MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 8, 2012, 9:30 a.m.
Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Jay W. Beattie
Arwen Bird
Michael Brian
Brian S. Campf
Brooks F. Cooper
Kristen S. David*
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson
Hon. Lauren S. Holland*
Robert M. Keating
Hon. Rives Kistler
Maureen Leonard
Hon. Eve L. Miller
Leslie W. O'Leary
Hon. David F. Rees
Mark R. Weaver*

Members Absent:

Eugene H. Buckle
Jennifer L. Gates
Hon. Robert D. Herndon
Hon. Locke A. Williams
Hon. Charles M. Zennaché

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 17 A • ORCP 19 B • ORCP 27 • ORCP 39 C • ORCP 44 C • ORCP 46 B • ORCP 55 H • ORCP 57 F • ORCP 59 H • 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 44 C • ORCP 45 • ORCP 54 A

I. Call to Order (Mr. Cooper)

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

II. Introduction of Guests

There were no guests present requiring introduction.

III. Approval of June 9, 2012, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft June 9, 2012, minutes (Appendix A) which had been previously circulated to the members. Prof. Peterson suggested that a word change needed to be made on page 3, in the first full paragraph, to read "sufficient to prove by a preponderance." A motion was made to approve the minutes as amended, the motion was seconded, a voice vote was taken, and the amended minutes were unanimously approved.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Ms. Nilsson briefly reviewed the Website Report (Appendix B) and stated that the number of visitors was down compared with the last report and that this could have been due to the fact that people were on summer vacation and that the Council did not have a meeting during the period in question. She mentioned that more visitors came to the website via referrals from other sites than by search engine queries or direct visits, so it is important to continue to maintain relationships with other agencies, bar associations, and the like and ask that a link to the Council's website continue to be maintained on their websites.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson stated that he had prepared a draft e-mail for Council members to send to their legislator contacts after the June Council meeting, and that he will do the same after this meeting.

V. Old Business (Mr. Cooper)

A. Committee Updates/Reports

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

Ms. O'Leary reminded the Council that the reasons for the change to ORCP 17 A (Appendix C) were: 1) to make it more convenient for small firms to get filings to court without original attorney signatures; and 2) to make the rule conform to the electronic filing system which is going to be implemented over the coming year. She noted that the Uniform Trial Court Rules (UTCR) require electronic filing with an electronic signature and that the current Oregon Rules of Civil Procedure (ORCP) would ostensibly conflict with that. Ms. O'Leary noted that the draft has been through a lot of vetting with the committee and the full Council.

Judge Gerking asked whether there is another ORCP that refers to electronic filing. Mr. Cooper stated that, other than Rule 1 which gives the authority for electronic filing, there is not.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 17 A

A motion was made to publish the committee's draft amendment of ORCP 17 A. The motion was seconded and passed by voice vote.

2. ORCP 19: Affirmative Defenses – modernize *res judicata* (Ms. Leonard)

Ms. Leonard explained that the change to ORCP 19 (Appendix D) was to update the language in section B, where "*res judicata*" was replaced with "claim preclusion and issue preclusion." Prof. Peterson pointed out four staff changes and punctuation changes which improved readability of the rule, but did not change it substantively.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 19

A motion was made to publish the committee's draft amendment of ORCP 19. The motion was seconded and passed by voice vote.

3. **ORCP 27**: Notice and Other Protections in Appointment of Guardians Ad Litem (Mr. Cooper)

Mr. Cooper observed that this version of the committee's draft (Appendix E) is slightly different in grammar and language than the version that the Council looked at in May. He stated that Council staff did a great job in making grammatical changes and cleaning up the rule without changing the substance, and that the rule is now much clearer. Mr. Cooper explained that the bench has been experiencing problems with what it sees as improper use of guardians ad litem (GAL), especially in the case elderly people. He stated that it is shocking that, under the existing rule, no proof is required to have someone declared incompetent and to have a GAL appointed.

Mr. Brian stated that he has concerns about what would happen in, for example, a personal injury case involving a minor where the parents come in to an attorney right before the statute of limitations runs. He asked Mr. Cooper to explain how the new rule will not add days before one can have a GAL appointed and, therefore, cause the statute of limitations to expire. Mr. Cooper stated that section G gives the bench clear discretion to waive or modify notice, and that section was drafted with Mr. Brian's exact thought in mind. Mr. Brian asked how we will make sure that lawyers and judges know this. Mr. Cooper stated that it is an education issue and that, if this amendment is promulgated, he will be talking to the Oregon Trial Lawyers Association and that he expects that other lawyers on the Council will talk to the Oregon Association of Defense Council and that judges will talk to the bench. Mr. Brian stated that he does not anticipate problems in a small county like Jackson but that, in larger counties, there can be much more formal procedures for getting the GAL motion heard. He expressed concern that we may be setting a trap for the unwary. Mr. Cooper stated that, in most counties, there is an opportunity once or twice a day for *ex parte* sessions with the presiding judge. Judge Miller stated that an attorney can come before any judge to explain his or her need for a ruling on a motion.

Judge Holland stated she does a lot of guardianship and probate cases and that Mr. Brian's point is well taken. She observed that the Council really does have to take a good look at any unintended consequences of changing the ORCP in the tort area because, despite the language "for good cause shown," there are a lot of judges who will that say filing a case at the end of the statute of limitations and rushing to file something is not good cause if you had information beforehand. She stated that it is a concern for judges who do not have the benefit of being on the Council. Judge Holland stated that if one looks at ORS chapter 125, where some of the changes to the rule are coming from, a temporary guardianship requires more criteria, and is not just temporary in time, but is also based upon an emergency posing immediate danger to the life or welfare of a respondent. She observed that this is a higher standard than "good cause." She noted that, if someone looks at that statute and tries to transpose that aspect of the temporary guardianship onto section G of Rule 27, then good cause may be thought to involve far different criteria. Judge Holland stated that she is not sure how to address the issue because the statutes do not distinguish between a GAL and a guardian. Judge Miller observed that, by virtue of the fact that these issues are being discussed on the Council's record, perhaps we can make it clear that appointing a GAL is not the same as trying to appoint a guardian in the other statutory schemes, and that the genesis for this section of the rule change is trying to address the problem of representing an incapacitated party where the statute of limitations is about to expire. She stated that she cannot conceive of a way of including this in the rule where it is not overly cumbersome.

Mr. Cooper noted that the only place in the entire Oregon legislative scheme where the concept of a "guardian ad litem" is used is in ORCP 27. In ORS chapter 125, the terms "guardian" and "conservator" are used but the "guardian" has a vast swath of control over the protected person, whereas a GAL's control is limited to a single piece of litigation. Mr. Cooper said he would be surprised if anyone would attempt to import things like the very cumbersome temporary guardianship scheme into Rule 27. He pointed out that the only place the rule refers to chapter 125 is in the definition of an incapacitated person, and that this is simply as a matter of legislative clarity to avoid the need to change the rule if chapter 125 changes. He stated that the only way he can see the rule working to provide more protection for elderly and incapacitated persons, but still leave discretion for judges, is something along the lines of section G. Mr. Beattie stated that he agrees with Judge Holland that judges can deny relief if an attorney comes to them at the last minute, and that this could lead to denial of the appointment of a GAL and sabotage the plaintiff. He asked whether there is any way to say that a GAL can appear without appointment for the sole purpose of filing a complaint, and then require approval to continue representing the plaintiff.

Justice Kistler stated that another way to get to the same place might be to say that good cause for temporary appointment includes the need to file within the statute of limitations. Mr. Bachofner wondered if we could devise a situation where a GAL is allowed and, within 14 days, another hearing is held. Judge Holland stated that she would hate to make this exception because filing a lawsuit could include a Family Abuse Protection Act (FAPA) or Elder/Disabled Abuse Prevention Act (EDAPA) restraining order, and abuse of that procedure is what the rule change is trying to help avoid. Prof. Peterson stated that, in the rule regarding the amendment of pleadings, Rule 23, there is language that states that amendments shall be allowed when justice so requires, and wondered if that language could be used. He also observed that, in an instance where a case is filed on behalf of a 13-year-old the day before the statute runs and the person who filed the case

did not have capacity, that could be objected to, but the statute of limitations would have been met. Judge Miller stated that relying on such a filing is a risky proposition for a lawyer. Mr. Cooper stated that a minor is incapacitated by law from hiring counsel and engaging in the process of litigation, so he would see the filing of a lawsuit on behalf of a 13-year-old in the same way as filing on behalf of Mickey Mouse: filing for a non-party. Mr. Bachofner wondered whether a minor is incapacitated from hiring an attorney, or just incapacitated from being able to bind himself or herself. Judge Miller stated that she has seen someone sue in the name of a dead person, not realizing that they needed a personal representative, but that it is a risky business to think that somehow the statute would toll and a judge would say that the later appointment of a GAL is sufficient to have covered the earlier filing.

Mr. Cooper suggested using Prof. Peterson's suggestion of changing "for good cause shown" to "when justice so requires." Mr. Bachofner suggested using both terms. Judge Rees suggested, "for good cause shown including but not limited to filing within the statute of limitations." Judge Miller observed that there are deadlines that are not necessarily statutes of limitations for FAPA cases and other such matters. Mr. Cooper stated that he would like the language to be more broad rather than more limited, because many attorneys do not have a lot of experience with issues that the bench sees all the time, and he is uninterested in restricting the bench's discretion. Mr. Cooper stated that he would be happy with either "when justice so requires" or both terms. Judge Rees stated that he is hearing concern that some judges will exercise discretion to dismiss a case that is filed right up against the statute of limitations, and that those words would actually limit discretion.

Judge Miller observed that there is a practical problem of clerks who issue forms and papers and then say, "your paperwork is in order," and present it to the judge *ex parte*. She noted that there are some clerks who are so literal they cannot imagine there would be some discretion the judge would apply. She stated that there is often a layer between a litigant and the judge that sometimes needs to be bridged in order for the people processing papers to understand that they need to show something promptly to the judge. Judge Gerking stated that he prefers "when justice so requires." Judge Holland stated that she prefers more general language. She observed that FAPA restraining orders do not have a statute of limitations, but the petitioner must allege that abuse has occurred in the last six months, and she is concerned that someone might consider that six month period to be a statute of limitations when reading this rule. She stated that she likes "good cause and when justice so requires." Mr. Bachofner stated that if "for good cause shown," is not included, a practitioner would not know what "when justice so requires" means and would not know how to put on a showing that the notice requirements should be waived or modified.

Mr. Cooper asked that the Council vote on whether to amend section (G) to read either: 1) "for good cause shown, or when justice requires, the court..."; or 2) "for good cause shown, which includes but is not limited to when necessary to meet a filing deadline, the court may..." The Council took two voice votes: the first suggestion received eight votes and the second received nine votes.

Mr. Keating asked whether section (H) is a statement of existing law. Mr. Cooper stated that it is, and that a guardian ad litem does not have authority to settle because their job

is only to prosecute or defend the litigation. He stated that he has met very few members of the bench who disagree with him. Mr. Keating expressed concern in determining with whom defense counsel can negotiate a settlement in a disposition of a property claim. Mr. Beattie stated that the change seems substantive and not procedural to him, since who has the authority to settle a case is a matter of statute and not rule. Mr. Cooper stated that the reasoning behind the draft is that the bench has represented to him that many times the plaintiff comes in and asks for authority for a GAL to settle a case, or to have a case voluntarily dismissed because the GAL signed a settlement agreement and got their hands on the minor's money, and the bench's position is that the settlement needs to be in the hands of a conservator under the court's authority or the parties need to utilize the procedure designed in ORS 126.725 for small settlements. Mr. Cooper pointed out that the reason this is included in the rule is for the purpose of education of the bar.

Judge Miller stated that she believed that a GAL could settle a case but could not receive the money – that, once the settlement occurs but before the money is tendered from the payer, there must be a conservatorship established, but the authority to settle was with the GAL with court approval. Judge Holland stated that, as a practical matter, she has not had a GAL settle a case in the last 10 years, and that it has always been a conservator. She noted that this does not mean it could not happen because Judge Miller is correct that, under the rule, the GAL could potentially be involved in the settlement which must be approved by the judge. Mr. Cooper observed that, even if Mr. Keating reaches a settlement agreement with a GAL, he may expect a delay of a couple of months in the settlement of a case because a conservator needs to be appointed. Judge Miller stated that she agrees with the concept of the conservator being the one who gets to actually present the settlement but that, as a practical matter, when there is a trial date and deadlines and the parties need to call off witnesses once settlement is reached, if you reach settlement with a GAL you are entering a kind of a no-man's-land. Mr. Beattie agreed that this is particularly true with multiple defendants where a settlement may be reached with one party but the case is not over. Mr. Cooper addressed the question of whether the change is procedural or substantive by pointing out that a GAL is solely a creature of the ORCP and, in this area, all we are doing is shifting the necessary work of seeking approval from one potential fiduciary to another, which feels very procedural to him.

Mr. Keating stated that he is hearing that a GAL does not have the capacity to settle a case, and when he walks out of a mediation and starts calling off witnesses, the reality is that, if someone later believes the settlement was not a good deal, all they have to do is say the GAL lacked authority to settle the case. He observed that the safest thing to do as a defense lawyer is to get a conservator appointed before the mediation. Mr. Cooper noted that there is always a period of limbo where you have to seek court approval, but certainly a GAL could agree in a binding way that they would immediately seek appointment of a conservator and seek approval of the settlement, and that the only risk the defendant faces is people who are entitled to notice objecting, in which case there would be a hearing on the conservatorship.

Judge Holland stated that, in Lane County, if the settlement is done by a settlement judge, it is pretty pro forma that it will be approved by a probate judge. She stated that there are always other issues in terms of getting a probate judge to approve a settlement, one of which is that sometimes the court will require that another attorney be appointed for the

minor because sometimes the conservator has a potential conflict of interest, particularly if the conservator is a parent. Mr. Bachofner stated that he deals with a similar issue in bankruptcy cases where he represents the trustee and settlements are subject to approval from the bankruptcy court. Mr. Beattie wondered whether there are any other statutory situations other than where a conservator has been appointed or ORS 126.725 to which this rule may apply. He stated that he wants to make sure that we are not substantively changing things by limiting it to those two situations. Mr. Cooper stated that he is not aware of any. Mr. Beattie asked whether we want to put anything in the rule stating that the settlement has to be approved subject to the probate code, because you could end up with this procedure and then a substantive requirement elsewhere. Mr. Cooper pointed out that, at this point, there are only two fiduciaries he knows of in our entire statutory scheme to hold financial assets for someone else, and those are the custodian who fills out the affidavit under ORS 126.725 and the court appointed conservator. He observed that the conservator statutes have been static for well over a decade.

Ms. Leonard suggested eliminating the second half of the first sentence in section H and stringing the two sentences together. She asked whether that means approval for such settlement must be obtained. Mr. Cooper answered that it does. Mr. Cooper asked that the Council vote on whether to make the following amendment to section H: "Where settlement of the action will result in the receipt of property or money by the person for whom the guardian ad litem was appointed, approval of such settlement must be sought and obtained by a conservator. Alternatively, settlement may be accomplished pursuant to ORS 126.725, if applicable." The Council took a voice vote and the amendment passed.

Mr. Brian stated that he wanted to make clear whether the GAL has the authority to make a deal. Mr. Cooper and Judge Holland stated that GALs do not have this authority. Mr. Bachofner stated that it would be a tentative settlement agreement, and that the agreement should state that it is subject to court approval. Mr. Brian stated that, in big cases, if you do not get the right judge who will approve the settlement, this is worrisome. He stated that, because the Council's minutes are legislative history, he wanted to make clear that this group feels that the GAL has the authority to settle subject to the approval of the court. Judge Rees stated that he does not believe we are changing the substantive law, because the GAL does not have that authority. Mr. Beattie stated that this was a learning moment for him, because he did not know that the judge had veto power and he has always settled with GALs. Mr. Cooper observed that the way it happens in real practice is, if the GAL petitions to be appointed as conservator, the only time you will have a possible rejection of the settlement is where someone entitled to notice steps in and objects. Mr. Beattie asked how many situations there are where the GAL is not the conservator. Mr. Cooper stated that there are not very many and that it is possible, but that it is not very likely. He stated that, functionally, the only times he has seen a conservator appointed that is not the GAL is when there is a very seriously injured minor who will have money going into a special needs trust, and the parent is not educationally or intellectually equipped to handle it. Mr. Bachofner wondered about a situation where a minor objects to a settlement. Mr. Cooper stated that, if a minor is over the age of 14, he or she has right to object, even without counsel. He stated that there could be a situation where the parent says the settlement is adequate but the minor does not think so, in which case the parent, plaintiff's lawyer, defense lawyer, judge, and minor's lawyer would discuss the settlement. Judge Holland stated that sometimes the situation goes the other way, where the minor wants to settle the case in a reasonable way, but the parent may

have an addiction problem and want to try to get more money for himself or herself.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 27

A motion was made to publish the committee's draft amendment of ORCP 27, with the amendments to sections G and H outlined above. The motion was seconded and passed by voice vote.

