MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 7, 2013, 9:30 a.m.
Jordan Ramis, Lake Oswego, Oregon

ATTENDANCE

Members Present:

Hon. Sheryl Bachart
John R. Bachofner
Jay W. Beattie
Hon. Paula M. Bechtold*
Arwen Bird
Michael Brian*
Brian S. Campf
Kristen S. David
Hon. Roger J. DeHoog
Jennifer L. Gates*
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson
Robert M. Keating
Maureen Leonard
Hon. Eve L. Miller
Shenoa L. Payne
Mark R. Weaver*
Deanna L. Wray
Hon. Charles M. Zennaché

Members Absent:

Hon. Rex Armstrong
Hon. R. Curtis Conover
Travis Eiva
Hon. Jack L. Landau

Guests:

Brooks F. Cooper
Michael Fuller, OlsenDaines PC
Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

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 1 • ORCP 4 • ORCP 7 • ORCP 9 • ORCP 13 • ORCP 15 • ORCP 26 • ORCP 27 • ORCP 36 • ORCP 36-46 • ORCP 40 • ORCP 43 • ORCP 44 • ORCP 45 • ORCP 46 • ORCP 47 • ORCP 54 • ORCP 55 • ORCP 59 • ORCP 62 • ORCP 64 • ORCP 67 • ORCP 68 • ORCP 73	• ORCP 26 • ORCP 40 • ORCP 59 • ORCP 62 • ORCP 64		

I. Call to Order (Mr. Cooper)

The outgoing chair (2011-2013) Mr. Cooper called the meeting to order at 9:30 a.m.

II. Introductions (all)

Everyone present, and those on the telephone, introduced themselves to the group. Mr. Cooper welcomed guests and new members of the Council. Ms. Nilsson asked that members look at the roster **(Appendix A)** and let her know of any necessary corrections.

III. Approval of December 1, 2012, Minutes (Mr. Cooper)

Mr. Cooper asked whether any members had corrections to the draft December 1, 2012, minutes **(Appendix B)**, which had been previously circulated to the members. Hearing none, he called for a motion to approve the minutes. Such motion was made and seconded, and the minutes were approved by voice vote.

IV. Council Rules of Procedure per ORS 1.730(2)(b) (Prof. Peterson)

A. Prof. Peterson briefly reviewed the Council's Rules of Procedure, as provided in ORS 1.730(2)(b) **(Appendix C)**. He also pointed out the timeline **(Appendix D)** that Council staff had prepared, and noted that the dates would need to be adjusted based on the earlier-than-planned first meeting date this biennium.

B. Upon discussion, Council members agreed to schedule Council meetings for the first Saturday of each month. Prof. Peterson explained that the Oregon State Bar usually hosts Council meetings, and that the Council had at one time been required by statute to endeavor to meet in every congressional district in the state, but that this is no longer the case. He stated, however, that in deference to members who live outside the Portland area and travel often for meetings, it would be nice to schedule some meetings in other places throughout the state. Meetings were tentatively scheduled outside the Portland area for the following months: Eugene in November, 2013; Bend in March, 2014; Medford in May, 2014; and Newport in June, 2014. Mr. Shields agreed to check with the Oregon State Bar to ensure that a meeting room will be available for each meeting that will be held in the Portland area.

C. The meeting schedule for the biennium will be as follows (subject to revision):

- October 5, 2013, Oregon State Bar
- November 2, 2013, Eugene (location TBA)
- December 7, 2013, Oregon State Bar
- January 4, 2014, Oregon State Bar
- February 1, 2014, Oregon State Bar
- March 1, 2014, Bend (location TBA)
- April 5, 2014, Oregon State Bar

- May 3, 2014, Medford (location TBA)
- June 7, 2014, Newport (location TBA)
- September 6, 2014, Oregon State Bar
- December 6, 2014, Oregon State Bar

V. Annual election of officers per ORS 1.730(2)(b) (Mr. Cooper)

A. Chair

Mr. Cooper asked the members for nominations for chair. Ms. David was nominated, a motion was made to elect her as chair, and the motion was seconded. The motion passed via a voice vote.

B. Vice Chair

Mr. Cooper asked the members for nominations for vice-chair. Mr. Brian was nominated, a motion was made to elect him as vice-chair, and the motion was seconded. The motion passed via a voice vote.

C. Treasurer

Mr. Cooper asked the members for nominations for chair. Ms. Bird was nominated, a motion was made to elect her as treasurer, and the motion was seconded. The motion passed via a voice vote.

At this point, Ms. David thanked Mr. Cooper for his service on the Council and presented him with a framed certificate of appreciation. Mr. Cooper left the meeting.

VI. Reports Regarding Last Biennium (Ms. David)

A. Promulgated rules (Prof. Peterson)

Prof. Peterson reported that the 77th Legislative Assembly did not modify or reject any of the Council's promulgated rules, and that the rules will therefore go into effect on January 1, 2014.

B. 76th Legislative Assembly's ORCP amendments outside of Council amendments (Prof. Peterson) **(Appendix E)**

Prof. Peterson explained that the Legislature had amended ORCP 1 E in HB 2833 , ORCP 38 C in HB 2148, and ORCP 79 E in HB 2778 on its own initiative. He reported that an attempt was also made to modify ORCP 44 E in HB 3022, but that this effort was not successful.

Prof. Peterson stated that the amendment of ORCP 1 E was in regard to declarations given outside of Oregon or the United States. Prof. Peterson stated that he was not

aware that there was a problem. He also pointed out that the language used by Legislative Counsel in the Oregon Laws publication, which refers to the "2013 Act," will likely not be the final language used in the ORCP. The amendment of ORCP 38 C was a technical fix to correct internal references and to conform the existing language with current legislative style. ORCP 79 E was amended to include reference to the legislature's 2013 Act (HB 2779) regarding protective orders for victims of sexual abuse, and became effective July 29, 2013, due to an emergency clause.

Prof. Peterson stated that the attempted amendment of ORCP 44 E was an attempt to provide that physician-patient privilege and nurse-patient privilege do not apply to communications made following an injury for which a patient brings certain civil actions based on negligent or unauthorized medical treatment. He recommended that, if a committee is formed to examine ORCP 44, it should look at this House Bill.

VII. Administrative Matters (Ms. David)

A. Funding (Prof. Peterson/Mr. Shields)

Prof. Peterson explained that the Council had been moved from being under the umbrella of the Office of Legislative Counsel to the Judicial Department, and that the Legislature had appropriated $52,000 for the Council's operations last biennium. The Council received a check in the amount of $50,960 in August of 2013, and that, while he was not certain why the amount was short of $52,000, the Council is grateful for continued funding.

B. Council Commentary on Amendments (Prof. Peterson)

Prof. Peterson stated that Judge Richard Barron of Coos County had asked why the Council no longer provides staff comments to rule amendments. He observed that the Council had ceased writing staff comments after the *Portland General Electric v. Bureau of Labor and Industries*, [317 Or 606 (1993)] case, but that it may not be a bad idea to start writing them again. He noted that the Council already provides somewhat detailed comments with its transmittal letter to the Legislature. He suggested that, in order to be more helpful to practitioners, perhaps Council staff could distill a short comment explaining the reason for and effect of each change that could be approved by the Council at the time of the promulgation of any rule changes. Prof. Peterson observed that we can revisit the issue again later in the biennium.

C. Suggestions Regarding Improvement to the Council from the Oregon State Bar Survey (Prof. Peterson)

Prof. Peterson noted that the survey sent to bench and bar during the summer of 2013 yielded a number of general suggestions regarding improvement to the Council.

1. Reduce the number of votes required to pass rules.
2. The Council is too sensitive in avoiding substantive issues.

Prof. Peterson observed that these are both issues that are set by statute and not something that the Council can change.

3. More time and resources should be devoted to soliciting feedback and proposals from the bench and bar.
4. Civil procedure rules are for entire state - Portland area should not drive all procedure.
5. Predictability is extremely important to the fairness and efficacy of the ORCP - avoid making too many changes for the sake of "improvement."

Prof. Peterson stated, and several Council members agreed, that his sense is that the Council is already sensitive to these issues, but he asked that we continue to be mindful of these comments and suggestions in the future.

VIII. Old Business (Ms. David)

There was no old business to deal with other than items carried over from last biennium, which are addressed below.

IX. New Business (Ms. David)

Ms. David provided a brief overview of the biennium as a refresher for continuing members and a briefing for new members. She stated that the expectation is that committees will do a lot of work this fall, especially on topics that may require surveys or other ways of obtaining information from the bench and bar, so that any information can be compiled by January and that potential amendments can be brought to the Council at the beginning of 2014. She noted that problems arise when committees do not bring initial reports before the full Council until May or June. Ms. David recommended scheduling regular telephone conference calls and suggested using freeconferencing.com as a resource. She noted that the reports that committees bring back to the Council become appendices at later meetings, and that this is helpful in terms of legislative history.

Ms. David also mentioned that, during the biennium, Council members will send periodic updates to members of the Legislature to let them know the issues on which the Council is working. She stated that Ms. Nilsson will be preparing a matrix of legislators and that we will be asking Council members to let us know of any connections to legislators (personal acquaintance, residence in district, etc.). She also stated that she will be asking for a volunteer to write the basic e-mails that Council members can personalize.

Because there were so many items carried over from last biennium, along with new suggestions, the Council grouped them together by subject matter and assigned committees on this basis. The following committees were formed:

ELECTRONIC DISCOVERY

- ORCP 43 (better rules for electronic discovery) **Appendix F, suggestion #9 on survey**
- ORCP 43 (more specific rules regarding electronic discovery, as with recent amendments to the FRCP) **Appendix F, suggestion #16 on survey**

Committee Members

Brian Campf
Kristen David - chair
Judge DeHoog
Judge Gerking
Judge Hodson
Judge Zennaché

GENERAL DISCOVERY

- ORCP 36 (allow expert discovery; rules could limit the time and number of expert depositions; expert discovery in complex cases) **Appendix F, suggestions #8, 17, 24, 31, 36, on survey**
- ORCP 36 (name expert witnesses 60 days before trial; require a statement of opinion, resume, and list of cases in which they've testified within past 10 years) **Appendix F, suggestion #22 on survey**
- ORCP 36 (rules for complex and construction defect litigation permitting limited expert discovery) **Appendix F, suggestion #40 on survey**
- ORCP 36 (allow interrogatories; basic interrogatory provision mirroring the federal rules; limited interrogatory practice) **Appendix F, suggestions #14, 32, 46 on survey**
- ORCP 36 (discovery rules need teeth - parties and judges routinely disregard timelines and due dates) **Appendix F, suggestion #6 on survey**
- ORCP 36 (limits on discovery depending on value of case); **Appendix F, suggestion #1 on survey**
- ORCP 36 (mandatory disclosure of all relevant discovery to be used at trial, as in criminal cases) **Appendix F, suggestion #7 on survey**
- ORCP 36 (problem is that there is no bar to admissibility of documents that are not produced unless an order compelling production of the same) **Appendix F, suggestion #17 on survey**
- ORCP 36 (rules to produce evidence earlier in the process) **Appendix F, suggestion #46 on survey**

- ORCP 36-46 (discovery rules very disorganized, going from the general to specific back to the general) **Appendix F, suggestion #23 on survey**
- ORCP 43 (discovery rules should more closely parallel federal rules; Oregon's "trial by ambush" leads to abuse; motions to compel are a waste of time) **Appendix F, suggestion #17 on survey**
- ORCP 43 (eliminate requirement to produce documents to correspond to requests) **Appendix F, suggestion #33 on survey**

Committee Members

Jay Beattie
Judge Bachart
Shenoa Payne - chair

ORCP 1 AND LEGISLATIVE COUNSEL SUGGESTIONS

- ORCP 1 (Review HB 2833, legislative change to 1 E)
- ORCP 1(ORCP should specifically disallow Supplemental Local Rules (SLR) from requiring an affidavit - declarations only should be used) **Appendix F, suggestion #44 on survey**
- ORCP 4 (revise numbering; reword internal references) **Appendix T**
- ORCP 7 C (add a lead line, which involves changing numbering) **Appendix T**
- ORCP 7 D (reword internal references; substitute phrase in 7 D(4)(b)) **Appendix T**
- ORCP 7 E (changes to conform to ORS 21.300(2)) **Appendix T**
- ORCP 9 (replace e-mail with formal term "electronic mail") **Appendix T**
- ORCP 46 B (add lead lines, correct syntax, reword internal references, correct punctuation, consider rewriting section) **Appendix T**
- ORCP 54 D (add lead lines) **Appendix T**
- ORCP 55 D (add and amend lead lines) **Appendix T**
- ORCP 67 C (amend lead lines) **Appendix T**
- ORCP 73 C (amend lead lines) **Appendix T**

Committee Members

Judge Armstrong
Brian Campf
Kristen David - chair
Mark Peterson

ORCP 7/9/10 REGARDING SERVICE

- ORCP 7 (allowing mail service by non-attorneys) **Appendix G**
- ORCP 7 (allow mail service to entities, not just those whose registered agents or offices are not within the county in which the action is pending) **Appendix F**,

suggestion #20 on survey

- ORCP 9 (recognize the prevalent use of internet based fax solutions and explicitly allow their use as a method of serving and being served) **Appendix P**
- ORCP 9 (e-service and allowing attorneys to choose service via e-mail; adding fax confirmations to the certificate of service does not make sense - certifying that you faxed to the correct number should be enough) **Appendix F, suggestion #4 on survey**
- ORCP 9 (allow service by e-mail to be automatic) **Appendix F**, **suggestions #5, #21 on survey**
- ORCP 9 (allow e-mail service of pleadings without special agreements) **Appendix F**, **suggestion #35 on survey**
- ORCP 10 (adding three days for e-mail service) **Appendix H**

Committee Members

John Bachofner - chair
Mike Brian
Judge Miller
Mark Peterson
Judge Zennaché

ORCP 13

- ORCP 13 (show cause motions in family law context should be considered "pleadings") **Appendix F, suggestion #13 on survey**

Committee Members

Kristen David
Jennifer Gates
Justice Landau
Judge Miller
Judge Zennaché - chair

ORCP 15

- ORCP 15 (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) **Appendix I**

Committee Members

Jay Beattie - chair
Judge De Hoog
Maureen Leonard

ORCP 27

- Re-Examination of ORCP 27 **Appendix J**

Committee Members

Mark Peterson
Judge Betchtold
Mark Weaver - chair
Travis Eiva

To be invited to provide input: Brooks Cooper and Judge Lauren Holland

ORCP 44

- Re-Examination of ORCP 44 **Appendix K**
- ORCP 44 (avoid "same body part" and instead allow discovery that relates to claims being made) **Appendix F, suggestion #10 on survey**
- ORCP 44 (broader discovery allowed regarding pre- and post-accident medical records) **Appendix F, suggestion #19 on survey**

Committee Members

John Bachofner
Arwen Bird
Mike Brian
Travis Eiva
Judge Gerking
Judge Hodson
Bob Keating - chair

ORCP 45

- ORCP 45 (whether there should be some kind of rule stating that the time for responding to or objecting to requests for admission should be measured after a party is represented by counsel or after a party has indicated they are going to be representing themselves pro se) **Appendix L**
- ORCP 9 D (requests for admissions should be required to be filed with the court) **Appendix F, suggestion #26 on survey**
- ORCP 45 (rule should specify that requests for admissions and their responses are to be filed) **Appendix F, suggestion #26 on survey**
- ORCP 45 (judges do not enforce requests for admission) **Appendix F, suggestion #42 on survey**

Committee Members

Brian Campf
Judge Miller
Mark Peterson
Deanna Wray - chair

ORCP 46 and 55

- Re-Examination of ORCP 46 and 55 **Appendix M**
- ORCP 43 and 55 (subpoenaing medical records from a party to a lawsuit rather than a non-party and how this relates to the timeline in a request for production) **Appendix Q**
- ORCP 46 (sanctions for discovery abuses) **Appendix F, suggestion #41 on survey**

Committee Members

John Bachofner
Travis Eiva
Judge Gerking - chair
Bob Keating
Shenoa Payne

ORCP 47 E

- ORCP 47 E (deleting the word "retained" used twice in said subsection) **Appendix R**

Committee Members

Kristen David - chair
Judge DeHoog
Maureen Leonard
Judge Miller

ORCP 54 A

- Re-Examination of ORCP 54 A **Appendix N**

Committee Members

Judge Armstrong
Judge Bachart
Maureen Leonard - chair
Mark Peterson
Mark Weaver

ORCP 54 E

- ORCP 54 E (making reciprocal) **Appendix O**
- ORCP 54 E (offers of judgment simplified textually and clarified; how to make an offer of judgment global (all fees and costs); is prejudgment interest included) **Appendix F, suggestion #11 on survey**
- ORCP 54 E (add lead lines and reword internal references) **Appendix T**

Committee Members

Kristen David - chair
Jennifer Gates
Judge Gerking
Mark Peterson

NO COMMITTEE WAS FORMED FOR THE FOLLOWING ITEMS

ORCP 26 (require that petitioners in restraining order cases receive actual notice of any hearings) **Appendix F, suggestion #25 on survey**
ORCP 40 (depositions upon written questions only if stipulation or the court allows it) **Appendix F, suggestion #2 on survey**
ORCP 59 H (contains needless trap and is a problem) **Appendix F, suggestion #12 on survey**
ORCP 62 (findings of fact - every judge seems to believe this rule does not apply) **Appendix F, suggestion #23 on survey**
ORCP 64 (amend to provide that a motion for reconsideration shall be addressed as a motion for a new trial) **Appendix F, suggestion #46 on survey**
ORCP 68 (abolish the American rule on attorney fees and impose a "loser pays" rule) **Appendix F, suggestion #38 on survey**

