MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 1, 2014, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
John R. Bachofner
Jay W. Beattie
Michael Brian
Hon. R. Curtis Conover
Kristen S. David
Hon. Roger J. DeHoog
Travis Eiva
Hon. Timothy C. Gerking*
Hon. Jerry B. Hodson
Robert M. Keating
Hon. Eve L. Miller
Shenoa L. Payne
Mark R. Weaver
Deanna L. Wray
Hon. Charles M. Zennaché*

Members Absent:

Hon. Sheryl Bachart
Hon. Paula M. Bechtold
Arwen Bird
Brian S. Campf
Jennifer L. Gates
Hon. Jack L. Landau
Maureen Leonard

Guests:

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 7 • ORCP 9 • ORCP 10 • ORCP 27 • ORCP 44 • ORCP 46 • ORCP 55 • ORCP 69	• ORCP 26 • ORCP 40 • ORCP 47 E • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery		

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:37 a.m.

II. Approval of January 4, 2014, Minutes (Ms. David)

Ms. David called for a motion to approve the January 4, 2014, minutes (Appendix A). A motion was made and seconded, and the minutes were approved unanimously.

III. Administrative Matters (Ms. David)

A. Council Meeting Schedule

Ms. David reminded the Council that the next meeting date had been changed to March 8, 2014, in order to accommodate the University of Oregon Law School's availability. She stated that it will be a good meeting for law students to attend, since several committees will have proposals to vote to put on the agenda for September. Ms. David asked that committee chairs get items to Ms. Nilsson in plenty of time so that she can create a meeting packet which can be distributed to law students ahead of time.

Council members discussed the possibility of holding meetings in either Bend or Newport, since it is an aspirational goal for the Council to hold meetings in various congressional districts throughout the biennium. Since it is getting late in the biennium and attendance at upcoming meetings is crucial, it was decided to keep all remaining meetings after March at the Oregon State Bar.

B. Contacting Legislators

Ms. David stated that Prof. Peterson will be drafting an update e-mail for Council members to edit and send to their assigned legislators. At this point in the biennium it is very important to keep the Legislature informed of our work. Judge Miller mentioned that Rep. Chris Garrett has been appointed to the Court of Appeals and that Ann Lininger will be taking his place in the House. Ms. Nilsson will check to see which Council member was contacting Rep. Garrett and give him or her Rep. Lininger's contact information.

C. Smart Phone/Tablet App for ORCP/ORCP in More Readable Format on Council Website (Ms. Nilsson)

Ms. Nilsson stated that Laura Orr, librarian at the Washington County Law Library, has been in touch and let her know that every Oregon State Bar member has access to Fastcase products through their Bar membership. Fastcase makes “e-books” for various products, and Ms. Orr has spoken to a Fastcase representative who may be willing to create an ORCP e-book as part of the Bar’s contract with Fastcase. The Fastcase representative will be speaking to Ms. Orr and to the Bar about the possibility. Ms.

Nilsson stated that the nice thing about an E-Book is that, unlike an app, it can be used on any smart phone or tablet with an e-book reader.

Mr. Bachofner stated that Fastcase does have an app for smart phones and tablets, but he cautioned that his experience has shown that there are some inaccuracies in Fastcase itself in terms of its search functions and content. He often finds more information when searching Westlaw than when searching Fastcase.

IV. Old Business (Ms. David)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David reported that the committee is still monitoring whether there are any problems with the recently amended Rule 43 and has not heard anything significant.

2. ORCP 1 and Legislative Counsel Suggestions (Ms. David)

Prof. Peterson reported that the committee has met and discussed several issues. The draft that was previously submitted to the Council is ready except for adding the citation to the foreign declarations statute when Legislative Counsel finalizes it. By the March Council meeting, the draft should be ready for members to vote on whether to add it to the September publication docket.

3. ORCP 7/9/10 Regarding Service (Mr. Bachofner)

Mr. Bachofner stated that the committee had met again on January 31 regarding changes that Prof. Peterson had drafted to ORCP 7, 9, and 10 and issued a summary of its meeting (Appendix B). He stated that the committee had concluded that mail service should only be done by attorneys and, regardless of the prevailing opinion on whether that is what ORCP 7E says currently, the committee is proposing that it be changed to permit only attorneys to serve by mail as provided in Rule 7 D(2)(d) (as opposed to follow-up service by mail).

Judge Miller mentioned that there is some dispute over whether forms that are provided to self-represented parties in administrative child support proceedings and other matters state that these parties are allowed to mail the summons. Prof. Peterson reminded the Council that Holly Rudolph from the Judicial Department has been following the Council's work and that she is involved in creating the forms that are given to self-represented parties. He observed that she will likely not appreciate the committee's change to Rule 7 but that she recognizes that, if the Council promulgates such a change, the Judicial Department will need to

change the forms. Mr. Bachofner noted that Ms. Rudolph was the original proponent that self-represented litigants as well as attorneys be allowed to serve by mail. He stated that the committee felt that, generally speaking, self-represented litigants should be held to the same rules as attorneys, but the majority felt that original service was important enough that initial mail service should be restricted to attorneys because there has been a vetting process to be licensed to practice law, as well as ethics rules and malpractice insurance in case something goes wrong.

Mr. Beattie noted that ORCP 7 D(2)(d)(i) lays out the general mechanics for service by mail when so permitted, while ORCP 7 E states who can make service by mail. He observed that the new language in the draft states that, pursuant to ORCP 7 D(2)(d)(i), service may only be made by an attorney for a party, and wondered how someone not represented by counsel could serve and why they do not get the benefit of the first sentence of ORCP 7 E. Mr. Bachofner replied that other service methods could be used, such as having a friend over 18 years of age serve. Mr. Beattie stated that this is confusing because the language says that service may only be made by an attorney for any party, but this is not true because it can be made by any party who falls into the description in sentence 1. Prof. Peterson explained that the way the rule previously read was that attorneys are generally not allowed to serve the summons but, if the only method of service is by mail in a form that requires a signature, attorneys are allowed to do that kind of service. The proposed amendment clarifies that *only* an attorney is allowed to do it. Mr. Beattie asked if only an attorney can serve an out of state corporation that is permissibly served via mail. Prof. Peterson replied that, if mail service is the only method of service, yes. However, he pointed out that mail service is not the preferred method of corporate service, and stated that a process server that performs office service or substituted service can do the follow-up mailing that completes the service. Mr. Beattie wondered why a competent process server could not do initial mail service and why it is limited to attorneys. Judge Miller stated that the committee's thinking was that not all process servers are certified and that, since there is not a licensing process such as for private investigators, there is no guarantee that a process server would have enough education, training, or qualifications to ensure that they would get it right.

Mr. Beattie observed that mail service requires a return receipt. Judge Zennaché stated that this is the case only for individuals. Prof. Peterson noted that for motor vehicle cases it does not but, otherwise, the summons and complaint must be sent by certified mail; therefore, a return receipt is required on all others . With corporations and business entities, the Council has now incorporated the Rule 7 D(2)(d) procedure, but the committee is still working on that. Judge Zennaché stated that he believes that the rule allows for service by mail under very limited circumstances where the rule specifically provides, and that service by mail is only effective if the individual signs a return receipt and it is deemed effective on the

return of the signed receipt. He thinks a change is unnecessary but, if anything, would suggest changing the rules that allow service on a corporation without a return receipt. Prof. Peterson stated that, if the only service that attaches personal jurisdiction is an envelope from a soon-to-be former spouse, a party might not open it but, if it is from a law firm, a party might be more inclined to open it. He pointed out that the Council has heard a number of anecdotal stories of self-represented litigants who did not know what to serve so they served the summons only or the complaint only. Prof. Peterson told the Council that the committee has also included language to state that, if service is not accomplished by the sheriff, the server needs to indicate the specific documents that were served. This is an additional check to make sure that all necessary documents are served but, if the person serving does not know what a summons or complaint is, we may not get very good service anyway. Prof. Peterson stated that the Council has also heard concerns from the family law bench that it adds cost to litigation if an attorney has to serve by mail but, if a party cannot afford an attorney, that party can have his or her brother serve the defendant personally or, if the party cannot find the defendant, that party can do substituted service and complete it by mail. The committee thought that, if the only way someone was going to be served was by mail, it would be good if the mail was from a law firm and it required a signature.

Judge Zennaché wondered, if it is acceptable for someone's brother to hand a defendant some pieces of paper that he does not understand and certify that he served the defendant, why it is more problematic for that same person to serve by mail. Prof. Peterson replied that part of the reason is that an envelope received in the mail may be thrown away, whereas a document handed personally to a defendant may be more likely to be read. Ms. David noted that many process servers now hand documents to a defendant in an envelope and obtain a signature. Judge Zennaché stated that the reality is that a lot of that service is being performed by family members or friends, because a lot of people do not have $36 to pay the sheriff. Mr. Beattie stated that there are a lot of out of state corporations and some people are not sophisticated enough to obtain service in the state of the business, whereas they could send the corporate defendant a letter and there is a high likelihood the corporation will get the mailing because it has an address that receives regular mail. Prof. Peterson observed that corporations are different from individuals in that there is a higher likelihood corporations will open their mail and process it. Ms. Payne asked whether the concern is more that we should not have self-represented parties serving individuals. She wondered whether, if that is the case, individual service should be limited but that self-represented litigants could be allowed to serve corporations. Mr. Bachofner stated that, with corporations that do not have a registered agent, officer, or director within the county in which the action is filed, there are many alternatives set forth under D(3)(b)(ii) that include mailing, but not as the primary method. He stated that the concern about changing corporate service to allow

mailing is that it would probably result in service by mail being the only way corporations would be served. Prof. Peterson recalled that, when the Council amended Rule 7 regarding corporate entities last biennium, it retained the primary service method and confirmed that method should be attempted first; mailing should not be done first.