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

Judge Gerking explained that the committee's proposed amendments, Version A (Appendix F) and Version B (Appendix G), change subsection C(6) and that this requires for the first time that the organization provide notice to designate the names of the individuals who are to testify on behalf of the organization. Judge Gerking suggested an additional change to specify that the actual notice presented to the organization include the requirement that the organization must, within the specified time period, designate the individuals who will be deposed. He stated that this will help protect smaller, non-party organizations. Mr. Cooper clarified that Judge Gerking was looking to include some words that make the subpoena require the language itself. Judge Rees observed that the language is already there: "a subpoena shall advise a non-party organization of its duty to make such a designation." Judge Gerking felt that the language is not explicit enough. Mr. Cooper stated that he understood Judge Gerking's concern in terms of a subpoena to a non-party. Judge Holland stated that she thinks it is pretty clear, that this is what has been there before, and that she is loathe to change that language as well. Judge Rees stated that the rule does not say that those are the words the subpoena should use, it says the subpoena shall advise them of their duties. Mr. Cooper agreed that the language "such a designation" will now include giving the name in advance. Judge Rees noted that the subpoena should say that. Mr. Bachofner stated that it should include it whether it is a non-party organization or a party organization.

Justice Kistler wondered whether "reasonable advance notice" means that someone could come in and argue that the required notice was not reasonable. He suggested removing the word "reasonable." Mr. Cooper proposed a scenario where the deposing party argues that they received the information 25 hours in advance but, since the subpoena was sent three months ago, it would have been reasonable to give notice of the person designated a week in advance, so they want to keep their deposition open and come back after doing more investigation. Justice Kistler asked, given the scope of what is at stake, what does the word "reasonable" add? Mr. Bachofner stated that there was concern by some on the committee that if you just have "provide advance notice no fewer than 24 hours (or three days)" that will be the default but that the "reasonable" language requires provision of reasonable notice but also gives a deadline. He observed that, as a practical matter, he could identify the deponent a week before and give

the name.

Judge Miller stated that the language does suggest that 24 hours (or three days) is all that is needed, that the subpoena was sent earlier but that by default the name is to be provided 24 hours (or three days) before the deposition. Mr. Bachofner stated that, practically speaking, there are instances where the name should not be provided three weeks in advance because you are trying to settle a case and you do not want to incur the expense of preparing somebody three weeks in advance. Judge Gerking stated that whether something is reasonable or not depends on the circumstances of the case, and that he thinks "reasonable" should remain, with a drop dead date. Judge Holland stated that, if it is meant that way, the language should read, "provide reasonable advance notice but not fewer than 24 hours (or three days)." Judge Hodson stated that he would be confused by that change, because then we are saying it has to be reasonable advance notice but not less than 24 hours (or three days) absent good cause shown. Mr. Cooper noted that, if we change "of" to "but," it does make sense to take out "absent good cause." Mr. Bachofner stated that this part should stay in because there are situations where there is going to be good cause, such as a deponent becoming ill and the organization needing to use someone else. Judge Hodson stated that is he agreeable to that concept, but wanted to leave the word "of," because "but" is meaningless if we say "absent good cause."

Mr. Keating raised the question of "reasonable" to whom. He observed that this is a corporate deposition and that someone is coming forth to speak for the corporation, so it does not matter who that person is. He noted that the plaintiff's lawyer should know the questions in advance and that, traditionally, the person who is produced pursuant to this rule will not be deposed personally at the Rule 39 C deposition. Mr. Keating opined that the only reason someone wants three weeks' notice of the person's name would be to figure out how to examine the deponent beyond the questions outlined in the organization's deposition. He wondered why 24 hours would not be considered reasonable. Mr. Campf stated that he could not imagine a circumstance where opposing counsel would give him the name of the person designated other than in the shortest amount of time allowed by the rule, because that time period would be construed as "reasonable." He stated that he feels that the word "reasonable" is not necessary because it adds confusion. Mr. Beattie agreed, unless you are talking about the quality of the notice.

Judge Miller asked to have Mr. Keating's concern addressed more thoroughly, and wondered about the questions that are asked in an organizational deposition. Mr. Cooper stated that the rule, as it exists now, requires the notice to describe with reasonable particularity the matters on which examination is requested. He observed that Mr. Keating's point is that it does not matter who will be answering those questions, so he wondered what difference it makes. Mr. Campf stated that, if he knows who the deponent is, he may have deposed this person before, or he

may have documents pertaining to that deponent which may be very relevant because, even if that person is testifying on behalf of the corporation, they are still speaking with knowledge of certain events, and he can use documents they are copied on to refresh their recollection, to impeach their testimony, or for some other purpose to bring out the facts. Judge Miller suggested setting up a second deposition because you cannot go beyond the scope of the corporate deposition but you may then want to depose the deponent as a person. Mr. Campf agreed that sometimes he will make arrangements with opposing counsel to do that during the corporate deposition but that you do so at your own peril, because you are making a judgment call on strategy. He stated that having the name more than 24 hours in advance is helpful because it takes time to find documents, and having the facts helps to elicit the testimony and guide the witness on topics that are noticed. Mr. Campf stated that he may have e-mails from the deponent about topic A and wants to have them with him to impeach testimony if the deponent answers in a certain way, and he thinks that the law allows this. Mr. Keating stated that the reality is that an attorney can depose the corporation, and then depose the individual as to his or her knowledge of the case. He stated that he raised question about reasonable because he wonders "reasonable in terms of what"? Judge Miller stated that she could understand how knowing the name of the deponent would allow an attorney to make the deposition personalized, not personal. Mr. Campf agreed that it would be personalized because that person has knowledge about a topic that he may want to use other discovery to probe.

Judge Hodson wondered whether this debate was appropriate since the Council will not vote on whether to promulgate until December. Mr. Keating stated that he did not intend to stir up a whole debate. Mr. Cooper replied that it is appropriate to talk about whether it is a useful change to the rule, because if a majority believes it is not useful we should not waste the bar and public's time by publishing.

Ms. O'Leary stated that, often, corporate designees are not adequately prepared although they are supposed to read everything and become knowledgeable about the entire corporation on these topics, and this is a reasonable time to make sure that they are reasonably prepared. She noted that she can use certain documents that, as a corporate designee, the deponent should have been aware of but was not adequately prepared for in the deposition. She stated that documents that pertain to the person in their individual capacity or in their corporate capacity can refresh the deponent's memory if they are purporting to speak on behalf of the corporation because the documents pertain to matters that the deponent should have been prepared for and should have been able to testify about at the deposition. Ms. O'Leary stated that knowing the name is a helpful tool, makes sure the witness is properly prepared, and makes sure the deposing party can get the needed testimony. Mr. Bachofner respectfully disagreed and stated that this is not like the deposition of a regular witness but, rather, of the corporation itself. He stated that, to the extent the deponent does not know something, the

deposing party gets the deponent to say the corporation does not know, and then gets to impeach them in trial. Judge Miller pointed out that the deposition is not being designed just so the deposing party can impeach someone, and it may be impeding discovery that could lead to reasonable evidence. Mr. Bachofner stated that a designated person can later be deposed as an individual. Mr. Campf asked whether there is something wrong with using information you have regarding witness A to ask questions about the corporation. Mr. Bachofner stated that there is nothing wrong with that but, for some corporations, it is sometimes difficult to get someone 24 hours beforehand, especially if it is a non-party. He noted that non-parties do not want to spend the money to find someone to testify and to hire a lawyer to prepare since they do not have a dog in the fight. Mr. Beattie stated that he thinks that the prior rule made it clear that it is important to know who you are going to be deposing for whatever reason, and that all we are trying to do now is to figure out what amount of notice to the deposing party is appropriate. He observed that "reasonable" does not make sense because, whether the Council chooses 24 hours or three days, that period will be per se reasonable.

Judge Gerking stated that he believed that the purpose of the change was professional courtesy. He stated that, the more protracted this becomes, you get into grey areas where plaintiff's lawyers are trying to push the envelope into a personal deposition, and there will be more disputes with regard to the appropriateness of the examination during the course of an organization's deposition. He opined that the time frame should be short.

a. ACTION ITEM: Vote on Whether to Publish Draft (A or B) of ORCP 39

Mr. Cooper asked the Council to vote on whether either of the amendments should be published at all. By voice vote, the Council voted that one or both versions should be published. A motion was made to remove the phrase "reasonable and advance" from both versions of the amendment. The motion was seconded and passed by voice vote. A motion was made to publish Version A (Appendix F) as amended. The motion was seconded and passed by voice vote. A motion was made to publish Version B (Appendix G) as amended. The motion was seconded and passed by voice vote.

5. **ORCP 44/46/55**: Medical Examinations/Medical Records – refining that which is discoverable; requiring plaintiff to identify records not produced and applicable privilege; penalties (Mr. Keating)

Mr. Keating pointed out that the Council staff made some additional changes to the committee's draft amendments of ORCP 44 (Version A - Appendix H; Version B - Appendix I) and that these changes are not controversial but, rather, make the amendments read better. He stated that the committee's change to ORCP 44

relates specifically to a proposal to define the phrase "relating to injuries for which recovery is sought." Mr. Keating observed that medical records relating to injuries or illnesses other than the specific injury for which recovery is sought are frequently very relevant to the merits of a claim and are, therefore, admissible. He gave the example of a claim for permanency, in which any illness or injury that can affect a claimant's life expectancy may be relevant. He noted that, in fact, the standard jury instruction on life expectancy tells the jury to take into account the plaintiff's health. Mr. Keating noted that *Doran v. Culver* [88 Or App 452, 745 P2d 817 (1987)] dealt with admissibility and held that gynecological records regarding chronic back pain were admissible in a case where a plaintiff was claiming a back injury from an automobile accident. He stated that, in his area of practice, in medical malpractice cases, it is sometimes alleged that a doctor did not take an adequate history and there is no other way to find this out than to find out what the plaintiff's actual medical history was. He submitted that the "same body part" requirement is a narrowing of the rule and not the rule's original scope. He stated that the consequence of this narrow scope is that the plaintiff's lawyer determines what is related to an injury claim and that, once the plaintiff's lawyer makes that determination, the defense lawyer never gets to see the records to determine whether there are other records out there that may be relevant.

Mr. Keating stated that he believes it has always been understood that ORCP 44 C constitutes a limited waiver of the physician/patient privilege, and he submitted that this privilege is waived so that the defendant can get medical records that are reasonably likely to lead to the discovery of admissible evidence, but that the defendant cannot depose the people who made the medical records, if at all, until the medical privilege is actually waived. Mr. Keating feels that the attempt to construe "related to the injury claimed" as being narrower than the general scope stated in Rule 36 B as to what is discoverable frustrates the defendant's ability to adequately evaluate the plaintiff's claims. He stated that his preference is to use version B of the draft amendment because, if in fact it is the intention of the Council to articulate that discovery of medical records reasonably related to the injury claimed includes those records which might lead to the discovery of additional evidence, it is better to so state that than to simply refer to ORCP 36 B, because ORCP 36 B contains the language "unless privileged" and you wind up in a loop. Mr. Keating suggested that the Council adopt the language directly so there can be no argument that the limited waiver precludes the discovery of other medial records that may lead to the discovery of admissible evidence.

Mr. Cooper stated that he is bothered by a rule change that takes language from another rule and inserts it into this rule. He stated that this proposed rule change clearly must have an intent behind it and clearly must change the bench's interpretation of ORCP 44 C and he thinks that is Mr. Keating's goal. Mr. Cooper observed that this type of change borders on the substantive because the rules already say what the proposed rule change would have it say, and this would be viewed as an attempt to restrain or direct the bench's inherently broad discretion

in regard to discovery. Mr. Cooper stated that he recognizes the problem that Mr. Keating has in practice but, that being said, he believes that this is a problem of either education of the bench or advocacy on both sides to get a better result. He stated that he thinks it would take what is a relatively neutral body of rules and tilt them in one way or another, and he thinks that the problem being identified is one where the bench is not applying the rule in a way a Council member would like it to, and does not think this is a reason for the Council to change the rule. Mr. Bachofner respectfully disagreed, and stated that he believes the amendment clarifies the existing rule. He suggested looking at ORCP 36 B and 44, and stated that it is supposed to be interpreted so as to allow the defendant to obtain discovery that is reasonably calculated to lead to the discovery of admissible evidence. Mr. Bachofner stated that the amendment does not substantively change that but, rather, clarifies the rule for the purpose of education of counsel and the court. Mr. Bachofner noted that another situation where the rule change would be helpful would be where a plaintiff has an epileptic seizure, which is unrelated to the injuries being claimed, but the seizure caused the accident and the defendant needs to be able to show that the plaintiff has a history of seizures but continued to drive, in order to show comparative fault. He noted that, if the rule is not changed and someone wants to preclude that discovery, you are essentially creating an injustice.

Judge Rees stated that he believes the change is absolutely substantive and that it would ultimately conflict with Oregon Evidence Code (OEC) 511, which says that a patient does not waive a physician/patient privilege by filing a lawsuit. Judge Rees opined that, effectively, the proposed amendment would say that, if it is relevant, it is waived. He stated that, as a judge, he would have on one hand OEC 511 that says a privilege is not waived by filing a lawsuit, and on the other hand this amendment that completely contradicts it. Mr. Bachofner pointed out that ORCP 44 C does that now with a limited waiver of the physician/patient privilege. Judge Rees noted that ORCP 44 C says "all written reports and existing notations of any examinations relating to injuries for which recovery is sought ” which is much narrower, and that he is certainly not contending that those issues are going to be completely irrelevant and out of the lawsuit because some of the medical records are not produced. He stated that, in fact, he thinks that if a witness at trial testifies about life expectancy, those records become subject to production. Judge Rees stated that he is not here to say that the current practice is a good system or a bad system, but pointed out that this is an important substantive change that he does not think the Council should enact, but that the legislature should address.

Mr. Beattie observed that ORCP 44 C has always been substantive, and has always given a right to production, but that it always had to come through the plaintiff so that there is a filter there. He stated that ORCP 36 is not necessarily or by implication a part of 44, so ORCP 36 says you are entitled to anything that can lead to the discovery of admissible evidence except for things that are privileged. He stated that you cannot get in front of a judge and say look at ORCP 44 C, it

incorporates ORCP 36, it is broad, it is anything that perhaps would lead to the discovery of admissible evidence. He observed that you need something to get past the narrow language, and this change would broaden it. Mr. Beattie stated that, in his practice, he needs to get this information to fully understand and defend the case, and he does not believe it is too intrusive to the plaintiff because the lawyer filters it and it is all "mother-may-I" through the plaintiff's lawyer, not through the physician. Judge Miller stated that she believes that the rule does not need to have the phrase defined further, and that there are some things that are personal in nature and embarrassing, but a judge can do an *in camera* review and make those determinations. She stated that judges are in a position to look at these things in a private setting and, hopefully, not be overly restrictive when there is a record relating to a claim being made.

