says "play fair."

Judge Holland asked whether we have received input from OTLA and OADC. Mr. Cooper stated that the uniform response from OTLA is that the rule pretty much works. Ms. David stated that OADC members are in favor of the rule change. Mr. Beattie observed that he would find it likely that OADC and its members would support a rule that plaintiffs waive the physician/patient privilege and that records do not become admissible but, rather, discoverable. He stated that such a change would provide consistency from county to county.

Ms. David stated that she represents doctors and lawyers all over the state and has filed this type of motion in a dozen different counties in the last three to four years, and that this issue comes up fairly regularly throughout the state, not just in Multnomah County. She observed that the ORCP are written very broadly to allow parties to obtain any material calculated to lead to discovery and to allow parties to go to the court as the gatekeeper to determine whether it is discoverable. Ms. David pointed out that defendants would not know about other non-body-part related records unless they were provided. She stated that she feels like attorneys file a lot of unnecessary motions just to get information that ORCP 36 already says is discoverable. She stated that she is in favor of the second version and that she believes it is a clarification that the scope of discovery under Rule 44 is the same as under ORCP 36 B.

Ms. Gates observed that she has seen that the Council usually errs on the side of

restraint, especially when it is a question of: a) a substantive change; b) a philosophical issue; or c) language that is really going to change practice. She encouraged Council members to think about those issues in relation to this proposed change and noted that, for other rules, the Council has taken the step of writing to OTLA, OADC, and the Circuit Court Judges Association encouraging them to start education or discussion with their members. Ms. Gates stated that she believes that there is a better way to address this issue than the proposed language, which can create a potentially circular reading between ORCP 44 and ORCP 36. She observed that, while it might educate some judges, it might confuse the ones who understand how the rule operates now.

Mr. Cooper noted that the Council does not vote on publication until September and suggested that it might be time to table discussion unless someone believes that there are problems with the language. Judge Gerking observed that, since the committee was torn on this issue, it follows that the whole body will also be torn. Judge Holland asked whether the Council can choose a version now to vote on in September, or decide not to vote on either in September and table the issue altogether. Mr. Cooper stated that he would feel uncomfortable not having a vote on the September agenda since some members feel very strongly about the issue. A motion was made to table discussion on the issue and to vote on the proposed amendments at the September meeting. The motion was seconded and passed unanimously.

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

Mr. Keating reported that the committee had met the previous Friday. Ms. David stated that the committee will produce a memo to the Council illustrating its analysis of the various issues but that, in essence, it has determined that this seems to be a bench and bar education issue. She noted that the committee will also ask Prof. Peterson to send a friendly letter to various associations such as the Oregon Law Institute, Oregon Association of Trial Lawyers, and the Oregon Association of Defense Counsel suggesting that they might be interested in developing seminars about best practices for summary judgment.

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

Prof. Peterson reported that he had done research regarding the origins of ORCP 54 and found that then-Judge Kistler's opinion in *Guerin v Beamer*, [163 Or. App. 172, 986 P. 2d 1241 (1999)] provides a better recounting of the Council's discussion at the time of the adoption of the rule than is found in the Council's records. He stated that this issue was brought to the Council last biennium by Judge Leslie Roberts, who was troubled by a party bailing out of lawsuit at the point of summary judgment and being able to restart. Prof. Peterson stated that discussion on our rule specifically included whether summary judgment should be a point where a case could not be voluntarily dismissed without prejudice and then re-filed, and this premise was hotly debated but ultimately rejected by the Council at the inception of the ORCP. He noted that Mr. Weaver's paralegal had done some research which found that Washington is more generous about the five days, and even allows a party to withdraw a case in the midst of trial. He stated that the committee will meet and talk about all of this research. He stated that this may be an issue of fairness, and also noted that there is already a statute of limitations limitation on this kind of dismissal. If a case is filed late in the statue of limitations and a voluntary dismissal is taken, it will end up being the same as an involuntary dismissal and will be a dismissal that will finally adjudicate the case. However, if a case is filed early enough, there is the opportunity to have two bites at the apple, even if a serious mistake is made. He stated that the original Council thought that was a good idea at the time and that he does not know if the committee will think it is a good idea now.

Ms. David pointed out that the Legislature changed ORS 12.220 in 2003 to address whether a dismissal is with or without prejudice, and asked whether the committee had considered this statute in relation to ORCP 54 A. Prof. Peterson stated that the committee had not, and thanked her for bringing it to its attention. Ms. David stated that it can create an inadvertent time bar that was unanticipated when both sides agreed to a dismiss and re-file the case, they do so, and find that there is a statute that bars them from it.