Ms. Payne asked how much it generally costs to serve out of state with a process server. Ms. David estimated $60 to $70. Ms. Payne remarked that we are basically forcing self-represented parties to pay this to serve out-of-state corporations. Mr. Bachofner stated that self-represented parties can have anyone over 18 serve the Secretary of State's office in Oregon. Mr. Beattie pointed out that the Secretary of State is not authorized to accept service for a foreign corporation, and that there are many corporations that have virtually no presence in Oregon except that their products are sold here. In the case of a self-represented party injured by an out of state corporation with no presence in Oregon, that party will have to pay a process server, because the party cannot serve by mail. Ms. Payne stated that this raises some concerns – the party is self-represented in the first place because they cannot afford an attorney. Judge Miller stated that the committee came down on the side of the competing interest of making sure the defendant is served. If a plaintiff obtains a default judgment, it is hugely inconvenient and expensive, and the court has to resolve whether the person was served properly. She noted that, the longer Rule 7 gets, the more complicated it gets and the more ways there are for people to get it wrong.

Ms. David stated that we can all agree that ORCP 7 is long, voluminous, and confusing and her sense is that, over the next two to four years with the advent of e-court, a complete re-write with a flowchart style may be necessary to make the rule easier for people to decipher. Ms. Payne stated that perhaps the goal should be to make mail service better, rather than to create barriers to bringing an action. Mr. Bachofner stated that the committee has concerns about mail service in any case; although there is a presumption in the evidence code that mail will be received, mail often gets lost. He stated that he gets concerned when it comes to establishment of personal jurisdiction, because it should not be too easy, but he agrees we need to try to make it clear. He stated that the committee will look at additional changes to Rule 7, but the majority of the committee believes that, in balancing the abilities and interests of self-represented parties and attorneys, it was worth having a stronger limitation in service by mail. Mr. Beattie observed that this is a perfectly valid policy reason for limiting Rule 7 D(2)(d) service, but noted that a lot of important material, from jury summonses to violation notices, comes in the mail and, if you do not respond, you are subject to at least monetary penalties. Judge Conover pointed out that these items do not require a return receipt.

Ms. David related an incident where a process server served the security guard in her building as the "person in charge," and stated that the Council can only do so much to fix every wrong that can happen when someone reads Rule 7. Prof. Peterson stated that he also added the words "if any" with regard to the return receipt for the Council's consideration. He noted that, in motor vehicle cases or service by court order, the receipt may never be returned and wondered, in that case, whether personal jurisdiction is established. He noted that, if a piece of certified mail is not signed for, normally the sender would get the envelope back stamped “refused” or “unclaimed,” but sometimes nothing is returned. He stated that the committee will probably take the suggested “if any” out because, if the sender does not get a return of service and gets the envelope back in a motor vehicle case, the sender probably does not have personal jurisdiction yet. Mr. Bachofner asked that Council members review the committee's draft changes for any unintended consequences and report any to the committee.

With regard to ORCP 9, Mr. Bachofner stated that the committee wanted to address the concern that facsimiles could be received in ways other than telephonic faxes, such as e-mail services. He noted that the committee will make a further change by taking out the word "technology" and defining facsimile communication in another section. This will make the rule less wordy. Some other changes were to use the word "documents" in place of "papers" and, pursuant to a request from Legislative Counsel, to use the words "electronic mail" instead of "e-mail." The committee also made clear that, no matter what kind of technology is used, service is subject to the three additional days of ORCP 10 C. Mr. Bachofner stated that the committee made other small changes as well, and asked that the Council review the draft for unintended consequences.

With regard to ORCP 10, the committee added language to make clear that the 3 additional days apply whether service is by mail, electronic mail, or facsimile.

Judge DeHoog asked why the committee changed "e-mail" to "electronic mail." Prof. Peterson stated that Legislative Counsel prefers this more formal term and asked the Council to make the change. Judge DeHoog noted that, with the advent of e-court, the use of the terms "electronic service" and "electronic mail" could cause confusion. Prof. Peterson replied that he could contact Legislative Counsel to determine how strongly it feels about this change.

Prof. Peterson asked whether Oregon continues to have terms of court and, if not, whether section B of Rule 10 could be removed. Mr. Bachofner expressed concern that there could be unintended problems if section B were removed. Judge Armstrong stated that the term has no application in any sense now. Mr. Bachofner wondered whether there could be any statutory provisions about a term of court, perhaps if the legislature were to create a court with a limited term for a specific purpose. Prof. Peterson stated that it would probably not be a circuit

court, to which the ORCP apply. Judge Armstrong stated that he believes it is an archaic term. Mr. Bachofner suggested doing a search in the statutes to see if there is a reference to a term of court that remains.

Mr. Bachofner stated that the committee will also be taking into consideration issues raised by Lisa Norris-Lampe and Aaron Crowe.

4. ORCP 13 (Judge Zennaché)

Judge Zennaché stated that the committee did not meet due to scheduling conflicts, but would be meeting the following week. Ms. David noted that the committee is trying to include non-Council members in its work group, which makes scheduling more difficult.

5. ORCP 15 (Mr. Beattie)

Mr. Beattie stated that he will write a report summarizing the committee's decision to take no action.

6. ORCP 27 (Mr. Weaver)

Mr. Weaver reported that the committee had drafted an amendment to ORCP 27 (Appendix C) which it is submitting to the Council for discussion. The committee also plans to meet with last biennium's committee that drafted the amendment that was published, but not promulgated, including Brooks Cooper. Prof. Peterson noted that the committee provided a draft that included changes as well as a "clean copy" of how the potential new rule would read for ease of reading.

Prof. Peterson reminded the Council that there was concern about front loading the decision on notice, as well as concerns about the statute of limitations, and stated that the change would allow the plaintiff to file a claim and then have a period in which to determine whether notice was necessary to protect the person for whom the guardian ad litem (GAL) was sought and, if so, to whom the notice should be given. This would give the court enough opportunity to determine whether there is anything of concern or anything that indicates an abuse of the process. The change is intended to allow a plaintiff or petitioner to get their papers filed as well as allow the court the opportunity to look at it before too much mischief can occur. Prof. Peterson stated that another concern from last biennium was that the phrase “guardian ad litem” was being used elsewhere in the statutes, and it is clear that certain proceedings, such as termination of parental rights, are separate statutory procedures that the Council’s promulgations should not be impacting. He stated that attorney Erin Olson attended the Council’s promulgation meeting last biennium and expressed concern about potential conflict between last biennium's draft amendment and termination of parental

rights proceedings, as well as a potential conflict with the Elderly Persons and Persons with Disabilities Abuse Prevention Act (EDAPA) statute. Prof. Peterson stated that the committee will invite Ms. Olson to a work group to help determine what language to use in terms of excluding particular statutory procedures from this rule.

Mr. Bachofner asked for an example of where you would not want to give notice to the party for whom a guardian ad litem is being appointed. Prof. Peterson gave the example of a very young child who has been injured with a parent appointed as GAL. Mr. Bachofner asked why a six-year-old child should not be aware that there is litigation and that someone has been appointed who they can contact if they have a problem. He stated that perhaps the person for whom a GAL is being appointed should always get notice. Mr. Eiva noted that this language tracks the conservator rules, which say that notice should be given if a minor is age 14 or older. He remarked that the GAL process is meant to be looser than a conservatorship. Mr. Bachofner stated that, if a GAL is being appointed because a six-year-old may be being abused, we may want to err on the side of that child being notified so that the child knows that there is someone he or she can contact. Mr. Eiva replied that this situation is covered under the ORS 417A statutes, and that the GAL process is more for civil litigation.

Judge Zennaché stated that he does not see language anywhere that states that service on the GAL who is initially appointed and then is either replaced or discharged amounts to effective service. The committee might want to include that. He stated that he has concern with the language in section E(3) that states that a person can call the clerk's office to be able to register an objection, because he does not see how that will be practical for the courts. He stated that he also has an overall concern that the list of people who need to receive notice seems onerous. Prof. Peterson noted that the list includes people who arguably should be entitled to notice, and it is up to the practitioner to let the court know that some on the list may not apply. The court may then modify the list. Judge Zennaché pointed out that the language of the rule states that these people “shall” receive notice.

Prof. Peterson stated that telephonic notice is currently included in the conservatorship statutes, and the Council has received feedback from Multnomah and Lane counties that telephone calls are received and the court is able to handle them. Judge Zennaché noted that there are far fewer actions for conservatorships filed than actions to appoint a GAL. Prof. Peterson stated that the committee will talk about the judge’s comments about service and objections.

Mr. Eiva stated that he has some general concerns, although he likes the idea of a simpler process. He gave the example of a homeless child with no parents connected to him, and stated that obtaining all of the information about who to

serve would be quite a burden. He noted that section D states that the notice must be provided no later than seven days after the filing. He stated that Multnomah County has a good process in place now for appointment of GALs: you go in ex parte and obtain a GAL before the case is even filed, then take the pleading in the name of the GAL and file it. Mr. Eiva suggested that a better way to deal with notice would be to have a longer process, perhaps 30 days after the order appointing the GAL, to meet the notice requirements. He stated that the notice requirements should be removed if, within 30 days, the party files for a conservatorship. Mr. Eiva stated that use of the word “entirely” in section G almost suggests that the court may only waive notice "entirely" and not partially. He suggested changing this language to "entirely or partially." Prof. Peterson noted that the seven days was just a placeholder, and that this time period could be changed. Judge Miller asked whether seven day increments should be used. She stated that there will not be a default judgment issued unless 30 days has passed.

Prof. Peterson observed that EDAPA cases are temporary orders for emergency relief and the committee would seek input as to whether the proposed amendment would cause adverse consequences in those cases.

Prof. Peterson stated that the committee will create one more draft before including the work group in its next meeting.

