MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 1, 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
Jennifer L. Gates
Hon. Timothy C. Gerking
Hon. Robert D. Herndon
Hon. Jerry B. Hodson*
Hon. Lauren S. Holland*
Robert M. Keating
Hon. Rives Kistler
Maureen Leonard
Leslie W. O'Leary
Hon. David F. Rees*
Mark R. Weaver*
Hon. Charles M. Zennaché

Members Absent:

Eugene H. Buckle
Hon. Eve L. Miller
Hon. Locke A. Williams

Guests:

Matt Shields, Oregon State Bar
Erin Olson, Attorney at Law

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 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 17 A • ORCP 19 B • ORCP 39 C • ORCP 55 H • ORCP 57 F • ORCP 59 H • ORCP 68	• ORCP 7 • ORCP 15 • ORCP 27 • ORCP 44 C • ORCP 45 • ORCP 46 • ORCP 54 A • ORCP 54 E • ORCP 55

I. Call to Order (Mr. Cooper)

The meeting was called to order at approximately 9:30 a.m.

II. Introduction of Guests

Matt Shields of the Public Affairs Department of the Oregon State Bar was present to act as the Bar's liaison to the Council, as David Nebel was unable to attend. Attorney Erin Olson was present to discuss her comments to the Council's published draft amendments (Appendix A).

III. Approval of September 8, 2012, Minutes (Mr. Cooper)

Mr. Cooper called for a motion to approve the draft September 8, 2012, minutes (Appendix B) which had been previously circulated to the members. A motion was made to approve the minutes, the motion was seconded, and the minutes were approved by voice vote.

IV. Administrative Matters

A. Website Report (Ms. Nilsson)

Due to technical difficulties, no website report was available for this meeting.

B. Legislative Contacts (Prof. Peterson)

Prof. Peterson explained that Council staff will be drafting a letter to the legislature to be submitted with the Council's promulgated rules, and that he will provide language from that letter in even plainer terms in drafting an update for Council members to send to their assigned legislators.

C. Council Timeline/Expiring Terms (Mr. Cooper)

Mr. Cooper thanked the following outgoing Council members for their service, as their terms will end in August of 2013, prior to the Council's opening meeting of the 2013-2015 biennium: Mr. Buckle; Ms. O'Leary; Judge Herndon; Judge Holland; Justice Kistler; and Judge Williams. He also noted that his own term will expire in August of 2013, and that he has enjoyed his time on the Council. The Council thanked all outgoing members for their service.

D. ACTION ITEM: Election of Officers per ORS 1.730(2)(b) (Mr. Cooper)

1. Chair

Judge Hodson nominated Mr. Cooper to serve as Chair for the remainder of the biennium (and the remainder of Mr. Cooper's Council term) ending August 31, 2013. The motion was seconded and passed by voice vote.

2. Vice Chair

Judge Hodson nominated Ms. David to serve as Vice Chair for the remainder of the biennium ending August 31, 2013. The motion was seconded and passed by voice vote.

3. Treasurer

Judge Hodson nominated Ms. Bird to serve as Treasurer for the remainder of the biennium ending August 31, 2013. The motion was seconded and passed by voice vote.

E. ACTION ITEM: Election of Legislative Advisory Committee per ORS 1.760 (Mr. Cooper)

Mr. Cooper noted that ORS 1.760 requires that the Council elect a Legislative Advisory Committee to testify if the Legislature has any questions for the Council. He stated that the Committee generally consists of the Chair, the Vice Chair, the public member, and two judges. Mr. Cooper, Ms. David, Ms. Bird, Judge Armstrong, and Judge Herndon were nominated to serve on the Committee. The motion was seconded and passed by voice vote.

V. Old Business (Mr. Cooper)

A. Voting on Promulgated Amendments

Prof. Peterson pointed out that, in order to promulgate a rule change, a super majority of the Council must vote in favor of promulgation. He noted that a quorum was present, and that 15 yes votes would be required for promulgation. Mr. Brian clarified that, if 19 members were present, five non-yes votes (which would include abstentions) would cause a promulgation not to pass. Mr. Cooper stated that it is Council procedure not to make substantive changes to published rules at the December meeting but, if the Council finds technical or grammatical changes it determines should be made, it can do so. Prof. Peterson noted that the statute requires that the Council publish amendments and, if changes are subsequently made, requires that the changed amendments be republished. As a practice, the Council publishes its promulgations as a matter of course. He agreed

that technical changes are appropriate, but that wholesale rewriting would not be.

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

   a. Discussion

   Mr. Cooper explained that the published amendment to ORCP 17 A (Appendix C) would add language to allow electronic signatures on pleadings and court documents as e-filing becomes available. Mr. Cooper asked if Council members would like to discuss the amendment further; they declined.

   b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 17 A

   A motion was made to promulgate the amendment to ORCP 17 A. The motion was seconded and passed by roll call vote. The vote was 20 in favor, 0 opposed, and 0 abstentions.

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

   a. Discussion

   Ms. Leonard explained that the published amendment to ORCP 19 (Appendix D) would replace the term *res judicata* with the more modern terms "claim preclusion and issue preclusion." Judge Zennaché asked whether the amendment should read "claim preclusion or issue preclusion" to make it clear that they are two separate issues. Mr. Beattie suggested separating the two and listing them alphabetically in keeping with the alphabetical list that already exists in the current rule. Judge Herndon made a motion to amend the published rule change to make this technical change. The motion was seconded and passed unanimously by voice vote.

   b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 19

   A motion was made to promulgate the amendment to ORCP 19 with the technical change noted above. The motion was seconded and passed by roll call vote. The vote was 20 in favor, 0 opposed, and 0 abstentions.

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

a. Discussion

Mr. Cooper stated that the published amendment to ORCP 27 (Appendix E) is a wholesale revision of the guardian ad litem (GAL) rule and was based primarily on feedback from the bench that there is significant misuse of the current rule. The concern was the current practice's informality and lack of notice. He noted that the list of persons who would be entitled to notice in the amended rule was imported from Chapter 125 of the Oregon Revised Statutes because a large part of the existing problem is that people are seeking appointment of a GAL where the protected person and other interested parties do not know what is happening, as no notice is required under the current rule. Mr. Cooper pointed out that section G was added to allow waiver or modification of the notice requirement to avoid a malpractice trap if the statute of limitations is about to run. He stated that section G gives the bench the discretion to appoint a GAL and sort out the notice requirements later. Mr. Cooper stated that attorney Erin Olson had pointed out two specific statutory areas, in parental rights terminations and in restraining order proceedings, that would conflict with the proposed rule change if Rule 27 were the catch-all rule, and stated that he would, therefore, move to add the language "unless otherwise provided by statute or rule" as a predicate to the entire rule.