THE FOLLOWING ITEMS WERE CARRIED OVER TO THE NEXT MEETING

- ORCP 47 (trial judges should be given greater authority to resolve cases early on via summary judgment) **Appendix F, suggestion #38 on survey**
- ORCP 55 H (make clear whether a trial subpoena for medical records does or does not need to be served on the opposing attorney at least 14 days before it is served on the provider) **Appendix F, suggestion #29 on** survey
- ORCP 68 C (pleading and motion requirements for alleging a right to attorney fees should be contained in the pleading rules – e.g. ORCP 13-16 – or those rules should contain cross-references to ORCP 68 C(2)). **Appendix F, suggestion #27 on survey**
- ORCP 69 (require a party applying for a default order to provide a copy of the motion to the party being defaulted, even if that party has not appeared or given notice of the intent to appear) **Appendix F, suggestion #46 on survey**

- ORCP 69 B (whether the notice of default can be filed and served before the appearance period expires); **Appendix F, suggestion #1 on survey**
- ORCP 79-85 (prejudgment procedural remedies; Council did not fully adopt changes to statutes made in 1972 post *Fuentes v. Shevin* [407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972)]) **Appendix F, suggestion #12 on survey** ("comments about CCP or its work")
- ORCP 80-85 (review and revision) **Appendix F, suggestion #43 on survey**
- UTCR 2.030 (make it mandatory for both lawyers to notify the court and the presiding judge if a trial court has not ruled within 30 days in every case) **Appendix F, suggestion #25 on survey**
- No Specific ORCP (system is slow and expensive for clients I represent; rules are suited for people and companies with many resources; streamline processes for handling legal disputes) **Appendix F, suggestion #7 on survey** ("comments about CCP or its work")
- No Specific ORCP (rules on mediator qualification and appointment need to be fixed) **Appendix F, suggestion #40 on survey**
- No Specific ORCP (deal with foreclosure judgments for which no deficiency is sought to avoid the "money judgment" issue) **Appendix F, suggestion #40 on survey**
- No Specific ORCP (procedures to remove a wrongfully recorded lis pendens) **Appendix F, suggestion #40 on survey**
- No Specific ORCP (rules dealing with repetitive self-represented litigants) **Appendix F, suggestion #40 on survey**
- No Specific ORCP (better communication/invitation for changes to the ORCP, more communication about proposals) **Appendix F, suggestion #39 on survey**
- No Specific ORCP (make ORCP shorter and easier to understand) **Appendix F, suggestion #36 on survey**
- No Specific ORCP (ORCP should contain a scheduling rule akin to FRCP 16) **Appendix F, suggestion #34 on survey**
- No Specific ORCP (ORCP should clarify when a particular rule applies to a post-judgment show-cause motion) **Appendix F, suggestion #32 on survey**
- No Specific ORCP (ORS 107.095 should be amended - court may not issue orders under that provision without notice and opportunity for a hearing) **Appendix F, suggestion #30 on survey**
- No Specific ORCP (Please, for the love of God, convert everything to online case management) **Appendix F, suggestion #28 on survey**
- No Specific ORCP (make it easier to do telephonic testimony) **Appendix F, suggestion #25 on survey**
- No Specific ORCP (encourage more judge-run mediations) **Appendix F, suggestion #25 on survey**
- No Specific ORCP (school records as hearsay exceptions) **Appendix F, suggestion #25 on survey**
- No Specific ORCP (assign a judge from the beginning of a case as in federal court litigation and as Washington County does for family law cases)

Appendix F, suggestion #15 on survey

- No Specific ORCP (having to prep a case fully and knowing it probably won't go is frustrating) **Appendix F, suggestion #8 on survey** ("comments about CCP or its work")
- No Specific ORCP (publish a website that does for rules what OregonLaws.org does for the statutes - provides properly formatted presentation) **Appendix F, suggestion #18 on survey**
- No Specific ORCP (complete plain language overhaul like the federal rules) **Appendix F, suggestion #18 on survey**
- No Specific ORCP (disallow SLR from requiring orders to show cause except post-judgment when a case is closed - a simple motion should be the preferred route) **Appendix F, suggestion #44 on survey**

X. Adjournment

Ms. David adjourned the meeting at 11:55 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

Oregon Council on Court Procedures
Roster
2013-2015 Biennium

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Council on Court Procedures
September 7, 2013, Meeting
Appendix A-1

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DRAFT 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

*Appeared by teleconference

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

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

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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

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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

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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

COUNCIL ON COURT PROCEDURES

RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). The rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in the statute.

I. MEETINGS

Meetings of the Council shall be held regularly at the time and place fixed by the Chair after any appropriate consultation with the Executive Committee. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of such meeting shall be given personally by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of such meeting except where a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called.

All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a period of one year at the first meeting of the Council following September 1 of each year. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the

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absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to such meeting and provide reasonable notice to Council members of such agenda.

C. Committees. The Chair may appoint such committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. Such committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee selected pursuant to ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. The Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

b. The LAC, after a request by a legislative committee, has presented any proposal to the Council, and the Council has voted, by its super majority, to support the specific analysis and advice to be

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rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the Council on Court Procedures.

The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless such position has been submitted to the Council and approved by a super majority.

Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that such member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of required notice of meetings of the Council; preparation and disbursement of Council agenda; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council shall be retained by the Office of Legislative Counsel and/or the Oregon State Bar and shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. Council shall designate a location for an administrative office for the Council. All Council records shall be kept in such office under the supervision of

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the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.

B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed promulgations, amendments, or repeals, together with a list of statutory sections superseded thereby, and appropriate explanatory comments, in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby, together with explanatory comment, to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the

change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this 12th day of September, 2009.

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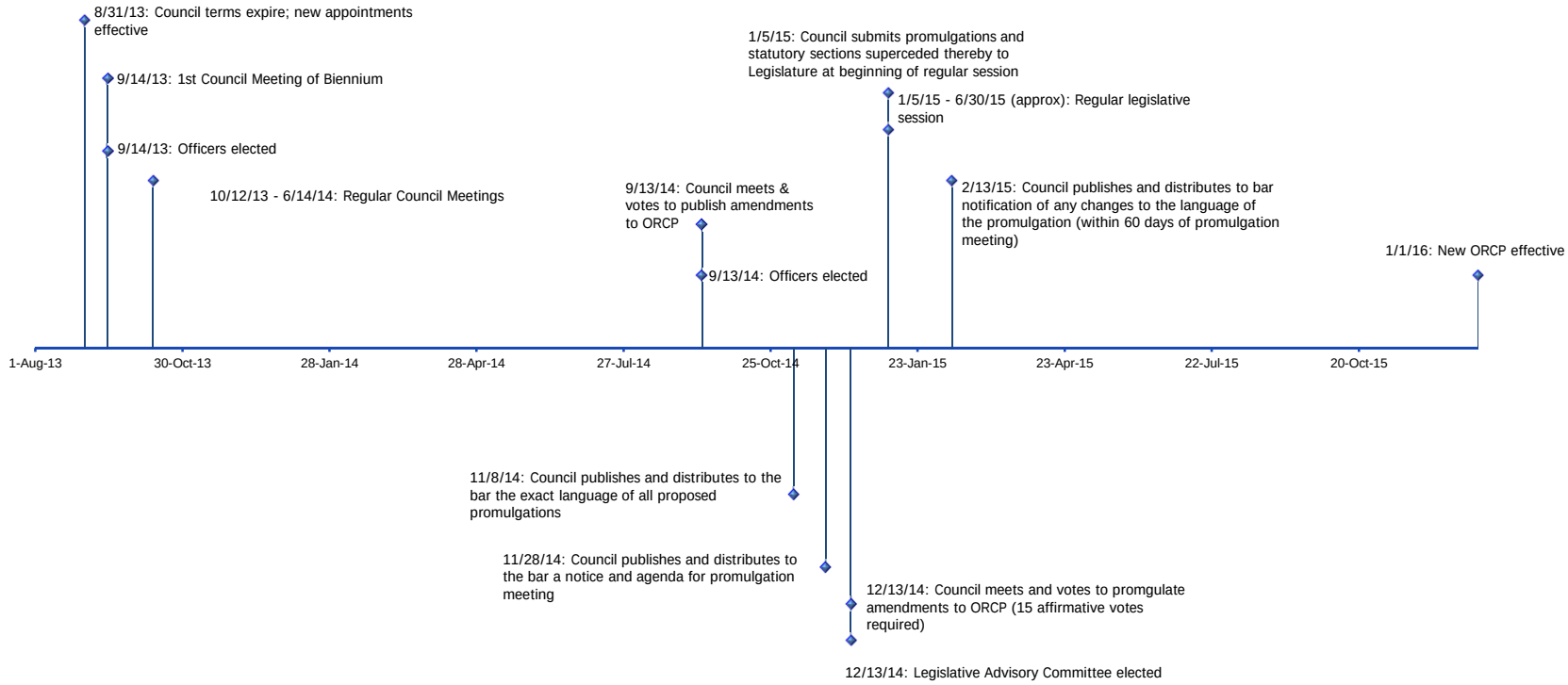
Council on Court Procedures: 2013-2015 Biennium Timeline (dates approximate)



CHAPTER 218

AN ACT HB 2833

Relating to unsworn foreign declarations; creating new provisions; and amending ORS 18.887, 45.010, 45.130, 111.205, 116.083, 116.253, 125.325, 136.583, 162.055, 162.065 and 162.075 and ORCP 1 E.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Short title. Sections 1 to 8 of this 2013 Act may be cited as the Uniform Unsworn Foreign Declarations Act.

SECTION 2. Definitions. As used in sections 1 to 8 of this 2013 Act:

(1) "Boundaries of the United States" means the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands and any territory or insular possession subject to the jurisdiction of the United States.

(2) "Law" includes the federal or a state Constitution, a federal or state statute, a judicial decision or order, a rule of court, an executive order and an administrative rule, regulation or order.

(3) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(4) "Sign" means, with present intent to authenticate or adopt a record:

(a) To execute or adopt a tangible symbol; or

(b) To attach to or logically associate with the record an electronic symbol, sound or process.

(5) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands or any territory or insular possession subject to the jurisdiction of the United States.

(6) "Sworn declaration" means a declaration in a signed record given under oath. "Sworn declaration" includes a sworn statement, verification, certificate and affidavit.

(7) "Unsworn declaration" means a declaration in a signed record that is not given under oath, but is given under penalty of perjury.

SECTION 3. Applicability. (1) Sections 1 to 8 of this 2013 Act apply to an unsworn declaration by a declarant who at the time of making the declaration is physically located outside the boundaries of the United States whether or not the location is subject to the jurisdiction of the United States.

(2) Sections 1 to 8 of this 2013 Act do not apply to a declaration by a declarant who is physically located on property that is within the boundaries of the United States and subject to the jurisdiction of another country or a federally recognized Indian tribe.

SECTION 4. Validity of unsworn declaration. (1) Except as otherwise provided in subsection (2) of this section, if a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of sections 1 to 8 of this 2013 Act has the same effect as a sworn declaration.

(2) Sections 1 to 8 of this 2013 Act do not apply to:

(a) A deposition;

(b) An oath of office;

(c) An oath required to be given before a specified official other than a notary public;

(d) A declaration to be recorded pursuant to the recording laws of this state, including but not limited to ORS 205.130 and ORS chapters 92, 93, 94, 100 and 105; or

(e) An oath required by ORS 113.055 (1).

SECTION 5. Required medium. If a law of this state requires that a sworn declaration be presented in a particular medium, an unsworn declaration must be presented in that medium.

SECTION 6. Form of unsworn declaration. An unsworn declaration under sections 1 to 8 of this 2013 Act must be in substantially the following form:

I declare under penalty of perjury under the law of Oregon that the foregoing is true and correct, and that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands and any territory or insular possession subject to the jurisdiction of the United States.

Executed on the ____ day of _____, _____, at _____, (date) (month) (year) (city or other location, and state)

_____
(country)

_____
(printed name)

_____
(signature)

SECTION 7. Uniformity of application and construction. In applying and construing sections 1 to 8 of this 2013 Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact it.

SECTION 8. Relation to Electronic Signatures in Global and National Commerce Act. Sections 1 to 8 of this 2013 Act modify, limit and supersede the federal Electronic Signatures in

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Global and National Commerce Act, 15 U.S.C. 7001, et seq., but do not modify, limit or supersede 15 U.S.C. 7001(c) or authorize electronic delivery of any of the notices described in 15 U.S.C. 7003(b).

SECTION 9. ORCP 1 E is amended to read:

E Use of declaration under penalty of perjury in lieu of affidavit; "declaration" defined. A declaration under penalty of perjury**, or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States,** may be used in lieu of any affidavit required or allowed by these rules. A declaration under penalty of perjury may be made without notice to adverse parties, must be signed by the declarant, and must include the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury." As used in these rules, "declaration" means a declaration under penalty of perjury.

SECTION 10. ORS 18.887 is amended to read:

18.887. (1) A sheriff may forcibly enter a structure or other enclosure for the purpose of levying on personal property only pursuant to an order issued by the court under this section.

(2) A judgment creditor may at any time file an ex parte motion requesting a court order directed to a sheriff that authorizes the sheriff to use force to enter a structure or other enclosure for the purpose of levying on personal property pursuant to a writ of execution. Except as provided in ORS 18.255, the motion must be filed with the court in which the judgment was entered. The motion must identify the specific structure or other enclosure to be entered and must contain a declaration under penalty of perjury made in the manner described by ORCP 1 E**, or an unsworn declaration made in the manner described in sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States,** that reflects facts supporting the judgment creditor's good faith belief that personal property subject to a writ of execution is located within the structure or other enclosure.

(3) An order issued under this section shall direct the sheriff to use all force reasonably necessary to enter the structure or other enclosure and levy on personal property pursuant to a writ of execution.

(4) A judgment creditor may deliver a copy of an order issued under this section to a sheriff with a writ of execution, or at any time after a writ of execution is delivered to a sheriff. A sheriff may rely on the copy of the order in entering a structure or other enclosure for the purpose of levying on personal property pursuant to a writ of execution.

SECTION 11. ORS 45.010 is amended to read:

45.010. The testimony of a witness is taken by six modes:

(1) Affidavit.

(2) Deposition.

(3) Oral examination.

(4) Telephone examination under ORS 45.400.

(5) Examination before a grand jury by means of simultaneous television transmission under ORS 132.320.

(6) Declaration under penalty of perjury, as described in ORCP 1 E**, or unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States**.

SECTION 12. ORS 45.130 is amended to read:

45.130. Whenever a provisional remedy has been allowed upon affidavit [*or*]**, a** declaration under penalty of perjury as described in ORCP 1 E **or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States**, the party against whom it is allowed may serve upon the party by whom it was obtained a notice, requiring the affiant or declarant to be produced for cross-examination before a named officer authorized to administer oaths. Thereupon the party to whom the remedy was allowed shall lose the benefit of the affidavit or declaration and all proceedings founded thereon, unless within eight days, or such other time as the court or judge may direct, upon a previous notice to the adversary of at least three days, the party produces the affiant or declarant for examination before the officer mentioned in the notice, or some other of like authority, provided for in the order of the court or judge. Upon production, the affiant or declarant may be examined by either party, but a party is not obliged to make this production of an affiant or a declarant except within the county where the provisional remedy was allowed.

SECTION 13. ORS 111.205 is amended to read:

111.205. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of an action not triable by right to a jury except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts in proceedings before a probate court must include a declaration under penalty of perjury in the form required by ORCP 1 E**, or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States,** made by at least one of the persons making the petitions, reports and accounts or by the attorney for the person, or in case of a corporation by its agent. The court exercises its powers by means of:

(1) A petition of a party in interest.

(2) A notice to a party.

(3) A subpoena to a witness.

(4) Orders and judgments.

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(5) An execution or warrant to enforce its orders and judgments.

SECTION 14. ORS 116.083 is amended to read:

116.083. (1) A personal representative shall make and file in the estate proceeding an account of the personal representative's administration:

(a) Unless the court orders otherwise, annually within 60 days after the anniversary date of the personal representative's appointment.

(b) Within 30 days after the date of the personal representative's removal or resignation or the revocation of the personal representative's letters.

(c) When the estate is ready for final settlement and distribution.

(d) At such other times as the court may order.

(2) Each account must include the following information:

(a) The period of time covered by the account.

(b) The total value of the property with which the personal representative is chargeable according to the inventory, or, if there was a prior account, the amount of the balance of the prior account.

(c) All money and property received during the period covered by the account.

(d) All disbursements made during the period covered by the account. Vouchers for disbursements must accompany the account, unless otherwise provided by order or rule of the court, or unless the personal representative is a trust company that has complied with ORS 709.030, but that personal representative shall:

(A) Maintain the vouchers for a period of not less than one year following the date on which the order approving the final account is entered;

(B) Permit interested persons to inspect the vouchers and receive copies thereof at their own expense at the place of business of the personal representative during the personal representative's normal business hours at any time prior to the end of the one-year period following the date on which the order approving the final account is entered; and

(C) Include in each annual account and in the final account a statement that the vouchers are not filed with the account but are maintained by the personal representative and may be inspected and copied as provided in subparagraph (B) of this paragraph.

(e) The money and property of the estate on hand.

(f) Such other information as the personal representative considers necessary to show the condition of the affairs of the estate or as the court may require.

(g) A declaration under penalty of perjury in the form required by ORCP 1 E**, or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States**.

(3) When the estate is ready for final settlement and distribution, the account must also include:

(a) A statement that all Oregon income taxes, inheritance or estate taxes and personal property taxes, if any, have been paid, or if not so paid, that payment of those taxes has been secured by bond, deposit or otherwise, and that all required tax returns have been filed.

(b) A petition for a judgment authorizing the personal representative to distribute the estate to the persons and in the portions specified therein.

(4) If the distributees consent thereto in writing and all creditors of the estate have been paid in full other than creditors owed administrative expenses that require court approval, the personal representative, in lieu of the final account otherwise required by this section, may file a statement that includes the following:

(a) The period of time covered by the statement.