7. ORCP 44 (Mr. Keating)

Mr. Keating referred the Council to the committee’s meeting summary from its January 30, 2014, meeting (Appendix D). He stated that, since the last Council meeting, Ms. Nilsson had provided him and Mr. Eiva with Council history on ORCP 44 E, which mirrors ORCP 44 C. He had a member of his office staff prepare a legislative history of ORCP 44 E for the committee. As the Council is aware, the issue at hand is the scope of the phrase "relating to injuries for which recovery is sought." There is a very distinct difference with clearly articulated interests between the plaintiffs’ bar and defense bar about what that phrase needs to mean in order to get a fair result in litigation. The defense wants to make sure it gets all information that allows it to adequately defend the case. For about 30 years, the plaintiffs’ bar has been articulating concerns about patient privacy. Mr. Keating stated that the Council's discussion regarding ORCP 44 E is very informative about this. ORCP 44 E was last addressed by the legislature in 1979. At that time it related to hospital records, and it provided that any party legally liable or against whom a claim is asserted for compensation or damages for injuries may examine and make copies of all records of any hospital in reference to and connected with any hospitalization or provision of medical treatment of the injured person within the scope of discovery under Rule 36 B, which is admissible or likely to lead to the discovery of admissible evidence. During the 1981-83 Council biennium, it was debated whether to amend ORCP 44 E to limit the scope from ORCP 36 B to what

basically amounts to a statement of the "same body part" rule. A motion to amend the rule was offered to limit access to hospital records to “those records arising out of the accident, injury, or occurrence for which the civil action had been brought.” That proposed language was recommended to the Council by the committee, and the Council declined to make the change.

In 2002, the Council further amended ORCP 44 E to its present form, which reads, "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 36 B." Mr. Keating stated that individually identifiable health information as defined under Rule 55 H is broader than hospital records. The current state of ORCP 44 E is that you can get any medical record of the person making a claim for damages pursuant to a subpoena within the limitations of ORCP 36 B. His proposal is to simply take the existing language in ORCP 44 E which references ORCP 36 B and put it in ORCP 44 C. He stated that this would mean that the plaintiff, upon request of a defendant, is obligated under ORCP 44 C to produce the same medical records as if requested by subpoena. He observed that there previously were notice provisions in 44 E but, when the Council adopted the Rule 55 H definition, that included the 14 day notice provisions from Rule 55 H.

Mr. Keating reported that the committee was not able to find consensus, as there is a strong division between the plaintiffs’ and the defense bar. He stated that there were concerns from Judge Hodson about whether the reference to ORCP 55 H really meant ORCP 44 E is no longer limited to hospital records. Mr. Keating stated that the committee concluded that it would come back to the full Council to see if the Council can provide any guidance. He stated that his practice of many years has shown him that ORCP 44 is important; while some lawyers advise just subpoenaing everybody since records are obtainable under ORCP 44 E, the person who knows the most about the plaintiff's medical situation is the plaintiff. The person who gets unlimited access to the medical records is the plaintiff. When an ORCP 44 C request comes in, a plaintiff's lawyer can go through the records and determine whether there is anything on which they wish to invoke privilege – at that time the lawyer can withhold documents and the defense lawyer can go before the court and ask for an in camera inspection. The plaintiff can then file a motion for a protective order. He thinks that the legitimate interests of both parties are met through this process.

Mr. Beattie wondered, after the decision in *State v. Vanornum,* SC S060715, December 27, 2013 [Reversing and Remanding 250 Or App 693, 282 P3d 908 (2012)], to what degree the Council can modify the ORCP 44 C waiver of privilege which was created by statute. Mr. Keating responded that the language of ORCP 44 C predated the Council. He stated that ORCP 44 E was promulgated by the Council in 1978, and the Legislature addressed it in 1979 and adopted an

amendment. Mr. Eiva noted that the Council has amended ORCP 44 C to include reports. Mr. Keating observed that, at the last Council meeting, members expressed concern about Justice Landau's concurring opinion possibly being a time bomb. He stated that the Council needs to decide whether it believes that, in light of the concurring opinion, the Council should change its procedures, or whether it believes the way the Council has been working since 1978 is appropriate. He noted that what we cannot do is to accept some segments of the rules where the Council has adjusted prior legislative work and then reject other segments. Mr. Eiva stated that he believes that, once it is addressed, the concurring opinion will not affect the Council's current procedure. He stated that, regardless of that opinion, the Council's authority does not allow us to make any modification on substantive rights – a privilege is a substantive right – or incursions into the rules of evidence – a privilege is a rule of evidence. He stated that he believes that the Council cannot modify the physician/patient privilege in any case because of the limitations in the Council's authorizing statute.

Mr. Keating stated that, even before there was a Council, the statutory precursor to ORCP 44 C stated that the filing of a complaint for personal injury does not waive the physician/patient privilege but, when a claim is made, records protected by the physician/patient privilege must be produced. In ORCP 44 E, records must be produced pursuant to subpoena that would have been protected by the privilege had the lawsuit never been filed. He stated that both rules do incorporate a limited waiver of a recognized privilege. Mr. Keating observed that there are two sections of the same rule, both statutorily based, one of which defines the scope of the waiver, and the other of which is silent. He feels that it is appropriate for the Council to address this incongruity and that it is not tampering with the privilege to send amendments to the Legislature suggesting that the two sections become congruent. Mr. Keating noted that, if there is an objection, it can be made clear and resolved. He explained that he is not talking about eroding the physician/patient privilege but, rather, giving direction as to its scope with the language in ORCP 44 C.

Mr. Brian asked whether we might consider making the language in section E congruent with section C, because doing the opposite would seem to be a modification of the physician/patient privilege. Mr. Eiva agreed and stated that the only reason we know something is not privileged in a medical record is to the extent that 44 C creates an incursion into the privilege or because the privilege was waived due to the deposition of a physician or other event during the litigation. He noted that ORCP 36 B(1) is completely informed by ORCP 44 C, to the extent that there is an incursion into the privilege, that means the records are not privileged under ORCP 36 B(1). Mr. Eiva stated that ORCP 36 B(1) carries with it not just "reasonably calculated to lead to admissible evidence" but, also, that you will not receive the material if it is privileged. Mr. Keating countered that there is a spectrum for which the Legislature has determined there is no privilege, and that

is therefore discoverable, and that is defined in section E but is not defined in section C. He asked why, in the practical real world, it is a good idea to tell the defense bar they need to serve subpoenas. Mr. Eiva stated that the language in section E was interpreted by the Supreme Court in *State ex rel. Calley v. Olsen* [532 P.2d 230 (1975)], and the court held that the rule does not mean prior medical information is allowed, but only the documents related to the accident for which a claim is made. He stated that the statutory precursor for ORCP 44 E was a statute that allowed medical records from a hospital that were related to the accident. He stated that the statutory precursor to ORCP 44 E used language similar to 44 C to describe a form of discovery in which a party could only get documents directly related to the claimed injury. He stated that the history is far more convoluted than what the language in the current 44 E might lead one to believe. Mr. Keating noted that the Legislature responded to the *Calley* case in 1979. Mr. Eiva stated that he did not believe the Legislature's change was substantive. Mr. Beattie stated that, as a practical matter, the change was substantive because, years ago, before the *Calley* case, attorneys would send out ORCP 55 subpoenas and receive all hospital records. He observed that it was not until the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and amendments the Council made to ORCP 55 that this practice was contracted.

Judge Zennaché stated that it sounds like both sides have firm positions, and it would be helpful to have the committee draft a report for Council members stating those positions so there is a good basis for informed discussion at the next meeting. Judge Miller asked Mr. Keating to provide the Council with the summary that his associate created. Mr. Keating noted that Mr. Eiva has also created a memorandum and asked him to circulate that to the Council as well. Ms. David asked that the committee meet again by telephone and consolidate the material into a concise report which includes the pros and cons of both sides. She noted that the Council may ultimately decide it is at an impasse.

Judge Zennaché stated that it would also be helpful to know exactly how the problem arose. Mr. Beattie replied that the genesis of the problem would seem to be different ORCP 44 C rulings in different counties. Judge Hodson noted that there is no such thing as a "body part rule" but, rather, there was a consensus statement from the Multnomah County motion panel a long time ago. He stated that no judge is bound by this consensus statement, and that he routinely grants the relief the defense is asking for, but he sometimes gives the relief plaintiffs are asking for. He believes that the rule gives him the latitude he needs and does not feel constrained by any implied "body part rule." He stated that, most of the time, the parties work it out themselves and the cases when they do not are not so frequent. He opined that this controversy began because certain people had issues with certain judges who routinely rule one way because of the way they interpret Rule 44, and he feels that it is more of an education issue for the bench. He understands, however, why the defense bar would want the change. Mr.

Bachofner stated the he does not want to create a rule that makes people file a motion to compel but, rather, wants a rule that plaintiffs can look at and know "this is the scope." He stated that everyone knows that motions to compel are discouraged, because judges tell attorneys that. They are also expensive for clients. Mr. Bachofner related a case where there were 70 providers and the opposing attorney would not provide records – he was looking at having to issue 70 subpoenas, which would be extremely expensive, or file a motion to compel in an outlying county, which would also be expensive. He stated that he would like to try to streamline the process so that there is a certain amount of predictability to it for both attorneys and judges. Mr. Bachofner noted that making a streamlined process is part of the Council's charge. Judge Miller observed that perhaps the process cannot be streamlined when you are dealing with people with body parts. Ms. David replied that it can, because the Council can help clarify the procedure to help assist the parties to reduce the needless expense and expenditure of time by getting them to a place where they can have that discussion.

Prof. Peterson asked that, as soon as anyone on the committee has any suggested language for a potential amendment, they send it to Ms. Nilsson. He observed that sometimes looking at the proposed language of an amendment helps to put things into better perspective. Ms. David asked that, if any Council members wish to submit suggestions or ideas to the committee, they do so in the next 10 days.

8. ORCP 45 (Ms. Wray)

Ms. Wray reported that the committee has met several times and feels like its charge has been completed. She referred the Council to the committee's report (Appendix E). The committee was dealing with several issues, including:

1) Whether ORCP 45 should state that the time for responding to or objecting to requests for admission starts to run after a party is represented by counsel or after the party has indicated that it has chosen to be self represented. Ms. Wray stated that the committee received feedback from the Oregon Trial Lawyers Association (OTLA) and the Professional Liability Fund, and concluded that the problem is not prevalent enough to consider a rule change.