Prof. Peterson observed that the termination of parental rights issue is clearly a problem because it has a different standard. He suggested adding the language "and pursuant to this rule unless a statute provides a different procedure" at the end of the last sentence in section A. Mr. Cooper instead suggested the language "unless provided in other statutes or rules." Judge Holland asked whether this type of modification has been done in other areas of the ORCP. Prof. Peterson stated that it was done in the pending ORCP 68 amendments with regard to the probate statutes. Judge Holland pointed out that this was a change made by the Council this biennium, and asked whether there have been other similar rule changes made in the past. She was concerned that there would be confusion on the part of the practitioner. Mr. Cooper stated that, if the rule is passed as written, there would be legitimate conflicts in parental rights terminations where there is a different standard of proof and in restraining order proceedings in Chapter 124, which provides a different procedure, and that this would cause confusion.

Judge Rees stated that he has no problem with the concept of the rule change, but worries that the language puts practitioners in a place where

they are wondering whether there may be some other statute out there that applies. He suggested specifically referencing the relevant statutes. Judge Gerking suggested referencing the ORS chapters. Judge Armstrong suggested referencing the ORS chapters as well as using the "unless otherwise provided by statute or rule" language in case there is another conflict of which we are unaware. Ms. David observed that the change to ORCP 9 last biennium includes the language "except as provided in Rule 54 E(3)." She suggested that using language consistent with that change might be helpful. Judge Holland observed that, if we have not already done so, it might be wise to go through the entire ORS to make sure that there are not more instances where the change to Rule 27 could conflict with a statute. Judge Armstrong suggested that general catch-all language could be used. Mr. Bachofner asked whether the statutes in question are in the same chapter. Mr. Cooper stated that they are not. Prof. Peterson stated that he is not sure that there is a conflict between the proposed rule change and the Elder and Disabled Person Abuse Prevention Act (EDPAPA) statute, located in Chapter 124, though it is apparent that there is a conflict with the parental rights termination statute. Mr. Cooper stated that Chapter 124 uses the language "guardian petitioner means a guardian or guardian ad litem for an elderly person who files a petition." He agreed with Prof. Peterson that the ORCP define GALs in this instance, but that a GAL in a parental rights termination is an entirely different animal.

Ms. Olson stated that the EDPAPA guardian ad litem process is intended to be a quick process. She stated that implementing the new changes would require notice and, while she understands there is an exception in the proposed section G, the current forms for EDPAPA contemplate that someone will file a petition for appointment of a GAL on a pre-printed court form at the same time they file the restraining order petition. She was concerned that trying to incorporate the proposed change to Rule 27 into EDPAPA cases would undermine the purpose of the statute, which is to be quick. She stated that she did not go through the statutes to see whether there are other potential statutory conflicts aside from the two that she raised in her written comments. Mr. Cooper noted that the Council heard from members of the bench that abuse of the EDPAPA process is one reason that judges want a change to ORCP 27. He stated that section G gives discretion to the bench to waive the notice requirements, if waiver is in the interests of justice.

Judge Zennaché observed that section A addresses the situation where a guardian or conservator has already been appointed, but section B addresses the situation where the party does not yet have one appointed. He stated that any language change regarding exceptions would need to be included in both sections. Mr. Beattie asked whether, if that language were included, it would mean that the provisions of the EDPAPA statute

relating to appointment of GALs would apply regardless of what is included in Rule 27. Mr. Cooper stated that he would propose a change to the modification. He stated that it is his view that the reference in ORS 124.005(3) should be read as a reference back to Rule 27, not a stand-alone different fiduciary, and, if that is the case, the Council is really only trying to avoid conflict with the ORS 419 parental rights termination statute, to which the proposed Rule 27 clearly should not be applicable. Mr. Beattie asked whether this would be adding additional notice requirements to the existing requirements under a statute. Mr. Cooper stated that ORCP 27 has absolutely no notice requirement now, but that it is being added to avoid abuse of the rule. Mr. Beattie asked whether the EDPAPA statute has its own notice requirement. Judge Herndon stated that it does not, that it just mirrors current Rule 27. Mr. Beattie asked whether the EDPAPA statute has an appointment provision in it. Mr. Cooper stated that it does not; it merely references a "guardian ad litem."

Judge Herndon stated that the current application of ORCP 27 is a train wreck and that it is being abused, but that he is concerned that the proposed expansion by the Council goes beyond its purview and ventures into substantive law, as much as it is needed. Ms. Leonard asked whether judges do not currently have discretion under current Rule 27. Judge Herndon stated that, arguably, judges do have discretion any time someone appears at ex parte, but the judge does not necessarily have a way to determine whether abuse is taking place from the information presented by the petitioner.

Mr. Cooper suggested amending section B "as pursuant to this rule, except as provided in ORS 419 B.231." Prof. Peterson suggested referencing Chapter 419 B generally. Judge Gerking wondered whether the proposed amendment would violate the policy of not making substantive changes before promulgation. Mr. Cooper stated that he sees the amendment as a repair of a technical error. Judge Gerking wondered about the notion that we have not captured all of the statutes that might potentially be impacted by the amendment. Mr. Cooper stated that this bothers him, but stated that we will not be able to determine that today. Mr. Cooper made a motion to amend the published amendment to read "except as provided in ORS Chapter 419 B." Judge Armstrong seconded the motion. The motion failed to pass by voice vote. The vote was 13 in favor, 6 opposed, and 1 abstention.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 27

A motion was made to promulgate the amendment to ORCP 27. The motion was seconded and the amendment failed to pass by roll call vote. The final vote tally was 0 for, 16 against, and 4 abstentions.

Mr. Cooper suggested that the issue be re-examined by the Council next biennium and volunteered to assist whatever committee is appointed regarding ORCP 27. He also invited Ms. Olson to assist the committee; she agreed. Prof. Peterson remarked that Ms. Olson had also raised the issue of adding the language "interested person" to the rule. Mr. Cooper stated that addition of this language would codify the Court of Appeals' decision in *Helmig v. Farley, Piazza & Associates*, [218 Or App 622, 180 P3d 749 (2008)] in which the Court stated that pretty much anyone with a concern about the welfare of a person is qualified to petition to be a GAL. He stated that he feels that this would be a good addition to the amendment.

Judge Holland stated that this rule raised a valid concern about what the Council's purview is and what rule changes are substantive vs. procedural. Mr. Bachofner and Judge Holland volunteered to be on any committee that is formed next biennium to do research on this issue.

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

a. Discussion, ORCP 39 Drafts A and B

Mr. Cooper briefly explained that the published amendments would require that, for organizational depositions, the name of the person who will testify on behalf of the organization would be required to provided in advance of the deposition, absent good cause or agreement. He noted that there are two versions of the proposed amendment and that Version A (Appendix F) would require no fewer than 24 hours' notice and Version B (Appendix G) would require no fewer than three days' notice. Mr. Campf opined that 24 hours is too short a time period. Prof. Peterson stated that Mr. Bachofner had raised concerns about non-party organizations, and noted that it would behoove anyone taking a deposition of an organization that is not a party to spell out what they want concerning identifying the deponent in advance of the deposition in plain English. Mr. Keating suggested first voting on the three day version and then on the 24 hour version. He stated that he will vote no because of his previously voiced objections and a fear of the abuse of extending the organizational deposition into a personal deposition. Ms. Gates also suggested voting on the three day version first.