Ms. David stated that this is only a change to the discovery rules and that it does not mean that the records will not get re-addressed at trial as to relevance and whether they are admissible. She observed that, in the discovery phase, she feels that the defense has the right to get the records and to understand what happened. She stated that she is currently arguing a second motion to compel in a case where the motion practice would not have been necessary had this rule change been in place. She stated that the argument is essentially about the phrase "information reasonably calculated to lead to the discovery of admissible evidence." Ms. David noted that her opposing counsel's argument was that the defendant does not get to include the scope of ORCP 36 in an ORCP 44 issue in a case involving a gallbladder surgery with complications where the plaintiff had a gastric bypass operation, involving organs all around the gallbladder, right after the surgery at issue in the lawsuit. She stated that, notwithstanding what is going to happen at trial, she believes the defense is entitled to that discovery and that she feels that, in the discovery phase, the defense should get the medical records, but that at trial the judge is the gatekeeper. Ms. David stated that she does not believe the rule is in conflict with the evidence code, and observed that a plaintiff can still go to the court for a protective order if they believe that step is necessary. She pointed out that, if this amendment were in place, her two motions to compel would not have been necessary.

Mr. Keating stated that this Council has defined terms before and, in 1986, added the following language to Rule 44: "a copy of all written reports and existing notations of any examinations." He stated that the staff comment to the rule amendment reads as follows:

> "The amendment to rule 44 was made as a response to rulings out of Multnomah County Circuit Court. The current language 'written reports' has been construed so as to not include office and chart notes. The distinction has been made between reports that are generated for purposes of litigation and notes made contemporaneous with an examination. Adding 'or existing notations' is intended to broaden the rule

to include office and chart notes."

Mr. Keating pointed out that this change was not substantive, that ORCP 44 C is a product of this Council, and if this Council determines that the way the rule being interpreted is too narrow and is not fulfilling the purpose of the rule, it can so articulate and it has done so in the past. Mr. Keating stated that Judge Miller's concern about circumstances where people are reluctant to disclose sensitive material is not an uncommon occurrence in discovery of any nature, and that people approach the court or parties stipulate to the terms of an order to protect sensitive information that is produced in discovery. He noted that *in camera* discussion is readily available to a plaintiff's counsel, but that this amendment has to do with whether defense counsel gets to know that potentially relevant records even exist. Judge Miller observed that this depends on who you are dealing with in litigation, and that sometimes there is private information that could be chilling on a plaintiff's willingness to go ahead with trial if it came out. She noted that some attorneys think that everything is relevant, and this can result in fishing expeditions and harassment. She does not want to open the door so wide that there is not some opportunity for a judge, before it even gets to the protective order stage, to look at it and to assure counsel that there is nothing that is relevant. Mr. Keating stated that this simply requires that someone go to the court and say that there is an issue of concern. He pointed out that the defense attorney cannot even make the argument if he or she is unaware that the information exists, and that the rule has never before been as narrowly construed as it has been in the last few years.

Mr. Bachofner stated that he has seen it to be a problem as well. He noted that he has had situations where opposing counsel has let him look at the records, but has not produced them, and that even that may be sufficient because then the defense attorney would know whether something exists. Mr. Bachofner suggested that this may be an alternative to the current draft amendment, but that some are not willing to do even that. He stated that he does a lot of under insured motorist claims where he gets a medical authorization and sends out for records, and almost every time, he obtains additional records that were not produced by the plaintiff's attorney that are entirely relevant: either they did not get them from their client or they did not know about them. He stated that he is not trying to say plaintiffs need to have this information go out into the public realm, but that the Council should balance what is fair to the plaintiff and what is fair to the defendant so that the defendant can defend the case. Mr. Bachofner stated that the test is still whether it is reasonably calculated to lead to the discovery of admissible evidence, and the defendant still has to be able to link that. He observed that, if plaintiff's attorney thinks the information is too private or too embarrassing, there are alternatives they have to protect that plaintiff: they can have a conversation with the defense attorney or they can file a motion for a protective order. Mr. Bachofner stated that all we are talking about is for the defendant to at least be able to know so they can defend properly. Mr. Brian

stated that he objects to the change, but that he thinks it should go on the December calendar and that we are just talking now about what the vote should be.

Judge Holland stated that she is not sure whether the proposed amendment should go on for a promulgation vote. She observed that the court is the gatekeeper when it comes to discovery, and that there are procedures available like a motion to compel that allow things to be brought up, as well as depositions of a plaintiff that would allow this information to come out. She stated that the fact that someone does not agree with a judge's rulings or the fact that Multnomah County does something in a particular way should not drive the rules for the whole state, and that it becomes a matter of education. Judge Holland stated that it sounds like part of what is being done is to shift the burden to the plaintiff to file a protective order rather than for the defense to file a motion to compel and, if there are rulings that are not as favorable to the person who is filing for them, there is an available mechanism to deal with that: an appeal. Mr. Campf asked how the rule relates to OEC 511. Mr. Beattie stated that he thinks it is procedural. Judge Rees again noted that he will have OEC 511 which says the physician/patient privilege is not waived by filing a lawsuit and ORCP 44 C which says anything that is reasonably calculated to lead to the discovery of admissible evidence in this lawsuit, that is otherwise subject to the physician/patient privilege, is subject to production, and he sees that as a contradiction that he would not know how to resolve. Judge Armstrong noted that the Supreme Court already explained that history: that the rule originated from the statutes, and that the Council simply continued those statutes in ORCP 44. He stated that the policy questions, including what it does to the privilege, have essentially been abolished, because this rule produces this material, and that the question now being debated is what exactly is the material that comes under this rule. Judge Armstrong stated that, to the extent that it supersedes OEC 511, it basically says that "this is how the world works, there is not a conflict," so instead it is clarified or modified, it is within that context, it is still trying to capture certain documents you are going to get to see.

Ms. O'Leary expressed the opinion that this change is federalizing ORCP 44. She noted that, in federal court, the sky is the limit, and that this is costly and that embarrassing information can be used in depositions. Ms. O'Leary stated that, in Oregon, at least the judges have a lot of discretion to decide whether information is related and whether the defense has access. She observed that, by moving closer to the federal system, we take a lot of discretion away from the court, cases get out of hand, and it invites more cost and litigation than we need. Ms. O'Leary feels that the system we have is working pretty well. Judge Hodson stated that he has allowed discovery in the circumstances that have been described by Mr. Keating as being the reason for making the change of the current rule. He stated that he likes the language as it is because he likes the tension it creates and the opportunity it gives him to make those decisions on a case by case basis. He

stated that he will vote to put on it on the agenda in December, but ultimately feels it does not need to be changed. Mr. Beattie stated that he has reservations about incorporating the ORCP 36 language into ORCP 44 C (Version A) because we would be incorporating into a dead end.

a. ACTION ITEM: Vote on Whether to Publish Draft (A or B) of ORCP 44

Mr. Cooper asked the Council to vote on whether either of the amendments should be published at all. By voice vote, the Council voted that neither version should be published (eight votes for publication, nine votes against). Mr. Bachofner proposed a rule allowing defense counsel to review records in camera so that there would be no production of documents, but defense counsel would at least know whether there were relevant records. Mr. Cooper stated that he thought that would be a good rule to propose for next biennium, but that it should not be proposed in September of a year of publishing. Mr. Bachofner stated that we could make an amendment to the rule and then allow comment after publication. Judge Holland pointed out that the vote had already been taken. Mr. Cooper suggested that Mr. Bachofner's idea be placed on the agenda for next biennium.

Mr. Keating explained that the draft change to Rule 55 (Appendix K) was a product of the committee's concern that, under the current rule, the attorney or party objecting to the subpoena can merely state "I object." He stated that, in order to enforce the change to ORCP 55, the amendment in ORCP 46 (Appendix J) includes language that grounds for a motion to compel include "if a party fails to comply with the requirements of Rule 55 H." Mr. Brian stated that he supports both rule changes.

b. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 46

A motion was made to publish the committee's draft amendment of ORCP 46. The motion was seconded and passed by voice vote.

c. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 55

A motion was made to publish the committee's draft amendment of ORCP 55. The motion was seconded and passed by voice vote.

6. **ORCP 57**: Alternate Jurors – not discharging until verdict and allowing judicial discretion in assigning alternates and peremptory challenges (Ms. O'Leary)

Ms. O'Leary stated that this amendment (Appendix L) began with various suggestions to give judges more discretion as to how to pick alternate jurors, as well as a proposal by Clackamas County Circuit Judge Susie Norby to allow alternates to sit in and watch deliberations. She stated that, during a series of meetings, the committee took away from Council meetings the consensus that alternates should not be allowed to be present in deliberations or to deliberate. She noted that Judge Zennaché and Judge Armstrong then worked on a proposed draft, after which Judge Norby approached the committee again and provided a more organized version of the rule which incorporated the Council's changes. She stated that the existing section F is rather amorphous, and the new version breaks it down into subsections. Ms. O'Leary stated that the committee agreed that Judge Norby's changes would improve the rule vastly, making it easier to follow and better for new practitioners. She stated that Judge Norby was invited to participate in the committee's most recent conference call, and that the committee made it clear at that time that it would not include language that would allow alternates to be present in deliberations. Judge Norby was unhappy with the committee's decision not to include such language, but understood that was the position of the majority of the Council. Ms. O'Leary pointed out that nothing in subsections F(1) through F(5) is substantively different from the committee's previous draft, that it is just reorganized.

Mr. Bachofner stated that the words "in the event" in subsection F(1) makes it seem that an alternate will not be chosen until the juror is lost. Prof. Peterson stated that those words were a staff change to Judge Norby's new language, and that the intent was to clean up the language and that changing the meaning was unintentional. Judge Miller suggested adding the words "before trial." Ms. Nilsson suggested "in case the number of jurors required under Rule 56 is decreased." Mr. Beattie stated that there is still a problem with this language, and suggested "to serve in the event." Ms. Leonard asked about the peremptory challenges in subsection F(3) and whether a decision on the use of peremptory challenges

would be made at the time when a decision is made to use alternate jurors. Judge Miller stated that the first six or 12 jurors would be chosen first, then alternates would be chosen. Judge Armstrong stated that the language is now phrased so that a judge can do it any way he or she chooses. Judge Miller observed that some judges do not want to designate the alternates as alternates. Judge Rees confirmed that his current practice, if the parties agree, is to pick alternates out of a hat just prior to deliberations. Ms. Leonard asked for confirmation that the manner in which alternate jurors are chosen and the use of peremptory challenges will be resolved before the trial starts. Mr. Cooper confirmed this. Mr. Brian stated that the practice could make things more complicated, since attorneys will now have to focus on potentially 15 jurors, rather than 12. Judge Rees stated that he uses this process because he wants to make sure the alternates are engaged.

Mr. Keating stated that he reads the changes in subsection F(5) as a substantive change because an alternate juror, at the time the jury goes out, is told "you are not going in to deliberations." He noted that deliberations could then go on for hours or days and, if that alternate juror is later empanelled, the jury is to start all over again, and it defeats the whole concept of a collective judgment as a dynamic emerges in the jury room. Prof. Peterson stated that, when he was wordsmithing the rule, he was going to remove a lot of language in subsection (5) because it seemed redundant, but then he looked more closely at it. He stated that, the way it reads now, before deliberations begin, a judge is *required* to install an alternate juror, so you do not lose a trial just because someone trips on the way out. However, once the jury starts deliberating, the judge *may* install an alternate juror, so at that point the parties can argue to the court whether to continue or to declare a mistrial. Judge Miller stated that she would probably never do it, because after more than a couple of hours it would be hard to get the alternate up to speed and not impair the integrity of the deliberations. Judge Armstrong stated that, if it is a three month trial and the jurors have been deliberating for three days, the parties may still think the new person will not fully participate in the same way the juror who is replaced would have, but everyone may be willing to go ahead and let it play out knowing that it is going to be different, and the jurors will nonetheless be told "your job is to deliberate." Judge Miller noted that, if she had strenuous objections, she would probably declare a mistrial, but that judges did not have any discretion over this before, and the change just gives the option. Judge Hodson asked whether is it our intent to leave it up to judge to decide. Mr. Cooper noted that the word "may" is permissive, so that is our intent. He stated that, even if both lawyers agreed to use alternates, the judge could still say no. Mr. Beattie wondered how discharge is handled. Judge Rees stated it would be just like going home at the end of the day: do not discuss the case with anyone. Ms. Nilsson noted that the staff had changed Judge Norby's suggested "primary jury" language to "jury" and that the committee agreed with this change. Judge Norby had explained that she was trying to clearly differentiate between the installed jurors and the alternates. Ms. O'Leary stated that, given the wonderful job done in drafting, the committee felt that the difference between the "jury" and

"alternates" was now very clear.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 57

A motion was made to publish the committee's draft amendment of ORCP 57. The motion was seconded and passed by voice vote.

7. **ORCP 59 H(1)**: Exceptions to Jury Instructions – timing (Ms. Leonard)

Ms. Leonard explained that this amendment (Appendix M) is intended to clarify objections to jury instructions at the end of a trial. She stated that subsection H(1) adds some judicial discretion as to when parties take their objections to jury instructions. It also adds a last sentence which is about preserving error for appellate review. She noted that subsection H(2) attempts to clarify what it means to take a notation of exception at the end of all instructions and to give meaning as to how that should be done. She stated that a party does not necessarily have to repeat with particularity the exceptions they have already made to jury instructions, but they do have to worry about preserving their objections, so the amendment states that a party may incorporate by reference the points that they previously made with particularity.

Judge Armstrong suggested amending the draft in two particulars on page one: 1) to change the language, "legal error that is apparent" to "legal errors that are apparent" on line 13; and to change the language, "made on the record with particularity" to "made with particularity on the record" on line 20.

Mr. Cooper stated that subsection H(2), line 18, provides that exceptions can be made orally on the record, which is the way it has always been done, or with a writing filed with the court. He wondered if there was concern that the amendment would allow him to go home the night before court, type up his exceptions, drop them in the file box, and the trial judge would never know that he had made those exceptions. Judge Armstrong suggested changing the language to "in a writing submitted to the court." Prof. Peterson pointed out that existing language states "in a writing filed with the court." Judge Armstrong agreed that the amendment had maintained some of the rule's language, but thought that the word "filed" may have been intended to mean "submitted," because there is no practical reason why a trial lawyer would not want to submit his or her exception directly to the court because the point is to let the judge correct the error before the case goes to the jury. Judge Gerking observed that the exceptions would not be on the record if submitted by filing in the file box. Judge Hodson asked whether this concern is taken care of with subsection H(1) where it says, "identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury..." Mr. Cooper stated that this addresses his concern. Mr. Beattie stated that subsections H(2) and H(1) serve different functions: H(2) is specificity and H(1) is how you do it. He stated that the only

problem he sees with subsection H(2) is the last clause of the last sentence, and that he understands that we want to give the court a last possible chance to fix something that is wrong but, if the judge has set the time for objections as after the jury has been instructed, does that leave counsel with the need to say "we incorporate all the objections we made as follows" and enumerate them? Mr. Bachofner wondered whether the phrase "with particularity" refers to the previous arguments made on the record. Mr. Cooper stated that Judge Armstrong's wordsmithing makes this more clear. Judge Armstrong stated that he believes it is already taken care of: you have had a debate about the instruction; you are now at the exception stage; and you say you are incorporating the exception.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 59

A motion was made to publish the committee's draft amendment of ORCP 59, with Judge Armstrong's changes. The motion was seconded and passed by voice vote.

8. **ORCP 68**: Cost Bills - multiple issues (Ms. David)

Ms. David reminded the Council that the committee's draft (Appendix N) does three main things: 1) adds language to address situations where a statute that otherwise refers to the rule but provides for a procedure which varies from the procedure in ORCP 68; 2) addresses the fact that there are motions and responses to motions that might in different ways raise the right to attorney fees; and 3) changes the hearing procedure so that a party can submit a statement of attorney fees and the court can rule on it unless there is an objection which contains a request for a hearing so that the process is hopefully streamlined. Judge Miller stated that Judge Deanne Darling had originally asked that the default procedure be no hearing. Prof. Peterson pointed out that the court still has discretion to hold a hearing, even if the attorneys do not ask for one, if the court has a concern. He also stated that the amendment includes a right to file a reply to an objection and to request a hearing in the reply. Mr. Campf observed that the amendment allows a response to an objection within seven days, and wondered whether that is enough time or whether it should be raised to 14 days. Mr. Cooper stated that an attorney will be aware that attorney fees are an issue in a case long before the statement is filed, so he is fine with seven days. Judge Armstrong suggested changing the word "which" to "that" on page 2, line 7.