2) What can be done about judges not enforcing requests for admission. The committee recommended no action be taken on this matter.

3) Whether ORCP 45 should specify that requests for admissions and their responses are to be filed with the court. The committee recommended no action be taken on this matter.

Mr. Bachofner stated that he can think of instances where requests for admissions

were either served with the complaint or immediately upon the attorney being available, when the defendant's attorney is not knowledgeable about the facts involved. Ms. Wray stated that the concern was not that it happens, but that attorneys are not finding out about the request for admissions in a timely manner from their clients. She stated that, for the few instances the committee heard about where the attorney did not have enough time to respond, the courts were more than willing to grant relief. Prof. Peterson noted that the committee was surprised by the OTLA responses that responding attorneys did not have any problem amending or clarifying responses. Mr. Keating stated that receiving immediate requests for admission is routine, and he can think of one lawyer who has a standard 57 requests for admission he files with every complaint. Mr. Bachofner observed that some attorneys play a game where they serve the summons and then immediately serve a request for admissions separately. Ms. Wray stated that the committee did not hear that the court was not granting relief if attorneys are caught in a situation where their client did not get them the request for admissions on time. Mr. Keating stated that, if service is made and the response is not filed within 30 days, or 45 days, the request is deemed admitted. He noted that to have a rule that says that a defense lawyer needs to rely on the plaintiff's lawyer saying "you can have more time," or the judge being understanding, is grossly unfair.

Ms. Wray asked what is unfair about the 45 days. Mr. Keating replied that, in the case of an early request for admissions, the defense attorney does not know anything about the case when it first comes in the door and is being asked, at some expense to his or her client, to deny something, thereby running the risk of attorney fees. Judge Miller asked whether it is a problem to contact the opposing side and ask for another 30 days. Ms. David replied that there are many practitioners who will not afford additional time. Ms. Wray asked if there is a procedure for filing a supplemental response later. Mr. Bachofner stated that a supplemental response may be used, but asked the purpose for serving a request for admissions that close to the commencement of a case. He wondered whether there is a reason for needing to know 30 or 45 days after the case is filed versus knowing later on. Prof. Peterson stated that one of the responses from OTLA indicated that there is an attorney who routinely sends a request for admission that the service is proper.

Ms. David stated that her sense is that what the committee was charged with is determining whether there is enough of a concern or direct problem in Oregon that we need to address a direct change to the rule. She recognizes that attorneys all have individualized issues they deal with, but judges have been accommodating about extending times and there are other fixes. She noted that the committee's position is that there is not enough of a problem to address at this time. Mr. Beattie asked whether anyone has ever had an award of attorney fees against them for failing to admit a fact, because that is the downside of just denying

everything. Ms. Wray stated that a judge once awarded $26,000 in fees for the plaintiff having to call a doctor, but that was the first time in her 16 years of practice she had heard of it. The defendant denied the fact because it was so early, and failed to revisit it before trial. Mr. Weaver stated that he received an award of attorney fees where the other side failed to stipulate to the foundation of medical records and he had to call a doctor to say, "Yes, these are the records." Ms. Payne stated that she does not understand the concern when an attorney has the ability to amend his or her responses a month before trial, before the point where fees would be awarded. Ms. David suggested that it is perhaps a bench and bar education issue, to get practitioners to tickle revisiting their admissions issues for 90 days before trial.

Mr. Beattie asked whether the relevant date for determining whether you have admitted is trial. Ms. Wray stated that the rule does not really address the amendment process. Judge Zennaché asked whether one can file an objection saying it is too early for me to respond because I just got the case. Mr. Bachofner stated that ORCP 45 says that this is not a basis for objection. Ms. Wray stated that she feels that the committee was not directed to evaluate this particular matter. Mr. Bachofner agreed that the discussion has moved on to other topics. He stated that, in considering whether to send the committee back for further contemplation, he was going to suggest a change to ORCP 45 F because it only allows 30 requests for admission. He suggested amending that section to not include requests to admit the authenticity of documents or records so that the need to call a records custodian as a witness would be obviated. This would streamline the trial process and benefit plaintiffs as well as defendants. Judge Miller asked whether this would be something along the lines of the rule of evidence about authentication. Mr. Bachofner stated that requests for admissions would attach the documents, and include language such as “admit that the documents attached as Exhibit A are what they purport to be,” so that a records custodian would not be required to appear. He stated that the number of documents would be unlimited so that the documents can be exchanged beforehand as a way to avoid having the records custodian at trial. Ms. David asked whether Mr. Bachofner would be willing to join the committee and asked whether the committee could come up with streamlined language in the next 30 days and run it by OTLA and the Oregon Association of Defense Counsel, since it is already February. Mr. Bachofner stated that he does not need to join committee; he can just give the suggested language to Ms. Wray. Ms. Wray agreed that the committee will meet again and discuss the new issues raised in today's meeting.

9. ORCP 46 and 55 (Judge Gerking)

Judge Gerking reported that the committee met again but that Mr. Eiva was not able to join the meeting. The committee talked about two issues regarding ORCP 55. The first was ORCP 55 H(2)(b), which the Council added last biennium. The committee suggested adding a new section, 55 H(2)(b)(i) (Appendix F). He stated that this seemed satisfactory because it provided a mechanism for resolving objections to the subpoena and the adequacy of the objections without involving ORCP 46 and the sanctions within that rule. He noted that he had subsequently talked to Mr. Eiva regarding the proposed language and he agreed. Prof. Peterson stated that the committee might consider reformatting the amendment by eliminating the subparagraph and just adding the new language to the previous paragraph. He stated that Council staff can make this change and resubmit the amendment for the Council's consideration next month.

Judge Gerking stated that the committee also considered ORCP 55 H(2) as to whether the rule, as currently drafted, requires advance notice to the party whose records are being sought as provided by ORCP 55 H(2)(a) prior to serving the subpoena on the health care provider for a request that copies of records be sent to trial under ORCP 55 H(2)(c) or whether advance notice would be required prior to serving a subpoena on a records custodian pursuant to ORCP 55 H(4). He stated that the committee was able to reach consensus on the need for clarifying amendments to make this confusing rule clear for the practitioner. Judge Gerking stated that the committee did not have enough background information during its meeting, but that Ms. Nilsson provided this information afterward and the committee will look at this history. He stated that Mr. Eiva will also research HIPAA to determine whether it would require notice to a party whose records are being sought in every instance no matter where the subpoena directs the records to be produced. He anticipates that the committee will have a more thorough discussion before the March meeting and will have more to report. He noted that the HIPAA research might help resolve it, and he is also considering the possibility of suggesting that the Council include some kind of pre-notice other than the notice required by ORCP H(2)(a).

Prof. Peterson stated that he believes that the committee's Rule 46 charge has been resolved, but he suggested that the committee look at last biennium's staff changes as well as Legislative Counsel's pink sheet suggestions to see whether any formatting and clarifying changes should be made. Ms. Nilsson will send those materials to Judge Gerking.

10. ORCP 54 A (Ms. Leonard)

Ms. Leonard was ill and unable to attend the meeting. Ms. Nilsson noted that the committee was still waiting for the Oregon State Bar to arrange for a survey of the bench and bar.

11. ORCP 54 E (Ms. Gates)

Prof. Peterson stated that we are waiting for the committee to write a short report on its findings.

12. ORCP 68 (Mr. Weaver)

Mr. Weaver stated that the committee is still waiting for results from its survey of the bench and should have a report available by the next Council meeting.

13. ORCP 69 (Mr. Campf)

Ms. David reported that the committee had met and is still in a conundrum about whether motions to show cause are or should be pleadings. She stated that Prof. Peterson had provided the committee with some draft language and the committee is working with the rule 13 committee to see if they can reach consensus. She stated that the committee's other issue is whether Rule 69 A's 10 day period is concurrent or consecutive with the 30 days to appear and defend afforded by Rule 7 C(2). She stated that the committee has had interesting conversations about different interpretations of the rule, and the strict reading of rule is not as clear as the committee first believed. Ms. David reported that the committee is working to clarify that.

14. Early Assignment of Cases/Scheduling (Judge Gerking)

Judge Gerking referred the Council to the committee's report (Appendix G). He stated that the issue is already covered by Uniform Trial Court Rule 7.020. He stated that no further action is necessary.

15. ORCP 79-85, Various Consumer Law Issues (Prof. Peterson)

Prof. Peterson stated that the committee has not met; he has been busy working on other committees' matters and he needs to get non-Council work group members involved as well. He will schedule a meeting as soon as possible.

16. Council's Authority to Amend ORCP Enacted by the Legislature (Prof. Peterson)

Prof. Peterson stated that the committee had a good, wide-ranging discussion, and that he will write a report and send it to committee members to see whether they have a consensus on what approach we would like to take. He noted that, as Justice Landau said, asking the Legislature to make each of our rules legislation is not without consequence but it is one of the options on the table. He stated that there is also an argument to be made that the Legislature set up the Council system to create the rules and the Legislature meant what it said, and they are good rules and it is a good system, and the concurrence is not consequential. He stated that Mr. Shields had talked to him just before the meeting and suggested engaging Susan Grabe of the Bar, but he stated that the committee is not quite ready to have that meeting yet.

V. New Business (Ms. David)

No new business was raised.