9. ORCP 57 F: Alternate Jurors (Ms. O'Leary) (Appendix E)

Judge Zennaché stated that the most recent draft amendment is different from the last one submitted by the committee. He noted that the changes before the Council in the current amendment are to allow alternate jurors to be substituted at the court's discretion once deliberation has begun if a juror is not able to complete deliberation. Judge Zennaché observed that the committee has one more issue to address: whether to allow more discretion about how to allow a judge to handle peremptory challenges if the judge wants to identify alternate jurors at the end of the trial rather than during jury selection. He stated that this

would entail a modest change at the end of section F. Prof. Peterson informed the Council that Council staff and Judge Armstrong had also made numerous small technical changes to the rule and asked that Council members read through the rule carefully. Judge Zennaché stated that the committee will provide another draft at the next meeting.

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

Ms. Leonard and Judge Armstrong were not present at the meeting. Judge Zennaché stated that the committee had met briefly and that Judge Armstrong planned to draft language for a rule amendment. He stated that the committee will meet again and report in May.

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

Ms. David reported that the committee needs to meet again to wrap up loose ends. Mr. Cooper stated that Mike Schmidt of the Oregon State Bar Elderlaw Section had drafted an amendment to the probate statute to specifically say that ORCP 68 does not apply to attorney fee awards in probate cases. He stated that he will talk to Mr. Schmidt before the committee talks again. Ms. Grabe informed the Council that April 2, 2012, was the deadline for sections to submit legislative proposals to the OSB, and that there is a board meeting on scheduled for April 23, 2012, from 10:00 a.m. to 12:00 noon at the OSB Center. She stated that there is also a legislative forum where representatives will be available and where other interested groups can provide input. Ms. Grabe stated that all of the proposals are currently available on the Bar's website. She stated that she or David Nebel will let the Council know if there are any other proposals which will impact the ORCP. Mr. Cooper stated that he will try to attend the meeting on April 23, 2012.

VI. New Business (Mr. Cooper)

A. Legislative Amendments to ORCP 65 (Prof. Peterson) (Appendix F)

Prof. Peterson reported that the Legislature had made a change to ORCP 65 which will in no way will affect how the rule works but, rather, will change how referees are funded.

B. ORCP 7 (Prof. Peterson)

Prof. Peterson indicated that he had received an e-mail from Holly Rudolph, the Oregon e-court Forms Coordinator at the Oregon Judicial Department. She indicated that she is drafting instructions for the pro se forms provided by the state and had a question about whether the intent of Rule 7 D(2) is to require a process server to mail the documents or if parties may do so, and whether any proposal has been made to clarify or change this rule. Prof. Peterson noted that Ms. Rudolph had indicated that she was aware that Multnomah

County Circuit Court Judge Maureen McKnight had raised this issue with the Council early in this biennium. He stated that he informed Ms. Rudolph that ORCP 7 D(2) is silent as to who can serve, but the qualifications for servers (found in ORCP 7 E) indicate that attorneys can serve by mail and that parties cannot. The ability of attorneys to serve by mail as provided in ORCP 7 D(2) is an exception, as attorneys cannot generally serve the summons. The Council's discussion was that personal jurisdiction is a significant thing and it is not wise to allow just anyone to perform service of the summons. Prof. Peterson explained to Ms. Rudolph that the exception for mail service by an attorney for a party is one that was carefully considered. Ms. Rudolph stated that her group had done a survey which found that the courts thought that it was fine for any party to serve by mail and no one had raised an issue. Prof. Peterson noted that it is not the court's duty to affirmatively question the qualification of the server, and someday some defendant will challenge personal jurisdiction based on the qualifications of the server when service is by mail. Ms. Rudolph stated that she will change the forms based on the discussion and indicate that only attorneys can perform service by mail, since that is what the rule seems to say. However, she wondered whether the Council might want to reconsider and allow parties, or anyone, to serve by mail. Prof. Peterson told Ms. Rudolph that the Council is close to the end of its biennial cycle and might look at the issue next biennium.

C. Assigning Liaison to UTCR Committee (Ms. David)

Ms. David observed that it would be helpful for the Council to assign a liaison to the UTCR Committee. She stated that the UTCR Committee sometimes seeks changes to the ORCP, and that there are currently many out-of-cycle UTCR changes being considered due to the e-court roll-out. Ms. Grabe stated that the UTCR Committee meets twice a year for seven to eight hour sessions and that their appointments are made by the Supreme Court. She noted that the Committee will have an all-day meeting on April 20, 2012, and will consider public comments at that meeting. Mr. Keating mentioned that his partner, Lindsey Hughes, is on the UTCR committee. Mr. Cooper stated that he will call Ms. Hughes before the April 20, 2012, meeting to check in. At this point, Judge Gerking, who had been out of the room, returned and indicated that he is also a member of the UTCR Committee. Ms. David asked if he would be willing to be the Council's liaison and keep the Council informed of what is happening on the UTCR Committee. Judge Gerking agreed.