Judge Miller stated that she was doing a fee hearing in a modification of custody and support and the attorney had wrongly stated the statutory basis for fees in his statement. She noted that the other attorney stated that, if you read the rule, it seems to say that, if you do not state the specific statutory basis, there is no right to attorney fees and you will not get them, but that she was aware that there is a Supreme Court or Court of Appeals case which ruled that you do. Judge

Armstrong agreed that, when the wrong statute or rule or source is cited, a party can still get attorney fees if there is a factual or other feature that is sufficient to basically say that the party gave enough information. Judge Armstrong stated that the rule's requirement that a basis for fees be stated arose from a concern that parties could not assess their exposure to attorney fees if the other party failed to provide enough of an idea about the basis for a fee award. He explained that parties often do not understand the need to cite a source or relevant facts that would entitle them to fees, and observed that there is a long history regarding this issue in the appellate courts.

Prof. Peterson pointed out that the application for attorney fees now must include the ORS 20.075 factors, and the objection to attorney fees must also incorporate those factors. He stated that it was Judge Zennaché's wish to have this included. He also noted that there is still the right to amend or supplement, but a party must file its statement, its objection, or its response, and all supporting documents within the respective time frames so that the other party does not get sandbagged when the opposing attorney simply shows up at hearing with documents and witnesses that had not been filed and served in advance of the hearing. Judge Armstrong stated that he was not particularly in favor of that initiative from Judge Zennaché because he sees cases at the appellate level where the statements become pretty rote. He stated that there are attorneys asking for fees who say "I am experienced and this is my hourly rate," and the other side objects because the party seeking fees did not walk through every one of the ORS 20.075 factors. Judge Armstrong wondered whether the Council really wanted people to be forced through that drill; however, Judge Zennaché argued that, if the court is supposed to think about the factors, judges should be given the tools with which to think about them.

Mr. Bachofner stated that he recently had an issue come up with the ORCP 68 C(4)(a) 14-day requirement. He stated that he had submitted a default order and judgment with all of the backup and was waiting for the judgment to be entered, but that the clerk could not tell him if the judge had signed it and he was still in settlement negotiations. He noted that a substantial amount of work often goes into filing a statement for attorney fees, which adds to the cost of litigation, and wondered about including the ability of parties to stipulate to a time greater than 14 days. Judge Miller disagreed and stated that it often takes a very long time to get a judgment in the first place, particularly in family law cases, so sometimes she is having Rule 68 hearings six months after cases end. She stated that this is a huge burden on the judges, and 14 days is not unreasonable because it takes so long for the parties to get the judgment submitted in the first place. Ms. David pointed out that we do not want the parties to be able to stipulate because the court can look and see whether objections were timely filed and, if we open the door to let the parties do their own thing, the court does not get that information and will proceed to not grant a hearing because none was requested and will go ahead and rule on the statement and grant the fees. Mr. Bachofner stated that he

was not suggesting that the procedure after the filing of the statement should be changed, just the initial request for fees. He wondered whether an attorney could request additional time from a judge in a situation like his. Judge Miller stated that she would probably grant additional time, because she would not want a party to incur additional expense.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 68

A motion was made to publish the committee's draft amendment of ORCP 68, with Judge Armstrong's change. The motion was seconded and passed by voice vote.

VI. New Business (Mr. Cooper)

There was no new business.

VII. Adjournment

The meeting was adjourned at 12:45 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 9, 2012, 9:30 a.m.
Jackson County Courthouse
Judges' Conference Room
100 South Oakdale
Medford, Oregon 97501-3127

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Michael Brian
Brian S. Campf*
Kristen S. David
Jennifer L. Gates*
Hon. Timothy C. Gerking
Hon. Robert D. Herndon
Hon. Lauren S. Holland*
Robert M. Keating*
Hon. Rives Kistler*
Maureen Leonard*
Hon. Eve L. Miller
Leslie W. O'Leary*
Hon. David F. Rees*
Mark R. Weaver*
Hon. Locke A. Williams*
Hon. Charles M. Zennaché*

*Appeared by teleconference

Members Absent:

Jay W. Beattie
Eugene H. Buckle
Arwen Bird
Brooks F. Cooper
Hon. Jerry B. Hodson

Guests:

David Nebel, Oregon State Bar*
Hon. Susie Norby*

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 17 A • ORCP 27 B • ORCP 54 A • ORCP 57 F • ORCP 58 D • ORCP 59 H(1) • 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 • ORCP 54 A

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:44 a.m.

II. Introduction of Guests

Hon. Susie Norby, Clackamas County Circuit Court Judge, joined the meeting by telephone.

III. Approval of May 5, 2012, Minutes (Ms. David)

Ms. David called for a motion to approve the draft May 5, 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 briefly reviewed the Website Report (Appendix B). She pointed out that the Traffic Sources Overview page was of particular interest, as during this period more visitors reached the Council's page via referral pages than by search engine or directly.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson reported that he had sent to Council members draft language to be modified and sent to their legislator contacts. He stated that he will prepare another draft within about two weeks of the current meeting. Ms. David asked any Council members who have not yet communicated with their legislative contacts to please do so soon, as it is important to keep the legislature informed of the Council's work.

V. Old Business (Ms. David)

A. Committee Updates/Reports

1. ORCP 17 A: Original Signature on Pleadings (Prof. Peterson)

Prof. Peterson presented the latest draft of ORCP 17 A (Appendix C). He stated that the Council staff had made some punctuation and grammatical changes to the version of the draft approved at the last meeting. He noted that the committee had previously approved these changes, but that the staff felt that the full Council should have the opportunity to review them before the draft is presented at the publication meeting.

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

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

Mr. Cooper was not present at the meeting. Prof. Peterson reminded the Council that, although Council members were satisfied with the substance of the draft rule at the May meeting, this item was left on the agenda to allow Council staff to put the rule into a proper format and to allow Council members to review the rule again in the revised format. He explained that Council staff had made changes which included renumbering certain sections as well as grammatical and word choice changes, and stated that he hoped that Council members had the opportunity to review the current draft (Appendix D).

Ms. David asked about the language in section C which states, "the motion shall be supported by affidavits or declarations which provide admissible evidence sufficient to provide a preponderance of the evidence." She wondered whether the sentence should state, "which must provide admissible evidence," and noted that there is a difference between saying that the affidavit or declaration must contain admissible evidence to support the motion, and merely saying that submitting an affidavit or declaration is enough in and of itself. Judge Miller observed that the sentence does use the word "sufficient," but that it is located a little further into the sentence. She observed that moving the word further up in the sentence would just be a stylistic change. Judge Herndon suggested changing the word "provide" to "contain." Judge Armstrong agreed, and there was general agreement among Council members. Judge Armstrong made a friendly amendment to change "which provide" to "that contain." A motion was made for this friendly amendment, and the motion was seconded and passed unanimously. Prof. Peterson noted that Council staff had also added the word "affidavits" to make it clear that either an affidavit or a declaration could be used.

Judge Zennaché noted that subsection B(2) specifies that a motion must be filed within the time specified by the rule or any other rule for an appearance or an answer, and asked what would happen if a party waited more than 30 days but had not been defaulted and then filed a motion for a guardian ad litem (GAL). He stated that he is concerned about that language. Judge Armstrong observed that one might wonder why that language is needed. Judge Zennaché also asked about the list of persons and entities that need to receive notice and wondered whether this is something that is otherwise required by law or whether the Council is adding them. Judge Holland stated that the list comes from the probate statutes relating to conservatorships or guardianships. Judge Armstrong asked what purpose is served by the language regarding filing within the period of time specified in subsection B(2). Prof. Peterson stated that he believes that it is from the original language in the rule, which specifies when an adverse party may step in and do it, but noted that this does not mean that the Council should not look at it or change it. Judge Herndon observed that, often, the adverse party is applying in order to keep the case moving along. Judge Armstrong remarked that in effect the rule is designed to make clear the time that the defendant is allowed to file the motion as the actual party but, if the defendant does not, any other party can do

it. He noted that this does not preclude the actual party from filing later, and that it is theoretically possible to have competing applications. Judge Herndon stated that he could think of a few occasions where this has happened. Judge Zennaché stated that he understood the sequence now. Prof. Peterson observed that he reads the rule to provide that, if the minor is above the age of 14, there is a window of opportunity for that party to nominate someone but, if the minor is not or if nothing happens, this is the default provision.

Prof. Peterson stated that Council staff made changes to subsection 27 D(1) because the sentence that comprised the original section seemed long and convoluted and did not quite read correctly, and that he hoped that the committee had looked closely at the changes to ensure that the meaning was not changed. Judge Herndon stated that he thought the staff changes were good, and those were all required because they are required by the guardianship statute. Prof. Peterson noted that staff also changed the word "respondent" to "minor" or to "person" in several places depending on whether the party was under or above the age of 18. He hoped that this did not create any unanticipated problem. Judge Armstrong stated that he believed that the changes make sense.

Prof. Peterson stated that he had received a telephone call from a practitioner who stated that his practice, when representing a minor in a personal injury case, is to file a lawsuit to appoint a GAL without filing the tort case lawsuit, have a GAL appointed, and then negotiate with the insurance company. The practitioner stated that, if the insurance company does not settle, he is annoyed with the court for not allowing him to use the same case filing to file his personal injury case. Prof. Peterson remarked that it never had occurred to him that someone would file a "shell" GAL case for something that might happen later, but that he does not practice in this area of law. He noted that the practitioner stated that his reading of the rule led him to believe that this was an acceptable practice. Judge Herndon stated that the practitioner may believe that having a GAL appointed gives him more authority to settle a case in the eyes of the insurance company but, in most cases, a conservatorship will still need to be established in order to settle. Mr. Bachofner pointed out that there is statute that allows cases below a certain claim level to settle without getting a conservatorship, and that he suspects that some insurers are saying that they want to have some kind of guardian because they want to deal with someone who has authority to resolve a claim. Prof. Peterson stated that it seems clear that the draft amendment would direct that a case cannot be settled without obtaining the appointment of a conservator, and that the committee's new language nicely encapsulates what the practitioner needs to do in order to settle a case. Prof. Peterson stated that he told the practitioner that a change in the rule was likely to occur and suggested to him that he take a look at it but, because the issue was raised, Prof. Peterson also wanted to bring this to the attention of the Council for discussion. After polling the Council, Ms. David observed that there appeared to be no overriding belief that there needs to be further changes to the draft in light of this unique practice.

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

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

Mr. Weaver briefly reiterated that the issue before the committee is that ORCP 54 A allows dismissal any time up to five days before trial without court approval. He stated that there had been discussion as to whether this procedural rule has led to abuse, in particular where parties spend a lot of money getting ready for trial and there is a dismissal virtually at the last minute. He stated that the concern is that some practitioners might be using this procedure in bad faith, but he observed that there can be legitimate reasons as well, such as dismissal pending a summary judgment. He noted that federal rule allows dismissal only with court approval, and the broad issue is whether the Council wants to change the Oregon rule to require court approval.

Mr. Weaver stated that the committee ultimately decided that not all members have enough knowledge in the various areas of practice to know how a change would impact different practices. He stated that the committee's conclusion is to come up with balanced question to send to the bench and bar in order to determine whether there are abuses, how prevalent they are, and whether the procedure of court intervention makes any sense. The committee recommends putting this item on the agenda for next biennium. Judge Herndon observed that this is not a big problem in his county, but stated there may be other courts where it is. Judge Miller stated that there was a time when people could dismiss family law cases without notice to the other side and then get the case reinstated without the other side's knowledge. Although she believes that this has been changed by statute, she still agrees that it is a good idea to get more input from the bench and bar regarding dismissals. Ms. David stated that it would be a good idea to check with the Professional Liability Fund as well. Mr. Bachofner stated that another common use of this kind of dismissal is when there is a trial date and the court refuses to move it despite the fact that both counsel agree that a set over is necessary; sometimes the only option is to dismiss the case without prejudice. He noted that this is a fairly common practice. Judge Gerking also observed that it is not unheard of for the defense to waive the statute of limitations in certain situations.

The Council agreed to put this item on the agenda for the next biennium.

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

Ms. O'Leary presented the committee's latest draft of ORCP 57 F (Appendix E) and explained that some of the changes were merely wordsmithing but that the main changes are at the end of the rule, and those changes give judges more discretion in handling alternate jurors when empanelled jurors are deliberating, in the event that an empanelled juror becomes sick or unable to participate. Judge Miller stated that Judge Zennaché has been drafting the various versions, and that she has been forwarding them to Clackamas County Circuit Court Judge Susie Norby, who originally suggested that the rule be changed. Judge Miller remarked that she has spent some time with Judge Norby to let her know how the committee's thinking evolved into the current draft. Judge Miller stated that Judge Norby had a sense that perhaps the committee had misunderstood her intent and provided her own draft (Appendix F). Judge Miller observed that she is not taking a position one way or the another. She stated that she recalled a Council discussion about *Vander Veer v. Toyota Motor Distributors* [577 P2d 1343 (1978)] being the controlling decision that came out before ORCP 57 was created. Ms. O'Leary explained that the *Vander Veer* ruling occurred before the ORCP were created, and that the statute construed in that case was later abrogated and replaced by the ORCP. She noted that, at the end of its discussion regarding the case at the last full Council meeting, there seemed to be no question that *Vander Veer* was no longer good law.

Judge Zennaché explained that the draft makes three changes: 1) to authorize the trial court to replace a juror with an alternate after deliberations have begun; 2) to allow the court discretion about how alternates and additional peremptory challenges are used; and 3) to address some language differences and grammatical corrections. He noted that, with regard to *Vander Veer*, that case interpreted a prior statute which was replaced by the ORCP. He stated that the holding is not bad law, but that it was based on the language of the statute at the time, that Rule 57 ORCP was subsequently based on that statute, and that the Council can modify the ORCP at any time; therefore, he does not believe that *Vander Veer* is a barrier that prevents the Council from making the proposed changes.

Judge Miller recalled that there was not a consensus or even a lot of support to change the current way of doing business, specifically in the way that Judge Norby wanted alternate jurors to be able to be in the deliberation room during deliberations, but not to participate. Judge Armstrong observed that there was, in fact, unanimity among committee members against using this practice. Judge Norby stated that she did not believe that the Council missed anything in its draft but, rather, that there might be a tighter way to draft the changes. Judge Zennaché agreed and thought that Judge Norby's draft was a little tighter, but he wanted to emphasize that, despite her practice, Judge Norby's version still makes it clear that alternate jurors are not allowed to participate in deliberations. Judge

Norby stated that she was not trying to make a substantive change, but that there is a sentence in the committee's draft that makes it appear that alternate jurors have more power than they actually do. She stated that, because the committee's draft still says that alternate jurors have all of the same functions, powers, facilities, and privileges as regular jurors, it could be interpreted that they have the authority to sit in on deliberations when they do not. Judge Norby stated that her initial intent, which is still included in the draft, was to align ORCP 57 F with ORCP 58 D. She noted that ORCP 58 D already states that if, after the formation of the jury and before it reaches a verdict, a juror is unable to perform the duties of the juror, the court may order such juror to be discharged and replaced with an available alternate juror. Judge Norby observed that this cannot happen with ORCP 57 F as it stands because that rule currently states that alternate jurors must be discharged before deliberations. She stated that ORCP 58 D cannot be used if ORCP 57 F is followed.

Judge Armstrong remarked that he appreciates the revisions that Judge Norby has proposed and stated that they are tighter and convey the information in a cleaner way. He noted, however, that he is concerned about the language, "except the ability to deliberate and vote on the jury's verdict." Judge Armstrong expressed concern that this language could be interpreted to mean that alternate jurors could be allowed to sit in the jury room during deliberation as long as they did not participate. Judge Norby replied that she thinks of alternates as no longer being alternates once they are seated, but that this is not necessarily clear in the proposal she made. Judge Zennaché pointed out that the *Vander Veer* case specifically states that alternates cannot sit in deliberations. Judge Armstrong observed that someone might interpret the language in Judge Norby's draft to say that alternates can be present as long as they do not deliberate. He wondered why any of the language about alternates having the same functions and powers is necessary.