(1) ACTION ITEM: Vote on Whether to Promulgate Draft B of ORCP 39

A motion was made to promulgate the amendment to ORCP 39, Draft B. The motion was seconded and the amendment passed by

roll call vote. The vote was 19 in favor, 1 opposed , and 0 abstentions.

(2) ACTION ITEM: Vote on Whether to Promulgate Draft A of ORCP 39

This vote was not necessary since Draft B already passed.

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

a. Discussion, ORCP 55

Mr. Cooper explained that the published amendment of ORCP 55 (Appendix I) requires a party to respond in writing if objecting to a 14 day notice of intent to issue a subpoena, and to specify in detail the grounds for each objection. Mr. Brian stated that he has supported the amendment in the past, but that the comments others have raised have caused him to be concerned about the words "in detail." He stated that, as a plaintiff's lawyer, he is concerned that those words could mean that objections such as "I object because of the physician/patient privilege" would be considered insufficient. Mr. Cooper stated that attorney Don Corson had raised the hypothetical of an elderly plaintiff with decades of medical records. He stated that the rule change could be seen as shifting the burden to the plaintiff's lawyer to pre-collect all of these medical records and sift through them in detail to determine whether there are irrelevant records. Mr. Cooper stated that this is certainly not the intent of the rule change, but could be an effect in practice, given the language. Mr. Campf suggested taking out the words "specifying in detail" and replacing them with the words "stating." Judge Gerking stated that, as a practical issue, plaintiff's counsel has often not seen the documents either. Mr. Keating noted that the whole issue arose from occasions where defense attorneys receive a statement saying, "I object," with nothing further. He stated that he has no idea what is in the records and he has no option but to ask the plaintiff's lawyer first. Mr. Keating observed that taking out the specificity requirement takes us back to the problem we started with, with him having no idea how to make a motion to get legitimate discovery.

Ms. David stated that defense counsel often receives letters in response to requests for production that merely state "we object," and that defense counsel is just looking for a reason. She stated that the words "in detail" will at least make a plaintiff's attorney give some direction to defense counsel. She noted that Rule 43 B uses the language "any objection to a request for production or a part thereof and the reason for each

objection." She suggested borrowing that language for the proposed ORCP 55 H. She pointed out that defense lawyers are just looking for something that will get the parties to a point of discussion, not the dead end of "I object, period."

Mr. Cooper stated that a worry is that the new language in the published amendment to ORCP 55 H is different from the language in ORCP 43, and an amendment is also proposed to the sanctions section of ORCP 46 to add an enforcement mechanism. He stated that he could envision a scenario where a plaintiff's lawyer objects because the defense is seeking privileged information that is not within the limited waiver, but that the plaintiff's lawyer has not obtained all 40 years of his client's records. The defense lawyer then asks a judge for sanctions because he states that the plaintiff's lawyer should have obtained all of the records. Mr. Cooper stated that he does not see it as the plaintiff's lawyer's burden to prepare to produce every piece of paper that might possibly touch on the client.

Mr. Beattie observed that we may be proposing more than a technical change by using substantially different language than that in the published amendment. He noted that the change to ORCP 55 has nothing to do with discoverability of medical records and is not a Rule 46 issue but, rather, is a third party discovery issue and merely requires the opposing party to say why they object. Mr. Bachofner observed that conferring [under Uniform Trial Court Rule 5.010] is the next step. Mr. Beattie pointed out that the amendment basically requires a plaintiff's attorney to articulate an objection; that it does not expand the scope of discovery; that it does not set plaintiff's counsel up for sanctions under ORCP 46; that it is not a waiver; and that it is just a "nice thing to do" provision. Mr. Cooper observed that all of these problems would be solved by lawyers working well together.

Mr. Campf stated that the conferral requirement is already incorporated in the rules and that it is redundant because it is already what is going to happen next under the rules. He worried that this change may be leading to a federal-type system. He also suggested that, if the language change is not merely a technical change to the rule, the issue should be tabled until next biennium. Judge Zennaché suggested striking the words "in detail," and noted that giving a general basis for objection early on is always helpful. Judge Herndon observed that negligence litigation is the last place in our legal system where there is still the opportunity for trial by ambush. He stated that this rule change will hopefully stop wasting judicial resources over these discovery battles and that it is a minor change that makes the system work better. Mr. Campf stated that the general nature of the objection is not conveyed by the word "specify," and that he fears that this language will lead to more discovery battles. Ms. David suggested

borrowing the exact language from ORCP 43 B: "specifying the objection and the reason for each objection." Mr. Bachofner stated that this is a reasonable suggestion, since the whole purpose is to get a reason for the objection. Mr. Brian stated that he was comfortable with Ms. David's proposed change. He stated that he wanted to make clear that, as a plaintiff's lawyer, he feels that adequate responses to a subpoena include, "I object because of physician/patient privilege," and "I object because we do not know what is contained in the records." He stated that he feels that such responses should not subject an attorney to sanctions. Ms. O'Leary suggested using the language, "stating the reason for each objection." She noted that this is consistent with the language in ORCP 43 and resolves the worry that we are not being specific enough. Judge Gerking observed that Mr. Brian's hypothetical responses are actually helpful to defense counsel and give some direction to counsel and the judge.

A motion was made to adopt Ms. O'Leary's suggested language change to the published rule. The motion was seconded and passed unanimously via voice vote.

Ms. Gates pointed out that the use of the word "issuance" in ORCP 55 H(2)(b) does not mirror the language in the rest of the rule. She suggested using the word "date" instead. A motion was made to adopt this suggested language change. The motion was seconded and passed unanimously via voice vote.

(1) ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 55

A motion was made to promulgate the amendment to ORCP 55 with the language changes suggested by Ms. O'Leary and Ms. Gates. The motion was seconded and the amendment passed by roll call vote. The vote was 19 in favor, 1 opposed , and 0 abstentions.

b. Discussion, ORCP 46

Mr. Cooper stated that the amendments to ORCP 46 (Appendix H) were a companion to the amendments to ORCP 55. He noted that the Council received comments from attorney Don Corson (Appendix J) regarding issues that had not been previously raised by Council members. Mr. Keating stated that, during the committee process, he was satisfied with the changes to ORCP 55, but that other Council members pointed out that there was no mechanism in the rules to get an objection in front of the court. He stated that the suggestion was made to put that mechanism in ORCP 46. Mr. Keating observed that his main concern is being able to go before a court once he receives an objection to a proposed subpoena to

challenge the grounds stated and to ask the court to allow him to issue the subpoena. He stated that he had a conversation with Mr. Corson about the issue, and Mr. Corson stated that it was bizarre to think that a defendant could not take that objection before a court because the opposing party is contending that there is no mechanism in the rules to go before the court. Judge Gerking stated that the problem would be solved if ORCP 46 A(2) were amended to read "or if a party objects or fails to comply." Mr. Cooper stated that this would make it clear that, if a party does not like the objection, the next step is a motion to compel and issuance of a subpoena. He observed that a concern that plaintiffs' lawyers have is that ORCP 46 includes the attorney fee shifting provision which sets up the possibility of a defense attorney moving to compel on the grounds that an objection was not sufficient and then seeking an award of attorney fees for having gone through that exercise. Mr. Keating stated that every other item in Rule 46 A(2) carries some risk of sanction. Mr. Cooper stated that there is a long history in this state of the bench being reluctant to impose sanctions if there is a good faith dispute. Prof. Peterson observed that the amendment makes it clear that there is a duty to confer and that, with all discovery motions, a certification of conferral is required, so it gets counsel talking.