VI. Adjournment

Ms. David adjourned the meeting at 12:10 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 4, 2014, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Sheryl Bachart
John R. Bachofner
Arwen Bird
Michael Brian
Brian S. Campf
Hon. R. Curtis Conover
Kristen S. David
Hon. Roger J. DeHoog
Travis Eiva
Jennifer L. Gates
Hon. Timothy C. Gerking
Robert M. Keating
Hon. Jack L. Landau
Maureen Leonard
Shenoa L. Payne
Deanna L. Wray*
Hon. Charles M. Zennaché*

Members Absent:

Hon. Rex Armstrong
Jay W. Beattie
Hon. Paula M. Bechtold
Hon. Jerry B. Hodson
Hon. Eve L. Miller
Mark R. Weaver

Guests:

Mike 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 E • ORCP 13 • ORCP 27 • ORCP 44 • ORCP 54 E • ORCP 55 H • ORCP 47 E • ORCP 68	• ORCP 26 • ORCP 40 • ORCP 47 E • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery		

Council on Court Procedures
February 1, 2014, Meeting
Appendix A-1

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:33 a.m.

II. Approval of December 7, 2013, Minutes (Ms. David)

Ms. David asked whether there were any changes or corrections to the December 7, 2013, minutes (Appendix A). Ms. Payne noted a typographical error on page 11 (© instead of (c)) that needed to be changed. A motion was made to approve the minutes with this change, the motion was seconded, and the motion was passed by voice vote.

III. Administrative Matters (Ms. David)

A. Scheduling Non-Portland Area Meetings

A brief discussion was held regarding the feasability of scheduling meetings outside of the Portland area for the remainder of the biennium. It was decided that the goal will be to hold the March meeting in Eugene at the University of Oregon Law School and invite law students to attend. Mr. Bachofner will check with the Oregon Coast Aquarium in Newport to see whether a meeting room might be available in either April or May. Prof. Peterson will check with Lewis and Clark Law School regarding holding a meeting there in April if that meeting does not end up being scheduled in Newport. Ms. Nilsson will send an e-mail polling members about whether they would be able to attend a Bend meeting in either May or June. Depending on that result, Judge DeHoog will check on availability of either his jury room or another appropriate venue.

IV. Old Business (Ms. David)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David reported that the committee is still monitoring the situation and has not received feedback on any particular problems yet.

2. ORCP 1 and Legislative Counsel Suggestions (Ms. David)

Prof. Peterson stated that the Legislature had adopted a different declaration statement(Appendix B) suggested by the Oregon Law Commission for declarations signed outside of the United States, but that the required statement had not been included in Rule 1 E. The committee decided to include the alternative declaration statement in Rule 1 E to make it easy for practitioners to find said language. He stated that the only remaining question is the statutory cite which is left blank in the current draft amendment. He will need to check with Legislative Counsel to

see whether the reference has yet been codified, but he questioned whether the citation needs to be there at all. Prof. Peterson observed that, while the citation is somewhat helpful to practitioners, it may be superfluous since the declaration language will now be found in the rule. Ms. David observed that ORCP 7 includes an ORS reference, and that it can be helpful for practitioners. She stated that the only concern is if Legislative Counsel is still deciding where to put it in the statutes. Judge Gerking agreed that it could be useful, as it is not often an attorney has occasion to obtain a declaration outside of the United States. Prof. Peterson stated that the committee will discuss this issue once again before presenting a final version of the amendment to the Council.

Judge Zennaché wondered about the genesis of the specific language "being pursuant to laws of Oregon" on line 19. Prof. Peterson stated that this is a direct quote from the legislative enactment, adopted from the model language of the Uniform Laws Commission. Mr. Bachofner asked about language on lines 8 and 9 stating that a declaration may be made without notice to adverse parties; obviously a lawyer does not have to give notice before obtaining a declaration, but the declaration must be served on all other parties if it is filed. Prof. Peterson noted that the rule was reorganized to make a definitional section read correctly, but that this language has been in the rule since before his time on the Council, and that it was unchanged by the committee. He did not recall why it was there previously, and asked whether the committee should look into whether that language should be modified or deleted. Mr. Eiva asked whether the concern was that a party could file a declaration without notifying the other party. He stated that, according to Rule 9, the only time a party needs to let the other parties know about a declaration is when a motion is filed; that requires service on the other party. Prof. Peterson agreed that the filing of the motion triggers the duty to serve. Ms. David expressed concern that, if the Council deleted the entire sentence without clarifying that the reason was because it was redundant, parties might think notice needs to be given when a declaration is obtained. She stated that leaving the sentence in might help clarify things for a brand new lawyer, and that the committee will look at the issue one more time, as well as at other changes suggested by Legislative Counsel on rules that have not been assigned to other committees.

3. ORCP 7/9/10 Regarding Service (Mr. Bachofner)

Mr. Bachofner referred the Council to an e-mail (Appendix C) from Aaron Crowe of Nationwide Process Servers and stated that the committee will be looking at the issues raised therein. He stated that the committee was unable to meet due to committee members' illnesses, but that it will meet again and report back to the Council.

4. ORCP 13 (Judge Zennaché)

Judge Zennaché stated that the committee has met and discussed which ORCP, if any, should be applicable to motions and orders to show cause for modifications in family law practice. He noted that the discussion did not get very far, as the committee got bogged down on whether some of the rules relating to pleadings and counterclaims should apply, but that another meeting is scheduled. The committee did not discuss the issue presented to the Rule 69 committee regarding whether the Rule 69 default procedures should apply to motions and orders to show cause. Judge Zennaché stated that the Rule 69 committee should discuss this issue with the Rule 13 committee and compare thoughts at some point.

Prof. Peterson stated that he believes that all rules that apply to pleadings apply to family law procedures, because they are pleadings, but that the real issue is whether certain domestic relations motions should be defined as pleadings so as to make clear that the rest of the ORCP applying to pleadings also apply to those motions. Judge Zennaché clarified that the issue is modifications -- not original pleadings but, rather, motions and orders to show cause. He agreed with Prof. Peterson that the original petition and response are in fact pleadings but, beyond that, most of what happens in family law practice does not fall within the definition of pleadings. Judge Gerking observed that, logically, a post-judgment proceeding for modification ought to be considered a pleading. Judge Zennaché stated that the originating document is a motion and order to show cause pursuant to statute and Chapter 8 of the Uniform Trial Court Rules (UTCR). He noted that the Council could amend the rules generally to include motions and orders to show cause as pleadings but that there was some resistance to that at the committee level. Ms. David pointed out that ORCP 13 defines pleadings and ORCP 14 defines motions and, when those lines start to become blurred, there is some concern; on the other hand, the re-initiating document should somehow formally re-open and bring the case back to fruition such that it is very clear what has to happen thereafter. She stated that the committee is fortunate to have family law practitioners participating to help make informed choices.

5. ORCP 15 (Mr. Beattie)

Mr. Beattie was not present. Prof. Peterson reminded the Council that it is awaiting a short report summarizing the committee's decision not to take action.

6. ORCP 27 (Mr. Weaver)

Prof. Peterson stated that he had circulated a draft amendment to committee members a few days prior, and that the committee will meet again to discuss it. He reminded the Council that there have been numerous reports of the abuse of the guardian ad litem (GAL) procedure, and that the Council published, but did not

promulgate, an amendment to ORCP 27 in the last biennium, partly because of the concern that a plaintiff's rights might be affected if a last-minute filing that is up against the statute of limitations were to be prevented due to a judge's refusal to appoint a GAL without notice being given. Prof. Peterson stated that the committee had come up with the idea of delaying the notice decision, perhaps seven days after the filing of the case. Unless the notice requirement is waived by a judge, notices would be required to be sent to the plaintiff and others pursuant to the rule, or as modified by the court. Mr. Bachofner remarked that it would be similar to an injunction process where a preliminary injunction can be entered immediately, but a hearing is held within a short period of time to see whether the injunction was warranted. Prof. Peterson stated that this would give the court discretion as to whether notice should be sent.

Another issue of concern last biennium was whether to specifically exclude the termination of parental rights statutes from the amendment because appointment of a GAL is a radically different procedure in those cases. Prof. Peterson stated that there was also a discussion last biennium regarding the Elderly Persons and Persons with Disabilities Abuse Prevention Act, which is supposed to be a summary procedure, and whether parties and practitioners who use that Act would be able to live with the proposed amendment to ORCP 27. He stated that they may well be able to live with the changes the committee is considering this biennium, but that there will certainly be more discussion as to how to exempt any statutes that may be in conflict.

7. ORCP 44 (Mr. Keating)

Mr. Keating stated that the committee has a meeting scheduled toward the end of January. He noted that the Council has been talking about the scope issue for the last several years, and that Judge Hodson had suggested trying to determine the original intent of the rule's use of the term, "relating to injuries for which recovery is sought." Mr. Keating stated that Mr. Eiva had done some research, and that his own office had done a survey of other states with regard to the waiver of the physician/patient privilege. All of this research has been distributed to the committee. It appears that Oregon is the only state, among those that recognize the physician/patient privilege, that does not waive the physician/patient privilege by the initiation of the litigation. Each of those states that waives the privilege limits the "waiver by filing" to matters relevant to the claim being made. Mr. Keating stated that the next step is to survey those states to see how they are interpreting language similar to Oregon's, so that the committee may have some context and then examine whether it is something the Council needs to address. Mr. Keating observed that ORCP 44 was taken from a statute, and that the latest version of the rule was also enacted with direct action by the legislature, so there may be issues about the role of the Council with regard to this rule, in light of the issues presented in the New Business portion of the agenda.

8. ORCP 45 (Ms. Wray)

Ms. Wray stated that the committee has gathered responses from the Oregon Trial Lawyers Association listserv and talked to the Professional Liability Fund about whether this issue has been seen frequently. She stated that the committee is waiting for responses from the Oregon Association of Defense Council listserv, and should have a report for the Council by the February meeting.

9. ORCP 46 and 55 (Judge Gerking)

Judge Gerking stated that the committee will meet later in January. Mr. Bachofner related a recent experience where opposing counsel had objected to subpoenas of insurance company files seeking medical records, as well as information about prior accidents, because Mr. Bachofner had followed the ORCP 55 H process. Mr. Bachofner stated that the trial was set in a county where he probably could not have obtained a hearing before the trial, so he looked at how much advance notice he had to give if he were to seek only accident-related information, but specifically exclude medical information which was subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA), since insurance companies are not subject to HIPAA. He found that it was seven days' notice, and sent out a subpoena seeking information that seemed reasonably calculated to get information about prior accidents. He stated the impact of this type of situation is another thing for the committee to consider.