Judge Holland suggested eliminating the language, "except the ability to deliberate and vote on the jury's verdict," because she would argue that alternates have the same functions and powers as regular jurors, but the court directs when, even among the jurors in the box, those powers and functions come into play. As an example, Judge Holland explained that the court states that the regular jurors are not allowed to deliberate before the end of the evidence and arguments. She stated that the court would use the same authority to tell an alternate when he or she would be allowed to deliberate because the court directs when the powers can be utilized. Judge Armstrong posited that the rule does not need to specify that alternates have those powers until they become jurors. He stated that he is not sure that we need to speak in advance to what alternates do. Judge Norby suggested putting a period at the end of "to take the same oath" and deleting the rest of the sentence. Judge Armstrong agreed that the rest of the sentence is superfluous. Judge Miller observed that, if an alternate juror was aware of the

rule, it might make him or her feel like a second class citizen. Judge Armstrong replied that the rule would not say anything regarding alternates. Judge Miller remarked that this change would give the judge the discretion to pick 13 or 14 jurors and not disclose who the alternates are until the jury retires to deliberate, and that this procedure is designed to give everyone the feeling of equal standing. Mr. Bachofner agreed that this encourages equal engagement.

Judge Armstrong noted that the way the judge conducts the entire process is entirely at the judge's discretion, and that this rule does not need to state that alternates have the same powers because jurors will not be reading the rule, and the judge can say anything he or she feels is necessary. He noted that the language in the draft has the potential to be mischievous and serves no purpose that he can identify. Judge Miller agreed. Judge Holland stated that was she solely talking about deleting from the amendment the language "except the ability to deliberate and vote on the jury's verdict." She expressed concern about deleting anything further, stating that the existing rule has language that states that alternates "have the same functions" and that to delete it now would remove language from the existing rule that could potentially stir up questions about the abilities of an alternate juror. She stated that she does not want the Council's deletion to raise that question. Judge Armstrong replied that he does not believe it raises a question regarding an alternate's role but, rather, leaving the language as it is runs the risk of allowing alternates an unintended role. He stated that, if the Council does not change the language at issue and the *Vander Veer* case stands and the Council does not say that its amendment affects the import of that decision, that would presumably be the answer anyway. He stated that he does not believe that deleting the language has any detrimental effect on the role of an alternate juror.

Judge Gerking wondered whether a judge or a lawyer could question whether an alternate would have the power to ask a witness questions as the other jurors do. Judge Armstrong stated that part of his concern is that, if alternates are specifically listed as having the same privileges and powers as regular jurors, an alternate could insist on being in the jury room during deliberations because all of the other jurors are there. Judge Zennaché pointed out that the language is already in the rule and alternates are not allowed in deliberations. Judge Norby stated that the concern about alternates asking questions of witnesses would not be an issue because alternates are being set up with the anticipation that they may have to be seated and to deliberate. Mr. Bachofner noted that this is Judge Norby's enlightened view, which may not be shared by all. Judge Miller observed that there are new judges who have never conducted a jury trial, and that we should read the rule as if we were such a judge.

Mr. Bachofner stated that a change was made to section C to state that "each shall be examined as to his or her qualifications." He stated that, to someone without

experience, this may mean that the examination should be directed to each juror, one by one. Judge Zennaché observed that this was a Council staff change, not a committee change. Prof. Peterson explained that the pronoun "they" is not very clear and that staff was attempting to use the more correct grammar. Mr. Bachofner expressed concern that we do not want to imply that each juror has to be examined individually. He suggested using the language, "the panel shall be examined." Judge Zennaché suggested leaving the language as it was, despite the grammatical issue. A motion was made to this effect. The motion was seconded and passed unanimously.

Ms. David asked whether the committee wanted to attempt to wordsmith at the current Council meeting, or have further committee meetings and bring another draft to the Council in September. Judge Zennaché expressed concern about getting the rule out for comment. Ms. David noted that we do not need to do that until after publication in September. Judge Gerking stated that he believes the language in subsection F should remain, because he envisions a scenario where an alternate is writing out questions that seem favorable to one side and a lawyer objects and says that alternates are not allowed to ask questions. Judge Armstrong wondered whether there a way to keep that language and yet to capture the idea that makes it absolutely clear that the alternates cannot get close to the process that takes place in the deliberation room. Prof. Peterson suggested the words "during trial." Judge Zennaché suggested adding "except for the ability to deliberate, sit in on deliberations, or vote." Judge Norby suggested using the language, "unless needed as a regular juror."

Judge Holland stated that she dislikes the phrase "regular juror" and asked for a different suggestion. Judge Norby suggested "voting juror," because the difference between a juror and alternate is that a juror votes. Judge Miller observed that the Council frequently addresses judicial education issues, and that this may be more of an education issue than a rule change issue. Judge Zennaché pointed out that the committee's draft excluded the term "regular jurors" because the committee was sensitive to that term. He stated that the committee could look at the draft again, but that he feels that writing language into the rule that allows alternate jurors to sit in deliberations is not allowed and is overkill since most judges are not doing it. Judge Norby stated that she does allow the practice, but only when both attorneys agree. Judge Holland stated that she has heard of judges doing it by mistake, and that she is sensitive to the education piece as opposed to having a rule take care of every contingency. Judge Norby stated that the proposed change to the rule will actually make it more difficult for her to allow this practice, but that the impetus behind her draft was to try to put into language what she thought the committee really felt strongly about.

Judge Armstrong suggested the language, "except the ability to be present or participate in any way in the deliberation or vote." Mr. Bachofner proposed,

“except participation in deliberations unless needed." Mr. Keating made a suggestion to delete the words “on how” from the last sentence of section F. Judge Zennaché stated that the committee was attempting to allow the court discretion, because some courts are picking 14 people and giving seven challenges instead of six, and that there is experimentation among the trial courts and that the committee’s changes would allow that experimentation. Mr. Keating pointed out that the clause is used twice and he was talking about the first one, before the words “additional peremptory challenges may be used.” He stated that it is the lawyers who use the challenges, and that his reading of the sentence with the first “on how” included is that the court was going to tell him how to exercise those challenges. Judge Zennaché stated that he now understood Mr. Keating’s concern.

Ms. David observed that there is enough fine-tuning that needs to happen that the committee should take another look. She suggested keeping Judge Norby in the loop and inviting her to participate in a committee meeting and/or sending her draft. She also asked the committee to send its final version to Ms. Nilsson to put it into proper format. Ms. O’Leary observed that this is a difficult committee to get together, so she asked members to work with her to get a meeting done quickly. Judge Zennaché stated that he will attempt a new draft. Ms. Nilsson stated that she will send the most recent version of the rule in Word format to Judge Zennaché. Judge Norby thanked everyone who has worked so hard on the issue for so many hours and stated her appreciation.

Prof. Peterson suggested adding the words “and during the trial” before “shall have the same powers.” Judge Herndon observed that the trial includes deliberations. Prof. Peterson then suggested adding, "until deliberations." Judge Armstrong countered with, “until the jury retires to deliberate.” Mr. Bachofner stated that he is in favor of clarifying this language somehow. Prof. Peterson stated that the question now seems to be what the alternates do once they have been told they cannot deliberate but they are not yet free. Judge Miller asked whether the Council can agree that the only item the committee will work on in terms of changes is section F, and only wordsmithing and making clear the changes that include Judge Norby's suggestions. Judge Holland stated that she does not wish to put a parameter on it, and that she wants to leave it to the committee to decide. Judge Miller stated that she was just trying to get some guidance, because it was her impression that the concept of allowing judges to have discretion was something that Council members agreed with and the amendment appears to merely require wordsmithing now.

Ms. David stated that she does not want to put specific limitations on the committee if someone raises something that really needs to be dealt with, but that she hopes that it will stick mainly with dealing with wordsmithing in section F consistent with the discussion today. She encouraged the committee not to address new issues or revisit issues that have already been dealt with, but to be

sure to look at ORCP 58 D and make sure that any changes to ORCP 57 F are accurate and consistent so that there are no unintended consequences. Judge Holland stated that she feels that there is no consensus on the concept yet and that she is still questioning it. Judge Zennaché stated that today he heard primarily concerns on wordsmithing on the alternate jurors' not being present during deliberations. Judge Norby expressed concern that she has now created a monster, and that she still plans to allow jurors to sit in the deliberation room with the specific instruction that they cannot participate in the deliberations unless and until they have been seated. She stated that she has been doing this for a couple of years, with the permission of counsel, and she does not believe there is any rule that prohibits that. Judge Armstrong replied that the Council is writing a rule now that prohibits it. Judge Norby observed that there is no specific language prohibiting it in any rule at this time. Judge Armstrong stated that there will be. Judge Norby responded that she understands that the Council's general consensus is that this is not set practice and that the Council does not believe that judges should follow this practice. Judge Norby stated that she honors and respects that people have a different opinion than she does; however, she feels that writing a prohibition into the rule very much substantively changes it. She stated that everyone agrees that jurors cannot participate in any way in the deliberations in the jury room, but that she and the Council simply disagree on whether they can be present.

Ms. David observed that good suggestions will often result in a number of people looking at and analyzing a rule, and it may or may not come to be that there is a change that prevents Judge Norby's practice. She stated that she will leave it to the discretion of the committee to decide on the changes to bring before the Council, and that they will send Judge Norby a copy of their updated draft. Ms. David noted that It may end up being the consensus of the Council that this is not the procedure by which it wants to see the courts handle alternate jurors. She remarked that Council members bring a variety of perspectives to the process. Judge Herndon explained to Judge Norby that the Council votes to publish drafts, the drafts are published, there is an opportunity for comment, and the Council does not actually vote to promulgate and send the rules to the Legislature until December.

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

Ms. Leonard presented the committee's most recent draft (Appendix G). She explained that the purpose of the committee was to: 1) address the timing of the exception, modernize it, and give the trial court more discretion; 2) give guidance to practitioners about what is a sufficient exception; 3) discuss the value of even retaining an exception requirement; and 4) discuss the preservation section, unique to the ORCP, since the Court of Appeals has a particular interest in standards for reviewability and preservation. She stated that the committee made

a revision to subsection H(1) that allows discretion regarding the timing of exceptions. Ms. Leonard pointed out that the rule, as it exists, requires exceptions to be made immediately after the court instructs the jury and that there are many times when that timing is inconvenient or disruptive. She stated that the committee wanted to make clear that the trial court has the discretion to choose another time for the exception process. Ms. Leonard described the next sentence in subsection H(1) as stating that, even if a party fails to make an exception, the Court of Appeals may be able to engage in plain error review. Ms. Leonard observed that she is not entirely sold on this idea herself, since there are already Court of Appeals decisions about limitations on the Court of Appeals' existing plain error review in this area. She stated that subsection H(2) attempts to explain the specificity requirements for exceptions, and approves the practice that many people have of incorporating prior exceptions that have already been made. Ms. Leonard noted that this change would allow a party to incorporate by reference the prior exceptions, but that the party would need to be careful to be particular enough under the usual rules of preservation that the trial judge understands their criticism of the proposed instruction or refusal to include a proposed instruction and that they have otherwise preserved their exception.

Mr. Bachofner asked whether, in the final sentence of subsection H(2), the meaning was only for points that were previously made with particularity to the trial judge on the record, or whether it was the committee's intent that points that were made off the record could be incorporated by reference. Judge Zennaché clarified that the intent was to allow the practice of incorporating prior exceptions, but only for points made on the record, because otherwise they would not be known to the Court of Appeals. Mr. Bachofner asked whether this means that previous discussions in chambers cannot be incorporated. Mr. Brian observed that this may mean an end to meetings in the judge's chambers. Judge Miller remarked that this will just mean that, after the conference in chambers, the parties will go back on the record and the judge will state that there was a discussion in chambers and ask the lawyer if he or she wishes to explain the reason for the exception to the judge's ruling. She noted that the burden is on the attorneys to encapsulate whatever their appellate review point is and to preserve their record. She explained that she sometimes finds it helpful to go into chambers and sort through the issues. Mr. Bachofner suggested clarifying by adding "but do so on the record" after "trial judge." He stated that there is a reading that suggests that a party is incorporating by reference the points that the party previously made, which could mean all points. Ms. David suggesting removing the words "to the trial judge" and replacing them with "on the record." Mr. Bachofner expressed that the language should be as clear as possible. Prof. Peterson asked whether Mr. Bachofner thought that merely removing the words "to the trial judge" would be sufficient. Mr. Bachofner stated that including the words "but do so on the record" is a little stronger. Judge Zennaché suggested the alternate language, "a party may incorporate by reference points that the party previously made on the

record with particularity."

Judge Miller observed that the Council began with the idea that it would like judges to have a heads-up while there is still time for a problem to be cured. She stated that, if she forgot to give an instruction that the parties had agreed she would give, she would not want a party waiting until appellate review to raise the omission. Judge Armstrong noted that this change does not undo that problem. Judge Miller stated that the timing is important to the judges so they have an opportunity to fix a problem before the jury gets too far into deliberations. Judge Armstrong remarked that, while the committee was working on this rule, he worried about the potential scenario of a judge failing to give an instruction, the party failing to take an exception, and the party later maintaining that the judge had stated that the party was required to take the exception before the jury was instructed. In such a case, that party could claim it was not required to do anything at the point when the judge later failed to give an instruction because it was told that exceptions had to be done earlier. Judge Miller asked whether it makes a difference, since her practice is to ask for exceptions as soon as the jury door closes. Judge Gerking noted that the rule currently requires an exception after the instructions have been given to the jury. He wondered whether that practice should remain. Judge Armstrong stated that the rule, as amended, still says that. He noted that he is sensitive to the point Judge Miller raised and how this rule affects it, but stated that the fact is that, if the timing of instructions changes and no one expects it, the requirement to make an exception still exists. Mr. Bachofner asked how someone could make an exception to not giving an instruction before the instruction was not given. Judge Miller stated that it is up to the judge to make it clear that exceptions have to be made at a certain point, and that they may not be made after that point.

Judge Gerking recommended changing, on line 11, the word “or” to “and” or “as well as.” Judge Armstrong noted that the risk with this is that someone would say that it needs to be done twice. Judge Zennaché stated that the idea was to allow for a situation where it is inconvenient for someone to take an exception after the jury has been instructed. He stated that he often gives preliminary instructions early in the case and that he will have discussed the preliminary instructions with the lawyers before he gives them, which is immediately prior to opening statements. He remarked that he does not want to be required to ask for exceptions by taking a break and sending the jury out immediately after giving the preliminary instructions, but would rather take any exceptions at the next normal break. Judge Zennaché observed that the Council’s goal was to give the court the power to set a different time for taking exceptions, rather than requiring lawyers to immediately jump up and make the court take a break. Judge Armstrong stated that this clause was designed to do just that. Ms. Leonard stated that these are the identical considerations for the instructions given at the close of the case. Judge Armstrong stated that he was concerned about the potential argument that

the time specified for exceptions had passed and the party had not been able to make them, but that the party was still required to state their exceptions. Judge Gerking asked whether there should there still be a requirement that exceptions be made at the close of the instructions, because that would be helpful to the Court of Appeals and appellate counsel to be able to find them quickly. Judge Armstrong observed that this would indeed be helpful, but that the effort was to recognize that, at the trial level, it is valuable to have a level of flexibility that began with the question from Judge Karsten Rasmussen to the effect that he was not certain that insisting that exceptions be taken at that exact moment was essential. Judge Armstrong noted that he and other members of the Court of Appeals were aware that the change would add some imprecision and potential greater difficulty for them, but that they decided that they could live with it.

Judge Miller stated that she read the final sentence to mean that the attorney is saying "I am still objecting to this instruction and I refer back to the arguments I have already made." Judge Armstrong agreed that the attorney would be incorporating arguments already made on the record, and observed that the required particularity had better already be on the record. He stated that, as long as the prior arguments fulfill the particularity requirement on the record, the attorney does not need to argue further. Judge Armstrong noted that this conforms with existing practice, which is not to burden everyone with the need to go back and do it all over again. Mr. Weaver asked whether writings previously submitted are also incorporated by reference. He observed that, earlier in the rule, a distinction is made and that writings are part of the record if they have been submitted. Judge Armstrong stated that he thought the answer should be yes, but that he is not certain.