Mr. Cooper stated some on the plaintiffs' side had suggested putting the enforcement mechanism into ORCP 55 rather than into ORCP 46. Ms. David stated that, under ORCP 14, one can always apply to the court with a motion for relief and that UTCR 5.010 mandates that one must confer on discovery issues, but that ORCP 55 is not always deemed part of the discovery rules, so cross-referencing in ORCP 46 is helpful for younger practitioners. She stated that she likes Judge Gerking's friendly amendment because a third party might fail to comply but the opposing party might also object.

Mr. Beattie stated that he sees a fundamental disconnect between ORCP 46 and ORCP 55 because ORCP 55 is not a motion to compel production and ORCP 55 H is basically the result of an objection; under ORCP 55 H you have to go to the court and get a qualified protective order (QPO). Mr. Cooper stated that this is not necessarily the case because, if someone objects to his proposed subpoena and he believes the objection is wrong, he would ask for an order to issue the subpoena as is and he believes that would be an order compelling discovery. Ms. David noted that, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the party seeking production either must get the agreement of the opposing party or a QPO, so there is a merging of federal and state law. Mr. Cooper asked whether it was a real concern that there is no rule that says you may file a motion to overturn an objection and wondered whether judges actually would refuse to allow such motions. Judge Holland stated that she has not seen this as an issue in discovery. Mr. Cooper wondered

whether a change to ORCP 46 was necessary if this is not an issue.

Judge Holland stated that one of Mr. Corson's issues was that a failure to respond is not necessarily a failure to comply. She observed that his concern was that there would be an affirmative requirement that is not now imposed in order to avoid having this type of motion filed. Mr. Bachofner pointed out that Mr. Corson's position was that the issue would never come up. However, Mr. Bachofner suggested that opposing counsel will sometimes call and instruct a provider not to produce documents. Judge Holland raised the concern that the amendment is overly broad, and noted that, as Mr. Corson stated, some non-responses do comply and would be subject to sanctions.

Ms. David observed that a role of the ORCP is to help the bench and bar understand the chain of process and noted that, absent a reference to ORCP 55 in ORCP 46, a young attorney may file a motion to compel and the judge and/or opposing party could use that lack of reference to argue that there are no grounds for the motion. She stated that she believes it is helpful to include it in ORCP 46. Judge Gerking stated that one of Mr. Corson's points is that, if counsel complies by stating objections and has technically been in compliance with the rule, there is still no mechanism for defense counsel to obtain records pursuant to ORCP 46. He noted that this is where his suggested amendment applies. Mr. Cooper stated that he likes the idea of putting a mechanism in ORCP 46 A because it forces the issue into UTCR 5.010 (and imposes a duty to confer), over which the Council does not have control. He stated that he does not want a party to be able to say that ORCP 55 is not subject to conferral and to force the opposing party to file a motion, as this would be a waste of judicial time.

Mr. Beattie asked why we would not include a reference to all of ORCP 55 in ORCP 46, rather than just a reference to ORCP 55 H. He noted that ORCP 55 H has specific provisions which are self-executing, but that the balance of ORCP 55 states that, if there is a subpoena for non-medical records, a party may still object and the party issuing the subpoena will have to go to the court and get a motion to compel. He stated that, by only including section H, there is a disconnect with the rest of the rule. Mr. Cooper stated that ORCP 55 H(1)(B) defines a QPO, which is not otherwise mentioned in the ORCP, and certainly could be read as being a self-contained enforcement mechanism. Mr. Beattie stated that the balance of ORCP 55 deals with third party records which have a different notice requirement, but that objections could still be made. Prof. Peterson noted that a QPO limits how the information is used, but that Mr. Keating's issue is that he actually needs to obtain the information first. Prof. Peterson observed that it does not seem to him that the QPO gives a mechanism to get into court, but that perhaps he was reading it wrong. Mr. Beattie opined that a

procedure to compel a more adequate objection does not fit well into ORCP 46. Mr. Cooper stated that ORCP 55 B, regarding non-medical records subpoenas, already contains an enforcement mechanism that ORCP 55 H does not, so he wondered whether the idea should be contained in ORCP 55 H rather than in ORCP 46. Mr. Beattie stated that ORCP 55 H incorporates federal law (HIPAA) so, regardless of what a court does, a third party does not have to comply unless there is a QPO, and it is not the same enforcement mechanism as ORCP 55 B because of the federal law.

Mr. Campf asked whether it was necessary for the Council to promulgate the change to ORCP 46, having already promulgated the change to ORCP 55. Mr. Cooper stated that the Council can examine enforcement mechanisms in the next biennium, and that he is comfortable keeping the status quo until that time. Judge Zennaché pointed out that he is not sure one cannot currently get an order under Rule 55 B to compel, even if there is a non-meritorious objection. Mr. Bachofner reiterated that the obligation to confer aspect was the motivation behind the change to ORCP 46.

A motion was made to adopt Judge Gerking's suggested language change to the published rule. The motion was seconded and passed via voice vote.

(1) ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 46

A motion was made to promulgate the amendment to ORCP 46 as amended. The motion was seconded and the amendment failed to pass by roll call vote. The final vote tally was 8 in favor, 11 opposed, and 1 abstention.

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

a. Discussion

Ms. O'Leary explained that multiple changes were made to ORCP 57 (Appendix K). She stated that some were grammatical and technical language changes which do not affect the substance of the rule, but that the main changes give judges more discretion on how to deal with alternate jurors. She pointed out that section F has been divided into subsections to make the rule more readable. Ms. O'Leary noted that the main part of the committee's discussion was regarding whether alternate

jurors should be allowed to participate in deliberations, and that the committee and full Council had overwhelmingly agreed that this should not be allowed.

Mr. Keating stated that he was fine with all of the changes except allowing jurors to be replaced in a case where deliberations have begun. He stated that he sees "deliberating anew" as contrary to human nature. Ms. Leonard asked whether Mr. Keating disagreed with replacing a juror at any time after deliberations have begun. Mr. Keating stated that he does disagree, because it is impossible for the jury to forget what has already happened in deliberations. Judge Armstrong stated that he has served on a jury and that he could likely do it, but that it is not likely that most people could. Mr. Cooper pointed out that, if the Council is considering removing that sentence, the rule should probably be re-published. Justice Kistler asked Mr. Keating if he would remove the last two sentences from subsection F(5). Mr. Keating stated that he would.