10. ORCP 47 E (Ms. David)

Ms. David referred the Council to the committee's memorandum (Appendix D) suggesting that no amendments be made regarding ORCP 47 E.

With regard to the word "retained" being used twice, Ms. David pointed out that an attorney knows the difference between representations such as whether evidence is admissible, whether an expert is qualified, and whether an expert has been retained and is ready to go to trial, even if the expert has not yet been paid. The language specifically uses the term "retained" in such a way that the committee felt that, if the term were removed, the meaning would change. She stated that the committee looked at the legislative history -- at all revisions of ORCP 47 E in the past, as well as comments by former Council members and why the language was included -- and felt comfortable that the language was there for a reason and that there is no reason to delete it now.

With regard to some of the committee's other issues, the committee felt that judges already have the latitude that they need in determining whether to grant summary judgment; that page limits tend to create more work than they are worth because every case is different; and that, with the advent of e-court, time

increments will likely eventually be changed to seven-day increments, and this will probably be done all at once so the bench and bar can be educated.

Mr. Brian observed that e-court is currently available in Jackson County and that it seems to be working fine. Judge DeHoog stated that the general impression seems to be that, once the staff has gotten past the initial learning curve, both the bar and bench seem to like it and think that it is efficient. Ms. David stated that the Judicial Task Force has been looking at the possibility of going to increments of seven, but it has not reached that decision yet. She observed that, in the meantime, practitioners are quite adept at calculating days and knowing how weekends and judicial holidays impact time calculations.

11. ORCP 54 A (Ms. Leonard)

Ms. Leonard stated that the committee did not have another meeting, but that it is waiting for the Oregon State Bar to send out its survey to bench and bar. Mr. Shields stated that the survey is in process, but that progress was slowed down because of the holidays.

12. ORCP 54 E (Ms. Gates)

Ms. Gates stated that the committee had met and had discussions, including regarding legislative history that Ms. Nilsson had researched. She stated that the committee is working on a memorandum with a recommendation, and that the recommendation will likely be to take no action. Prof. Peterson reminded Mr. Bachofner that he had previously mentioned bringing attorney fees available in small tort and small contract claims within the rule. Mr. Bachofner observed that the Council had decided last biennium that this seemed to be a substantive change that the Legislature would have to make. He noted, however, that the intent of rule is to encourage settlement and, if there is an offer and the opposing party does not beat it, cutting off attorney fees would give more teeth to settlement offers in an ORS 20.080 case or an ORS 20.082 case. Mr. Bachofner stated that the committee certainly can look at the possibility.

13. ORCP 68 (Mr. Weaver)

Prof. Peterson stated that judges Zennaché and Conover are putting together a listserv survey for judges. He noted that there are two issues still under discussion. The first issue relates to whether a party in a multi-party case that is dismissed in an early limited judgment can then obtain a limited judgment for attorney fees, or whether the party must wait until the entire case is concluded. Prof. Peterson stated that the survey will ask whether this occurs frequently, how is it handled, and whether it will make a lot more work to allow a limited judgment for attorney fees when, in the judge's discretion, such a limited judgment is

appropriate.

The second issue relates to post-judgment attorney fees during or following efforts to collect the judgment, and making explicit that such attorney fees may be sought pursuant to the rule and clarifying the timelines. He stated that the committee seemed to agree that such fees should be allowed within some period of time of filing the full satisfaction, and there should be some kind of limitation so that an attorney is not asking for fees every two weeks or three months. Prof. Peterson stated that, based on the judges' responses, the committee might also want to conduct a bar poll.

14. ORCP 69 (Mr. Campf)

Mr. Campf stated that the committee had communicated by e-mail, will meet in January, and should have a recommendation by the next Council meeting, including a response to the latest e-mail from Holly Rudolph of the Judicial Department (Appendix E).

15. Early Assignment of Cases/Scheduling (Judge Gerking)

Judge Gerking stated that the committee will submit a final report in January.

16. ORCP 79-85, Various Consumer Law Issues (Prof. Peterson)

Prof. Peterson stated that he had reached out to various bar sections and needs to follow up with the Consumer Law Section, the Debtor Creditor Section, and the Real Estate and Land Use Section. He will do so and the committee will meet and report in February.

V. New Business (Ms. David)

A. Rules or Statutes: the Council's Authority to Amend the ORCP Enacted by the Legislature: Concurrence in *State v. Vanornum,* SC S060715, December 27, 2013 (Reversing and Remanding 250 Or App 693, 282 P3d 908 (2012))

Prof. Peterson stated that the above-entitled Supreme Court case and Justice Landau's concurrence opinion (Appendix F) raise interesting and important issues. He noted that, to his knowledge, this issue has not been raised in the past, probably because the Council has worked so successfully. Prof. Peterson opined that the Legislature's decision in vesting the authority for drafting and amending the ORCP with the Council was a good one. Prior to the creation of the ORCP, the rules of court were scattered throughout the statutes and were difficult to piece together. The Council, with its composition of practitioners and judges with specialized knowledge, has higher level civil procedure discussions than could be had in a legislature composed primarily of non-lawyers. Judges

provide both trial court experience and appellate experience, which gives a unique perspective for better rules of procedure. Prof. Peterson stated that the role of the Council is to make law improvements, and to ignore the political forces that have been and would be a part of the legislative process.

Prof. Peterson observed that one fix for half of the problem would be for the Legislature to formally enact the Council's amendments each biennium. He stated that, if the Legislature were asked to formally and affirmatively sign off on the ORCP, one would hope it would simply trust that the Council knows what it is doing. However, any time that we put the rules of civil procedure back in the political forum, the process can become political again.

Prof. Peterson stated that, when he first started teaching civil pleading and practice, he thought Oregon was unique in how it creates rules of civil procedure; however, he found a law review article which included a survey of the 50 states which shows that Oregon is not unique at all -- many states have created some type of hybrid council or commission to create rules of civil procedure. Some states' rules are judicially created, and some are legislatively created, but Oregon made the determination that the rules are in the legislative purview. Frederic Merrill's law review article [*The Oregon Rules of Civil Procedure – History and Background, Basic Application, and The "Merger" of Law and Equity*, 65 Or. L. Rev. 527 (1986)] stated that Oregon had thought through the addition of judges. Oregon's process is not unique; the Legislature determined that the rules are within the legislative province, delegated those rulemaking functions to the Council, and defined the Council's makeup. The Legislature did this for a purpose, as well as legislatively determining that, when the Council amends a rule, pursuant to ORS 1.750 the rule is published in Oregon's statutes. Prof. Peterson stated that another solution to the dilemma might be a constitutional amendment.

Judge Zennaché stated that the concurrence seemed to be focused more on improper delegation than on separation of powers. Justice Landau stated that his concurring opinion did, indeed, focus primarily on improper delegation, but it also said that, to the extent that the Legislature could delegate authority, it would be anomalous that it could delegate that authority to a body that included judges because that adds a layer of concern regarding separation of powers. Mr. Bachofner noted that a threshold question is whether any action needs to be taken on this issue this year, and he stated that it is his belief that action needs to be taken quickly. Prof. Peterson stated that construing what the Council does as a delegation to create administrative rules creates its own problems, not including the participation of the judges. Although the Council is not an amorphous, undefined group making the rules – it is a clearly defined body making the rules – there is not a lot of direction being provided as to how to do so, which is problematic in its own way. He stated that there is a problem where the Council replaced a statute with a rule at the beginning, the Legislature has then changed that rule, and the Council has changed it yet again. Justice Landau stated that it is his understanding that the Legislature, in the initial legislation creating the Council and authorizing it, enacted a bill that repealed all of

the old civil procedure statutes; then, into that vacuum, came the ORCP.

Justice Landau noted that his is just a concurring opinion, but that footnote 4 of the majority opinion does indicate a concern with the issue. It seems to him that there are practical consequences – for example, if the Legislature steps in and adopts a rule and then the Council purports to repeal that rule, how does that work when the Legislature did not do anything in response to the Council's promulgation? It goes back to first principles of the Legislature's role and its constitutional authority, and he still has not determined how a body other than the Legislature can repeal legislation. Justice Landau stated that a secondary question is what happens when the Council does not repeal, but amends a rule. This question can become even messier, because one sentence can be adopted by the Legislature, the next sentence adopted by the Council, and so on. He noted that some states are authorized by their constitutions to amend by reference, but that Oregon requires that the complete text of the section being amended be published. When the Legislature puts the full text of a rule into a bill and adds a sentence, does it make into a statute the whole section, or just the sentence? There is some authority in old Supreme Court cases that says it does not create a new statute out of the extra language, but it does create extra wrinkles.

Judge Zennaché suggested the possibility of proposing a bill where the Legislature adopts the ORCP as they exist now and, in addition, the Council could ask the Legislature to modify the procedure set forth in ORS 1.735 to require official approval of the amendments each biennium. Mr. Bachofner agreed, and added that the Council needs to clarify the impact of the Legislature making minor changes to the ORCP so that it is enacting the entire rule at that time. If the Legislature in the future amends and adds a sentence, but includes all of the existing language in the rule, it needs to clarify whether it amends the rule as a whole. Ms. Payne asked whether Prof. Peterson's concerns are valid, that asking the Legislature to affirmatively approve the Council's amendments may make the Council obsolete; that, once the rules come before the Legislature, they are going to be re-debated in a political process and the Council's vetting and thoughtful working of amendments to the rules may not be valued. She suggested that the Council talk with the Legislature and ask how we can prevent that from happening. Prof. Peterson stated that the Council is required to send its promulgations to the Legislature, and that is currently accomplished with a very detailed transmittal letter sent to the leadership, the majority and minority chairs of the House and Senate judiciary committees, and to Legislative Counsel, so the Legislature is clearly on notice as to all Council promulgations.