(b) A statement that all creditors have been paid in full other than creditors owed administrative expenses that require court approval.

(c) The statement and petition referred to in subsection (3) of this section.

(d) A declaration under penalty of perjury in the form required by ORCP 1 E**, or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States**.

(5) Notice of time for filing objections to the statement described in subsection (4) of this section is not required.

(6) The Chief Justice of the Supreme Court may by rule specify the form and contents of accounts that must be filed by a personal representative.

SECTION 15. ORS 116.253 is amended to read:

116.253. (1) Within 10 years after the death of a decedent whose estate escheated in whole or in part to the state, or within eight years after the entry of a judgment or order escheating property of an estate to the state, a claim may be made for the property escheated, or the proceeds thereof, by or on behalf of a person not having actual knowledge of the escheat or by or on behalf of a person who at the time of the escheat was unable to prove entitlement to the escheated property.

(2) The claim shall be made by a petition filed with the Director of the Department of State Lands. The claim is considered a contested case as provided in ORS 183.310 and there is the right of judicial review as provided in ORS 183.480. The petition must include a declaration under penalty of perjury in the form required by ORCP 1 E**, or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States,** and shall state:

(a) The age and place of residence of the claimant by whom or on whose behalf the petition is filed;

(b) That the claimant lawfully is entitled to the property or proceeds, briefly describing the property or proceeds;

(c) That at the time the property escheated to the state the claimant had no knowledge or notice thereof or was unable to prove entitlement to the escheated property and has subsequently acquired new evidence of that entitlement;

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(d) That the claimant claims the property or proceeds as an heir or devisee or as the personal representative of the estate of an heir or devisee, setting forth the relationship, if any, of the claimant to the decedent who at the time of death was the owner;

(e) That 10 years have not elapsed since the death of the decedent, or that eight years have not elapsed since the entry of the judgment or order escheating the property to the state; and

(f) If the petition is not filed by the claimant, the status of the petitioner.

(3) If it is determined that the claimant is entitled to the property or the proceeds thereof, the Director of the Department of State Lands shall deliver the property to the petitioner, subject to and charged with any tax on the property and the costs and expenses of the state in connection therewith.

(4) If the person whose property escheated or reverted to the state was at any time an inmate of a state institution in Oregon for persons with mental illness or mental retardation, the reasonable unpaid cost of the care and maintenance of the person while a ward of the institution, regardless of when the cost was incurred, may be deducted from, or, if necessary, be offset in full against, the amount of the escheated property. The reasonable unpaid cost of care and maintenance shall be determined by:

(a) The Department of Human Services for patients of the Eastern Oregon Training Center; and

(b) The Oregon Health Authority for patients of the Blue Mountain Recovery Center and the Oregon State Hospital.

(5) For the purposes of this section, the death of the decedent is presumed to have occurred on the date shown in the decedent's death certificate or in any other similar document issued by the jurisdiction in which the death occurred or issued by an agency of the federal government.

SECTION 16. ORS 125.325 is amended to read:

125.325. Within 30 days after each anniversary of appointment, a guardian for an adult protected person shall file with the court a written report. The report must include a declaration under penalty of perjury in the form required by ORCP 1 E**, or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States**. Copies of the guardian's report must be given to those persons specified in ORS 125.060 (3). The report shall be in substantially the following form:

IN THE _____ COURT
_____ COUNTY,
STATE OF OREGON
DEPARTMENT OF PROBATE

In the Matter of the Guardianship of _____, (Name of protected person) A Protected Person.	)))))	No. _____

GUARDIAN'S REPORT

I am the guardian for the person named above, and I make the following report to the court as required by law:

1. My name is _____.

2. My address and telephone number are:

_____

_____

Phone _____

3. The name, if applicable, and address of the place where the person now resides are:

_____

_____

4. The person is currently residing at the following type of facility or residence:

_____

5. The person is currently engaged in the following programs and activities and receiving the following services (brief description):

_____

6. I was paid for providing the following items of lodging, food or other services to the person:

_____

_____

7. The name of the person primarily responsible for the care of the person at the person's place of residence is:

_____

8. The name and address of any hospital or other institution where the person is now admitted on a temporary or permanent basis are:

_____

_____

9. The person's physical condition is as follows (brief description):

_____

_____

10. The person's mental condition is as follows (brief description):

_____

_____

11. I made the following contacts with the person during the past year (brief description):

_____

12. I made the following major decisions on behalf of the person during the past year (brief description):

_____

13. I believe the guardianship should or should not continue because:

_____

14. At the time of my last report, I held the following amount of money on behalf of the person: $_____. Since my last report, I received the following amount of money on behalf of the person: $_____. I spent the following amount of money on behalf of the person: $_____. I now hold the following amount of money on behalf of the person: $_____.

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15. A true copy of this report will be given to the person, any conservator for the person and any other person who has requested notice.

16. Since my last report:

(a) I have been convicted of the following crimes (not including traffic violations):

_____

(b) I have filed for or received protection from creditors under the Federal Bankruptcy Code (yes or no): _____.

(c) I have had a professional or occupational license revoked or suspended (yes or no): _____.

(d) I have had my driver license revoked or suspended (yes or no): _____.

17. Since my last report, I have delegated the following powers over the protected person for the following periods of time (provide name of person powers delegated to):

_____

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated this ____ day of _____, 2____.

_____

Guardian

_____

SECTION 17. ORS 136.583 is amended to read:

136.583. (1) Notwithstanding ORS 136.557, 136.563, 136.565 or 136.567 and subject to ORS 136.580 (2), criminal process authorizing or commanding the seizure or production of papers, documents, records or other things may be issued to a recipient, regardless of whether the recipient or the papers, documents, records or things are located within this state, if:

(a) The criminal matter is triable in Oregon under ORS 131.205 to 131.235; and

(b) The exercise of jurisdiction over the recipient is not inconsistent with the Constitution of this state or the Constitution of the United States.

(2) Criminal process that authorizes or commands the seizure or production of papers, documents, records or other things from a recipient may be served by:

(a) Delivering a copy to the recipient personally; or

(b) Sending a copy by:

(A) Certified or registered mail, return receipt requested;

(B) Express mail; or

(C) Facsimile or electronic transmission, if the copy is sent in a manner that provides proof of delivery.

(3) When criminal process is served under subsection (2) of this section, the recipient shall provide the applicant, or if the process is described in ORS 136.447 or 136.580 (2), the court, with all of the papers, documents, records or other things described in the criminal process within 20 business days from the date the criminal process is received, unless:

(a) The court, for good cause shown, includes in the process a requirement for production within a period of time that is less than 20 business days;

(b) The court, for good cause shown, extends the time for production to a period of time that is more than 20 business days; or

(c) The applicant consents to a request from the recipient for additional time to comply with the process.

(4) A recipient who seeks to quash or otherwise challenge the criminal process must seek relief from the court that issued the process within the time required for production. The court shall hear and decide the issue as soon as practicable. The consent of the applicant to additional time to comply with the process under subsection (3)(c) of this section does not extend the date by which a recipient must seek relief under this subsection.

(5) Criminal process issued under this section must contain a notice on the first page of the document that indicates:

(a) That the process was issued under this section;

(b) The date before which the recipient must respond to the process; and

(c) That the deadline for seeking relief is not altered by the applicant's consent to additional time to respond to the process.

(6) Upon order of the court or the written request of the applicant, the recipient of the process shall verify the authenticity of the papers, documents, records or other things that the recipient produces in response to the criminal process by providing an affidavit or declaration that includes contact information for the custodian or other qualified person completing the document and attests to the nature of the papers, documents, records or other things. An affidavit or declaration that complies with this subsection may fulfill the requirements of ORS 40.460 (6), 40.505 and 132.320.

(7) A party that intends to offer a paper, document, record or other thing into evidence under this section must file written notice of that intention with the court and must disclose the affidavit or declaration sufficiently in advance of offering the paper, document, record or other thing into evidence to provide the adverse party with an opportunity to challenge the affidavit or declaration and to have that challenge determined without prejudice to the ability of the moving party to produce the custodian or other qualified person at trial. A motion opposing admission of the paper, document, record or other thing into evidence must be filed and determined by the court before trial and with sufficient time to allow the party offering the paper, document, record or other thing, if the motion is granted, to produce the custodian of the record or other qualified person at trial, without creating a hardship on the party or the custodian or other qualified person.

(8) Failure by a party that receives notice under subsection (7) of this section to timely file a motion opposing admission of the paper, document, record or other thing constitutes a waiver of objection to

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the admission of the evidence on the basis of the insufficiency of the affidavit or declaration unless the court finds good cause to grant relief from the waiver. If the court grants relief from the waiver, the court shall order the trial continued upon the request of the proponent of the evidence and allow the proponent sufficient time to arrange for the necessary witness to appear.

(9) A recipient of criminal process under this section or any individual that responds to the process is immune from civil and criminal liability for complying with the process and for any failure to provide notice of any disclosure to a person who is the subject of, or identified in, the disclosure.

(10) Nothing in this section limits the authority of a court to issue criminal process under any other provision of law or prohibits a party from calling the custodian of the evidence or other qualified person to testify regarding the evidence.

(11) As used in this section:

(a) "Applicant" means:

(A) A police officer or district attorney who applies for a search warrant or other court order or seeks to issue a subpoena under this section; or

(B) A defense attorney who applies for a court order or seeks to issue a subpoena under this section.

(b) "Criminal process" means a subpoena, search warrant or other court order.

(c) "Declaration" [*has the meaning given that term in*] **means a declaration under penalty of perjury under** ORCP 1 E **or an unsworn declaration under sections 1 to 8 of this 2013 Act, if the declarant is physically outside the boundaries of the United States**.

(d) "Defense attorney" means an attorney of record for a person charged with a crime who is seeking the issuance of criminal process for the defense of the criminal case.

(e) "Recipient" means a business entity or nonprofit entity that has conducted business or engaged in transactions occurring at least in part in this state.

SECTION 18. ORS 162.055 is amended to read:

162.055. As used in ORS 162.055 to 162.425 and 162.465, unless the context requires otherwise:

(1) "Benefit" means gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary.

(2) "Material" means that which could have affected the course or outcome of any proceeding or transaction. Whether a false statement is "material" in a given factual situation is a question of law.

(3) "Statement" means any representation of fact and includes a representation of opinion, belief or other state of mind where the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation.

(4) "Sworn statement" means any statement that attests to the truth of what is stated and that is knowingly given under any form of oath or affirmation or by declaration under penalty of perjury as described in ORCP 1 E.

(5) "Unsworn declaration" has the meaning given that term in section 2 of this 2013 Act.

SECTION 19. ORS 162.065 is amended to read:

162.065. (1) A person commits the crime of perjury if the person makes a false sworn statement **or a false unsworn declaration** in regard to a material issue, knowing it to be false.

(2) Perjury is a Class C felony.

SECTION 20. ORS 162.075 is amended to read:

162.075. (1) A person commits the crime of false swearing if the person makes a false sworn statement **or a false unsworn declaration**, knowing it to be false.

(2) False swearing is a Class A misdemeanor.

SECTION 21. The section captions used in this 2013 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2013 Act.

SECTION 22. Sections 1 to 8 of this 2013 Act and the amendments to ORS 18.887, 45.010, 45.130, 111.205, 116.083, 116.253, 125.325, 136.583, 162.055, 162.065 and 162.075 and ORCP 1 E by sections 9 to 20 of this 2013 Act apply to unsworn declarations made on or after the effective date of this 2013 Act.

Approved by the Governor May 23, 2013
Filed in the office of Secretary of State May 23, 2013
Effective date January 1, 2014

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CHAPTER 1

AN ACT HB 2148

Relating to correction of erroneous material in Oregon law; creating new provisions; amending ORS 30.865, 109.135, 146.035, 161.327, 163.193, 163.700, 173.763, 173.766, 174.112, 174.120, 174.535, 174.540, 176.260, 181.610, 197.649, 200.065, 215.211, 255.235, 258.280, 273.554, 291.229, 295.046, 329.704, 332.118, 334.125, 336.585, 336.590, 339.035, 341.425, 341.430, 341.440, 341.535, 342.156, 342.173, 342.360, 343.155, 343.224, 346.015, 346.035, 346.041, 348.105, 348.270, 351.293, 351.296, 352.720, 352.790, 390.114, 408.370, 413.011, 413.032, 413.037, 413.520, 418.580, 419B.100, 427.293, 431.864, 433.815, 442.342, 443.065, 460.330, 460.355, 461.010, 468.581, 469.805, 471.580, 496.090, 536.220, 539.040, 608.015, 646.605, 646.951, 646.957, 657.335, 671.425, 684.040, 685.060, 688.132, 701.348, 743.777, 774.070, 802.110 and 830.990 and section 4, chapter 455, Oregon Laws 2005, sections 8, 12, 14 and 16, chapter 624, Oregon Laws 2011, section 3, chapter 88, Oregon Laws 2012, and section 1, chapter 101, Oregon Laws 2012, and ORCP 38 C; and repealing section 13, chapter 658, Oregon Laws 2003, and section 8, chapter 59, Oregon Laws 2010.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 174.535 is amended to read:

174.535. It is the policy of the Legislative Assembly to revise sections from Oregon Revised Statutes and Oregon law periodically in order to maintain accuracy. However, nothing in chapter 740, Oregon Laws 1983, chapter 565, Oregon Laws 1985, chapter 158, Oregon Laws 1987, chapter 171, Oregon Laws 1989, chapters 67 and 927, Oregon Laws 1991, chapters 18 and 469, Oregon Laws 1993, chapter 79, Oregon Laws 1995, chapter 249, Oregon Laws 1997, chapter 59, Oregon Laws 1999, chapter 104, Oregon Laws 2001, chapter 14, Oregon Laws 2003, chapter 22, Oregon Laws 2005, chapter 71, Oregon Laws 2007, chapter 11, Oregon Laws 2009, [*or*] chapter 9, Oregon Laws 2011, **or this 2013 Act** is intended to alter the legislative intent or purpose of statutory sections affected by chapter 740, Oregon Laws 1983, chapter 565, Oregon Laws 1985, chapter 158, Oregon Laws 1987, chapter 171, Oregon Laws 1989, chapters 67 and 927, Oregon Laws 1991, chapters 18 and 469, Oregon Laws 1993, chapter 79, Oregon Laws 1995, chapter 249, Oregon Laws 1997, chapter 59, Oregon Laws 1999, chapter 104, Oregon Laws 2001, chapter 14, Oregon Laws 2003, chapter 22, Oregon Laws 2005, chapter 71, Oregon Laws 2007, chapter 11, Oregon Laws 2009, [*and*] chapter 9, Oregon Laws 2011, **and this 2013 Act** except insofar as the amendments thereto, or repeals thereof, specifically require.

NOTE: Sets forth Reviser's Bill policy statement.

SECTION 2. ORCP 38 C is amended to read:

C Foreign depositions and subpoenas.

C(1) Definitions. For the purpose of this [*rule*] **section**:

C(1)(a) "Foreign subpoena" means a subpoena issued under authority of a court of record of any state other than Oregon.

C(1)(b) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

C(2) Issuance of subpoena.

C(2)(a) To request issuance of a subpoena under this [*rule*] **section**, a party or attorney shall submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in this state.

C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in this state, the clerk, in accordance with that court's procedure and requirements, shall assign a case number and promptly issue a subpoena for service upon the person to whom the foreign subpoena is directed. If a party to an out-of-state proceeding retains an attorney licensed to practice in this state, that attorney may assist the clerk in drafting the subpoena.

C(2)(c) A subpoena under this subsection shall:

(i) [*conform*] **Conform** to the requirements of these Oregon Rules of Civil Procedure, including Rule 55, and conform substantially to the form provided in Rule 55 A but may otherwise incorporate the terms used in the foreign subpoena as long as those terms conform to these rules; and

(ii) [*contain*] **Contain** or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

C(3) Service of subpoena. A subpoena issued by a clerk of court under subsection (2) of this [*rule*] **section** shall be served in compliance with Rule 55.

C(4) Effects of request for subpoena. A request for issuance of a subpoena under this [*rule*] **section** does not constitute an appearance in the court. A request does allow the court to impose sanctions for any action in connection with the subpoena that is a violation of applicable law.

C(5) Motions. A motion to the court, or a response thereto, for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this [*rule*] **section** is an appearance before the court and shall comply with the rules and statutes of this state. The motion shall be submitted to the court in the county in which discovery is to be conducted.

C(6) Uniformity of application and construction. In applying and construing this [*rule*] **section**, consideration shall be given to the need to promote the uniformity of the law with respect to its subject matter among states that enact it.

NOTE: Corrects internal references in C(1), (2)(a), (3), (4), (5) and (6); uppercases beginning of C(2)(c)(i) and (ii) in conformance with legislative style.

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House Bill 3022

Sponsored by Representative CONGER

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Provides that physician-patient privilege and nurse-patient privilege do not apply to communications made in course of any medical treatment received by patient after injury for which patient brings certain civil actions based on negligent or unauthorized medical treatment.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to privileges; creating new provisions; amending ORS 40.235 and 40.240 and ORCP 44 E; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORCP 44 E is amended to read:

E Access to individually identifiable health information.

E(1) Any party against whom a civil action is filed for compensation or damages for injuries may obtain copies of individually identifiable health information as defined in Rule 55 H within the scope of discovery under Rule 36 B. Individually identifiable health information may be obtained by written patient authorization, by an order of the court, or by subpoena in accordance with Rule 55 H.

E(2) When a patient has filed a civil action based on negligence in the provision of health care or unauthorized rendering of health care against a person licensed, certified or otherwise authorized or permitted by the law of this state to administer health care in the ordinary course of business or practice of a profession, or against a health care facility, as defined in ORS 442.015, the health care provider or health care facility may obtain copies of individually identifiable health information created in the course of medical treatment provided by any health care provider after the patient's injuries occurred.