Judge Zennaché noted that his concern is with public resources. He stated that, for example, declaring a mistrial one hour after deliberations have started, when a trial has gone on for four weeks, because a juror becomes ill and the attorneys cannot agree to continue with 11 jurors puts an unfair burden on the state. He stated that the attorneys will have the opportunity to make the argument that deliberations have gone on too long to replace a juror. Mr. Cooper pointed out that the rule includes language which allows for the discretion of the bench. Judge Herndon stated that it has been his experience that attorneys and judges do not give jurors enough credit for being as smart and talented as they are. Mr. Bachofner stated that he feels that this is the lesser of the evils of losing the time in a trial and that the bench will properly use its discretion. Mr. Cooper pointed out attorney Erin Olson's comment regarding subsection F(3) and her desire to make it clear that the court has discretion as to how and when to designate the alternate jurors. He stated that this was the Council's intent with the amendment.

Justice Kistler observed that the language "sole discretion" is used in subsection F(2), whereas elsewhere in the rule just the word "discretion" is used. He suggested removing the word "sole" in subsection F(2). A motion was made to adopt Justice Kistler's suggested language change to the published rule. The motion was seconded and passed unanimously via voice vote.

Ms. Leonard suggested modifying the language in subsection F(3), "The court shall have discretion as to when and how additional peremptory challenges may be used and how alternate jurors are selected," to read, "The court shall have discretion as to when and how additional peremptory

challenges may be used and when and how alternate jurors are selected." A motion was made to adopt Ms. Leonard's suggested language change to the published rule. The motion was seconded and passed unanimously via voice vote.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 57

A motion was made to promulgate the amendment to ORCP 57 with the changes suggested by Justice Kistler and Ms. Leonard. The motion was seconded and passed by roll call vote. The vote was 20 in favor, 0 opposed, and 0 abstentions.

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

a. Discussion

Ms. Leonard stated that the published amendment to ORCP 59 H(1) (Appendix L) gives direction regarding the exception process and does not preclude the appellate court from reviewing plain error. She stated that subsection H(2) describes the exception process and that the intent was to be helpful to practitioners. She explained that the exception process after instructions is also addressed and provides that a party may incorporate by reference exceptions previously made as long as they were made with particularity on the record.

Ms. Leonard noted that Ms. Olson had observed that the language "statement of issues to a jury" could be confusing. Ms. Leonard pointed out that this language appears early in the rule in section C, and that it is not part of the Council's amendment. She stated that the Council has never talked about defining or removing that phrase. Prof. Peterson observed that this phrase also arguably appears in ORCP 58 B(1): "Prior to voir dire, each party may, with the court's consent, present a short statement of the facts to the entire jury panel." Ms. Olson stated that her concern was that the new language in subsection H(1) states "In noting an exception, a party may incorporate by reference the points that the party previously made with particularity on the record regarding the statement or instruction to which the exception applies," and she was concerned that it was unclear whether the word "statement" referred to "statement of issues to a jury" in subsection C(2). Judge Armstrong stated that this was indeed the reference intended.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 59

A motion was made to promulgate the amendment to ORCP 59. The motion was seconded and passed by roll call vote. The vote was 19 in

favor, 0 opposed, and 1 abstention.

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

a. Discussion

Ms. David explained that the published amendment to ORCP 68 (Appendix M) lays out the process for a party to respond to motions/responses/replies, the time frames, and what an objecting party needs to include in an objection. Mr. Cooper observed that the amendment will make the probate attorney fee process easier. Ms. David pointed out that paragraph C(1)(c) makes an exception for probate proceedings and situations where other statutes refer to ORCP 68 but provide for different procedures.

b. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 68

A motion was made to promulgate the amendment to ORCP 68. The motion was seconded and passed by roll call vote. The final vote was 20 in favor, 0 opposed, and 0 abstentions.

VI. New Business (Mr. Cooper)

A. Proposal from Jeff Kucirek re: ORCP 15 (Prof. Peterson)
B. Proposal from Danny Lang re: ORCP 54 E (Prof. Peterson)

Mr. Cooper stated that the proposals noted above (Appendix N and O, respectively) had been recently submitted to the Council and that they would be added to the agenda for the first Council meeting of the 2013-2015 biennium.

VII. Adjournment

The meeting was adjourned at approximately 12:30 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

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VIA E-MAIL ATTACHMENT

November 15, 2012

Council on Court Procedures
c/o Brooks Cooper, Chair
2300 SW 1st Avenue, Suite 101
Portland, OR 97201

Re: Comments on Proposed Amendments to Oregon Rules of Civil Procedure

Dear Council on Court Procedures:

I am an attorney in private practice in Portland. Most of my practice involves the civil prosecution of physical, sexual, and financial abuse claims on behalf of minors and vulnerable adults.

1. ORCP 27 – Minor or Incapacitated Parties.

I have reviewed the available CCP minutes in which the proposed amendments to ORCP 27 are discussed, and I understand that abuses observed by the bench are the impetus for the proposed overhaul of ORCP 27.

I do not practice family law, so have no insight into the issues presented in those cases. I do routinely represent GALs in my civil cases, and I have concerns that the proposed amendments will significantly complicate what is now a simple, flexible, and inexpensive process for the appointment of guardians *ad litem* in civil cases. The notice requirements alone will burden both the parties and the courts by inviting litigation before the complaint is even filed, and as a result, will have a not-insignificant financial impact on parties and courts.

With regard to the categories of proposed amendments:

The requirement that guardians *ad litem* be appointed in all civil matters only "pursuant to this rule" limits the flexibility that courts are currently willing to exercise in order to appoint GALs under other appropriate circumstances, or on the application of someone other than a relative or friend. Additionally, there are statutes that contemplate the appointment of GALs in civil matters by other procedures, such as termination

proceedings (ORS 419B.231) and restraining order proceedings (ORS 124.005 *et seq.*) with which this proposed amendment would conflict or be inconsistent.

Additionally, if appointments of GALs in all civil matters are to be only pursuant to ORCP 27, then those who may apply for the appointment of a GAL should be expanded to include "other interested persons," and not just relatives and friends. This is to permit applications by fiduciaries who are not friends or relatives of the person for whom a GAL is sought, such as professional fiduciaries, caseworkers, protective services workers, and dependency attorneys. In cases involving children or adults in state care, it is often not feasible for relatives or friends to apply for the appointment of a GAL because they are the reason the child or incapacitated person is in state care. In those and other cases, appointment of a professional fiduciary or similar neutral is necessary because a conflict exists between the minor/incapacitated person and his or her relatives.

The proposed amendments would also appear to limit the availability of GALs to minors and those who are incapacitated. It is sometimes appropriate to have GALs appointed for other vulnerable persons, including the elderly and persons with a disability. If ORCP 27 is to be all-encompassing, it should allow the appointment of GALs for all "vulnerable persons" as that is defined in ORS 124.100, and not just minors, incapacitated persons, and financially incapable persons. A consent requirement for the appointment of a GAL for those capable of consenting would be appropriate in such circumstances.

In my opinion, the requirement of an affidavit or declaration containing "admissible evidence" that the minor is a minor or the adult is incapacitated or financially incapable is not necessary. An affidavit or declaration, if required at all, should contain information that supports the appointment of a GAL, but the "admissible evidence" requirement is unnecessarily burdensome, and could be used to the detriment of the party seeking the appointment in the civil case for which the appointment is sought.