Justice Landau asked, notwithstanding that procedure, how it is that the Legislature's decision to do nothing and not pass a bill to send to the Governor for signature transforms this body's rules into statutes. Ms. Leonard observed that what the Council is doing is rulemaking and not statute making. If the Legislature wanted to involve itself, it would pass a statute and supercede the Council's rules. Justice Landau stated that he believes that the Council is engaged in the process of promulgating rules, like an administrative agency. The problem is that, in the past, the Council has gone beyond that and done what

rulemaking agencies cannot do, and that is to amend statutes. Mr. Shields stated that, if that is the characterization, the Council would have to look at every rule it considers amending and see whether it is a rule that the Legislature has created, in which case it would be off the table. Prof. Peterson noted that, for those rules where a promulgation will affect a statute, a careful note is made in the transmittal letter. He stated that the Council has had good luck with asking the Legislature to repeal or amend statutes to conform with our rules. Ms. Payne stated that we would have to propose a bill to the Legislature in that case.

Justice Landau stated that it seems to him that, if the Council does nothing about these issues, it runs the risk that there will be a ORCP 18 B issue or an ORCP 55 I issue where an attorney or party claims that a prior iteration of a rule still exists because the Council did not have the authority to repeal it. Mr. Bachofner stated that he has concerns about whether the Legislature does it, but he thinks that the better process is to have the Legislature approve the rules as they are now so that they are statutes.

Justice Landau observed that he does not think there is a separation of powers issue with judges being on the Council, unless we take the position that the Council is creating statutes. If the Council is just drafting rules and amendments to rules and asking the Legislature to approve them, it should be fine. Mr. Bachofner stated that the Oregon Law Commission publishes recommendations for changes to the statutes and that the Legislature typically adopts them. Prof. Peterson stated that such a procedure would remove one of the benefits that the Council provides -- keeping the rules out of the political thicket. Judge Zennaché stated that this could be minimized if a friendly legislator made a proposal whereby enacting the Council's promulgations would be an all or nothing process for the Legislature and that the language in any particular rule would not be not taken up. Mr. Shields stated that there is no way to lock the Legislature into that without constitutional issues. Judge Zennaché observed that any legislator could have challenged a particular rule with the process we have now, and that this could have become political, but that it has not been. He does not see any way around having the Legislature approve the rules.

Mr. Eiva stated that the Council has not really looked at the way it has amended or repealed statutes, and that making a blind policy decision may not be the right way to go. While it is true that an enterprising lawyer could potentially undo a particular rule before the court, Mr. Eiva questioned whether that would be that much of a disaster. Judge Zennaché stated that there is a concern that the rules are not adopted appropriately to make them law, and we want them to be law; here is a process by which they can be made into law by legislative approval. He stated that one level is the conflict between statutes or rules, and the other level is whether the Council should just be making rules or whether they should be statutes. Judge Zennaché suggested that past legislative history indicates that the ORCP should be statutes, but the only way they can be is if the Legislature adopts them. Prof. Peterson stated that he does not know that the Council can tell the Legislature to vote yes or no on a package, because any procedure allows the

Legislature to pick and choose once the Council turns its promulgations over to the Legislature for regular legislative enactment. As a simple solution, in each transmittal letter, the Council could request, if the Legislature has previously amended a rule that the Council is now amending, that the Legislature affirmatively vote on it.

Mr. Bachofner suggested setting up a meeting with the House and Senate leadership asking for input, letting them know which direction the Council is leaning, and expressing our concern that it might become a political battle. Mr. Shields observed that the 2014 session is a short session that starts in 25 days, with a deadline for the process in two weeks, so it is probably not feasible to take action until the 2015 session. Judge Zennaché stated that placeholders might be able to be used if a legislator is willing to work with the Council. Mr. Eiva asked whether we can agree that, to the extent that a person cannot identify that a rule is contrary to a statute or repealed a statute, these rules still have the force of a rule? Justice Landau replied in the affirmative.

Mr. Brian asked, if the end result of these conversations is that the ORCP are just rules, then what has been gained? Mr. Bachofner stated that the problem will be where the Legislature has tweaked a rule, which creates uncertainty as to the impact of many of the rules that the Council has created or amended in the past, which creates a huge risk for litigants on both sides of the table. Justice Landau stated that it creates the following problems: 1) the Council acting to change a legislatively adopted rule calls into question the validity of that change; and 2) in a conflict between something in the ORCP not adopted by the Legislature and a statute, the statute always wins. Mr. Shields stated that, even if there is no consensus on the best process going forward, we might be able to get the Legislature to ratify the existing rules as statutes in the short 2014 session. Justice Landau remarked that it has to be recognized that doing so changes the Council's function.

Prof. Peterson stated that he liked Mr. Bachofner's suggestion of arranging a meeting with legislative leadership and talking to them about the Council's thoughts and seeking the Legislature's suggestions. Justice Landau suggested talking to the Office of Legislative Counsel as well, since past legislative counsel have expressed concern over the dichotomy between rules and statutes and the Council's function. Judge Zennaché stated that he had already informally raised the issue with Senator Floyd Prozanski, the Chair of the Senate Judiciary Committee, who expressed a willingness to talk with the Council. Mr. Brian asked whether the goal of a meeting is to have the Legislature pass a law stating that the ORCP are now statutes. Mr. Bachofner stated that the purpose of the meeting is to find out whether the Legislature has ideas on what to do, or opposition to any of the Council's proposals. Ms. Leonard suggested that we be more organized before the meeting and come up with a formal position. Justice Landau suggested forming a committee, and Ms. David suggested that the committee provide two or three options for the Legislature.

A committee was formed consisting of the following members:

Arwen Bird
John Bachofner
Travis Eiva
Shenoa Payne
Mark Peterson
Judge Zennaché
Judge Conover
Brian Campf
Bob Keating
Maureen Leonard
Judge Bachart
Judge Gerking
Kristen David

Bar liaisons will be Matt Shields and Susan Grabe. Mr. Fuller, a guest from OlsonDaines, asked to be included in any work groups.

Ms. Nilsson will help facilitate setting up a telephone conference for the group as soon as possible.

VI. Adjournment

Ms. David adjourned the meeting at 11:23 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

ORCP 7/9/10 Committee
January 27, 2014
Meeting Summary

The committee held a very productive meeting, with everyone but Judge Zennache attending The committee will meet again prior to the Council meeting on February 1 in order to obtain the benefit of his input, and is also scheduled to meet again on Friday, February 7, 2014 at noon.

Because Mike Brian had not been able to participate in the earlier meetings, we discussed the previously addressed issues raised by legislative counsel and Holly Rudolph. Mike was initially concerned about treating pro se litigants differently from attorneys as to mail service. However, following a thorough discussion of the vetting and protections required of attorneys, but not of pro se litigants, as well as the anecdotal experiences of Judge Miller and others, he agreed that only allowing ORCP 7D(2)(d)(i) mailing by attorneys was appropriate. Everyone agreed that ORCP 7E should be better clarified to state that only attorneys could perform mail service under ORCP 7D(2)(d)(i). We recommend that the relevant sentence in the middle of 7E should be changed to state: "However, service pursuant to subparagraph D(2)(d)(i) of this rule may only be made by an attorney for any party."

We again discussed whether 7D(3)(b) service on corporations should be changed to allow mail service even if the registered agent, officer or director of the corporation could be found within the county where the action is filed. Everyone at the meeting agreed that the existing rule is not overly burdensome, and that changing the rule as requested would virtually result in mail being the service on corporations. We recommended against any change.

As to 7E fees for service, we previously agreed to keep the term "reasonable" in order to give judges discretion over the amount of the fees.

As to 7C, we previously agreed that a descriptive line should be added. Mark is going to provide draft language.

With regard to proof of service (7F), we discussed and agreed that proof of service should contain some certification of what was mailed and served as there are frequently situations, particularly with pro se parties, where it appears that only a summons or only a complaint was served. Mark was going to draft language to make this change.

As to ORCP 10C, considered whether less time should be allowed for response when a document is emailed but, given the mass of emails being received, decided that email should not shorten the time from the additional three days of mailing. We agreed that the subparagraph should be amended to add three days for email service of documents. The heading of 10C should be changed to the following: "C Additional time after service by facsimile, regular, and electronic mail." The end of the last sentence of that paragraph should also be amended to insert the same language so it reads as follows: "* * * after the service of

notice or paper upon such part and the notice or paper is service by facsimile, regular, or electronic mail, 3 days shall be added to the prescribed period."

As to ORCP 9G, we considered whether email should be available automatically, without agreement of counsel required. However, we concluded that we should wait until e-court becomes more readily available before making such a change as some attorneys still are not receiving emails. It was agreed that changes similar to 10C should be made in the middle of 9G to make it clear that email would be treated similar to regular mail as to timing. The second to the last sentence of 9G should be amended to insert the following: "Subject to rule 10C, service is effective under this method when the sender has received confirmation that the attachment * * * *" Mark will provide a draft of the full proposed language.

As to 9F, we agreed that the rule should be changed in recognition of computer applications and third-party vendors receiving facsimiles for attorneys. Mark was going to provide us with proposed language.

As for continuing business, we still need to review the issues raised by Lisa Norris-Lampe, look at the issues raised by Aaron Crowe, and consider whether to make additional changes to ORCP 7 to simplify it (if possible).

SUMMONS

RULE 7

A Definitions. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint.

B Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summonses under section E of this rule. A summons is issued when subscribed by plaintiff or an active member of the Oregon State Bar.

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.**

Council on Court Procedures
February 1, 2014, Meeting
Appendix B-3

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.