VII. Adjournment

Mr. Cooper adjourned the meeting at 11:33 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT 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)

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

SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; SANCTIONS

RULE 17

A Signing by party or attorney; certificate. Every pleading, motion and other document of a party represented by an attorney shall be signed by at least one attorney of record who is an active member of the Oregon State Bar. A party who is not represented by an attorney shall sign the pleading, motion or other document and state the address of the party. Pleadings need not be verified or accompanied by affidavit or declaration. **The form of signature for conventional filings may be electronic, consistent with the provisions for electronic signatures set forth in UTCR 21.090(2).**

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DEPOSITIONS UPON ORAL EXAMINATION

RULE 39

*****

C Notice of examination.

C(1) General requirements. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

C(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when served with notice under this subsection, the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C(3) Shorter or longer time. The court may for cause shown enlarge or shorten the time for taking the deposition.

C(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A

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court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deponent. The procedure of Rule 43 shall apply to the request.

C(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall **provide reasonable advance notice of no fewer than twenty-four (24) hours before the scheduled deposition, absent good cause or agreement of the parties and the deponent,** [*designate*] **designating the name(s) of** one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and [*shall set*] **setting** forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C(7) Deposition by telephone. Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the

party taking the deposition.

*****

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C(2) Special notice. Leave of court is not required for the taking of a deposition by plaintiff if the notice (a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

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C(4) Non-stenographic recording. The notice of deposition required under subsection (1) of this section may provide that the testimony be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A

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court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) Production of documents and things. The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 43 shall apply to the request.

C(6) Deposition of organization. A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall **provide reasonable advance notice of no fewer than three (3) days before the scheduled deposition, absent good cause or agreement of the parties and the deponent,** [*designate*] **designating the name(s) of** one or more officers, directors, managing agents, or other persons who consent to testify on its behalf, and [*shall set*] **setting** forth, for each person designated, the matters on which such person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C(7) Deposition by telephone. Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the

party taking the deposition.

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PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

RULE 44

A Order for examination. When the mental or physical condition or the blood relationship of a party, or of an agent, employee, or person in the custody or under the legal control of a party (including the spouse of a party in an action to recover for injury to the spouse), is in controversy, the court may order the party to submit to a physical or mental examination by a physician or a mental examination by a psychologist or to produce for examination the person in such party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

B Report of examining physician or psychologist. If requested by the party against whom an order is made under section A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to

comply. **The phrase "relating to injuries for which recovery is sought" shall be construed consistently with Rule 36 B.**

D Report; effect of failure to comply.

D(1) Preparation of written report. If an obligation to furnish a report arises under sections B or C of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.

D(2) Failure to comply or make report or request report. If a party fails to comply with sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

E Access to individually identifiable health information. Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

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RULE 44

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B Report of examining physician or psychologist. If requested by the party against whom an order is made under section A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting person or party a copy of a detailed report of the examining physician or psychologist setting out such physician's or psychologist's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows inability to obtain it. This section applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise.

C Reports of examinations; claims for damages for injuries. In a civil action where a claim is made for damages for injuries to the party or to a person in the custody or under the legal control of a party, upon the request of the party against whom the claim is pending, the claimant shall deliver to the requesting party a copy of all written reports and existing notations of any examinations relating to injuries for which recovery is sought unless the claimant shows inability to

comply. **The phrase "relating to injuries for which recovery is sought" shall be construed to include information reasonably calculated to lead to the discovery of admissible evidence.**

D Report; effect of failure to comply.

D(1) Preparation of written report. If an obligation to furnish a report arises under sections B or C of this rule and the examining physician or psychologist has not made a written report, the party who is obliged to furnish the report shall request that the examining physician or psychologist prepare a written report of the examination, and the party requesting such report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to prepare such a report.

D(2) Failure to comply or make report or request report. If a party fails to comply with sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed report within a reasonable time, or if a party fails to request that the examining physician or psychologist prepare a written report within a reasonable time, the court may require the physician or psychologist to appear for a deposition or may exclude the physician's or psychologist's testimony if offered at the trial.

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SUBPOENA

RULE 55

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H Individually identifiable health information.

H(1) Definitions. As used in this rule, the terms "individually identifiable health information" and "qualified protective order" are defined as follows:

H(1)(a) "Individually identifiable health information" means information which identifies an individual or which could be used to identify an individual; which has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and which relates to the past, present or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.