The requirement that the motion for appointment of a GAL be filed "in the proceeding in which the GAL is sought" is unclear and potentially problematic in civil cases. A GAL is sought to bring the civil suit on behalf of another person, and this proposed amendment implies that the proceeding has already been commenced. While each county seems to have its own procedures for the appointment of a GAL, the typical process I have undertaken has been to seek appointment of a GAL by submitting the application and supporting materials *ex parte* to a presiding or duty judge before a case has been opened, and then filing those documents at the time the complaint is filed and the case is opened. However, at times, the appointment of a GAL is sought before a

civil complaint is filed, usually for some particular purpose such as obtaining records or filing a tort claim notice. On such occasions, a GAL may be appointed, but no lawsuit is filed. While this is an atypical scenario, it is useful to have a flexible, court-supervised process that the proposed amendments would seemingly preclude.

My strongest objection to the proposed amendments to ORCP 27 is to the notice requirements. They mirror the requirements for a protective proceeding, and while a GAL is a fiduciary, it is a fiduciary with limited authority. The notifications required by the proposed amendments would lead to delays, challenges, and litigation that I do not believe is warranted. This is particularly so if all settlements of cases in which a GAL has been appointed must be approved by the court – a proposed change with which I agree in principle, but not in the manner in which it is presented in the proposed amendments.

I believe that settlements in cases in which a GAL has been appointed should all require court approval. However, that approval should only require a conservatorship if the real party in interest is a minor or someone who requires a guardian or conservator. As indicated above, there are circumstances in which the appointment of a GAL is appropriate when the real party in interest does not require a guardian or conservator because while "vulnerable," they are not minors, incapacitated, or financially incapable. In such circumstances, court approval is appropriate – and notifications to interested persons, entities, and state agencies that have not already been notified by litigation counsel may also be appropriate – but the requirement that approval of all settlements be sought and obtained *only* by a conservator in cases in which a GAL has been appointed (except those to which ORS 126.725 applies) is, in my opinion, overbroad and unnecessarily burdensome.

I appreciate the concerns expressed by the bench that led to the desire to overhaul this rule. However, I believe the observed abuses can be addressed in ways other than the proposed amendments to ORCP 27, and that this issue warrants further study.

2. <u>ORCP 39 – Depositions.</u>

I believe Version B is appropriate, but the notice requirements should be three <u>judicial</u> days, or 3 <u>business</u> days in order for the notice to be meaningful.

3. ORCP 57 – Jurors.

I suggest the Council consider adding to F(3) the authority of a court to determine when selected jurors are designated as alternates, i.e. at the beginning or end of trial. With such a modification, F(3) would read something like: "The court shall have discretion as to when and how additional peremptory challenges may be used, how alternate jurors are selected, **and when jurors are designated as alternate jurors."** For example, this would permit a trial judge to determine that two alternates should be selected, and to allow the parties to exercise the total number of peremptories to choose a jury of 14 rather than to require that they exercise alternate-only peremptories. The alternates could then be selected at the end of the trial. Under such circumstances, no one knows who the alternates will be until they are drawn from a hat at the end of the trial. While some judges and attorneys feel strongly one way or the other about this practice, I think the rules should allow for it.

4. ORCP 59 – Instructions.

I believe the term "jury statement" should be defined or eliminated, as it appears nowhere else in the ORCPs or in any published Oregon opinion that I could find.

Thank you for your consideration of these comments. I plan to attend the December 1st meeting in the event the Council has questions.

Sincerely,

Erin K. Olson

DRAFT 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

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.

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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.

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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:

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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,*] upon application of a relative or friend of the person.

[*B(2)*] **B(4)** When the **defendant or respondent is a** person *[is defendant*] **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

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;

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, which includes but is not limited to when necessary to meet a filing deadline, 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, approval of such settlement must be sought and obtained by a conservator. Alternatively, settlement may be accomplished pursuant to ORS 126.725, if applicable.

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

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

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

*****

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

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

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

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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.

* * * * *

SUBPOENA

RULE 55

*****

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

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)*]

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.

Shari Nilsson <nilsson@lclark.edu>

RE: Council on Court Procedures; proposed amendments to ORCP

Don Corson <dcorson@corsonjohnsonlaw.com> Thu, Nov 29, 2012 at 10:45 PM
To: Mark Peterson <mpeterso@lclark.edu>
Cc: Brooks Cooper <brooks@bcooper-law.com>, Shari Nilsson <nilsson@lclark.edu>

Mark,

Thanks so much for getting back to me so promptly, and at such a late hour.

I laughed when I read your email below about ORCP 39C(6); I had no idea this proposal was in response to comments I must have made quite a while back. No wonder I thought it was a good idea when I read it! I respectfully suggest that the timing of making designations in advance should not change the dynamic of the deposition of the organization. If the deposing attorney strays from the deposition of the organization, the defending attorney can and should object. That is true whether the designations are made 24 hours or 3 days or some other period of time in advance of the deposition. Three days still makes sense to me, for the reasons I tried to articulate in the original email.

The ORCP 55H and ORCP 46 issues are more complex, and I did not do an adequate job of explaining my concerns. I support the proposed new provision of Rule 55 to make it clear what is expected if an attorney objects to a Rule 55H medical records subpoena. My concern is that resolution of a dispute over such objections should be left in the Rule 55 arena, and not imported into Rule 46. It was only the Rule 46A proposal that I suggested should not be adopted. Let me try to explain, I hope better than before. I will address a number of points below, in arbitrary order:

. You wrote, "The Rule 46 A(2) proposal is to make clear that the failure to respond . . . is a matter that can be heard by the court in a motion to compel." Respectfully, a "failure to respond" is not a failure at all, but simply a lack of objections. If there are no objections, there is no dispute; the medical provider should produce the records subject to the subpoena. If the provider does not, that is not the fault of the party whose records are sought, but the fault of the provider. The means to address such a problem is through contempt proceedings, which are already provided for in the existing text of Rule 55. It would not be fair or proper to move for sanctions against a party whose records are sought, who has not objected, and has done nothing wrong, and in fact is not in control of the records sought. On the other hand, if by "failure to respond," you are referring to the medical provider's failure to produce records requested by subpoena to which no objections were raised, that is purely a Rule 55 issue. An order directed to a party ordering the party to produce records it may not have that another party requested from a medical provider makes no sense to me, and would not be effective.

.More specifically, you wrote in the sentence I partially quoted above, "The Rule 46 A(2) proposal is to make clear that the failure to respond *and to specify the grounds for any objections* is a matter that can be heard by the court in a motion to compel." Once Rule 55 is amended to make it clear that the grounds for objections must be stated, Rule 55 has its own procedures for resolving those objections. There is no need to also have Rule 46 procedures. Furthermore, if a Rule 46 motion to compel were granted against a party, it would not be effective as against the

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medical provider who actually has the records sought. The order needs to be against the medical provider who refuses to produce records, not against the party. That is the role of Rule 55, not Rule 46.