Justice Kistler asked whether the plain error rule refers to plain error that excuses the failure to file an exception, or plain error that fails to make any objection whatsoever. Judge Armstrong stated that it encompasses both. Justice Kistler observed that it appears in the section dealing with exceptions but that it is actually broader. Judge Armstrong stated that it is broader because the rule itself earlier speaks of the need both to assert the objection to the trial court and to include an exception. He stated that there is a twin feature that the point has been made in the charging process and an exception has been taken. Justice Kistler remarked that sometimes an error apparent on the face of the record simply means that the instruction is legally incorrect, but plain error also encompasses a discretionary feature on the part of the Court of Appeals in order to reach the error. He asked whether the intention, by using the phrase "error apparent on the face of the record" was to preclude discretion on the part of the Court of Appeals. Judge Armstrong replied that this was not the intention. Justice Kistler stated that exceptions incorporated by reference make perfect sense when the nature of the exception has been constant throughout the discussion with the trial court. He presented a scenario where multiple discussions about an

instruction have been had and the trial court has modified the instruction during the course of those discussions. He asked whether, when the trial court gave its instruction and counsel took exception and incorporated by reference all the things said with particularity on the record, would counsel need to specify particular grounds or could counsel rely on all of the grounds previously mentioned, even though they had shifted over the course of the trial? Judge Armstrong stated that the committee thought about this issue and that he had discussed it with his colleagues on the Court of Appeals a number of times, but that there was no consensus. He stated that the language in the draft represents a judgment that he ultimately made, which recognizes that counsel may be in a position where the exception with particularity need not actually encompass the particular point counsel is going to stand on at the end of the process. He noted that this will make the task more difficult for the Court of Appeals, but not for the Supreme Court or the trial court. He stated that there may be less clarity at the end point but that the Court of Appeals is willing to work with this change to be accommodating , to allow some flexibility in handling exceptions in the trial courts. Justice Kistler stated that he was thinking of the trial court because, at times, the trial court may believe it solved the problem counsel was raising, and would have fixed the problem had it realized that the problem still existed. He observed that this is one of the thoughts behind the generic "everything I said before is still good, I am still objecting on that ground," because it puts the trial court on notice that counsel still believes the trial court has not fixed the problem even though, in the trial court's mind, it had.

Judge Gerking observed that there must be a time in the trial when the judge officially takes exceptions because, if one of the lawyers constantly objects to a particular instruction, there still has to be a time when the judge invites the lawyers to take exceptions to instructions. Judge Zennaché stated that this is still required by the rule change, and that the trial court has discretion as to the time when exceptions are made; the trial court is still required to set a time for counsel to make exceptions on the record. He also noted that the incorporation is by incorporation of direct points, not by incorporation of exceptions. Judge Armstrong noted that Justice Kistler's sensitivity is appropriate because, by expressly allowing the idea of incorporation, it is less clear that counsel needs to be focused to take exceptions at whatever point the judge determines is appropriate. He stated that, by allowing the phenomenon of incorporation, we are running the risk that there will be less precision or clarity for the Court of Appeals, as well as the risk that what the trial court believed was no longer alive as an issue can arise at the appellate level. Justice Kistler wondered whether we want to open up the possibility that parties can go through a trial where instructions are given and nobody objects to or raises an issue and then, for the first time on appeal, a party is able to raise that issue. He stated that the court's discretion to reach it may be there but, if it turns out to be wrong in some particular, he wondered what the grounds are for exercising the discretion not to

reach it. Justice Kistler observed that it seems to potentially subject a judgment or verdict to collateral challenges that nobody considered.

Ms. Leonard expressed concern about having the opportunity to raise a whole new issue that was never in the party's mind, counsel's mind, or the court's mind just because the case is on appeal, and opening the door to disrupting judgments and verdicts. Judge Armstrong stated that plain error is already recognized in this very context in a perverse way with the case of *State v. Toth* [213 Or App 505, 509-10, 162 P3d 317 (2007)]. He noted that Judge Landau made it clear in this case that the Court of Appeals can address as plain error an instruction that was never requested if it was for a necessary legal principle that needed to be in the mix. He stated that he thinks of it as akin to the *Boots* issue [*State v. Boots*, 308 Or 371, 780 P2d 725 (1989)] in criminal law where jury unanimity is required and, even if no one had the idea that a *Boots* instruction was necessary, if it turns out that there was a need for one, it is still error and it can be fixed for the first time on appeal. Justice Kistler stated that one might question whether Judge Landau went too far in that ruling. Judge Armstrong stated that the perversity is that we now have a plain error principle that says that, if no one thought of the issue so there was never a request to have an instruction about it, this rule does not foreclose review of the omission because it only speaks to review of things that have been requested or to which objections have been made. He explained that our plain error exception in this setting is for things that never surfaced at all, and the Court of Appeals has already said that these things are subject to plain error review. He noted that, as Justice Kistler stated, this might disappear down the road after people think about what kind of plain error is possible, but that it makes some sense to confirm that this is in fact available.

In response to an inquiry from Justice Kistler, Judge Armstrong confirmed that the amendment speaks to the law we apply at the time of appeal versus at the time of trial. If the law has shifted so that the instruction given was wrong, and the issue had been debated but someone forgot to take an exception, the Court of Appeals could still reach it simply make clear that the bad instruction can still be sent back to be fixed, notwithstanding the absence of an exception.

Judge Armstrong pointed out that the amendment is designed to say that plain error review is available; however, he stated that the chance of it happening is remote, so no one should take a case up on appeal if the only issue is the jury instruction that will be fixed by plain error. He reassured Ms. Leonard that her fear that the change may open up a door that will lead to more opportunities to undo what juries have done will not happen. Judge Armstrong stated that plain error review is still a very rare opportunity, but that the rule change was designed to confirm what was already said in the *Toth* case.

Judge Miller stated that it is the judge's responsibility to tell the jury the law and, if

a lawyer fails to ask for an instruction on the burden of proof or the presumption of innocence, that is the judge's burden. She stated that there may be situation where a judge forgets to do something he or she is obliged to do, and where the lawyers are not paying attention. Judge Herndon noted that the reference to the *Boots* case is a classic example and that the court's ruling in that case makes sense. He stated that he can see why the court would give a pass on a lawyer not requesting that instruction. Judge Herndon stated that he believes that the Council should publish the draft and that he feels that it will generate a lot of discussion.

Judge Zennaché addressed the final sentence of subsection H(1) and stated that, while he knows that it is the status of the law now, he does not think it is appropriate to add this to a trial court rule. He believes that it is more a rule of appellate procedure and, whether that language is in the rule or not, he thinks the Court of Appeals will continue to have the discretion to review what it perceives as plain error. Judge Armstrong responded that this is the only rule in the ORCP that speaks to what a party must do to obtain review on appeal and it in effect tells the Court of Appeals what it is allowed to do. He stated that, if the rule does not say what the Court of Appeals can do, the Court cannot do it. Judge Armstrong noted that the *Toth* case does say that the only time the Court of Appeals can consider plain error review is when it literally does not fit within the language of the rule itself, which is a very narrow exception for an instruction no one thought to ask for or to object to, and that seems to be a funny distortion of the plain error function. He acknowledged that it is a perversity that this rule speaks to the Court of Appeals' function on review, but stated that it must also speak to when the Court can review for error when there is non-compliance with the rule. Judge Zennaché asked whether this is not the status of the rule right now. Judge Armstrong stated that, currently, the Court of Appeals can only conduct plain error review in the narrowest of circumstances, where it is not subject to the exception requirement at all. He stated that the exception piece is just the cap to that but, since this rule covers that which is otherwise subject to an objection or request, anything that did not come with an exception or request is beyond the Court's plain error review function. He noted that the rule change is designed to broaden it and to cover the very things the rule says the Court cannot do. Judge Armstrong pointed out that, without the change, the Court is unable to conduct plain error review except within the narrow exception. Judge Zennaché stated that he is all right with the change in that case.

Judge Armstrong suggested one more wordsmithing change on line 14, to change "errors of law that are apparent on the record" to "legal error that is apparent on the record." A motion was made to make this friendly amendment as well as the amendment previously suggested for the last sentence of subsection H(2) by Judge Zennaché. The motion was seconded and passed unanimously. A motion was made to vote on the draft of the proposed amendment (with the friendly

amendments) at the September meeting. The motion was seconded and passed unanimously. Ms. Nilsson agreed to make the amendments and circulate the amended draft to the Council.

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

Ms. David presented the committee's most recent draft (Appendix H). She stated that the committee had looked at clarifying the difference between costs and fees in Section A, but opted not to try to make any changes in that regard given that it might open up a can of worms. She noted that every case is different and that it would be difficult to enumerate every kind of cost versus every kind of attorney fee. She stated that the committee looked at whether there was an opportunity to clarify special versus general findings in existing paragraph C(4)(e) and determined that it appears that an attempted clarification could touch on substantive issues because there are so many areas of law. She stated that the committee ultimately decided that the difference is not an easy thing to define in a rule change, that the rule already tells practitioners that there are things called general findings and other things called special findings and, if a party thinks they have a preservation issue, they had better figure it out and make the appropriate request. Ms. David remarked that the majority of the changes were drafted by Judge Zennaché and Prof. Peterson. She stated that the draft ORCP 68 C creates a narrow exception where ORCP 68 does not apply in order to accommodate the Oregon State Bar's Elder Law Section, which is trying to make a specific change to statutes in their area of law that would mandate a different procedure.

Ms. David explained that the majority of the rest of the changes relate to having a hearing and whether a hearing must be held as a matter of law. She stated that the proposed process is as follows: the moving party files a statement for attorney fees (and it is clarified in the draft amendment that the party needs to explain the applicable factors under ORS 20.075 and any other rule); objections are allowed; a response to any objections is allowed; and a hearing is only required when a party asks for one in the objection or in the response to an objection. Ms. David noted that the last provision is contrary to the current rule, which mandates that court must hold a hearing if any objections are filed. She stated that the committee contemplated some instances where both parties file their documents and just ask the judge to make a determination without a hearing. Ms. David explained that the committee made one additional minor change in subsection C(4) so that the requirement to allege a right to attorney fees can be better incorporated in domestic relations proceedings as well, since many domestic relations cases take on a new life when post-judgment motions and responses get filed, rather than formal pleadings. Ms. David stated that the committee spent a lot of time rearranging the rule to try to give practitioners a good step-by-step guide as to what needs to be done and to assist the court in making findings that will be viable upon review.

Judge Gerking asked why the party seeking fees should be required in their statement to go through the factors enumerated in ORS 20.075. Judge Zennaché replied that the factors in ORS 20.075(1) govern the court's exercise of discretion on whether to award attorney fees and ORS 20.075(2)'s factors govern the amount of fees to be awarded so, whether an award is discretionary or mandatory, the court still has to consider those factors. He noted that the Court of Appeals has taken the position that, if the trial court awards attorney fees but does not make at least general findings on the factors, the judgment is subject to reversal because the trial court has not made a meaningful record for appellate review. Judge Zennaché stated that the committee felt that it was appropriate for a party asking for fees to address the factors in ORS 20.075. He observed that the Uniform Trial Court Rules (UTCR) form [5.080] for applying for attorney fees does state that these factors should be addressed but that, unfortunately, sometimes attorneys simply attach the statute without giving any factual basis to support any findings on those factors. Judge Gerking asked whether failure to do so would be fatal. Judge Zennaché remarked that failure to do so is already fatal under the existing rule. Prof. Peterson noted that the rule currently allows, and the amendment would still allow, amendment or supplementation, so a party could always ask the judge for leave to amend or supplement if not enough information was previously provided.

Judge Armstrong acknowledged that he initially had the same reaction as Judge Gerking, since the Court of Appeals often sees the same issue in attorney fee petitions. He observed that he is leery of laying the groundwork for that kind of response because the Court of Appeals may award fees, even if the petitioner did not go to the trouble to walk through all of the criteria, and it can become sort of predictable to see statements that say this factor does not apply for this reason, when the court on its own will realize that certain factors do not have a bearing and can figure out which ones do. Judge Armstrong explained that when he heard Judge Zennaché's response that attorneys are required to make an effort to sort through the factors, he still was not fully convinced, since a party still has the opportunity to ask for leave to amend or supplement if the other party objects. Ms. David pointed out that the language under subparagraph C(4)(a)(i) started out as "must include," in the first committee draft, was changed to "may include," and then became "which explains," because the committee wanted the practitioner to help the judge understand why and in what amount fees should be awarded. She stated that the language was wordsmithed to try to explain the request for fees, not to create a potential Professional Liability Fund issue where a party was forever barred from receiving attorney fees.

Mr. Bachofner stated that there are some practitioners who still use the "check box" method without any explanation. Judge Miller asked whether, if a practitioner does not ask for oral argument and is seeking an award of attorney fees, and an objection is filed, is the objecting party precluded from having a

witness come in and testify? Ms. David explained that paragraph C(4)(e) now lays out that the judge can still set a hearing on the court's own motion if neither party asks but that, if either party asks for a hearing, then one will be held. She stated that there can be additional information and that there is always the opportunity to bring in an expert by testimony or by use of a declaration. Judge Miller observed that sometimes attorneys do not ask for oral argument, but merely submit affidavits with one side stating that the fees are reasonable and customary and the other side saying that they are not, and stated that she will not set a hearing in that case. Ms. David stated that the court may rule based only on affidavits and that she is free to make that judgment call. Judge Zennaché noted that the party that filed the original statement may respond to objections and may submit affidavits instead of asking for oral argument as well.

Mr. Weaver asked whether a hearing means oral argument or an evidentiary hearing. He stated that, in some counties in Southern Oregon, if a party requests an evidentiary hearing it will be a different process than requesting an oral argument and will be held at different times. Judge Zennaché responded that a hearing means both and that, under the current rule, a party is allowed to put on evidence. Judge Armstrong stated that a party may tell the court it will not have evidence if it just wants oral argument, and that the judge can choose to hold the hearing however he or she wants.

Judge Armstrong proposed a friendly amendment to change the word "which" to "that" in the beginning of the new language in subparagraph C(4)(a)(i). Ms. David stated that Mr. Bachofner proposed another friendly amendment in paragraph C(4)(e) to change the language "unless a party has requested a hearing in the caption of the objection or response" to "unless the party has requested a hearing in the caption of the request, objection, or response." Judge Zennaché stated that he was trying to avoid asking for a hearing at the very beginning. Mr. Bachofner noted that this means that a hearing cannot be requested by the party filing the statement. Judge Zennaché stated that the party still has the opportunity to request a hearing in their response to an objection. He observed that the current rule states that a hearing will be held if an objection is filed but that, most of the time, the parties do not even want a hearing. He stated that the committee was attempting to avoid the practice of automatically requesting a hearing in the original application and felt that a party should make a considered decision regarding whether a hearing is needed when the response to the objection is filed. Mr. Bachofner stated that he could see the benefit to this but wondered if it may be a trap for the unwary, if a party originally intended to have a hearing and neglects to ask for a hearing in their response. Judge Zennaché noted that the committee tried to make the procedure very clear. Ms. David stated that the rule is designed so that the last provision of C(4)(e) "or unless the court sets a hearing on its own motion," will allow the court the discretion to grant a hearing in cases where a party may have overlooked this step. Judge Armstrong stated that felt

the same way as Mr. Bachofner at first, but that Judge Zennaché had convinced him that, until a party sees the objections, the party will not necessarily know whether a hearing is necessary. Judge Holland suggested requiring the request for oral argument to be in the caption because it makes it easier for the clerks. Judge Zennaché pointed out that the amendment still requires the request for hearing to be in the caption of the response or objection.

Prof. Peterson suggested two friendly amendments: 1) in paragraph C(4)(d) the phrase "Statements and objections may be amended," should read "Statements, objections, and responses may be amended"; and 2) in paragraph C(4)(e), the language "application, objection, response" should be changed to "statement, objection, response." A motion was made to adopt Prof. Peterson's amendments. The motion was seconded and passed unanimously. A motion was made to vote on the draft of the proposed amendment (with friendly amendments) at the September meeting. The motion was seconded and passed unanimously. Ms. Nilsson agreed to make the amendments and to circulate the amended draft to the Council.

VI. New Business (Ms. David)

A. Evidentiary Ruling re: Social Media

Ms. David informed the Council that a Multnomah County judge had ordered a plaintiff to produce all of his Facebook postings and correspondence relating to Facebook postings in a civil trial. She noted that this type of ruling is being upheld all over the country. She stated that she received two telephone calls asking where in the ORCP social media comes into play and she suggested that the callers read ORCP 36 through 46. Mr. Brian asked whether it was all postings or just postings relating to the case. Ms. David stated that it was all postings. Prof. Peterson, Mr. Bachofner, and Judge Miller related instances of cases where Facebook postings had been used as evidence.