SECTION 2. ORS 40.235 is amended to read:

40.235. (1) As used in this section, unless the context requires otherwise:

(a) "Confidential communication" means a communication not intended to be disclosed to third persons except:

(A) Persons present to further the interest of the patient in the consultation, examination or interview;

(B) Persons reasonably necessary for the transmission of the communication; or

(C) Persons who are participating in the diagnosis and treatment under the direction of the physician, including members of the patient's family.

(b) "Patient" means a person who consults or is examined or interviewed by a physician.

(c) "Physician" means a person authorized and licensed or certified to practice medicine or dentistry in any state or nation, or reasonably believed by the patient so to be, while engaged in the

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

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diagnosis or treatment of a physical condition. "Physician" includes licensed or certified naturopathic and chiropractic physicians and dentists.

(2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

(3) The privilege created by this section may be claimed by:

(a) The patient;

(b) A guardian or conservator of the patient;

(c) The personal representative of a deceased patient; or

(d) The person who was the physician, but only on behalf of the patient. Such person's authority so to do is presumed in the absence of evidence to the contrary.

(4) The following is a nonexclusive list of limits on the privilege granted by this section:

(a) If the judge orders an examination of the physical condition of the patient, communications made in the course thereof are not privileged under this section with respect to the particular purpose for which the examination is ordered unless the judge orders otherwise.

(b) Except as provided in ORCP 44, there is no privilege under this section for communications made in the course of a physical examination performed under ORCP 44.

(c) There is no privilege under this section with regard to any confidential communication or record of such confidential communication that would otherwise be privileged under this section when the use of the communication or record is specifically allowed under ORS 426.070, 426.074, 426.075, 426.095, 426.120 or 426.307. This paragraph only applies to the use of the communication or record to the extent and for the purposes set forth in the described statute sections.

(d) There is no privilege under this section with regard to communications or records of communications made in the course of medical treatment provided to the plaintiff by any physician after an injury for which the plaintiff has commenced a civil action against a person licensed, certified or otherwise authorized or permitted by the law of this state to administer health care in the ordinary course of business or practice of a profession, or against a health care facility, as defined in ORS 442.015, based on negligence in the provision of health care or unauthorized rendering of health care.

SECTION 3. ORS 40.240 is amended to read:

40.240. **(1)** A licensed professional nurse shall not, without the consent of a patient who was cared for by such nurse, be examined in a civil action or proceeding, as to any information acquired in caring for the patient, which was necessary to enable the nurse to care for the patient.

(2) There is no privilege under this section with regard to communications or records of communications made in the course of medical treatment provided to the plaintiff by any nurse after an injury for which the plaintiff has commenced a civil action against a person licensed, certified or otherwise authorized or permitted by the law of this state to administer health care in the ordinary course of business or practice of a profession, or against a health care facility, as defined in ORS 442.015, based on negligence in the provision of health care or unauthorized rendering of health care.

SECTION 4. The amendments to ORCP 44 E and ORS 40.235 and 40.240 by sections 1 to 3 of this 2013 Act apply only to civil actions commenced on and after the effective date of this 2013 Act.

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SECTION 5. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

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CHAPTER 687

AN ACT HB 2779

Relating to protective orders for victims of sexual abuse; creating new provisions; amending ORS 21.245, 36.185, 40.210, 107.835, 133.310, 133.381 and 659A.270 and ORCP 79 E; appropriating money; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 8 of this 2013 Act:

(1) "Family or household members," "interfere," "intimidate," "menace" and "molest" have the meanings given those terms in ORS 107.705.

(2) "Sexual abuse" means sexual contact with:

(a) A person who does not consent to the sexual contact; or

(b) A person who is considered incapable of consenting to a sexual act under ORS 163.315, unless the sexual contact would be lawful under ORS 163.325 or 163.345.

(3) "Sexual contact" has the meaning given that term in ORS 163.305.

SECTION 2. (1) A person who has been subjected to sexual abuse and who reasonably fears for the person's physical safety may petition the circuit court for a restraining order if:

(a) The person and the respondent are not family or household members;

(b) The respondent is at least 18 years of age; and

(c) The respondent is not prohibited from contacting the person pursuant to a foreign restraining order as defined in ORS 24.190, an order issued under ORS 30.866, 124.015, 124.020, 163.738 or 419B.845 or an order entered in a criminal action.

(2)(a) A petition seeking relief under sections 1 to 8 of this 2013 Act must be filed in the circuit court for the county in which the petitioner or the respondent resides. The petition may be filed, without the appointment of a guardian ad litem, by a person who is at least 12 years of age or by a parent or lawful guardian of a person who is under 18 years of age.

(b) The petition must allege that:

(A) The petitioner reasonably fears for the petitioner's physical safety with respect to the respondent; and

(B) The respondent subjected the petitioner to sexual abuse within the 180 days preceding the filing of the petition.

(c) Statements in the petition must be made under oath or affirmation.

(d) The petitioner has the burden of proving a claim under sections 1 to 8 of this 2013 Act by a preponderance of the evidence.

(3) The following periods of time may not be counted for the purpose of computing the 180-day period described in this section and section 3 of this 2013 Act:

(a) Any time during which the respondent is incarcerated.

(b) Any time during which the respondent has a principal residence more than 100 miles from the principal residence of the petitioner.

(c) Any time during which the respondent is subject to an order described in subsection (1)(c) of this section.

SECTION 3. (1) When a petition is filed in accordance with section 2 of this 2013 Act, the circuit court shall hold an ex parte hearing in person or by telephone on the day the petition is filed or on the following judicial day. Upon a finding that it is objectively reasonable for a person in the petitioner's situation to fear for the person's physical safety if an order granting relief under sections 1 to 8 of this 2013 Act is not entered and that the respondent has subjected the petitioner to sexual abuse within the 180 days preceding the filing of the petition, the circuit court:

(a) Shall enter an order restraining the respondent from contacting the petitioner and from intimidating, molesting, interfering with or menacing the petitioner, or attempting to intimidate, molest, interfere with or menace the petitioner.

(b) If the petitioner requests, may order:

(A) That the respondent be restrained from contacting the petitioner's children or family or household members;

(B) That the respondent be restrained from entering, or attempting to enter, a reasonable area surrounding the petitioner's residence;

(C) That the respondent be restrained from intimidating, molesting, interfering with or menacing any children or family or household members of the petitioner, or attempting to intimidate, molest, interfere with or menace any children or family or household members of the petitioner;

(D) That the respondent be restrained from entering, or attempting to enter, any premises and a reasonable area surrounding the premises when necessary to prevent the respondent from intimidating, molesting, interfering with or menacing the petitioner or the petitioner's children or family or household members; and

(E) Other relief necessary to provide for the safety and welfare of the petitioner or the petitioner's children or family or household members.

(2) If the respondent is restrained from entering or attempting to enter an area surrounding the petitioner's residence or any other premises, the restraining order must specifically describe the area or premises.

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(3) When the circuit court enters a restraining order under this section, the court shall set a security amount for the violation of the order.

(4) If the circuit court enters a restraining order under subsection (1) of this section:

(a) The clerk of the court shall provide, without charge, the number of certified true copies of the petition and the restraining order necessary to provide the petitioner with one copy and to effect service and shall have a true copy of the petition and the restraining order delivered to the county sheriff for service upon the respondent, unless the circuit court finds that further service is unnecessary because the respondent appeared in person before the court. In addition and upon request by the petitioner, the clerk of the court shall provide the petitioner, without charge, two exemplified copies of the petition and the restraining order.

(b) The county sheriff shall serve the respondent personally unless the petitioner elects to have the respondent served personally by another party. Proof of service shall be made in accordance with section 6 of this 2013 Act. When the restraining order does not contain the respondent's date of birth and service is effected by the sheriff, the sheriff shall verify the respondent's date of birth with the respondent and shall record that date on the restraining order or proof of service entered into the Law Enforcement Data System under section 6 of this 2013 Act.

(5) If the county sheriff:

(a) Determines that the restraining order and petition are incomplete, the sheriff shall return the restraining order and petition to the clerk of the court. The clerk of the court shall notify the petitioner, at the address provided by the petitioner, of the error or omission.

(b) Cannot complete service within 10 days after accepting the restraining order and petition, the sheriff shall notify the petitioner, at the address provided by the petitioner, that the documents have not been served. If the petitioner does not respond within 10 days, the sheriff shall hold the restraining order and petition for future service and file a return to the clerk of the court showing that service was not completed.

(6)(a) Within 30 days after a restraining order is served under this section, the respondent may request a circuit court hearing upon any relief granted.

(b) If the respondent requests a hearing under paragraph (a) of this subsection, the clerk of the court shall notify the petitioner of the date and time of the hearing and shall supply the petitioner with a copy of the respondent's request for a hearing. The petitioner shall give the clerk of the court information sufficient to allow such notification.

(7) If the respondent fails to request a hearing within 30 days after a restraining order is served, the restraining order is confirmed by operation of law.

(8) A restraining order entered under this section is effective for a period of one year, unless the restraining order is renewed, modified or terminated in accordance with sections 1 to 8 of this 2013 Act.

SECTION 4. (1) If the respondent requests a hearing under section 3 (6) of this 2013 Act, the circuit court shall hold the hearing within 21 days after the request. At the hearing, the circuit court may terminate or modify the restraining order issued under section 3 of this 2013 Act.

(2)(a) If service of a notice of hearing is inadequate to provide a party with sufficient notice of the hearing, the circuit court may extend the date of the hearing for up to five days so that the party may seek representation.

(b) If one party is represented by an attorney at the hearing, the circuit court may extend the date of the hearing for up to five days at the other party's request so that the other party may seek representation.

(3) If the circuit court continues the restraining order issued under section 3 of this 2013 Act, with or without modification, at a hearing about which the respondent received actual notice and the opportunity to be heard, the court shall include in the restraining order a certificate in substantially the following form in a separate section immediately above the signature of the judge:

CERTIFICATE OF COMPLIANCE WITH THE VIOLENCE AGAINST WOMEN ACT OF 1994

This protective order meets all full faith and credit requirements of the Violence Against Women Act of 1994, 18 U.S.C. 2265. This court has jurisdiction over the parties and the subject matter. The respondent was afforded notice and timely opportunity to be heard as provided by the law of this jurisdiction. This protective order is valid and entitled to enforcement in this and all other jurisdictions.

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(4) The circuit court may approve a consent agreement if the court determines that the agreement provides sufficient protections to the petitioner. The circuit court may not approve a term in a consent agreement that provides for restraint of a party to the agreement unless the other party petitioned for and was granted a restraining order issued under section 3 of this 2013 Act.

(5) A restraining order entered under this section, or a consent agreement entered into under this section, shall continue for a period

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of one year from the date of the restraining order issued under section 3 of this 2013 Act, unless the restraining order is renewed, modified or terminated in accordance with section 7 of this 2013 Act.

SECTION 5. (1) A party may file a motion under ORS 45.400 requesting that the circuit court allow the appearance of the party or a witness by telephone or by other two-way electronic communication device in a proceeding under sections 1 to 8 of this 2013 Act.

(2) In determining whether to allow written notice less than 30 days before the proceeding under ORS 45.400 (2), the circuit court shall consider the expedited nature of a proceeding under sections 1 to 8 of this 2013 Act.

(3) In addition to the factors listed in ORS 45.400 (7) that would support a finding of good cause, the circuit court shall consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at a proceeding under sections 1 to 8 of this 2013 Act.

(4) A motion or good cause determination is not required for ex parte hearings held by telephone under section 3 of this 2013 Act.

SECTION 6. (1)(a) When a restraining order is issued in accordance with sections 1 to 8 of this 2013 Act and the person to be restrained has actual notice of the restraining order, the clerk of the court or any other person serving the petition and the restraining order shall immediately deliver to a county sheriff copies of the petition and the restraining order and a true copy of the affidavit of proof of service on which it is stated that the petition and the restraining order were served personally on the respondent. If a restraining order entered by the circuit court recites that the respondent appeared in person before the court, the necessity for service of the restraining order and an affidavit of proof of service is waived.

(b) Upon receipt of a copy of the restraining order and notice of completion of any required service by a member of a law enforcement agency, the county sheriff shall immediately enter the restraining order into the Law Enforcement Data System maintained by the Department of State Police and the databases of the National Crime Information Center of the United States Department of Justice. If the petition and the restraining order were served on the respondent by a person other than a member of a law enforcement agency, the county sheriff shall enter the restraining order into the Law Enforcement Data System and the databases of the National Crime Information Center upon receipt of a true copy of the affidavit of proof of service. The sheriff shall provide the petitioner with a true copy of any required proof of service.

(c) Entry into the Law Enforcement Data System constitutes notice to all law enforcement agencies of the existence of the restraining order. Law enforcement agencies shall establish procedures adequate to ensure that an officer at the scene of an alleged violation of the restraining order may be informed of the existence and terms of the restraining order. The restraining order is fully enforceable in any county or tribal land in this state.

(d) When a restraining order has been entered into the Law Enforcement Data System and the databases of the National Crime Information Center of the United States Department of Justice under this subsection, a county sheriff shall cooperate with a request from a law enforcement agency from any other jurisdiction to verify the existence of the restraining order or to transmit a copy of the restraining order to the requesting jurisdiction.

(2) A sheriff may serve a restraining order issued under sections 1 to 8 of this 2013 Act in the county in which the sheriff was elected and in any county that is adjacent to the county in which the sheriff was elected.

(3)(a) A sheriff may serve and enter into the Law Enforcement Data System a copy of a restraining order issued under sections 1 to 8 of this 2013 Act that was transmitted to the sheriff by a circuit court or law enforcement agency through an electronic communication device. Before transmitting a copy of a restraining order to a sheriff under this subsection through an electronic communication device, the person transmitting the copy must receive confirmation from the sheriff's office that an electronic communication device is available and operating.

(b) For purposes of this subsection, "electronic communication device" means a device by which any kind of electronic communication can be made, including but not limited to communication by telephonic facsimile and electronic mail.

(4) When a circuit court enters an order terminating a restraining order issued under sections 1 to 8 of this 2013 Act before the expiration date, the clerk of the court shall immediately deliver a copy of the termination order to the county sheriff with whom the original restraining order was filed. Upon receipt of the termination order, the county sheriff shall promptly remove the original restraining order from the Law Enforcement Data System and the databases of the National Crime Information Center of the United States Department of Justice.

(5)(a) A contempt proceeding for an alleged violation of a restraining order issued under sections 1 to 8 of this 2013 Act must be conducted by the circuit court that issued the restraining order or by the circuit court for the county in which the alleged violation of the restraining order occurs. If contempt proceedings

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are initiated in the circuit court for the county in which the alleged violation of the restraining order occurs, the person initiating the contempt proceedings shall file with the court a copy of the restraining order that is certified by the clerk of the court that originally issued the restraining order. Upon filing of the certified copy of the restraining order, the circuit court shall enforce the restraining order as though that court had originally issued the restraining order.

(b) Pending a contempt hearing for an alleged violation of a restraining order issued under sections 1 to 8 of this 2013 Act, a person arrested and taken into custody pursuant to ORS 133.310 may be released as provided in ORS 135.230 to 135.290.

(c) Service of process or other legal documents upon the petitioner is not a violation of a restraining order entered under sections 1 to 8 of this 2013 Act if the petitioner is served as provided in ORCP 7 or 9.

SECTION 7. (1)(a) A circuit court may renew a restraining order entered under sections 1 to 8 of this 2013 Act upon a finding that it is objectively reasonable for a person in the petitioner's situation to fear for the person's physical safety if the restraining order is not renewed. A finding that the respondent has subjected the petitioner to additional sexual abuse is not required.

(b) A circuit court may renew a restraining order on the basis of a sworn, ex parte petition alleging facts supporting the required finding. If the renewal order is granted, the provisions of sections 3 (4) to (8) and 4 (3) of this 2013 Act apply, except that the court may hear no issue other than the basis for renewal, unless requested in the hearing request form and thereafter agreed to by the petitioner. The circuit court shall hold a hearing required under this paragraph within 21 days after the respondent's request.

(2) At any time after the time period set forth in section 3 (6) of this 2013 Act:

(a) A party may request that the circuit court modify terms in the restraining order for good cause shown.

(b) A petitioner may request that the circuit court remove terms in the restraining order or make terms in the order less restrictive. Application to the circuit court under this paragraph may be by ex parte motion.

(3) The clerk of the court shall provide without charge the number of certified true copies of the request for modification of the restraining order and notice of hearing necessary to effect service and, at the election of the party requesting the modification, shall have a true copy of the request and notice delivered to the county sheriff for service upon the other party.

(4) The county sheriff shall serve the other party with a request for modification of a restraining order under subsection (2)(a) of this section by personal service, unless the party requesting the modification elects to have the other party personally served by a private party or unless otherwise ordered by the circuit court.

(5) The provisions of section 4 (3) of this 2013 Act apply to a modification of a restraining order under this section.

(6) The clerk of the court shall deliver a copy of an order of modification entered under this section to the county sheriff for service and entry into the Law Enforcement Data System as provided in section 6 of this 2013 Act.

(7)(a) The county sheriff shall serve a copy of an order of modification:

(A) Entered under subsection (2)(a) of this section by personal service on the nonrequesting party.

(B) Entered under subsection (2)(b) of this section by mailing a copy of the order of modification to the respondent by first class mail.

(b) If the order of modification recites that the respondent appeared in person before the circuit court, the necessity for service of the order and an affidavit of proof of service is waived.

(8) A restraining order entered under sections 1 to 8 of this 2013 Act may not be terminated on motion of the petitioner, unless the motion is notarized.