.More fundamentally, once a party has specified the grounds for objections, they have in fact *complied* with ORCP 55H. Please recall the relevant part of the proposed Rule 46 language I am concerned about: "if a party fails to comply with the requirements of Rule 55 H . . . the discovering party may move for an order compelling discovery in accordance with the request." A party would not "fail to comply with the requirements of Rule 55 H" once they made the requisite objections. This would be true whether or not a court later determined the objections were well-founded. In other words, if a party fails to object, that party has not failed to comply with the requirements of Rule 55 H. If the party objects, that party has also complied with the requirements of Rule 55 H. If the party seeking to enforce the subpoena thinks the objections were inadequate or not well-taken, Rule 55 already provides a means to resolve such disputes.

.Your email suggested, "The thought is to shift the burden of justifying the objection to the party with knowledge of what records exist with the potential to get the attorneys conferring more instead of resorting to motion practice as the default." There is an interesting assumption that the party who might object in fact has "knowledge of what records exist." Nonetheless, I am a fan of meaningful conferrals, which as you know are generally required by the UTCRs, not by the ORCPs. I may be missing something, but I did not see anything in the proposals that would shift the burden of persuasion. One party seeks medical records via a ORCP 55H subpoena. An attorney for a party whose records are sought raises objections to that subpoena. What in the proposed new rules assigns a burden of persuasion to either party in this context? Generally, the party asking a court to do something has the burden, which is true under the existing rules and I believe would also be true if the proposed amendment were adopted.

In sum, I support the proposed requirement to make clear in Rule 55 that, as you put it, "[t]he intent is to require the individual or the individual's attorney to do more than issue a blanket objection and, rather, to respond to the party issuing the notice with some specificity as to what the objection is and the grounds therefor." However, I respectfully request that the Council *not* adopt the proposed changes to Rule 46A(2), for all of the reasons I tried to explain in my original email and I hope I have clarified above.

I hope the Council meeting goes well on Saturday. It may sound odd to say it after all of those years of Saturday meetings, but they were both a professional and personal pleasure. On the other hand, I'm getting to enjoy a few more youth soccer games nowadays.

Best,

Don

From: Mark Peterson [mailto:mpeterso@lclark.edu]
Sent: Thursday, November 29, 2012 7:58 PM
To: Don Corson
Cc: Brooks Cooper; Shari Nilsson
Subject: Re: Council on Court Procedures; proposed amendments to ORCP

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Don.

Good to hear from you. Now that you are a former member of the Council, I think that you are eligible to apply for another eight year hitch.

You will recall that the Rule 39 C(6) proposal is the product of your inquiry as you were leaving the Counsel. No one opposed the concept but some defense side members are concerned that too much advance notice of the identity of the organization's designated deponent will turn the deposition into a personal deposition as well as a deposition of the organization. Your concerns about the inefficiency of learning the identity of the deponent at the start of the deposition were generally accepted and it was conceded that if the deposing attorney tries to morph the organization's deposition into a deposition of the person, the defending attorney can certainly object and direct his or her client, if they represent the deponent, not to answer the question. Concerns were raised about preparing the deponent for the organizational deposition and not for a deposition of the person and the potential for mischief when the questions begin to inquire about the person's role in whatever acts and omissions are at issue.

I have not been involved in health records discovery to the extent of most members of the Council but I'll take a stab at the Rule 55 H (and Rule 46 A) proposal. The intent is to require the individual or the individual's attorney to do more than issue a blanket objection and, rather, to respond to the party issuing the notice with some specificity as to what the objection is and the grounds therefor. There was no opposition to the concept and a number of war stories about objections that were completely opaque and required motion practice to discover that a number of the records were clearly not relevant but that some records could be produced. The thought is to shift the burden of justifying the objection to the party with knowledge of what records exist with the potential to get the attorneys conferring more instead of resorting to motion practice as the default. The Rule 46 A(2) proposal is to make clear that the failure to respond and to specify the grounds for any objections is a matter that can be heard by the court in a motion to compel. The Rule 46 A(2) language only applies to parties and, therefore, a non party who asserts a deficient, nonspecific objection could not be hailed into court on a motion for sanctions.

Is the forgoing helpful to understanding the second proposal? If I have misstated what the Council's intend was, Brooks will be able to correct my errors. As always, we do not wish to make the practice of law more difficult and less efficient than it currently is. If you are still concerned, please confirm your concerns before the meeting this Saturday.

Mark

On Thu, Nov 29, 2012 at 4:13 PM, Don Corson <dcorson@corsonjohnsonlaw.com> wrote:

Dear Brooks and Mark,

Congratulations to you and the Council on Court Procedures for another excellent two years of hard work. I appreciated reading the proposed amendments to the Oregon Rules of Civil Procedure that were issued by the Council. I write here to (1) encourage the Council to adopt Version B of the Rule 39 amendments, and (2) encourage the Council to not adopt the additional language shown for the first paragraph of Rule 46A(2).

> (1) Improving ORCP 39C(6) to require designations three days before the depositions makes good sense, and should promote efficiency and reduce costs. The existing rule does not specify when the designations must be made, or how. In my experience, this has sometimes resulted in “designations” being made orally at the deposition, with the predictable result that the witness for the organization is not always prepared to testify “as to matters known or reasonably available to the organization” (as the existing rule requires). This sometimes results in an additional round of ORCP 39C(6) depositions, which is an unnecessary expense. As a practical matter, if the designations were not due until 24 hours before the depositions, it may not be clear to some witnesses what they should be prepared to testify about in sufficient time to allow them to do the necessary pre-deposition preparation. Three days is a good proposal, and I hope the Council adopts Version B.

(2) I was puzzled about the rationale for the adding the proposed additional language to ORCP 46A(2), "or if a party fails to comply with the requirements of Rule 55 H." I assume that this may have been discussed at the Council's September meeting, but those minutes do not appear to be available yet. In relevant part, if this amendment were adopted, it would provide "if a party fails to comply with the requirements of Rule 55 H . . . the discovering party may move for an order compelling discovery in accordance with the request." The *discovering* party in Rule 55H is seeking otherwise protected medical records from a *non*party, usually a hospital or other medical provider. I am not aware of any requirement for the *non*-discovering *party* (typically, the person whose medical records are sought) to do anything to comply with Rule 55H. In other words, how could the non-discovering *party* not comply? If that non-discovering party does nothing, the subpoena goes through; there is nothing to move for pursuant to Rule 46. If the non-discovering party objects, there are already procedures in place to resolve disagreements about subpoenas. Further, Rule 46 would not be implicated in that case, because when a party objects, that is one way of complying with the requirements of Rule 55H. In short, without seeing a record of the Council's decision-making, it is my impression that the proposed new language, "or if a party fails to comply with the requirements of Rule 55 H," should not be adopted. If adopted, I suspect that trial court judges will find it equally difficult to understand and

Apply. I respectfully urge the Council not to adopt this specific language for this rule.

Thank you for your consideration of these comments. If you have any questions about these matters, I would more than welcome your call.

Sincerely,

Don

Don Corson

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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 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 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 serve in the event that the number of jurors required under Rule 56 is decreased by illness, incapacitation, or disqualification of one or more jurors selected.

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.

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 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 the jurors throughout the trial, 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 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 juror after deliberations have begun, the jury shall be instructed to begin deliberations anew.

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 errors that are 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 with particularity on the record regarding the statement or instruction to which the exception applies.**

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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.