B. Resolution

Mr. Bachofner asked whether the Council might consider passing a resolution commenting on the importance of financial support for the Judicial Department for education and the impact of the recent budget cuts. Judge Herndon observed that this is a nice thought but, in his opinion, might be a wasted effort because legislators do not seem to be that interested in the opinion of lawyers.

C. Next Meeting

It was pointed out that the September 8, 2012, meeting is very important, as the Council will vote on which draft amendments to publish. The meeting will take place at 9:30 a.m. at the Oregon State Bar offices. Prof. Peterson noted that a quorum and simple majority is required to publish drafts at this meeting.

VII. Adjournment

Ms. David adjourned the meeting at 12:04 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Council on Court Procedures
Website/Inquiries Update
Reporting Period: 6/1/12 - 8/10/12

I. Inquires

The Council received one telephone inquiry regarding a wage claim. The caller was referred to the Bureau of Labor and Industries, which handles wage claims, and the Oregon State Bar Lawyer Referral Service.

II. Website Statistics

Attached are analytical reports detailing website visitors, geographical information, page views, keywords from search engines, and traffic sources for the Council's website during the period of approximately two months since the last website report. The site had 125 visits from 103 unique visitors, and 320 page views in this period. 71% of visits to the site were from new visitors; the average number of pages viewed per visit was 2.56; and the average time spent on the site was two minutes and three seconds.

Other than the index page, visitors seemed to spend most of their time viewing the pages which include legislative history. The number of visits and number of visitors is significantly lower than during the period of the last website report; this may be due to the fact that it is summer and more people are on vacation, in addition to the fact that the Council has not held a full meeting during this time.

Once again, more visitors reached the website via direct referral from other pages than by search engine or directly navigating to the site. It is important to maintain relationships with other agencies so that they continue to post links to the Council's website from theirs. Please let me know if there are any other agencies with whom you believe we should be in contact for this purpose.

Respectfully submitted,

Shari Nilsson
Council Administrative Assistant

Council on Court Procedures
September 8, 2012, Meeting
Appendix B-1

Google Analytics

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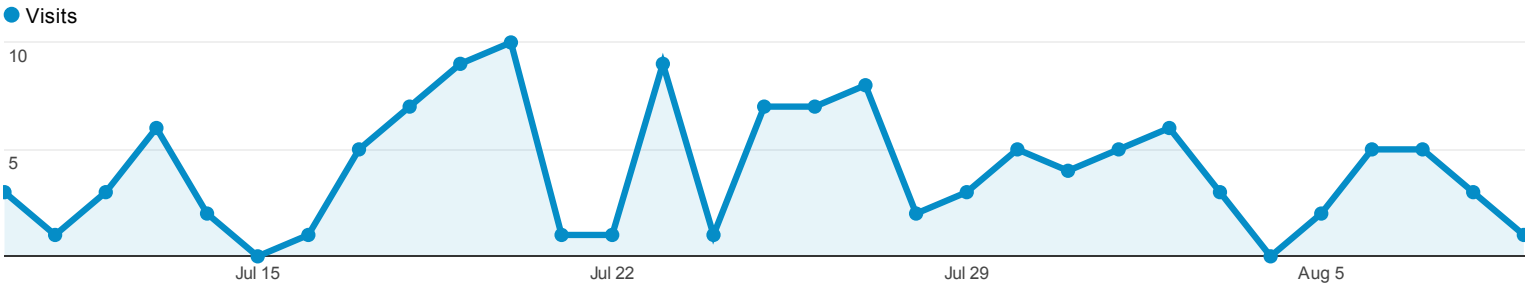
www.lclark.edu/~ccp [DEFAULT]

Visitors Overview

Jul 10, 2012 - Aug 9, 2012

% of visits: 100.00%

Overview



103 people visited this site

Visits: 125
Unique Visitors: 103
Pageviews: 320
Pages / Visit: 2.56
Avg. Visit Duration: 00:02:03
Bounce Rate: 48.00%
% New Visits: 71.20%

71.20% New Visitor
89 Visits

28.80% Returning Visitor
36 Visits

	Language	Visits	% Visits
1.	en-us	124	99.20%
2.	en	1	0.80%

view full report

Google Analytics

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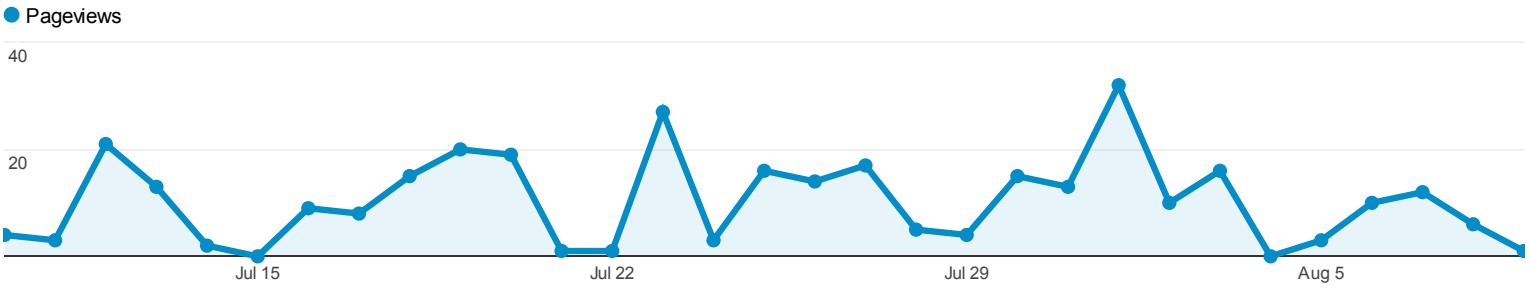
www.lclark.edu/~ccp [DEFAULT]

Content Overview

Jul 10, 2012 - Aug 9, 2012

% of pageviews: 100.00%

Overview



Pages on this site were viewed a total of 320 times

Pageviews: 320

Unique Pageviews: 221

Avg. Time on Page: 00:01:19

Bounce Rate: 48.00%

% Exit: 39.06%

	Page	Pageviews	% Pageviews
1.	/~ccp/index.htm	115	35.94%
2.	/~ccp/Past_Biennia.htm	59	18.44%
3.	/~ccp/resources.htm	38	11.88%
4.	/~ccp/LegislativeHistoryofRules.htm	32	10.00%
5.	/~ccp/Current_Biennium.htm	31	9.69%
6.	/~ccp/contact.htm	11	3.44%
7.	/~ccp/order.htm	10	3.12%
8.	/~ccp/Council_Membership.htm	9	2.81%
9.	/~ccp/CurrentBienniumMeetings.htm	8	2.50%
10.	/~ccp/For_Council_Members.htm	3	0.94%

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Location

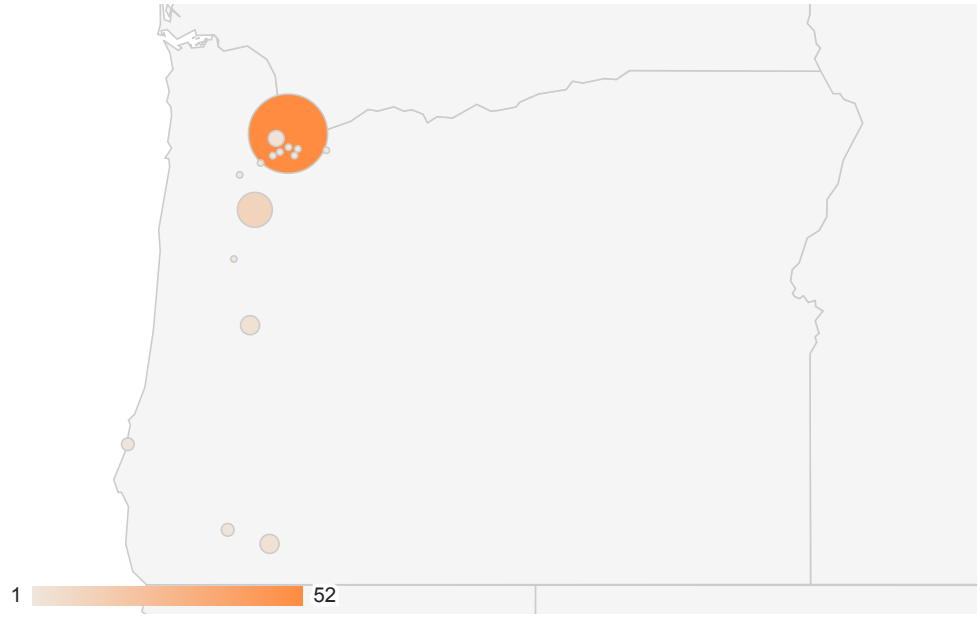
Jul 10, 2012 - Aug 9, 2012

ALL » COUNTRY / TERRITORY: United States » REGION: Oregon

% of visits: 69.60%

Map Overlay

Site Usage



Visits	Pages / Visit	Avg. Visit Duration	% New Visits	Bounce Rate
87	**2.80**	**00:02:12**	**68.97%**	**44.83%**
% of Total: **69.60%** (**125**)	Site Avg: **2.56** (**9.55%**)	Site Avg: **00:02:03** (**7.24%**)	Site Avg: **71.20%** (**-3.14%**)	Site Avg: **48.00%** (**-6.61%**)

	City	Visits	Pages / Visit	Avg. Visit Duration	% New Visits	Bounce Rate
1.	Portland	**52**	2.29	00:01:30	65.38%	46.15%
2.	Salem	**11**	5.55	00:06:48	36.36%	27.27%
3.	Eugene	**4**	3.25	00:02:46	75.00%	25.00%
4.	Medford	**4**	1.50	00:00:14	100.00%	75.00%
5.	Beaverton	**3**	1.67	00:00:08	100.00%	66.67%
6.	Bandon	**2**	1.50	00:00:14	100.00%	50.00%
7.	Grants Pass	**2**	5.50	00:07:35	50.00%	0.00%
8.	Clackamas	**1**	1.00	00:00:00	100.00%	100.00%
9.	Corvallis	**1**	1.00	00:00:00	100.00%	100.00%
10.	Lake Oswego	**1**	10.00	00:05:01	100.00%	0.00%
11.	Mcminnville	**1**	1.00	00:00:00	100.00%	100.00%
12.	Newberg	**1**	1.00	00:00:00	100.00%	100.00%
13.	Oregon City	**1**	2.00	00:00:06	100.00%	0.00%
14.	Sandy	**1**	1.00	00:00:00	100.00%	100.00%
15.	Sherwood	**1**	5.00	00:00:30	100.00%	0.00%
16.	Tualatin	**1**	4.00	00:04:51	100.00%	0.00%

Rows 1 - 16 of 16

Google Analytics

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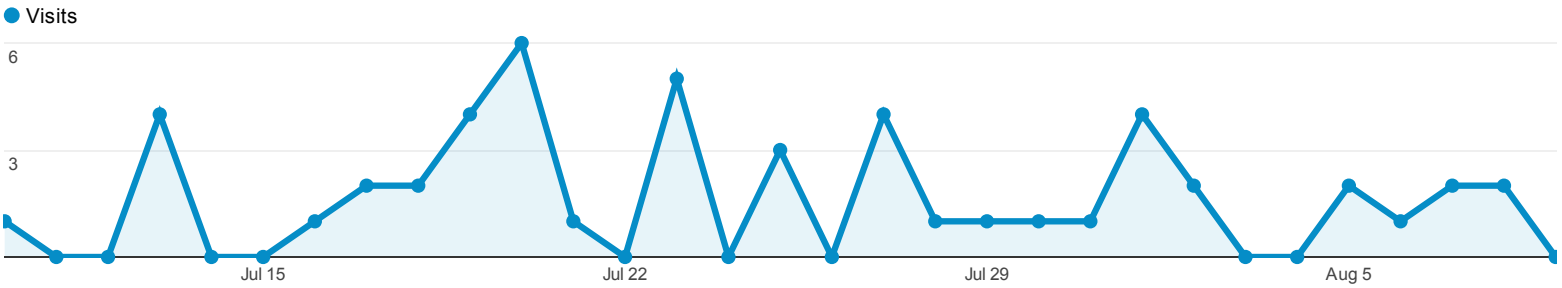
Referral Traffic

Jul 10, 2012 - Aug 9, 2012

% of visits: 40.00%

Explorer

Site Usage



Visits	Pages / Visit	Avg. Visit Duration	% New Visits	Bounce Rate
50	**2.24**	**00:01:06**	**90.00%**	**50.00%**
% of Total: **40.00%** (125)	Site Avg: **2.56** (-12.50%)	Site Avg: **00:02:03** (-46.21%)	Site Avg: **71.20%** (26.40%)	Site Avg: **48.00%** (4.17%)

	Source	Visits	Pages / Visit	Avg. Visit Duration	% New Visits	Bounce Rate
1.	courts.oregon.gov	**26**	1.81	00:00:27	100.00%	61.54%
2.	oregonlegalresearch.com	**10**	4.30	00:03:47	70.00%	0.00%
3.	councilcourtprocedures.org	**5**	1.40	00:00:29	80.00%	60.00%
4.	lawlib.lclark.edu	**4**	2.25	00:00:35	100.00%	50.00%
5.	osbar.org	**2**	1.00	00:00:00	100.00%	100.00%
6.	staging-courts.oregon.egov.com	**2**	1.00	00:00:00	50.00%	100.00%
7.	oregontriallawyers.org	**1**	2.00	00:00:57	100.00%	0.00%

Rows 1 - 7 of 7

Google Analytics

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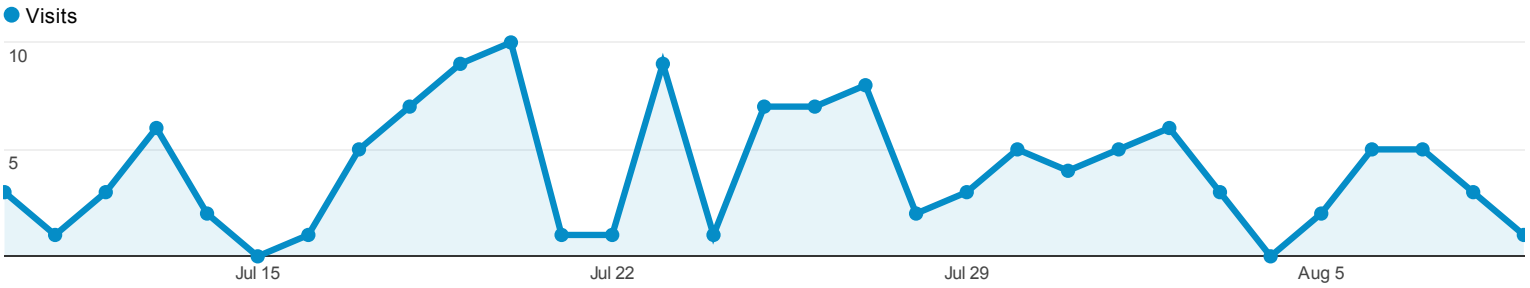
www.lclark.edu/~ccp [DEFAULT]

Traffic Sources Overview

Jul 10, 2012 - Aug 9, 2012

% of visits: 100.00%

Overview



125 people visited this site

24.80% Search Traffic
31 Visits

40.00% Referral Traffic
50 Visits

35.20% Direct Traffic
44 Visits

	Keyword	Visits	% Visits
1.	(not set)	11	35.48%
2.	oregon council on court procedures	5	16.13%
3.	council on court prodecures	3	9.68%
4.	oregon council court procedures	3	9.68%
5.	council on court procedures	2	6.45%
6.	council on court procedures oregon	2	6.45%
7.	counsil on court procedures	2	6.45%
8.	council on court proceedings, oregon	1	3.23%
9.	oregon council on court procedure	1	3.23%
10.	who is the council in court	1	3.23%

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www.lclark.edu/~ccp [DEFAULT]