SECTION 8. (1)(a) A filing fee, service fee or hearing fee may not be charged for proceedings seeking only the relief provided under sections 1 to 8 of this 2013 Act.

(b) An undertaking may not be required in any proceeding under sections 1 to 8 of this 2013 Act.

(2) A proceeding under sections 1 to 8 of this 2013 Act is in addition to any other available civil or criminal remedies.

(3)(a) After obtaining the approval of the Chief Justice of the Supreme Court, the Attorney General's Sexual Assault Task Force shall produce:

(A) The forms for petitions and restraining orders, hearing requests and any related forms for use under sections 1 to 8 of this 2013 Act; and

(B) An instructional brochure explaining the rights set forth in sections 1 to 8 of this 2013 Act.

(b) After obtaining the approval of the Chief Justice of the Supreme Court of the forms and instructional brochures produced pursuant to this subsection, the Attorney General's Sexual Assault Task Force shall provide the forms and copies of the instructional brochure to the clerks of the circuit court who shall make the forms and brochures available to the public.

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SECTION 9. The amendments to section 8 of this 2013 Act by section 10 of this 2013 Act become operative on July 1, 2021.

SECTION 10. Section 8 of this 2013 Act is amended to read:

Sec. 8. (1)(a) A filing fee, service fee or hearing fee may not be charged for proceedings seeking only the relief provided under sections 1 to 8 of this 2013 Act.

(b) An undertaking may not be required in any proceeding under sections 1 to 8 of this 2013 Act.

(2) A proceeding under sections 1 to 8 of this 2013 Act is in addition to any other available civil or criminal remedies.

(3)(a) [*After obtaining the approval of the Chief Justice of the Supreme Court, the Attorney General's Sexual Assault Task Force*] **The State Court Administrator** shall produce:

(A) The forms for petitions and restraining orders, hearing requests and any related forms for use under sections 1 to 8 of this 2013 Act; and

(B) An instructional brochure explaining the rights set forth in sections 1 to 8 of this 2013 Act.

(b) [*After obtaining the approval of the Chief Justice of the Supreme Court of the forms and instructional brochures produced pursuant to this subsection, the Attorney General's Sexual Assault Task Force*] **The State Court Administrator** shall provide the forms and copies of the instructional brochure to the clerks of the circuit court who shall make the forms and brochures available to the public.

SECTION 11. ORS 21.245 is amended to read:

21.245. (1) The State Court Administrator may prescribe and charge a reasonable price, covering the costs of labor and material, for any forms provided by the courts of this state. The sums so collected shall be paid over to the State Treasurer and credited to the Court Forms Revolving Fund.

(2) Notwithstanding subsection (1) of this section, no charge shall be made for forms made available under the provisions of ORS 107.700 to 107.735 or 124.005 to 124.040 **or sections 1 to 8 of this 2013 Act**.

SECTION 12. ORS 36.185 is amended to read:

36.185. After the appearance by all parties in any civil action, except proceedings under ORS 107.700 to 107.735 or 124.005 to 124.040 **or sections 1 to 8 of this 2013 Act**, a judge of any circuit court may refer a civil dispute to mediation under the terms and conditions set forth in ORS 36.185 to 36.210. When a party to a case files a written objection to mediation with the court, the action shall be removed from mediation and proceed in a normal fashion. All civil disputants shall be provided with written information describing the mediation process, as provided or approved by the State Court Administrator, along with information on established court mediation opportunities. Filing parties shall be provided with this information at the time of filing a civil action. Responding parties shall be provided with this information by the filing party along with the initial service of filing documents upon the responding party.

SECTION 13. ORS 40.210 is amended to read:

40.210. (1) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.355 to 163.427, [*or*] in a prosecution for an attempt to commit one of these crimes **or in a proceeding conducted under sections 1 to 8 of this 2013 Act**, the following evidence is not admissible:

(a) Reputation or opinion evidence of the past sexual behavior of an alleged victim [*of the crime*] or a corroborating witness; or

(b) Reputation or opinion evidence presented for the purpose of showing that the manner of dress of an alleged victim [*of the crime*] incited the crime **or, in a proceeding under sections 1 to 8 of this 2013 Act, incited the sexual abuse,** or indicated consent to the sexual acts **that are** alleged [*in the charge*].

(2) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.355 to 163.427, [*or*] in a prosecution for an attempt to commit one of these crimes **or in a proceeding conducted under sections 1 to 8 of this 2013 Act**, evidence of [*a*] **an alleged** victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless the evidence other than reputation or opinion evidence:

(a) Is admitted in accordance with subsection (4) of this section; and

(b) Is evidence that:

(A) Relates to the motive or bias of the alleged victim;

(B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

(C) Is otherwise constitutionally required to be admitted.

(3) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.355 to 163.427, [*or*] in a prosecution for an attempt to commit one of these crimes **or in a proceeding conducted under sections 1 to 8 of this 2013 Act**, evidence, other than reputation or opinion evidence, of the manner of dress of the alleged victim or a corroborating witness, presented by a person accused of committing the crime **or, in a proceeding conducted under sections 1 to 8 of this 2013 Act, by the respondent**, is also not admissible, unless the evidence is:

(a) Admitted in accordance with subsection (4) of this section; and

(b) Is evidence that:

(A) Relates to the motive or bias of the alleged victim;

(B) Is necessary to rebut or explain scientific, medical or testimonial evidence offered by the state;

(C) Is necessary to establish the identity of the **alleged** victim; or

(D) Is otherwise constitutionally required to be admitted.

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(4)(a) If the person accused of committing rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse**, or the respondent in a proceeding conducted under sections 1 to 8 of this 2013 Act,** intends to offer evidence under subsection (2) or (3) of this section, the accused **or the respondent** shall make a written motion to offer the evidence not later than 15 days before the date on which the trial in which the evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties[,] and**, in a criminal proceeding,** on the alleged victim through the office of the prosecutor.

(b) The motion described in paragraph (a) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (2) or (3) of this section, the court shall order a hearing in camera to determine if the evidence is admissible. At the hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding ORS 40.030 (2), if the relevancy of the evidence that the accused **or the respondent** seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in camera or at a subsequent hearing in camera scheduled for the same purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine the issue.

(c) If the court determines on the basis of the hearing described in paragraph (b) of this subsection that the evidence the accused **or the respondent** seeks to offer is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with respect to which a witness may be examined or cross-examined.

(d) An order admitting evidence under this subsection **in a criminal prosecution** may be appealed by the [*government*] **state** before trial.

(5) For purposes of this section:

(a) "Alleged victim" includes the petitioner in a proceeding conducted under sections 1 to 8 of this 2013 Act.

[*(a)*] **(b)** "In camera" means out of the presence of the public and the jury**.**[*; and*]

[*(b)*] **(c)** "Past sexual behavior" means sexual behavior other than**:**

(A) The sexual behavior with respect to which rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse is alleged[.]**; or**

(B) In a proceeding conducted under sections 1 to 8 of this 2013 Act, the alleged sexual abuse.

(d) "Trial" includes a hearing conducted under sections 1 to 8 of this 2013 Act.

SECTION 14. ORS 107.835 is amended to read:

107.835. (1) When a court enters a judgment, order or modification of a judgment or order under ORS chapter 25, 107, 108, 109, 110 or 416 **or sections 1 to 8 of this 2013 Act**, the court shall allow any party to the judgment or order to include in the judgment or order a waiver of personal service in a subsequent contempt proceeding in order to maintain the confidentiality of the party's residential address. In the waiver, the party shall give a contact address for service of process and select one of the following methods of substituted service:

(a) Mailing address;

(b) Business address; or

(c) Specified agent.

(2) Any time after a party has waived personal service under subsection (1) of this section, the party may file an amended waiver designating a different method of substituted service or a different address for substituted service. The party shall give notice of the amendment to all other parties.

(3) The State Court Administrator shall prescribe the content and form of the waiver and amended waiver described in this section.

SECTION 15. ORS 133.310 is amended to read:

133.310. (1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed any of the following:

(a) A felony.

(b) A misdemeanor.

(c) An unclassified offense for which the maximum penalty allowed by law is equal to or greater than the maximum penalty allowed for a Class C misdemeanor.

(d) Any other crime committed in the officer's presence.

(2) A peace officer may arrest a person without a warrant when the peace officer is notified by telegraph, telephone, radio or other mode of communication by another peace officer of any state that there exists a duly issued warrant for the arrest of a person within the other peace officer's jurisdiction.

(3) A peace officer shall arrest and take into custody a person without a warrant when the peace officer has probable cause to believe that:

(a) There exists an order issued pursuant to ORS 30.866, 107.095 (1)(c) or (d), 107.716, 107.718, 124.015, 124.020, 163.738 or 419B.845 **or section 3 or 4 of this 2013 Act** restraining the person;

(b) A true copy of the order and proof of service on the person has been filed as required in ORS 107.720, 124.030, 163.741 or 419B.845 **or section 6 of this 2013 Act**; and

(c) The person to be arrested has violated the terms of that order.

(4) A peace officer shall arrest and take into custody a person without a warrant if:

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(a) The person protected by a foreign restraining order as defined by ORS 24.190 presents a copy of the foreign restraining order to the officer and represents to the officer that the order supplied is the most recent order in effect between the parties and that the person restrained by the order has been personally served with a copy of the order or has actual notice of the order; and

(b) The peace officer has probable cause to believe that the person to be arrested has violated the terms of the foreign restraining order.

(5) A peace officer shall arrest and take into custody a person without a warrant if:

(a) The person protected by a foreign restraining order as defined by ORS 24.190 has filed a copy of the foreign restraining order with a court or has been identified by the officer as a party protected by a foreign restraining order entered in the Law Enforcement Data System or in the databases of the National Crime Information Center of the United States Department of Justice; and

(b) The peace officer has probable cause to believe that the person to be arrested has violated the terms of the foreign restraining order.

(6) A peace officer shall arrest and take into custody a person without a warrant if the peace officer has probable cause to believe:

(a) The person has been charged with an offense and is presently released as to that charge under ORS 135.230 to 135.290; and

(b) The person has failed to comply with a no contact condition of the release agreement.

SECTION 16. ORS 133.381 is amended to read:

133.381. (1) When a peace officer arrests a person pursuant to ORS 133.310 (3) or pursuant to a warrant issued under ORS 33.075 by a court or judicial officer for the arrest of a person charged with contempt for violating an order issued under ORS 107.095 (1)(c) or (d), 107.716, 107.718, 124.015 or 124.020 **or section 3 or 4 of this 2013 Act**, if the person is arrested in a county other than that in which the warrant or order was originally issued, the peace officer shall take the person before a magistrate as provided in ORS 133.450. If it becomes necessary to take the arrested person to the county in which the warrant or order was originally issued, the costs of such transportation shall be paid by that county.

(2) If a person arrested for the reasons described in subsection (1) of this section is subsequently found subject to the imposition of sanctions for contempt, the court, in addition to any other sanction it may impose, may order the person to repay a county all costs of transportation incurred by the county pursuant to subsection (1) of this section.

SECTION 17. ORS 659A.270 is amended to read:

659A.270. As used in ORS 659A.270 to 659A.285:

(1) "Covered employer" means an employer who employs six or more individuals in the State of Oregon for each working day during each of 20 or more calendar workweeks in the year in which an eligible employee takes leave to address domestic violence, harassment, sexual assault or stalking, or in the year immediately preceding the year in which an eligible employee takes leave to address domestic violence, harassment, sexual assault or stalking.

(2) "Eligible employee" means an employee who:

(a) Worked an average of more than 25 hours per week for a covered employer for at least 180 days immediately before the date the employee takes leave; and

(b) Is a victim of domestic violence, harassment, sexual assault or stalking or is the parent or guardian of a minor child or dependent who is a victim of domestic violence, harassment, sexual assault or stalking.

(3) "Protective order" means an order authorized by ORS 30.866, 107.095 (1)(c), 107.700 to 107.735, 124.005 to 124.040 or 163.730 to 163.750 **or sections 1 to 8 of this 2013 Act** or any other order that restrains an individual from contact with an eligible employee or the employee's minor child or dependent.

(4) "Victim of domestic violence" means:

(a) An individual who has been a victim of abuse, as defined in ORS 107.705; or

(b) Any other individual designated as a victim of domestic violence by rule adopted under ORS 659A.805.

(5) "Victim of harassment" means:

(a) An individual against whom harassment has been committed as described in ORS 166.065.

(b) Any other individual designated as a victim of harassment by rule adopted under ORS 659A.805.

(6) "Victim of sexual assault" means:

(a) An individual against whom a sexual offense has been committed as described in ORS 163.305 to 163.467 or 163.525; or

(b) Any other individual designated as a victim of sexual assault by rule adopted under ORS 659A.805.

(7) "Victim of stalking" means:

(a) An individual against whom stalking has been committed as described in ORS 163.732;

(b) An individual designated as a victim of stalking by rule adopted under ORS 659A.805; or

(c) An individual who has obtained a court's stalking protective order or a temporary court's stalking protective order under ORS 30.866.

(8) "Victim services provider" means a prosecutor-based victim assistance program or a nonprofit program offering safety planning, counseling, support or advocacy related to domestic violence, harassment, sexual assault or stalking.

SECTION 18. ORCP 79 E is amended to read:

E Scope of rule.

E(1) This rule does not apply to a temporary restraining order issued by authority of ORS 107.700 to 107.735 or 124.005 to 124.040 **or sections 1 to 8 of this 2013 Act**.

E(2) This rule does not apply to temporary restraining orders or preliminary injunctions granted

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pursuant to ORCP 83 except for the application of section D of this rule.

E(3) These rules do not modify any statute or rule of this state relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee.

SECTION 19. Notwithstanding any other provision of law, the General Fund appropriation made to the Judicial Department by section 1 (2), chapter 632, Oregon Laws 2013 (Enrolled House Bill 5016), for the biennium beginning July 1, 2013, as modified by legislative or Emergency Board action, is increased by $85,000 for the purpose of implementing the provisions of sections 1 to 8 of this 2013 Act.

SECTION 20. Sections 1 to 8 of this 2013 Act and the amendments to ORS 21.245, 36.185, 40.210, 107.835, 133.310, 133.381 and 659A.270 and ORCP 79E by sections 11 to 18 of this 2013 Act become operative on January 1, 2014.

SECTION 21. If Senate Bill 673 becomes law, section 13 of this 2013 Act (amending ORS 40.210) is repealed and ORS 40.210, as amended by section 5, chapter 720, Oregon Laws 2013 (Enrolled Senate Bill 673), is amended to read:

40.210. (1) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS 163.266 (1)(b) or (c), 163.355 to 163.427, 163.670 or 167.017, [*or*] in a prosecution for an attempt to commit one of those crimes **or in a proceeding conducted under sections 1 to 8 of this 2013 Act**, the following evidence is not admissible:

(a) Reputation or opinion evidence of the past sexual behavior of an alleged victim [*of the crime*] or a corroborating witness; or

(b) Reputation or opinion evidence presented for the purpose of showing that the manner of dress of an alleged victim [*of the crime*] incited the crime **or, in a proceeding under sections 1 to 8 of this 2013 Act, incited the sexual abuse,** or indicated consent to the sexual acts **that are** alleged [*in the charge*].

(2) Notwithstanding any other provision of law, in a prosecution for a crime or an attempt to commit a crime listed in subsection (1) of this section **or in a proceeding conducted under sections 1 to 8 of this 2013 Act**, evidence of [*a*] **an alleged** victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless the evidence other than reputation or opinion evidence:

(a) Is admitted in accordance with subsection (4) of this section; and

(b) Is evidence that:

(A) Relates to the motive or bias of the alleged victim;

(B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

(C) Is otherwise constitutionally required to be admitted.

(3) Notwithstanding any other provision of law, in a prosecution for a crime or an attempt to commit a crime listed in subsection (1) of this section **or in a proceeding conducted under sections 1 to 8 of this 2013 Act**, evidence, other than reputation or opinion evidence, of the manner of dress of the alleged victim or a corroborating witness, presented by a person accused of committing the crime **or, in a proceeding conducted under sections 1 to 8 of this 2013 Act, by the respondent**, is also not admissible, unless the evidence is:

(a) Admitted in accordance with subsection (4) of this section; and

(b) Is evidence that:

(A) Relates to the motive or bias of the alleged victim;

(B) Is necessary to rebut or explain scientific, medical or testimonial evidence offered by the state;

(C) Is necessary to establish the identity of the **alleged** victim; or

(D) Is otherwise constitutionally required to be admitted.

(4)(a) If the person accused of a crime or an attempt to commit a crime listed in subsection (1) of this section**, or the respondent in a proceeding conducted under sections 1 to 8 of this 2013 Act,** intends to offer evidence under subsection (2) or (3) of this section, the accused **or the respondent** shall make a written motion to offer the evidence not later than 15 days before the date on which the trial in which the evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which the evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties[,] and**, in a criminal proceeding,** on the alleged victim through the office of the prosecutor.

(b) The motion described in paragraph (a) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (2) or (3) of this section, the court shall order a hearing in camera to determine if the evidence is admissible. At the hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding ORS 40.030 (2), if the relevancy of the evidence that the accused **or the respondent** seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in camera or at a subsequent hearing in camera scheduled for the same purpose, shall accept evidence on the issue of whether the condition of fact is fulfilled and shall determine the issue.

(c) If the court determines on the basis of the hearing described in paragraph (b) of this subsection that the evidence the accused **or the respondent** seeks to offer is relevant and that the probative value of the evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to the extent an order made by the court specifies evidence that may be offered and areas with

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respect to which a witness may be examined or cross-examined.

(d) An order admitting evidence under this subsection **in a criminal prosecution** may be appealed by the [*government*] **state** before trial.

(5) For purposes of this section:

(a) "Alleged victim" includes the petitioner in a proceeding conducted under sections 1 to 8 of this 2013 Act.