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

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.

---------- Forwarded message ----------
From: Jeff Kucirek <jkucirek@rcolegal.com>
Date: Thu, Sep 27, 2012 at 3:08 PM
Subject: Data from submitproposal
To: "ccp@lclark.edu" <ccp@lclark.edu>

ORCP 15 A reads: "A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim shall be filed with the clerk by the time required by Rule 7 C(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed."

This rule divides all motions and answers into two groups. The first group contains motions and answers to the complaint and third party complaint and the reply to a counterclaim or answer to a cross-claim. Generally, items in this group must be filed within 30 days of service of summons pursuant to Rule 7 C(2). The second group contains all other motions and responsive pleadings. Items in this group must be filed within 10 days of service of the filing they move against. The text of the rule leaves the scope of the first group ambiguous. Motions and answers to a complaint or third party complaint will typically be made by parties new to the case and thus naturally fall within the purview of Rule 7. Counterclaims and cross-claims, on the other hand, may be made against existing parties or new parties.

For example, if plaintiff A sues defendants B and C, defendant B may assert counterclaims against plaintiff A and cross-claims against defendant C. Additionally, B may wish to include D as a codefendant in its counterclaim against A, and E as a codefendant in its cross-claim against C. Such joinder is permitted by ORCP 22 D(1). However, because D and E were not parties to the original complaint, both must be served in accordance with ORCP 7. The example above illustrates that there are two distinct types of counterclaim and cross-claim defendants: (1) those who were already party to the case (usually by virtue of service of the original complaint) and (2) those who are new to the case by virtue of the counterclaim or cross-claim presently asserted against them.

Pursuant to the discussion above, the question I would like the council to resolve is whether, under Rule 15, all replies to counterclaims and cross-claims are governed by the time allowed in Rule 7 C(2) or only replies by new parties. Please contact me with questions via email at jkucirek@rcolegal.com

---------- Forwarded message ----------
From: Mark Peterson [mailto:mpeterso@lclark.edu]
Sent: Friday, October 05, 2012 11:25 AM
To: Jeff Kucirek
Subject: Fwd: Data from submitproposal

Jeff Kucireck,

We have received your inquiry of September 27, 2012, regarding ORCP 15 A. I want to be certain that your concern is properly understood. The language of the rule would indicate that all motions, answers, and replies to complaints and claims contained within an answer would require a response, if available, within 30 days. The Staff Comment to the 1994 Council amendment to Rule 15 A indicates that the amendment to remove the phrase then deleted was to avoid ambiguity as to whether a different response time (10 days) applied to responses to pleadings of parties already within the lawsuit as opposed to parties new to the case via Rule 22. Does this answer your concern or do you see a potential problem with Rule 15 as written?

Mark

---------- Forwarded message ----------
From: Jeff Kucirek <jkucirek@rcolegal.com>
Date: Tue, Oct 9, 2012 at 10:21 AM
Subject: RE: Data from submitproposal
To: Mark Peterson <mpeterso@lclark.edu>

Mark,

Thank you for the clarification. I was unaware of the ORCP legislative history resource on the Council's webpage until you replied. The 1994 comment clearly indicates the resolution of my question. My confusion arose out of the fact that Rule 7 C(2) references the summons. Because of that reference, I fell into the same hole the 1994 amendment was intended to avoid. As a third-year law student, couldn't tell you whether this confusion is common among the members of the Bar or is simply a product of my own inexperience. If the council wanted to further clarify the rule, I would suggest incorporating a portion of the 1994 comment into Rule 15 A as shown below:

Any motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim, not merely those by a party joined under Rule 22 D, shall be filed with the clerk by the time required by Rule 7 C(2) to appear and defend. Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

Best,

Jeff Kucirek
Law Clerk
Direct: 503.459.0142
jkucirek@rcolegal.com
Routh Crabtree Olsen, P.S.

interruption of PIP Payments in cases where the injured patient has no other source of funds and is forced to await the resolution of what is known as a "PIP Dispute," for which a "PIP Arbitration" is the usual Forum.

Although a PIP Insured Claimant is allowed to demand a PIP Arbitration, a considerable delay results after the unilateral cut-off of PIP Benefits, which frequently occurs based upon the opinion by the IME that further treatment is no longer "reasonable and necessary." Worse yet, the PIP Medical Benefits Coverage Period continues to run even during the period of uncertainty facing both the Patient and Healthcare Providers during the Selection of PIP Arbitrator(s); PIP Discovery matters; plus the need to coordinate scheduling of a "PIP Arbitration Hearing" followed by final rendition of the Award.

Wherefore the present procedure results in foreseeable denial of access to Medical Treatment for injuries. In other words, if hypothetically, payment of PIP Benefits were suspended for a period of 180 days, followed by an Arbitration Award in favor of the PIP Claimant; then in that event the PIP Coverage Period should be extended by an additional 180 days beyond the present one year Coverage Period.

Prejudice to Injured Claimants results during the inherent delay until rendition of the PIP Arbitration Award. Therefore, in the interest of fairness and equity, there is a compelling need for amendment to the present PIP Statutes [ORS 742.520-742.528] by providing for the automatic extension of the PIP Coverage Period equal to the corresponding delay while the PIP Arbitration is pending.

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19. Amend Oregon Rule of Civil Procedure 54E (Delegate Resolution No. 7)

Whereas, The Oregon Constitution in Article 1, Bill of Rights, Section 20 requires **"Equality of privileges and immunities of citizens.** No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."; and

Whereas, Settlement of civil cases reduces the demand upon limited Oregon Circuit Court resources; and

Whereas, ORCP 54E [DISMISSAL OF ACTIONS; COMPROMISE] currently only empowers Defendants with the privilege of unilaterally tendering an "Offer of Judgment" to Plaintiff(s); and

Whereas, The Administration of Justice will be advanced by enabling Plaintiffs to initiate and promote settlement of cases, so as to further promote Settlement disputes and thereby reduce the litigation burden on Oregon Courts by further Pre-Trial Settlement of cases; and

Whereas, Plaintiffs, as Claimants, should have the "Equal Privilege" and Equal Procedural Rights as Defendants; now, therefore, be it

Resolved, That the House of Delegates recommend and encourage the Board of Governors, in the furtherance of the improvement of the Administration of Justice, to recommend to the Council on Court Procedures an amendment to ORCP 54E so as to provide Equal Access to Justice by Plaintiff(s), as well as Defendant(s), by providing that in addition to Defendant(s), Plaintiff(s) be allowed to file an Offer to Allow Judgment, with the same 10 day response time.

Presenter: Danny Lang
House of Delegates, Region 3

Background

Resolution of disputes in Civil Litigation via negotiated settlements, benefit Oregon Circuit Courts by reducing the burdensome back-log of pending cases and generally benefit the Parties by reducing expenses of Litigation. Equal opportunity and mutual fair opportunity to promote Settlements should be available to both Plaintiffs and Defendants rather than limiting the benefit of Offering to Allow Judgment only to Defendants. Accordingly, the use of an **Offer to Allow Judgment** should be a mutually available remedy rather than at the pleasure and in the sole control of Defendants.