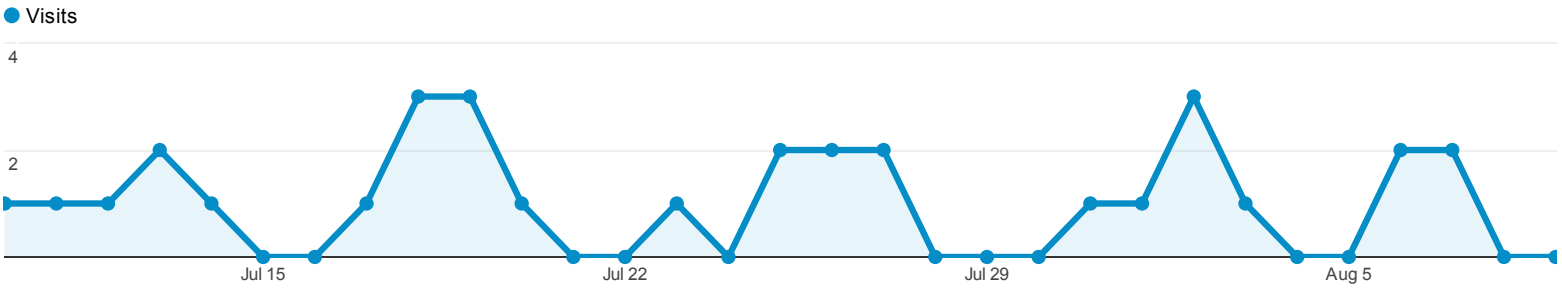
Search Overview

Jul 10, 2012 - Aug 9, 2012

% of visits: 24.80%

Explorer

Site Usage



Visits	Pages / Visit	Avg. Visit Duration	% New Visits	Bounce Rate
31	**3.16**	**00:03:29**	**48.39%**	**35.48%**
% of Total: **24.80%** **(125)**	Site Avg: **2.56** **(23.49%)**	Site Avg: **00:02:03** **(69.68%)**	Site Avg: **71.20%** **(-32.04%)**	Site Avg: **48.00%** **(-26.08%)**

	Keyword	Visits	Pages / Visit	Avg. Visit Duration	% New Visits	Bounce Rate
1.	(not set)	**11**	3.18	00:01:18	63.64%	36.36%
2.	oregon council on court procedures	**5**	6.40	00:11:26	60.00%	20.00%
3.	council on court prodecures	**3**	2.33	00:04:09	0.00%	33.33%
4.	oregon council court procedures	**3**	1.33	00:00:02	33.33%	66.67%
5.	council on court procedures	**2**	2.00	00:00:06	100.00%	0.00%
6.	council on court procedures oregon	**2**	3.00	00:03:08	50.00%	50.00%
7.	counsil on court procedures	**2**	2.00	00:07:54	0.00%	50.00%
8.	council on court proceedings, oregon	**1**	2.00	00:00:07	0.00%	0.00%
9.	oregon council on court procedure	**1**	3.00	00:01:36	0.00%	0.00%
10.	who is the council in court	**1**	1.00	00:00:00	100.00%	100.00%

Rows 1 - 10 of 10

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. **The signature for filings may be in the form approved for electronic filing in accordance with these rules or any other rule of court.** Pleadings need not be verified or accompanied by **an** affidavit or declaration.

Council on Court Procedures
September 8, 2012, Meeting
Appendix C-1

RESPONSIVE PLEADINGS

RULE 19

A Defenses; form of denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the allegations upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an allegation, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the allegations denied. When a pleader intends in good faith to deny only a part or a qualification of an allegation, the pleader shall admit so much of [*it*] **the allegation** as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all **of** the allegations of the preceding pleading, the denials may be made as specific denials of designated allegations or paragraphs, or the pleader may generally deny all **of** the allegations except such designated allegations or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all of the allegations of the preceding pleading, the pleader may do so by general denial of all allegations of the preceding pleading subject to the obligations set forth in Rule 17.

B Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively**:** accord and satisfaction[,]**;** arbitration and award[,]**;** assumption of risk[,]**; claim preclusion and issue preclusion;** comparative or contributory negligence[,]**;** discharge in bankruptcy[,]**;** duress[,]**;** estoppel[,]**;** failure of consideration[,]**;** fraud[,]**;** illegality[,]**;** injury by fellow servant[,]**;** laches[,]**;** license[,]**;** payment[,]**;** release[,]**;** [*res judicata,*] statute of frauds[,]**;** statute of limitations[,]**;** unconstitutionality[,]**;** waiver[,]**;** and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

C Effect of failure to deny. Allegations in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are admitted when not denied in the responsive pleading. Allegations in a pleading to which no responsive pleading is required or permitted [*shall be*] **are** taken as denied or avoided.

Council on Court Procedures
September 8, 2012, Meeting
Appendix D-1

MINOR OR INCAPACITATED PARTIES

RULE 27

A Appearance of [*minor*] parties by guardian or conservator. When a [*minor*] **person**[,] who has a conservator of such [*minor's*] **person's** estate or a guardian[,] is a party to any action, such [*minor*] **person** shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought **and pursuant to this rule**. [*If the minor does not have a conservator of such minor's estate or a guardian, the minor shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:*

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

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

B [*Appearance of incapacitated person by conservator or guardian.*] Appointment of guardian ad litem for minors; incapacitated or financially incapable parties. When a **minor or a** person who is incapacitated or financially incapable, as defined in ORS 125.005, [*who has a conservator of such person's estate or a guardian,*] is a party to [*any*] **an** action **and does not have a guardian or conservator**, the person shall appear by [*the conservator or guardian as may be appropriate or, if the court so orders, by*] a guardian ad litem appointed by the court in which the action is brought **and pursuant to this rule**. [*If the person does not have a conservator of such person's estate or a guardian, the person shall appear by a guardian ad litem appointed by the court.*] The court shall appoint some suitable person to act as guardian ad litem:

Council on Court Procedures
September 8, 2012, Meeting
Appendix E-1

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

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

[*B(1)*] **B(3)** When the **plaintiff or petitioner is a** person who is incapacitated or financially incapable, as defined in ORS 125.005, [*is plaintiff **or petitioner***], upon application of a relative or friend of the person.

[B(2)] **B(4)** When **the defendant or respondent is a** person *[is defendant **or respondent***] **who is incapacitated or financially incapable, as defined in ORS 125.005**, upon application of a relative or friend of the person filed within the period of time specified by these rules or **any** other rule or statute for appearance and answer after service of summons[,] or, if the application is not so filed, upon application of any party other than the person.

C Method of Seeking Appointment of Guardian Ad Litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain admissible evidence sufficient to prove by a preponderance of the evidence that the proposed protected person is a minor or is incapacitated or financially incapable, as defined in ORS 125.005.

D Notice of Motion Seeking Appointment of Guardian ad Litem. At the time the motion is filed, the person filing the motion must provide notice as set forth in this section. Notice shall be given by mailing to the address of each person or entity listed below, by first class mail, a true copy of the motion, supporting affidavit(s) or declaration(s), and the form of

Council on Court Procedures
September 8, 2012, Meeting
Appendix E-2

notice prescribed in Section E below.

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

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

D(2)(a) To the person;

D(2)(b) To the spouse, parents, and adult children of the person;

D(2)(c) If the person does not have a spouse, parent, or adult child, to the person or persons most closely related to the person;

D(2)(d) To any person who is cohabiting with the person and who is interested in the affairs or welfare of the person;

D(2)(e) To any person who has been nominated as fiduciary or appointed to act as fiduciary for the person by a court of any state, any trustee for a trust established by or for the person, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of attorney;

D(2)(f) If the person is receiving moneys paid or payable by the United States through the Department of Veterans Affairs, to a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the protected person;

D(2)(g) If the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a representative of the Department;

Council on Court Procedures
September 8, 2012, Meeting
Appendix E-3

D(2)(h) If the person is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a representative of the Authority;

D(2)(i) If the person is committed to the legal and physical custody of the Department of Corrections, to the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined;

D(2)(j) If the person is a foreign national, to the consulate for the person's country; and

D(2)(k) To any other person that the court requires.

E Contents of Notice. The notice shall contain:

E(1) The name, address, and telephone number of the [*petitioner or the*] person making the motion, and the relationship of the [*petitioner or*] person making the motion to the person for whom a guardian ad litem is sought;

(E)(2) A statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than [*20*] 21 days from the date of the notice; and

(E)(3) A statement indicating that the person for whom the guardian ad litem is sought may object in writing or by telephoning the clerk of the court in which the matter is pending and stating the desire to object.

F Hearing. As soon as practical after any [*objections are*] objection is filed, the court shall hold a hearing at which the court will determine the merits of the objection and make such orders as are appropriate.

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

H Settlement. Where settlement of the action will result in the receipt of property[,]

or money by the person for whom the guardian ad litem was appointed, the guardian ad litem lacks the authority to settle the action or to receive the funds. Such settlement must be sought and obtained by a conservator or pursuant to ORS 126.725.

DEPOSITIONS UPON ORAL EXAMINATION

RULE 39

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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 **will** be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A

Council on Court Procedures
September 8, 2012, Meeting
Appendix F-1

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**s** 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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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 **will** be recorded by other than stenographic means, in which event the notice shall designate the manner of recording and preserving the deposition. A

Council on Court Procedures
September 8, 2012, Meeting
Appendix G-1

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**s** 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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Council on Court Procedures
September 8, 2012, Meeting
Appendix G-3

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 **to** 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*] **the examination** is to be [*made*] **performed**.

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 **by** the person examined, the party causing the examination to be [*made*] **performed** 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 **an** examination of a person not a party, the party shows **an** 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

Council on Court Procedures
September 8, 2012, Meeting
Appendix H-1

examinations relating to injuries for which recovery is sought unless the claimant shows **an** 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.

Council on Court Procedures
September 8, 2012, Meeting
Appendix H-2

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 **to** 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*] **the examination** is to be [*made*] **performed**.

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 **by** the person examined, the party causing the examination to be [*made*] **performed** 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 **an** examination of a person not a party, the party shows **an** 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

Council on Court Procedures
September 8, 2012, Meeting
Appendix I-1

examinations relating to injuries for which recovery is sought unless the claimant shows **an** 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.

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.

Council on Court Procedures
September 8, 2012, Meeting
Appendix I-2

FAILURE TO MAKE DISCOVERY; SANCTIONS

RULE 46

A Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may [*apply*] **move** for an order compelling discovery as follows:

A(1) Appropriate court.

A(1)(a) Parties. [*An application*] **A motion** for an order [*to*] **directed against** a party may be made to the court in which the action is pending[,] and, on matters relating to a deponent's failure to answer questions at a deposition, such [*an application*] **a motion** may also be made to a court of competent jurisdiction in the political subdivision where the deponent is located.

A(1)(b) Non-parties. [*An application*] **A motion** for an order [*to*] **directed against** a deponent who is not a party shall be made to a court of competent jurisdiction in the political subdivision where the non-party deponent is located.

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 propounded or submitted under Rules 39 or 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make [*such*] **any** protective order [*as*] it would have been empowered to make on a motion made pursuant to Rule 36 C.

A(3) Evasive or incomplete answer. For purposes of this section, an evasive or incomplete answer is to be treated as a failure to answer.

Council on Court Procedures
September 8, 2012, Meeting
Appendix J-1

A(4) Award of expenses of motion. If the motion is granted, the court may, after **an** opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct**,** or both of them**,** to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after **an** opportunity for hearing, require the moving party or the attorney advising the motion**,** or both of them**,** to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

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Council on Court Procedures
September 8, 2012, Meeting
Appendix J-2

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 **the** 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

Council on Court Procedures
September 8, 2012, Meeting
Appendix K-1

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 the 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 **of** 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)*]

Council on Court Procedures
September 8, 2012, Meeting
Appendix K-2

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)*] **to the attorney or party issuing the subpoena**, 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 **by** 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*] **produced** 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

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 **from** the body of the county, so many qualified persons as

Council on Court Procedures
September 8, 2012, Meeting
Appendix L-1

may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders, or **from** the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall draw names at random from the list until the jury is completed.

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

D Challenges.

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

D(1)(a) The want of any 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 **of** 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 **of** 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

Council on Court Procedures
September 8, 2012, Meeting
Appendix L-3

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 violate paragraph (a) of this subsection is rebutted.

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

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

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

F(1) Definition. Alternate jurors are prospective replacement jurors empanelled at the court's discretion [*to ensure*] in the event that the number of [*primary*] jurors required under [*ORCP*] Rule 56 [*will not be irreversibly*] is decreased by illness, incapacitation, or disqualification of one or more [*primary*] jurors selected.

Council on Court Procedures
September 8, 2012, Meeting
Appendix L-5

F(2) Decision to allow alternate jurors. The court has sole discretion over whether alternate jurors may be empanelled. If the court allows, not more than six alternate jurors may be empanelled [*in addition to the primary jury*].

F(3) Peremptory challenges; number. In addition to challenges otherwise allowed by these rules or any other rule or statute, each party is entitled to: (a) one peremptory challenge if one or two alternate jurors are to be empanelled[,]; (b) two peremptory challenges if three or four alternate jurors are to be empanelled[,]; and (c) three peremptory challenges if five or six alternate jurors are to be empanelled. The [*trial*] court shall have discretion as to when and how additional peremptory challenges may be used and how alternate jurors are selected.

F(4) Duties and responsibilities. Alternate jurors shall be drawn in the same manner[,]; shall have the same qualifications; shall be subject to the same examination and challenge rules[,]; shall take the same oath[,]; and shall have the same functions, powers, facilities, and privileges as [*primary*] the jurors throughout the trial, [*up to the time*] until the case is submitted for deliberations. An alternate juror who does not replace a juror shall not attend or otherwise participate in deliberations.

F(5) Installation and discharge. Alternate jurors shall be installed to replace any [*primary*] jurors who become unable to perform their duties or are found to be disqualified before the jury begins deliberations. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be installed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a [*primary*] juror after deliberations have begun, the jury shall be instructed to begin deliberations anew.

Council on Court Procedures
September 8, 2012, Meeting
Appendix L-6

INSTRUCTIONS TO JURY AND DELIBERATION

RULE 59

* * * * *

H Necessity of noting exception on error in statement of issues or instructions given or refused.

H(1) Statement of issues or instructions given or refused. A party may not obtain **appellate** review [*on appeal*] of an asserted error by a trial court in submitting or refusing to submit a statement of issues to a jury pursuant to subsection C(2) of this rule or in giving or refusing to give an instruction to a jury unless the party [*who seeks to appeal*] **seeking review** identified the asserted error to the trial court and made a notation of exception immediately after the court instructed the jury **or at such other time as the trial court directed. The requirements of this rule do not preclude an appellate court from reviewing asserted errors in jury statements or instructions for legal error that is apparent on the record**.

H(2) Exceptions must be specific and on the record. [*A party shall state with particularity any point of exception to the trial judge. A party shall make a notation of exception either orally on the record or in a writing filed with the court.*] **The notation of exception required by subsection (1) of this section must be made orally on the record or in a writing filed with the court and must identify with particularity the points on which the exception is based. In noting an exception, a party may incorporate by reference the points that the party previously made on the record with particularity regarding the statement or instruction to which the exception applies.**

Council on Court Procedures
September 8, 2012, Meeting
Appendix M-1

ALLOWANCE AND TAXATION OF ATTORNEY FEES AND COSTS AND DISBURSEMENTS

RULE 68

A Definitions. As used in this rule:

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

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

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

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

Council on Court Procedures
September 8, 2012, Meeting
Appendix N-1

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

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

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

C(1)(c) A statute refers to this rule but provides for a procedure which varies from the procedure specified in this rule.

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

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

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

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

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

Council on Court Procedures
September 8, 2012, Meeting
Appendix N-2

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

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

C(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements **that explains the application of any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements**, together with proof of service, if any, in accordance with Rule 9 C; and

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

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

C(4)(c) Response to objections. The party seeking an award of attorney fees may file a response to an objection filed pursuant to paragraph C(4)(b) of this rule. The response and supporting documents, if any, shall be served within seven days after service of the objection. The response shall be specific and may address issues of law or fact. The party seeking attorney fees may present affidavits, declarations, and other evidence relevant to any factual

issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

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

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

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

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

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

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

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

conclusions of law regarding attorney fees.

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

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

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

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

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

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