[*(a)*] **(b)** "In camera" means out of the presence of the public and the jury[*; and*]**.**

[*(b)*] **(c)** "Past sexual behavior" means sexual behavior other than**:**

(A) The sexual behavior with respect to which the crime or attempt to commit the crime listed in subsection (1) of this section is alleged[*.*]**; or**

(B) In a proceeding conducted under sections 1 to 8 of this 2013 Act, the alleged sexual abuse.

(d) "Trial" includes a hearing conducted under sections 1 to 8 of this 2013 Act.

SECTION 22. If Senate Bill 673 becomes law, section 20 of this 2013 Act is amended to read:

Sec. 20. Sections 1 to 8 of this 2013 Act and the amendments to ORS 21.245, 36.185, 40.210, 107.835, 133.310, 133.381 and 659A.270 and ORCP 79E by sections 11**, 12, 14** to 18 **and 21** of this 2013 Act become operative on January 1, 2014.

SECTION 23. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

Approved by the Governor July 29, 2013
Filed in the office of Secretary of State July 30, 2013
Effective date July 29, 2013

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Council on Court Procedures
2013 Survey of Bench and Bar
Results

1. Do you agree that the Oregon Rules of Civil Procedure promote the just, speedy and inexpensive determination of civil court actions?

	Response Percent	Response Count
Agree Strongly	7.70%	21
Agree	40.90%	112
Agree Somewhat	38.30%	105
Disagree	6.90%	19
Disagree Strongly	2.60%	7
Don't Know	3.60%	10
answered question		274
skipped question		0

2. Please rate your familiarity with the composition and work of the Council on Court Procedures.

	Response Percent	Response Count
Very Familiar	12.40%	34
Somewhat Familiar	35.80%	98
Vaguely Familiar	32.50%	89
Unfamiliar	19.30%	53
answered question		274
skipped question		0

3. If you are very or somewhat familiar with the work of the CCP, how would you rate the quality of its work?

	Response Percent	Response Count
Excellent	26.80%	34
Good	50.40%	64
Fair	11.00%	14
Poor	0.00%	0
Extremely Poor	0.00%	0
Don't Know	11.80%	15
answered question		127
skipped question		147

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2013 Survey of Bench and Bar
Results

4. If you are very or somewhat familiar with the work of the CCP, how would you rate the CCP's responsiveness to the needs of litigants, lawyers, and judges?

	Response Percent	Response Count
Excellent	15.70%	20
Good	48.80%	62
Fair	14.20%	18
Poor	2.40%	3
Extremely Poor	0.80%	1
Don't Know	18.10%	23
answered question		127
skipped question		147

5. Have you visited the CCP website?

Yes	38.20%	81
No	61.80%	131
answered question		212
skipped question		62

6. If you have visited the CCP website, please rate its usefulness:

Excellent	11.10%	9
Good	46.90%	38
Fair	32.10%	26
Poor	2.50%	2
Extremely Poor	0.00%	0
Don't Know	7.40%	6
answered question		81
skipped question		193

7. Have you ever made a proposal to the CCP?

	Response Percent	Response Count
Yes	19.60%	41
No	80.40%	168
answered question		209
skipped question		65

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8. The legislature once had exclusive authority to enact and amend Oregon's civil procedure rules. That authority is now shared between the legislature and the CCP. Who do you think should have this authority?

Continue shared authority	47.40%	99
Favor CCP	43.10%	90
Favor Legislature	2.90%	6
Don't know	6.70%	14
answered question		209
skipped question		65

9. The following best describes my practice:

Defense lawyer	21.80%	55
Plaintiff's lawyer	19.80%	50
Probate law	2.00%	5
Family Law	18.30%	46
Trial judge	21.80%	55
Appellate judge	0.80%	2
Other	15.50%	39
answered question		252
skipped question		22

Other Practice Areas:

General litigation - both sides.	Intellectual Property Law
Not practicing, inactive	small town law
Business Litigation Lawyer	family law and estate planning
Divorce & family law, & criminal	Criminal Defense Lawyer who
Business litigation, both P and D	criminal defense doing post-
construction litigation	Legal Aid
General Practice	Criminal defense lawyer
Government attorney	Civil litigator --primarily
Both plaintiff and defense of civil	civil/environmental
Mediator	Non profit/public interest
general civil litigation	Business litigation
Commercial/Business Trial	Neutral
This is a stupid question - few of us	Non-practicing professional
domestic relations mediation	Collections
Litigator	commercial litigator (both
labor management side	general litigation
Municipal lawyer	government (non trial) lawyer
Primarily Bankruptcy Court practice, including plaintiff's	litigator
General Litigation Practice	Commercial Litigation and
Family, probate & federal court	

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2013 Survey of Bench and Bar
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10. If you have a specific suggestion for an amendment of an ORCP to improve its functionality, please let us know here:

1	Clarify whether the notice of default under ORCP 69B can be filed and served before the appearance period expires. Some lawyers serve it as a matter of course saying they will take a default if nothing is filed in the normal appearance time, which seems to kind of defeat the intent. Also, rules should provide bright line limits on discovery depending on value of case (e.g., no depositions in some cases) and otherwise provide for burden/benefit consideration relative to value of the case. Discovery is one of the main reasons they system is oppressively expensive and economically irrational for many cases.
2	I believe that ORCP 40 should be amended to make it more clear that a party can only engage in depositions upon written questions unless there is a stipulation or the court allows it. Most people do not seem to be clear about that issue.
3	Would suggest that the application of the rules of evidence and rules of civil procedure in family law cases be more in line with the rules applied in dependency cases.
4	More clarity needs to be done to e-service and allowing the attorneys to choose service via email. Adding fax confirmations to the cert of service before mailing to the court does not make sense with the practice as sometime fax confirmations do not come in till later. Certifying that you faxed to the correct fax number per the osb directory should be enough.
5	Perhaps this is being taken care of with the adoption of ecourt, but allow service by email to be automatic, no different than mailing or faxing and without first requiring agreement.
6	The discovery rules need to have teeth. In my divorce and family law cases, parties & judges routinely disregard with timelines and due dates to make the exchange of discovery a very slow process.
7	Mandatory disclosure of all relevant discovery to be used at trial (as is done in criminal cases) would dramatically enhance discovery and remove many discovery-related delays and expenses.
8	Allow expert discovery pre-trial.
9	Better rules for electronic discovery.
10	ORCP 44 needs to be corrected to avoid inappropriate reliance on "same body part" instead of discovery that relates to claims being made.
11	ORCP 54 E regarding offers of judgment needs to be simplified textually and clarified. Who knows how to make an offer of judgment "global" (all fees and costs and everything else), and, e.g., is prejudgment interest included?

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12	ORCP 59 H contains a needless trap and is a problem, in my opinion.
13	Certain Show Cause motions in the family law context should be considered "pleadings."
14	Allow interrogatories.
15	In the federal court civil litigation system you are assigned a judge from the very beginning who is there to work through the issues related to the case. For state family law cases this process makes a ton of sense. , Washington County has a similar system for family law cases which works well and is very helpful. Other state courts handle the attachment of a particular judge to a particular case in a variety of different ways. Some of these arrangements make more sense and work better than others. The CCP may wish to explore standardizing certain rules and procedures related to this.
16	We need more specific rules regarding electronic discovery, as with the recent amendments to the FRCP. Oregon seems vastly behind other states in the sophistication of its civil procedure rules and case law guidance concerning the methods and proper scope of electronic discovery.
17	All the discovery rules should be amended to more closely parallel the federal rules. Oregon's "trial by ambush" system leads to continual abuse, and very questionable practices by many practitioners. In my practice, I end up having to file motions to compel in about 70% of my cases, which is a colossal waste of time. However, practically speaking, there is no bar to admissibility of documents and other evidence without an order compelling production of the same (despite properly worded discovery requests, etc.). Also, interrogatories would greatly reduce the number of depositions, third party discovery, etc....which often are necessitated by obfuscatory and evasive discovery tactics. Also, it is ridiculous to have virtually no discovery of experts -- and it is ridiculous, even for experienced practitioners, to have to cross-examine experts without having pretrial discovery regarding those experts. In response to the concerns about increasing litigation cost due to expert depositions, etc., the Rules could limit the time (and number) of expert depositions (subject to judicial or arbitral permission to revise those limitations given unusual circumstances). Certainly, the number of attorney hours spent preparing vis-a-vis experts would significantly decrease if there was more discovery....since the preparation would be much more focused, narrow in scope, etc.
18	We need a complete plain-language overhaul like the Federal Rules got under Joe Kimball.
19	And the CCP's should host and publish a website that does for rules what OregonLaws.org does for the statutes -- provides properly formatted presentation so that human eyes can read them without having to fight the horrible formatting on top of the horrible, dense, convoluted language.
20	Need broader discovery allowed regarding pre- and post- accident medical records of a plaintiff
21	I think ORCP 7 could be amended to allow mail service to entities...and not just those whose reg. agents or offices are not within the county in which the action is pending. It seems like a trivial distinction. It saves our clients money and time to serve registered entities by mail.

22	Allowing service by email or other electronic means would be helpful. (I don't mean the initial service of the Summons, but service of documents after the case is pending.)
23	Name expert witnesses 60 days before trial and require a statement of opinion, resume and list of cases they have testified in during past 10 years.
24	The Discovery rules are very disorganized going from the general to the specific (what is discoverable) back to general (Motions & sanctions) and specific (admissions, production, depositions) Never has been logical to me.
25	Also Findings of Fact - every Judge seems to believe this rule doesn't apply to him or her? Really - can you mention that it applies in all courts (probate & family law too?)
26	expert discovery should be permitted in complex cases.
27	Make it mandatory for both lawyers to notify the court and the PJ if a trial court has not ruled within 30 days in every case.
28	Allow school records to be admitted to court as a hearsay exception. At least grades and attendance.
29	Encourage more judge run meditations.
30	Require courts to tell people that fee waivers applications are available.
31	Make it easier to do telephonic testimony, esp in family law cases.
32	Require that the Petitioner for a Family Abuse or Elder and Disabled Persons Restraining Order receive actual notice of any hearings, and that hearings not be set within 72 hours of the date and time of the hearing.

33	Almost every form of discovery pleading is not filed with the court -- but requests for admissions should be. The only way to know that, though, is to happen to know that you should go to subpart D of rule 9, which is nowhere near Rule 45, and check the rule numbers, and figure out that Rule 45 isn't in the list and that evidently RFAs ought to get filed. It would sure be nice if the rule itself specified that RFAs and their responses are to be filed. Technically, one can figure it out, if one knows where to look -- but it's one of those things that gives a real advantage to those of us who were lucky enough to work for a firm and to learn how things are done from other lawyers. I found the Rule 9 thing because I already knew the answer, and it was just a matter of hunting around in the case law until I found a case that cited the rule I needed. These days, a lot of people are having to teach themselves; the clearer our rules are, the better the overall level of practice in Oregon will be.
34	The pleading and motion requirements for alleging a right to attorney fees under ORCP 68 C(2) should either be contained in the pleading rules (e.g. in ORCP 13-16) or those rules should contain cross-references to ORCP 68 C(2). I have seen many instances where lawyers' pleadings and ORCP 21 motions fail to contain attorney fee allegations of the type required under ORCP 68 C(2), and I suspect that the organizational structure of the rules may be playing a role.
35	Please, for the love of God, convert everything to online case management
36	Make it clear whether a trial subpoena for medical records does or does not need to be served on the opposing attorney at least 14 days before it is served on the medical provider. In my opinion there is no need for such prior notice, as the trial court will decide if the records come into evidence.
37	ORS 107.095 should be amended to state that the court may not issue orders under that provision without notice and opportunity for a hearing. Some courts act on 107.095 on an ex parte basis and the opposing party is not given an opportunity for hearing until trial which is generally months later. This puts the court in the position of establishing a de facto status quo for custody purposes, which may not reflect the true situation of the parties at the time the ex parte was filed. It is simply wrong to issue what amounts to a custody order based on the affidavit of one party only with no opportunity for the other party to be heard. Even if the other party files for a custody hearing, it may be months before such a hearing takes place, during which time the first parent has de facto custody of the child.
38	Allow for expert discovery prior to trial.
39	Please give us a basic interrogatory provision mirroring the federal rules. Having practiced in a jurisdiction that uses interrogatories, I believe that they are a useful and inexpensive method of learning basic facts about a case that help the practitioner focus her or his discovery efforts. ORCP 43 is not sufficient to get all basic information about a case, when there are not informative documents and things to request, and depositions are often prohibitively expensive.
40	As a family practitioner I think it would be helpful for the ORCP to clarify when a particular rule applies to a post-judgment show-cause motion to modify the judgment. I treat a post-judgment show-cause modification motion like a completely new filing, and I believe that all of the ORCP's, and the due process afforded by them, applies to the modification action. For example, I believe that the non-moving party should be served with a summons with the clear notice provisions provided by ORCP 7, while some practitioners do not. A second example is that some courts will not permit a practitioner to obtain an order of default and submit a supplemental judgment by default on a post-judgment show-cause motion to modify--despite proof of service and notice to the opposing party--and other courts routinely permit defaults to be taken on such motions.
41	Eliminate requirement to produce documents to correspond to requests. This is enormously expensive.
42	I would like to see the ORCP contain a scheduling rule akin to FRCP 16. Timely resolution of civil cases in Circuit Court is now wholly dependent upon the level of pressure exerted by individual judges.

43	ORCP 9 should have long ago been amended to allow email service of pleadings without any special agreements, etc. I recently wrote an article on this topic in the Multnomah Lawyer magazine.
44	make them shorter and easier to understand
45	If the goal of the ORCP is truely to promote the speedy and inexpensive administration of justice, trial judges should be given greater authority to resolve cases early on via summary judgment. The changes to ORCP 47 made a few years ago supposedly with this goal in mind did nothing--at least as those changes were interpreted by our supreme court. The plaintiffs' tort bar will likely be opposed to any such changes, but if you really want to accomplish the goal, that is the easiest and least expensive way to do so. If you really want to streamline our civil litigation system, abolish the American rule on attorney fees and impose a "loser pays" rule as is common in most of the rest of the industrialized world. But I do not see that happening!
46	Better communication / invitation for changes to the ORCP, more communication about proposals to seek attorney and public feedback
47	I have tried before and found it a waste of time to work on amendments through the house of delegates of the State Bar, so I gave up. Changes needed include rules dealing with repetitive unsuccessful pro per litigants, we need rules and procedures to remove a wrongfully recorded lis pendens. We need amendments to deal with foreclosure judgments for which no deficiency is sought to avoid the "money judgment" issue. We need rules for complex and construction defect litigation permitting limited expert discovery. The rules on mediator qualification and appointment need to be fixed. Our county has only two trained attorney/mediators and noone else wants to waste the 36 hours needed for the required training.
48	sanctions for discovery abuses
49	judges simply do not enforce the use of requests for admission. parties are routinely allowed to no "fairly meet the substance" of requests, and no one is ever held accountable for failing to admit things that are routinely proved at trial.
50	ORCP 80-85 need review and revision
51	i would have the orcps specifically disallow the slr's from requiring an affidavit--declarations only should be used. i'd also have them specifically dissallow the slr's from requiring orders to show cause except post judgment when a case is closed. the 6th judicial district requires some affidavits in family law cases and provides for orders to show cause; both require more time and more money be spent. instead of the order to show cause, a simple motion should be the preferred route although there could be a required notice that if the motion is not responded to the moving party could obtain relief by default. but the order to show cause is meaningless and eats up time and money.
52	Judge Dan Harris: Add a provision in the discovery rules that permits a limited interrogatory practice. This would help streamline the framing of the issues and the discovery of relevant evidence. As with federal court, it would promote a more efficient resolution of the case if we have rules to produce evidence earlier in the process.
53	Judge Dan Harris: ORCP 69 needs to be amended to require a party applying for a default order to provide a copy of the motion for a default order to the party being defaulted, even if that party hasn't appeared or given notice of intent to appear. I see too many abuses of the right to apply ex parte for a default order. We would have fewer motions to set aside judgments if this change could be added.

54	Judge Dan Harris: Is there anyway to amend ORCP 64 to provide that a motion for reconsideration shall be addressed as a motion of a new trial. There may be a more appropriate version of this rule in another state the CCP could look at that more clearly addresses the common practice of asking the court to reconsider a ruling.
55	Reduce the number of votes required to pass rules.

11. Please add any comments you feel are appropriate about the CCP or its work:

1	I would encourage CCP to move forward on ideas present rather than deferring them to the legislature. It appears that family law (including probate) may be underrepresented on CCP,
2	The CCP works hard to make the rules work. However, it is too sensitive to avoiding substantive issues. It should try to improve the Civil Rules, regardless of whether it touches on substantive issues.
3	The Legislature is often ill-suited to make modifications or additions to the ORCP. By contrast, the CCP often has a good balance of litigating lawyers that can better understand the pros and cons of changes and additions to the ORCP.
4	It is pretty much invisible. I think efforts like this to reach out to attorneys and at least let them know that you exist are a really good idea.
5	The ORCP's are the "software" of the legal system, and, as such, all the innovations that have been made in software quality improvement in the last 40 years should be applied to the task of identifying bugs in the system and fixing them. There is no reason in the world that these rules should not be clear and correct and easily read without misinterpretation by a first-year law student, and to the greatest extent possible, the rules should be recast as procedures rather than rules. The way we, through the style of giving rules instead of giving procedures, make users divine for themselves (or by aping others) the procedures for themselves from statements of rules is a classic source of human error and wasted time and money. The composition of the CCP is likely a significant part of the problem; what is needed is a project to map the processes that people are to use and develop appropriate, plain-language procedures for successfully accomplishing those processes and then testing those procedures (and then doing appropriate quality monitoring by offering constant feedback tools so that we are continually identifying problem areas).
6	I am a relatively new attorney. I am not sure whether the ORCPs promote speedy and efficient outcomes compared to other jurisdictions' rules. I do know that in my short experience the system has proven to generally be very slow and very expensive for the clients I represent. I recognize that the all RCPs have been developed over many years and have led to the current system. I wonder if there is a better way to access the system for different types of litigants. My point is that I think the ORCPs are suited for people and companies with a lot of resources. There seems to be an entire class of individuals and businesses that are generally excluded from the legal process because of the time and expense involved in litigation. Expansion of any streamlined processes for handling legal disputes seems important and appropriate. I think many litigants would sacrifice a lot of requirements placed on lawyers to perform discovery in order for the chance to have their case heard expeditiously.
7	keep trying, the rules are basically OK, I just think the courts could use Lawyer time much more efficiently. Having to prep a case fully and then knowing it probably won't go is frustrating.