H(1)(b) "Qualified protective order" means an order of the court, by stipulation of the parties to the litigation or otherwise, that prohibits the parties from using or disclosing individually identifiable health information for any purpose other than the litigation for which such information was requested and which requires the return to the original custodian of such information or destruction of the individually identifiable health information (including all copies made) at the end of the litigation.

H(2) Mode of Compliance. Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.

H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information must serve the custodian or other keeper of such information either with a qualified protective order or with an affidavit or declaration together with attached

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supporting documentation demonstrating that:

H(2)(a)(i) the party has made a good faith attempt to provide written notice to the individual or the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object;

H(2)(a)(ii) the notice included the proposed subpoena and sufficient information about the litigation in which the individually identifiable health information was being requested to permit the individual or the individual's attorney to object; **and**

H(2)(a)(iii) the individual did not object within the 14 days or, if objections were made, they were resolved and the information being sought is consistent with such resolution. The party issuing a subpoena must also certify that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

H(2)(b) Within 14 days from the issuance of a notice requesting individually identifiable health information, the individual or individual's attorney objecting to the subpoena shall respond in writing to the party issuing the notice, specifying in detail the grounds for each objection.

H(2)[*(b)*]**(c)** Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of individually identifiable health information in an action in which the entity or person is not a party, and the subpoena requires the production of all or part of the records of the entity or person relating to the care or treatment of an individual, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection (3) of this section.

H(2)[*(c)*]**(d)** The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: [*(i)*]

if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; [*(ii)*] if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; [*(iii)*] in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; [*(iv)*] if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(c)(iv), then a copy of the proposed subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the entity or person. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.

H(2)[*(d)*]**(e)** After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing, at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records which are not introduced in evidence or required as part of the record shall be returned to the custodian of hospital records who submitted them.

H(2)[*(e)*]**(f)** For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection (3) of section D.

H(3) Affidavit or declaration of custodian of records.

H(3)(a) The records described in subsection (2) of this section shall be accompanied by the affidavit or declaration of a custodian of the records, stating in substance each of the following:

H(3)(a)(i) that the affiant or declarant is a duly authorized custodian of the records and has authority to certify records;

H(3)(a)(ii) that the copy is a true copy of all the records responsive to the subpoena; **and**

H(3)(a)(iii) that the records were prepared by the personnel of the entity or person acting under the control of either, in the ordinary course of the entity's or person's business, at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) If the entity or person has none of the records described in the subpoena, or only a part thereof, the affiant or declarant shall so state in the affidavit or declaration and shall send only those records of which the affiant or declarant has custody.

H(3)(c) When more than one person has knowledge of the facts required to be stated in the affidavit or declaration, more than one affidavit or declaration may be used.

H(4) Personal attendance of custodian of records may be required.

H(4)(a) The personal attendance of a custodian of records and the production of original records is required if the subpoena duces tecum contains the following statement:

_____

The personal attendance of a custodian of records and the production of original records is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

_____

H(4)(b) If more than one subpoena duces tecum is served on a custodian of records and personal attendance is required under each pursuant to paragraph (a) of this subsection, the custodian shall be deemed to be the witness of the party serving the first such subpoena.

H(5) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the

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contrary.

H(6) Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

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*] **a** 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

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*] **each** shall be examined as to [their] **his or her** 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 qualification[*s*] 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*] **of which** 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*] **has** 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*] **is** 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*] **is** 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 **as** to any juror before the jury is completed and sworn, notwithstanding **that** the juror challenged may have been [*theretofore*] **previously** 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*] **the** 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*] **empanelled** to sit as alternate jurors. Alternate jurors**,** in the order in which they are called**,** shall replace jurors who, [*prior to the time*] **before** the jury [*retired*] **retires** 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 do not 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 replaces 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]* **empanelled**, two peremptory challenges if three or four alternate jurors are to be [*impanelled]* **empanelled**, and three peremptory challenges if five or six alternate jurors are to be [*impanelled*] **empanelled**. 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.

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REFEREES

RULE 65

A In general.

A(1) Appointment. A court in which an action is pending may appoint a referee who shall have such qualifications as the court deems appropriate.

A(2) Compensation. The fees to be allowed to a referee shall be [*fixed by the court and shall be charged upon the parties or paid out of any fund or subject matter of the action which is in the custody and control of the court, as the court may direct*] **as provided in ORS 21.400**.

A(3) Delinquent fees. The referee [*shall*] **may** not retain the referee's report as security for compensation. [*If a party ordered to pay the fee allowed by the court does not pay it after notice and within the time prescribed by the court, the referee is entitled to a writ of execution against the delinquent party.*]

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