8	I think the effort to assure a fairrepresentation of the memebrs from the defense bar, the judges, the plaintiff's bar is very good.
9	thank you!
10	To my knowledge, very few if any on the CCP have a working knowledge of prejudgment procedural remedies; problem started when these rules were first transferred from ORS post Fuentes vs Shevin in 1972--the statutes which I helped put in place worked but the changes to CCP did not fully adopt all of them.
11	More time and resources should be devoted to soliciting feedback and proposals from the bench and bar.
12	I think that the CCP is more articulate and knowledgeable on the issues involving civil cases and the court processes. Moreover, by placing that authotrity with the CCP the rules overning litigation would be more litigant centered and responsive.
13	The CCP can currently complain that the requested amendments are too substantive, even though they are only related to civil procedure, and can pass the buck to the legislature, knowing that the matter is less likely to receive consideration because it didn't come from the CCP.
14	Please continue to be careful about (1) changing the rules of discovery - ie, don't, (2) making too many changes for the sake of "imporvement." Predictability is extremely important to the fairness and efficacy of the ORCP and change can undermine both.
15	You should know that I have been on the CCP for the past 8 years so my views are biased.
16	Want council members to please keep in mind that these are civil procedures for the entire state and that the Portland area should not drive all procedure
17	Thank you for your work!!

From April 14, 2012, Council Minutes Re: ORCP 7 Service by Mail

Prof. Peterson indicated that he had received an e-mail from Holly Rudolph, the Oregon e-court Forms Coordinator at the Oregon Judicial Department. She indicated that she is drafting instructions for the pro se forms provided by the state and had a question about whether the intent of Rule 7 D(2) is to require a process server to mail the documents or if parties may do so, and whether any proposal has been made to clarify or change this rule. Prof. Peterson noted that Ms. Rudolph had indicated that she was aware that Multnomah County Circuit Court Judge Maureen McKnight had raised this issue with the Council early in this biennium. He stated that he informed Ms. Rudolph that ORCP 7 D(2) is silent as to who can serve, but the qualifications for servers (found in ORCP 7 E) indicate that attorneys can serve by mail and that parties cannot. The ability of attorneys to serve by mail as provided in ORCP 7 D(2) is an exception, as attorneys cannot generally serve the summons. The Council's discussion was that personal jurisdiction is a significant thing and it is not wise to allow just anyone to perform service of the summons. Prof. Peterson explained to Ms. Rudolph that the exception for mail service by an attorney for a party is one that was carefully considered. Ms. Rudolph stated that her group had done a survey which found that the courts thought that it was fine for any party to serve by mail and no one had raised an issue. Prof. Peterson noted that it is not the court's duty to affirmatively question the qualification of the server, and someday some defendant will challenge personal jurisdiction based on the qualifications of the server when service is by mail. Ms. Rudolph stated that she will change the forms based on the discussion and indicate that only attorneys can perform service by mail, since that is what the rule seems to say. However, she wondered whether the Council might want to reconsider and allow parties, or anyone, to serve by mail. Prof. Peterson told Ms. Rudolph that the Council is close to the end of its biennial cycle and might look at the issue next biennium.

DOUGLASS H. SCHMOR
TIMOTHY E. BROPHY
DAVID B. PARADIS
TODD B. MADDOX
MARK R. WEAVER
THADDEUS G. PAUCK
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January 11, 2013

VIA EMAIL
Professor Mark Peterson
Executive Director
Civil Practice and Procedure Committee
(mpeterso@lclark.edu)

Dear Professor Peterson:

I would propose that ORCP 10C be amended to provide that when the notice or paper is served by mail, facsimile transmission, or email as allowed by these rules, three days shall be added to the prescribed period. This will bring the ORCP time periods in line with the US District Court time periods when pleadings are served by mail, facsimile, and/or email.

ORCP 9F provides that service by facsimile shall be equivalent to service by mail for purposes of Rule 10C.

9G should allow for the three days just like fax. The three days is needed because emails can be sent at the end of the day or even at night after the close of business. The three days is also of assistance when dealing with short time deadlines, like the five day deadline for a reply in a summary judgment proceeding. Attorneys would be encouraged to use email service if it came with the three days. Most practitioners will probably not agree to service by email without the three days.

In federal court, we file electronically and the court actually sends the service copies electronically to counsel of record. By local rule, the three days is provided. Oregon should adopt this system as it changes to electronic filing.

Thank you for your consideration of this matter.

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Very truly yours,

BROPHY, SCHMOR, BROPHY,
PARADIS, MADDOX & WEAVER, LLP

David B. Paradis

DBP:kmm
cc: Mark Weaver, Esq.

---------- 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.

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

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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.

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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.

PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

RULE 44

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

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

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

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examinations relating to injuries for which recovery is sought unless the claimant shows **an** inability to comply. **The phrase "relating to injuries for which recovery is sought" shall be construed consistently with Rule 36 B.**

D Report; effect of failure to comply.

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

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

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

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PHYSICAL AND MENTAL EXAMINATION OF PERSONS; REPORTS OF EXAMINATIONS

RULE 44

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

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

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

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

D Report; effect of failure to comply.

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

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

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

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From March 10, 2012 Council Minutes Re: ORCP 45 Requests for Admission

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

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

Ms. David stated that, if the Council is going to look at changing the time increments in the ORCP to multiples of seven next biennium, it might think about changing the time in this rule from 15 to 21 days to give a little more time. She noted that, practically speaking, as the court system becomes busier, there may be a few other rules where some additional time can be given to get things done by changing time increments. She stated that she is not aware of any other way to solve the problem at hand. Mr. Bachofner asked if there is something the Council can do to make the time run from when counsel gets involved, since the goal is not to trap people but, rather, to move cases toward resolution. He asked whether there is a downside to waiting until the plaintiff knows that a defendant is represented or knows that the defendant wants to represent himself or herself.

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

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

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supporting documentation demonstrating that:

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

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

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

H(2)(b) Within 14 days from the issuance of a notice requesting individually identifiable health information, the individual or 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)*]

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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:

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

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

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

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

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

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

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

_____

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

_____

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

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

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contrary.

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

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

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

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

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

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.

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From Brooks Cooper:

ORCP 9F allows fax service when a party is represented by an attorney AND the service may be made upon the attorney by means of a telephonic facsimile communication device if the attorney maintains such a device at the attorney's office and the device is operating at the time service is made.

9C says fax service is complete when "Attached to such affidavit, declaration, or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine, if facsimile communication is used. "

Each of these rules presume that there is a fax machine in sending and receiving counsel's offices. Many of us (I suspect a majority of active litigation practitioners) use some sort of e-fax service where we have no machine and no land line in our office but rather "send" faxes by uploading PDFS to a web service who faxes them and "receive" faxes by having that same service send us PDFs of faxes they receive on our behalf

It is admittedly technical, but on the state of the rules as written one could argue that fax service on an attorney who uses a service, OR by an attorney who uses a service is ineffective because the rules require us to have a physical machine.

I would propose that the Council consider a technical change to this rule to recognize the prevalent use of internet based fax solutions and to explicitly make them allowed as a method of serving and being served with pleadings.

From Kristen David

With the service of the Complaint, the Defendant received 1) an ORCP 43 Request for Production due within 45 days, and 2) an ORCP 55 Subpoena requiring production of medical records within 14 days.

ORCP 55G: Disobedience of subpoena, refusal to be sworn or answer as a witness

Disobedience to a subpoena or a refusal to be sworn or answer as a witness may be punished as contempt by a court before whom the action is pending or by the judge or justice issuing the subpoena. *Upon hearing or trial, if the witness is a party and disobeys a subpoena or refuses to be sworn or answer as a witness, such party's complaint, answer, or reply may be stricken.*

Proposal for Amendment to Oregon Rules of Civil Procedure

May 8, 2013
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I would suggest the Council give some consideration to amending ORCP 47E by deleting the word "retained" used twice in said subsection. A recent case in Lane County resulted in a summary judgment for Defendant because Plaintiff's counsel for the purpose of the summary judgment motion could not use the word "retained" in his affidavit due to the fact that he was not ongoing counsel for Plaintiff who was prosecuting the case on a pro se basis. It was suggested to the court that the word retained is generally construed to mean having paid the witness in some way and that was probably not what the Rule meant. The court held that the word "retained" was used in the rule twice, and she had to read it to mean what she felt it said. Thus a motion for summary judgment was granted even though there was at least one and probably two doctors who counsel could say of his own personal knowledge were available and willingness to testify there was breach of the standard of care and thus a genuine issue of fact. Because Plaintiff's counsel could not say he had "retained" the doctor or doctors a summary judgment was granted for Defendant.The purpose of this suggestion is not to attempt to interfere with that case, but rather to suggest to the Council that if there is a genuine issue of fact because there are doctors who counsel say are available and will testify, there should be no requirement they be "retained". It would seem more consistent with justice and the intent of the rule to allow counsel to say that he/she has consulted with the doctor and can indicate to the court the doctor is available and willing to testify with respect to the breach of the standard of care, not require her/him to "retain" the doctor.

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STATE OF OREGON
Legislative Counsel Committee

August 8, 2013

To: Mark A. Peterson, Executive Director
Shari C. Nilsson, Administrative Assistant
Council on Court Procedures

From: Marisa James, Deputy Legislative Counsel
Martha S. Anderson, Senior Editor

Subject: ORCP Pink Sheet Suggestions from Legislative Counsel

When we compile Oregon Revised Statutes in the fall of each odd-numbered year, we do a comprehensive review of all of our statutes and note technical problems that can or should be fixed in the future. This process is known internally as "pink sheeting." Because we compile the Legislative Assembly's amendments to ORCP sections along with the amendments promulgated by the Council on Court Procedures, we also pink sheet ORCP.

The accompanying document contains proposed changes to address technical problems we have pink sheeted during our biennial reviews. Some of our pink sheets related to ORCP are almost 20 years old.

We respectfully submit our office's proposed changes to the Council on Court Procedures for consideration during its 2013-2014 review cycle. Thank you for ensuring that our suggestions reach the Council for consideration.

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SECTION 1. ORCP 4 is amended to read:

A Personal jurisdiction. A court of this state having jurisdiction of the subject matter has jurisdiction over a party served in an action pursuant to Rule 7 under any of the following circumstances:

[*A*] **A(1)** Local presence or status. In any action, whether arising within or without this state, against a defendant who when the action is commenced:

[*A(1)*] **A(1)(a)** Is a natural person present within this state when served; or

[*A(2)*] **A(1)(b)** Is a natural person domiciled within this state; or

[*A(3)*] **A(1)(c)** Is a corporation created by or under the laws of this state; or

[*A(4)*] **A(1)(d)** Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise; or

[*A(5)*] **A(1)(e)** Has expressly consented to the exercise of personal jurisdiction over such defendant.

[*B*] **A(2)** Special jurisdiction statutes. In any action which may be brought under statutes or rules of this state that specifically confer grounds for personal jurisdiction over the defendant.

[*C*] **A(3)** Local act or omission. In any action claiming injury to person or property within or without this state arising out of an act or omission within this state by the defendant.

[*D*] **A(4)** Local injury; foreign act. In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

[*D(1)*] **A(4)(a)** Solicitation or service activities were carried on within this state by or on behalf of the defendant; or

[*D(2)*] **A(4)(b)** Products, materials, or things distributed, processed, serviced, or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

[*E*] **A(5)** Local services, goods, or contracts. In any action or proceeding which:

[*E(1)*] **A(5)(a)** Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to perform services within this state or to pay for services to be performed in this state by the plaintiff; or

[*E(2)*] **A(5)(b)** Arises out of services actually performed for the plaintiff by the defendant within this state or services actually performed for the defendant by the plaintiff within this state, if such performance within this state was authorized or ratified by the defendant; or

[*E(3)*] **A(5)(c)** Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this state or to send from this state goods, documents of title, or other things of value; or

[*E(4)*] **A(5)(d)** Relates to goods, documents of title, or other things of value sent from this state by the defendant to the plaintiff or to a third person on the plaintiff's order or direction; or

[*E(5)*] **A(5)(e)** Relates to goods, documents of title, or other things of value actually received in this state by the plaintiff from the defendant or by the defendant from the plaintiff, without regard to where delivery to carrier occurred.

[*F*] **A(6)** Local property. In any action which arises out of the ownership, use, or possession of real property situated in this state or the ownership, use, or possession of other tangible property, assets, or things of value which were within this state at the time of such ownership, use, or possession; including, but not limited to, actions to recover a deficiency judgment upon any mortgage, conditional sale contract, or other security agreement relating to such property, executed by the defendant or predecessor to whose obligation the defendant has succeeded.

[*G*] **A(7)** Director or officer of a domestic corporation. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out

of the activities of such corporation while the defendant held office as a director or officer.

[*H*] **A(8)** Taxes or assessments. In any action for the collection of taxes or assessments levied, assessed, or otherwise imposed by a taxing authority of this state.

[*I*] **A(9)** Insurance or insurers. In any action which arises out of a promise made anywhere to the plaintiff or some third party by the defendant to insure any person, property, or risk and in addition either:

[*I(1)*] **A(9)(a)** The person, property, or risk insured was located in this state at the time of the promise; or

[*I(2)*] **A(9)(b)** The person, property, or risk insured was located within this state when the event out of which the cause of action is claimed to arise occurred; or

[*I(3)*] **A(9)(c)** The event out of which the cause of action is claimed to arise occurred within this state, regardless of where the person, property, or risk insured was located.

[*J*] **A(10)** Securities. In any action arising under the Oregon Securities Law, including an action brought by the Director of the Department of Consumer and Business Services, against:

[*J(1)*] **A(10)(a)** An applicant for registration or registrant, and any person who offers or sells a security in this state, directly or indirectly, unless the security or the sale is exempt from ORS 59.055; or

[*J(2)*] **A(10)(b)** Any person, a resident or nonresident of this state, who has engaged in conduct prohibited or made actionable under the Oregon Securities Law.

[*K*] **A(11)** Certain marital and domestic relations actions.

[*K(1)*] **A(11)(a)** In any action to determine a question of status instituted under ORS chapter 106 or 107 when the plaintiff is a resident of or domiciled in this state.

[*K(2)*] **A(11)(b)** In any action to enforce personal obligations arising under ORS chapter 106 or 107, if the parties to a marriage have concurrently maintained the same or separate residences or domiciles within this state for a period of six months, notwithstanding departure from this state and acquisition of a residence or domicile in another state or country before filing of such action; but if an action to enforce personal obligations arising under ORS chapter 106 or 107 is not commenced within one year following the date upon which the party who left the state acquired a residence or domicile in another state or country, no jurisdiction is conferred by this [*subsection*] **paragraph** in any such action.

[*K(3)*] **A(11)(c)** In any proceeding to establish paternity under ORS chapter 109 or 110, or any action for declaration of paternity where the primary purpose of the action is to establish responsibility for child support, when the act of sexual intercourse which resulted in the birth of the child is alleged to have taken place in this state.

[*L*] **A(12)** Other actions. Notwithstanding a failure to satisfy the requirement of [*sections B through K of this rule*] **subsections (2) through (11) of this section**, in any action where prosecution of the action against a defendant in this state is not inconsistent with the Constitution of this state or the Constitution of the United States.

[*M*] **A(13)** Personal representative. In any action against a personal representative to enforce a claim against the deceased person represented where one or more of the grounds stated in [*sections A through L*] **subsections (1) through (12) of this section** would have furnished a basis for jurisdiction over the deceased had the deceased been living. It is immaterial whether the action is commenced during the lifetime of the deceased.

[*N*] **B** Joinder of claims in the same action. In any action brought in reliance upon jurisdictional grounds stated in [*sections B through L*] **subsections A(2) through (12)** of this rule, there cannot be joined in the same action any other claim or cause against the defendant unless grounds exist under this rule, or

other rule or statute, for personal jurisdiction over the defendant as to the claim or cause to be joined.

[*O*] **C "Defendant" defined.** For purposes of this rule and Rules 5 and 6, "defendant" includes any party subject to the jurisdiction of the court.

NOTE: Proposes restructuring of Rule 4 to correct read-in. Makes related conforming amendments to adjust internal references.

SECTION 2. ORCP 7 C is amended to read:

C Form.

[*C(1)*] **C(1)** Contents. The summons shall contain:

C(1)(a) Title. The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C(1)(b) Direction to defendant. A direction to the defendant requiring defendant to appear and defend within the time required by subsection (2) of this section and a notification to defendant that in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C(1)(c) Subscription; post office address. A subscription by the plaintiff or by an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

C(2) Time for response. If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D(6) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

C(3) Notice to party served.

C(3)(a) In general. All summonses, other than a summons referred to in paragraph (b) or (c) of this subsection, shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:
READ THESE PAPERS
CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

C(3)(b) Service for counterclaim. A summons to join a party to respond to a counterclaim pursuant to Rule 22 D (1) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:
READ THESE PAPERS
CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

C(3)(c) Service on persons liable for attorney fees. A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type which may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees will be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

NOTE: Suggests general section leadline for Rule 7 C. Compare to Rule 7 D (below), which has a general section leadline and subsection leadlines. Makes related amendment to correct formatting.

SECTION 3. ORCP 7 D is amended to read:

D Manner of service.

D(1) Notice required. Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of true copies of the summons and the complaint upon defendant or an agent of defendant authorized to receive process; substituted service by leaving true copies of the summons and the complaint at a person's dwelling house or usual place of abode; office service by leaving true copies of the summons and the complaint with a person who is apparently in charge of an office; service by mail; or, service by publication.

D(2) Service methods.

D(2)(a) Personal service. Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) Substituted service. Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served, to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon such mailing.

D(2)(c) Office service. If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at such office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed, by first class mail, true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or such other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon such mailing.

D(2)(d) Service by mail.

D(2)(d)(i) Generally. When required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested. For purposes of this section, "first class mail" does not include certified, registered, or express mail, return receipt requested, or any other form of mail which may delay or hinder actual delivery of mail to the addressee.

D(2)(d)(ii) Calculation of time. For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant, or other person authorized by appointment or law, signs a receipt for the mailing, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside the state, whichever first occurs.

D(3) Particular defendants. Service may be made upon specified defendants as follows:

D(3)(a) Individuals.

D(3)(a)(i) Generally. Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to such defendant or other person authorized by appointment or law to receive service of summons on behalf of such defendant, by substituted service, or by office service. Service may also be made upon an individual defendant to whom neither subparagraph (ii) nor (iii) of this paragraph applies by a mailing made in accordance with paragraph (2)(d) of this section provided the defendant signs a receipt for the certified, registered, or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

D(3)(a)(ii) Minors. Upon a minor under the age of 14 years, by service in the manner specified in subparagraph (i) of this paragraph upon such minor and, also, upon such minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor, or with whom such minor resides, or in whose service such minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 A(2).

D(3)(a)(iii) Incapacitated persons. Upon a person who is incapacitated or financially incapable, as defined by ORS 125.005, by service in the manner specified in subparagraph (i) of this paragraph upon such person and, also, upon the conservator of such person's estate or guardian, or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B(2).

D(3)(a)(iv) Tenant of a mail agent. Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646A.340 by delivering true copies of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff,

together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint.

Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this [*rule*] **section** to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

D(3)(b) Corporations including, but not limited to, professional corporations and cooperatives. Upon a domestic or foreign corporation:

D(3)(b)(i) Primary service method. By personal service or office service upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) Alternatives. If a registered agent, officer, or director cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

(A) by substituted service upon such registered agent, officer, or director;

(B) by personal service on any clerk or agent of the corporation who may be found in the county where the action is filed;

(C) by mailing in the manner specified in paragraph (2)(d) of this section true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the corporation, if any, as shown by the records on file in the office of the Secretary of State; or, if the corporation is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation, and in any case to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

(D) upon the Secretary of State in the manner provided in ORS 60.121 or 60.731.

D(3)(c) Limited liability companies. Upon a limited liability company:

D(3)(c)(i) Primary service method. By personal service or office service upon a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(c)(ii) Alternatives. If a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

(A) by substituted service upon such registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

(B) by personal service on any clerk or agent of the limited liability company who may be found in the county where the action is filed;

(C) by mailing in the manner specified in paragraph (2)(d) of this section true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the limited liability company, as shown by the records on file in the office of the Secretary of State or, if the limited liability company is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited liability company, and in any case to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

(D) upon the Secretary of State in the manner provided in ORS 63.121.

D(3)(d) Limited partnerships. Upon a domestic or foreign limited partnership:

D(3)(d)(i) Primary service method. By personal service or office service upon a registered agent or a general partner of a limited partnership; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(d)(ii) Alternatives. If a registered agent or a general partner of a limited partnership cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

(A) by substituted service upon such registered agent or general partner of a limited partnership;

(B) by personal service on any clerk or agent of the limited partnership who may be found in the county where the action is filed;

(C) by mailing in the manner specified in paragraph (2)(d) of this section true copies of the summons and the complaint to the office of the registered agent or to the last registered office of the limited partnership, as shown by the records on file in the office of the Secretary of State or, if the limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited partnership, and in any case to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

(D) upon the Secretary of State in the manner provided in ORS 70.040 or 70.045.

D(3)(e) General partnerships and limited liability partnerships. Upon any general partnership or limited liability partnership by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership or limited liability partnership.

D(3)(f) Other unincorporated association subject to suit under a common name. Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) State. Upon the state, by personal service upon the Attorney General or by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(h) Public bodies. Upon any county; incorporated city; school district; or other public corporation, commission, board, or agency by personal service or office service upon an officer, director, managing agent, or attorney thereof.

D(3)(i) Vessel owners and charterers. Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in such owner's or charterer's employment or any agent authorized by such owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D(4) Particular actions involving motor vehicles.

D(4)(a) Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law of this state if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection (3) of this section except service by mail pursuant to subparagraph (3)(a)(i) of this section and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph (2)(d) of this section addressed to that defendant at:

(A) any residence address provided by that defendant at the scene of the accident;

(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by **sub-subparagraphs** (A) and (B) **of this subparagraph** that reasonably might result in actual notice to that defendant.

Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by **sub-subparagraphs** (A), (B), and (C) [*above*] **of this subparagraph** was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by **sub-subparagraphs** (A), (B), and (C) [*above*] **of this subparagraph** is made. If the mailing required by **sub-subparagraph** (C) **of this subparagraph** is omitted because the plaintiff did not know of any address other than those specified in **sub-subparagraphs** (A) and (B) [*above*] **of this subparagraph**, the proof of service shall so certify.

D(4)(a)(ii) Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph (i) of this paragraph may be recovered as provided in Rule 68.

D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph (i) of this paragraph are as provided in Rule 69.

D(4)(b) Notification of change of address. Any person who; while operating a motor vehicle upon the roads, highways, streets, or premises open to the public as defined by law of this state; is involved in any accident, collision, or other event giving rise to liability shall forthwith notify the Department of Transportation of any change of [*such defendant's*] **the person's** address occurring within three years after such accident, collision, or event.

D(5) Service in foreign country. When service is to be effected upon a party in a foreign country, it is also sufficient if service of true copies of the summons

and the complaint is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

D(6) Court order for service; service by publication.

D(6)(a) Court order for service by other method. On motion upon a showing by affidavit or declaration that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods which under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of the defendant by first class mail and any of the following: certified, registered, or express mail, return receipt requested; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D(6)(b) Contents of published summons. In addition to the contents of a summons as described in section C of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) **of this rule** shall state: "The 'motion' or 'answer' (or 'reply') must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.

D(6)(c) Where published. An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication

shall be four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county where the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in the affidavit or declaration required by paragraph (a) of this subsection, and the court may order publication in a comparable manner at such location in addition to, or in lieu of, publication in the county where the action is commenced.

D(6)(d) Mailing summons and complaint. If the court orders service by publication and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff shall mail true copies of the summons and the complaint to the defendant at such address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know and cannot upon diligent inquiry ascertain the current address of any defendant, true copies of the summons and the complaint shall be mailed by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

D(6)(e) Unknown heirs or persons. If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in [*sections I and J of*] Rule 20 **I and J**, the action shall proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any such unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy, at the time of the commencement of the action, and served by publication, shall be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action was brought against such defendants by name.

D(6)(f) Defending before or after judgment. A defendant against whom publication is ordered or such defendant's representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action. A defendant against whom publication is ordered or such defendant's representatives may, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be affected thereby.

D(6)(g) Defendant who cannot be served. Within the meaning of this subsection, a defendant cannot be served with summons by any method authorized by subsection (3) of this section if: (i) service pursuant to subparagraph (4)(a)(i) of this section is not authorized, and the plaintiff attempted service of summons by all of the methods authorized by subsection (3) of this section and was unable to complete service, or (ii) if the plaintiff knew that service by such methods could not be accomplished.

NOTE: Proposes corrections to internal references near end of subparagraph D(3)(a)(iv) of this section and to internal references in subparagraph D(4)(a)(i) of this section and in paragraphs D(6)(b) and (e) of this section. Proposes change for clarification in paragraph D(4)(b) of this section.

SECTION 4. ORCP 7 E is amended to read:

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. However, service pursuant to subparagraph D(2)(d)(i) of this rule may be made by an attorney for any party. Compensation to a sheriff

or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, [*a reasonable*] **any** fee **agreed to between the server and the person requesting service** may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

NOTE: Proposes changes to conform ORCP 7 E to ORS 21.300 (2).

SECTION 5. ORCP 9 B is amended to read:

B Service; how made. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service shall be made upon the attorney unless otherwise ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to such attorney or party, by mailing it to such attorney's or party's last known address or, if the party is represented by an attorney, by telephonic facsimile communication device or [*e-mail*] **electronic mail** as provided in sections F or G of this rule. Delivery of a copy within this rule means: handing it to the person to be served; or leaving it at such person's office with such person's clerk or person apparently in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at such person's dwelling house or usual place of abode with some person over 14 years of age then residing therein. A party who has appeared without providing an appropriate address for service may be served by filing a copy of the pleading or other documents with the court. Service by mail is complete upon mailing. Service of any notice or other document to bring a party into contempt may only be upon such party personally.

NOTE: Proposes replacement of informal terminology with formal terminology used in ORS.

SECTION 6. ORCP 9 C is amended to read:

C Filing; proof of service. Except as provided by section D of this rule, all papers required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof of service of all papers required or permitted to be served may be by written acknowledgment of service, by affidavit or declaration of the person making service, or by certificate of an attorney. Such proof of service may be made upon the papers served or as a separate document attached to the papers. Where service is made by telephonic facsimile communication device or [*e-mail*] **electronic mail**, proof of service shall be made by affidavit or declaration of the person making service, or by certificate of an attorney or sheriff. Attached to such affidavit, declaration, or certificate shall be the printed confirmation of receipt of the message generated by the transmitting machine, if facsimile communication is used. If service is made by [*e-mail*] **electronic mail** under section G of this rule, the person making service must certify that he or she received confirmation that the message was received, either by return [*e-mail*] **electronic mail**, automatically generated message, telephonic facsimile, or orally.

NOTE: Proposes replacement of informal terminology with formal terminology used in ORS.

SECTION 7. ORCP 9 G is amended to read:

G Service by [*e-mail*] **electronic mail**. Service by [*e-mail*] **electronic mail** is prohibited unless attorneys agree in writing to [*e-mail*] **electronic mail** service. This agreement must provide the names and [*e-mail*] **electronic mail** addresses of all attorneys and the attorneys' designees, if any, to be served. Any attorney may withdraw his or her agreement at any time, upon proper notice via [*e-mail*] **electronic mail** and any one of the other methods authorized by this rule. Service is effective under this method when the sender has received confirmation that the attachment has been received by the designated recipient. Confirmation

of receipt does not include an automatically generated message that the recipient is out of the office or otherwise unavailable.

NOTE: Proposes replacement of informal terminology with formal terminology used in ORS.

SECTION 8. ORCP 46 B is amended to read:

B Failure to comply with order.

B(1) Sanctions by court in the county where the deponent is located. If a deponent fails to be sworn or to answer a question after being directed to do so by a circuit court judge in the county in which the deponent is located, the failure may be considered a contempt of court.

B(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent or a person designated under Rule 39 C(6) or **Rule** 40 A to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section A of this rule or Rule 44, the court in which the action is pending may make [*such*] orders in regard to the failure as are just, including among others, the following:

B(2)(a) **Establishment of facts.** An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order**.**[*;*]

B(2)(b) **Designated matters.** An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence**.**[*;*]

B(2)(c) **Strike, stay, or dismissal.** An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party**.**[*;*]

B(2)(d) **Contempt of court.** In lieu of **or in addition to** any of the [*foregoing orders or in addition thereto*] **orders listed in paragraph (a), (b), or (c) of this subsection**, an order treating as a contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

B(2)(e) **Inability to produce person.** [*Such*] Orders [*as are*] listed in paragraphs (a), (b), and (c) of this subsection, [*where*] **when** a party has failed to comply with an order under Rule 44 A requiring the party to produce another for examination, unless the party failing to comply shows inability to produce such person for examination.

B(3) Payment of expenses. In lieu of **or in addition to** any order listed in subsection (2) of this section**,** [*or in addition thereto,*] the court shall require the party failing to obey the order or the attorney advising such party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

NOTE: Proposes additional leadlines, corrections to syntax and internal references, and changes to punctuation in subsection B(2) of this section. We also suggest that the Council consider rewriting this section.

SECTION 9. ORCP 54 D is amended to read:

D Costs of previously dismissed action.

D(1) **Previous action dismissed by plaintiffs.** If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of any unpaid judgment for costs and disbursements against plaintiff in the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

D(2) **Previous claim dismissed with prejudice.** If a party who previously asserted a claim, counterclaim, cross-claim, or third party claim that was dis-

missed with prejudice subsequently files the same claim, counterclaim, cross-claim, or third party claim against the same party, the court shall enter a judgment dismissing the claim, counterclaim, cross-claim, or third party claim and may enter a judgment requiring the payment of reasonable attorney fees i curred by the party in obtaining the dismissal.

NOTE: Proposes leadlines for subsections D(1) and D(2) of this section. See use of subsection leadlines in sections A and B of this rule.

SECTION 10. ORCP 54 E is amended to read:

E Offer to allow judgment; effect of acceptance or rejection.

E(1) **Offer.** Except as provided in ORS 17.065 through 17.085, any party against whom a claim is asserted may, at any time up to 14 days prior to trial, serve upon any other party asserting the claim an offer to allow judgment to be entered against the party making the offer for the sum, or the property, or to the effect therein specified. The offer shall not be filed with the court clerk or provided to any assigned judge, except as set forth in subsections [*E(2) and E(3) below*] **(2) and (3) of this section**.

E(2) **Acceptance of offer.** If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon and file the same with the clerk before trial, and within seven days from the time the offer was served upon such party asserting the claim; and thereupon judgment shall be given accordingly as a stipulated judgment. If the offer does not state that it includes costs and disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.

E(3) **Failure to accept offer.** If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence at trial and may be filed with the court only after the case has been adjudicated on the merits and only if the party asserting the claim fails to obtain a judgment

more favorable than the offer to allow judgment. In such a case, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

NOTE: Suggests leadlines for subsections E(1), E(2), and E(3) of this section. See use of subsection leadlines in sections A and B of this rule. Proposes corrections to internal references in subsection E(1) of this section.

SECTION 11. ORCP 55 D is amended to read:

D Service; service on law enforcement agency; service by mail; proof of service.

D(1) Service. Except as provided in subsection (2) of this section, a subpoena may be served by the party or any other person 18 years of age or older. The service shall be made by delivering a copy to the witness personally and giving or offering to the witness at the same time the fees to which the witness is entitled for travel to and from the place designated and, whether or not personal attendance is required, one day's attendance fees. If the witness is under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the witness's parent, guardian or guardian ad litem. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. A subpoena for taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i), D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h). Copies of each subpoena commanding production of books, papers, documents or tangible things and inspection thereof before trial, not accompanied by command to appear at trial or hearing or at deposition, whether the subpoena is served personally or by mail, shall be served on each party at least

seven days before the subpoena is served on the person required to produce and permit inspection, unless the court orders a shorter period. In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period.

D(2) Service on law enforcement agency.

D(2)(a) **Designated individuals.** Every law enforcement agency shall designate individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

D(2)(b) **Time limitation.** If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency that employs the officer. A subpoena may be served by delivery to one of the individuals designated by the agency that employs the officer only if the subpoena is delivered at least 10 days before the date the officer's attendance is required, the officer is currently employed as a peace officer by the agency, and the officer is present within the state at the time of service.

D(2)(c) **Notice to officer.** When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to give actual notice to the officer whose attendance is sought of the date, time, and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall promptly notify the court and a postponement or continuance may be granted to allow the officer to be personally served.

D(2)(d) **"Law enforcement agency" defined.** As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, or a municipal police department.

[*D(3) Service by mail.*]

D(3) Service by mail. Under the following circumstances, service of a subpoena to a witness by mail shall be of the same legal force and effect as personal service otherwise authorized by this section:

D(3)(a) **Contact with willing witness.** The attorney certifies in connection with or upon the return of service that the attorney, or the attorney's agent, has had personal or telephone contact with the witness, and the witness indicated a willingness to appear at trial if subpoenaed;

D(3)(b) **Payment to witness of fees and mileage.** The attorney, or the attorney's agent, made arrangements for payment to the witness of fees and mileage satisfactory to the witness; and

D(3)(c) **Time limitations.** The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other designation of mail that provides a receipt for the mail signed by the recipient, and the attorney received a return receipt signed by the witness more than three days prior to trial.

D(4) Service by mail[*; exception*] **of subpoena not accompanied by command to appear**. Service of subpoena by mail may be used for a subpoena commanding production of books, papers, documents, or tangible things, not accompanied by a command to appear at trial or hearing or at deposition.

D(5) Proof of service. Proof of service of a subpoena is made in the same manner as proof of service of a summons except that the server need not certify that the server is not a party in the action, an attorney for a party in the action or an officer, director or employee of a party in the action.

NOTE: Proposes new leadlines and leadline amendments.

SECTION 12. ORCP 67 C is amended to read:

[*C Demand for judgment.*] **C Judgment for relief.** Every judgment shall grant the relief to which the party in whose favor it is rendered is entitled. A judgment for relief different in kind from or exceeding the amount prayed for in the pleadings may not be rendered unless reasonable notice and opportunity to be heard are given to any party against whom the judgment is to be entered.

NOTE: Proposes leadline amendment.

SECTION 13. ORCP 73 C is amended to read:

[*C Application by plaintiff.*] **C Filing statement; entry, enforcement of judgment.** Judgment by confession may be ordered by the court upon the filing of the statement required by section B of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

NOTE: Proposes leadline amendment.