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, **an attorney for a party may serve the summons and the complaint pursuant to this paragraph.** [*s*]**S**ervice 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 **or other person authorized to receive service** 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 **or other person authorized to receive service** 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 **is** 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 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 **parts** (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 **parts** (A), (B), and (C) **of this subparagraph** above 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 **parts** (A), (B), and (C) **of this subparagraph** [*above*] is made. If the mailing required by **part** (C) **of this subparagraph** is omitted because the plaintiff did not know of any address other than those specified in **parts** (A) and (B) **of this subparagraph** [*above*], 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*] **that** 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*] **in which** 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 **who are** 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.

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 **only** 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 fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F Return; proof of service.

F(1) **Return of summons.** The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by first class mail.

F(2) **Proof of service.** Proof of service of summons or mailing may be made as follows:

F(2)(a) **Service other than publication.** Service other than publication shall be proved by:

F(2)(a)(i) **Certificate of service when summons not served by sheriff or deputy.** If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: **the specific documents that were served;** the time, place, and manner of service; that the

server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom true copies of the summons and the complaint were left or describe in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate may be made by the person completing the mailing or the attorney for any party and shall state the circumstances of mailing and the return receipt**, if any,** shall be attached.

F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating the time, place, and manner of service, and if defendant is not personally served, when, where, and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt**, if any,** shall be attached.

F(2)(b) **Publication.** Service by publication shall be proved by an affidavit or by a declaration.

F(2)(b)(i) A publication by affidavit shall be in substantially the following form:

Affidavit of Publication

State of Oregon)

) ss.

County of)

I, _____, being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a

newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 2_____.

_____

Notary Public for Oregon

My commission expires

___day of _____, 2___.

F(2)(b)(ii) A publication by declaration shall be in substantially the following form:

Declaration of Publication

State of Oregon)

) ss.

County of)

I, _____, say that I am the _____ (here set forth the title or job description of the person making the declaration), of the _____, a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

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.

_____

___day of _____, 2___.

F(2)(c) **Making and certifying affidavit.** The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting as such by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of such person shall be affixed to the affidavit. The signature of such notary or other official, when so attested by the affixing of the official seal, if any, of such person, shall be prima facie evidence of authority to make and certify such affidavit.

F(2)(d) **Form of certificate, affidavit or declaration.** A certificate, affidavit, or declaration containing proof of service may be made upon the summons or as a separate document attached to the summons.

F(3) **Written admission.** In any case proof may be made by written admission of the defendant.

F(4) **Failure to make proof; validity of service.** If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of **a** summons, issuance of **a** summons, or who may serve **a** summons shall not affect the validity of service of **that** summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, affidavit, declaration, or certificate of service of summons. The court shall disregard any error in the content of **a** summons that does not materially prejudice the substantive rights of the party against whom **the** summons was issued. If service is made in any manner complying with subsection D(1) of this rule, the court shall also disregard any error in the service of **a** summons that does not violate the due process rights of the party against whom **the** summons was issued.

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

A Service; when required. Except as otherwise provided in these rules, every order; every pleading subsequent to the original complaint; every written motion other than one which may be heard ex parte; and every written request, notice, appearance, demand, offer of judgment, designation of record on appeal, and similar document shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 7.

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**; by electronic service as provided in section H of this rule;** or, if the party is represented by an attorney, by [*telephonic*] facsimile communication [*device*] **technology** or **by** [*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 **or older** 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.

C Filing; proof of service. Except as provided by section D of this rule, all [*papers*]

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documents 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*] **documents** 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*] **document** served or as a separate document attached [*to the papers*] thereto. [*Where*] **If** service is made by [*telephonic*] facsimile communication [*device*] **technology** 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*] **If service is made by facsimile communication technology under section E of this rule, the person making service shall attach** 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] **transmitting technology**. 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 **communication technology**, or orally**; however, an automatically generated message indicating that the recipient is not in the office or is otherwise unavailable cannot support the required certification**.

D When filing not required. Notices of deposition, requests made pursuant to Rule 43, and answers and responses thereto shall not be filed with the court. This rule shall not preclude their use as exhibits or as evidence on a motion or at trial. Offers [*of compromise*] **to allow judgment** made pursuant to Rule 54 E shall not be filed with the court except as provided in Rule 54 E(3).

E Filing with the court defined. The filing of pleadings and other documents with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that

office shall endorse upon such pleading or document the time of day, the day of the month, the month, and the year. The clerk or person exercising the duties of that office is not required to receive for filing any document unless **a caption that includes** the name of the court[,]**; the register number of the action, if one has been assigned;** the title of the [*cause and the*] document[,]**;** the names of the parties[,]**;** and the attorney for the party requesting filing, if there be one, [*are*] **is** legibly [*endorsed*] **displayed** on the front of the document, nor unless the contents thereof are legible.

F Service by [*telephonic*] facsimile communication [*device*] technology. 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 may be made upon the attorney by means of a [*telephonic*] facsimile communication [*device*] **technology** if the attorney [*maintains such a device at the attorney's office and the device*] **has such technology available and said technology** is operating at the time service is made. Service in this manner shall be [*equivalent to service by mail for purposes of*] **subject to** Rule 10 C.

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 who has consented to electronic mail service must notify the attorneys for other parties in writing of any changes to the attorney's electronic mail address.** 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*] **Subject to Rule 10 C, 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.

H Service by electronic service. As used in this section, electronic service means using

an electronic filing system provided by the Oregon Judicial Department. Service by electronic service is permitted as prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court. Service by electronic service is prohibited unless the person being served agrees to electronic service as prescribed in applicable rules adopted consistently with this section.

TIME

RULE 10

A Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any court, or by order of court[,] the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the period runs until the end of the next day [*which*] **that** is not a Saturday or a legal holiday. If the period so computed relates to serving a public officer or filing a document at a public office, and if the last day falls on a day when that particular office is closed before the end of or for all of the normal work day, the last day shall be excluded in computing the period of time within which service is to be made or the document is to be filed, in which event the period runs until the close of office hours on the next day the office is open for business. When the period of time prescribed or allowed (without regard to section C of this rule) is less than 7 days, intermediate Saturdays and legal holidays, including Sundays, shall be excluded in the computation. As used in this rule, "legal holiday" means legal holiday as defined in ORS 187.010 and 187.020. This section does not apply to any time limitation governed by ORS 174.120.

B Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending before it.

C Additional time after service by mail, electronic mail, or facsimile communication technology. Except for service of summons, whenever a party has the right or is required to do some act or **to** take some proceedings within a prescribed period after the service of a notice or other [*paper*] **document** upon such party and the notice or [*paper*] **document** is served by

mail**, electronic mail, or facsimile communication technology**, 3 days shall be added to the prescribed period.

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, or other interested person, if the minor is under 14 years of age;

B(2) When the 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 a 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, or other interested person;

[*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**, or other interested 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**, or other interested person,** filed within the period of time specified by these rules or **any** other rule or statute for appearance and answer after service of **a** 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*] Unless waived under Section G, no later than seven days after filing the motion for appointment of a guardian ad litem [*is filed*], the person filing the motion must provide notice as set forth in

this section, or as provided in a modification of the notice requirements as set forth in Section G. Notice shall be given by mailing to the address of each person or entity listed below, by first class mail, a true copy of the motion, supporting affidavit(s) or declaration(s), and the form of notice prescribed in Section E below.

D(1) If the party is a minor, notice shall be given to the minor if the minor is 14 years of age or older; to the parents of the minor; to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and custody of the minor during the 60-day period before the filing of the 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 person making the motion, and the relationship of the 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 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 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*] allow the case to proceed after the temporary appointment of a guardian ad litem before notice is given, or make such other orders regarding notice as are just and proper in the circumstances.

H Settlement. Where settlement of the action will result in the receipt of property or money by the person for whom the guardian ad litem was appointed, approval of such settlement must be sought and obtained by a conservator. Alternatively, settlement may be accomplished pursuant to ORS 126.725, if applicable.

***, except as provided in ORS Chapter 419 B.**

MINOR OR INCAPACITATED PARTIES

RULE 27

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

B 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, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule.* The court shall appoint some suitable person to act as guardian ad litem:

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

B(2) When the 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 a 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, or other interested person;

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

B(4) When the defendant or respondent is a person who is incapacitated or financially incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, filed within the period of time specified by these rules or any other

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rule or statute for appearance and answer after service of a 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. Unless waived under Section G, no later than seven days after filing the motion for appointment of a guardian ad litem, the person filing the motion must provide notice as set forth in this section, or as provided in a modification of the notice requirements as set forth in Section G. Notice shall be given by mailing to the address of each person or entity listed below, by first class mail, a true copy of the motion, supporting affidavit(s) or declaration(s), and the form of notice prescribed in Section E below.

D(1) If the party is a minor, notice shall be given to the minor if the minor is 14 years of age or older; to the parents of the minor; to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and custody of the minor during the 60-day period before the filing of the 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;

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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 person making the motion, and the relationship of the 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 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 objection is filed, the court shall hold a hearing at which the court will determine the merits of the objection and make such orders as are appropriate.

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

H Settlement. Where settlement of the action will result in the receipt of property or money by the person for whom the guardian ad litem was appointed, approval of such settlement must be sought and obtained by a conservator. Alternatively, settlement may be accomplished pursuant to ORS 126.725, if applicable.

*__**, except as provided in ORS Chapter 419 B.**__

SUBCOMMITTEE ON ORCP 44 C
REPORT RE MEETING OF JANUARY 30, 2014

The meeting was held by phone. Attending were Arwen Bird, Michael Bryant, John Bachofner, Travis Eiva, Robert Keating, and Judge Hodson. Judge Gerking was not able to attend.

The subcommittee is charged with addressing the issue of whether the scope of information required to be produced under 44C should be defined by the Council by amendment or additions to the Rule.

Shari had distributed to Mr. Keating and Mr. Eiva some legislative history from the Council where issues relating to the scope of discovery of medical records under ORCP 44 E were discussed in detail. They were similar issues as those with which we are wrestling. The history and scope of 44 E was discussed as shedding some light on our question. A proposal was made to simply adopt in 44 C the language of 44 E describing the scope of discovery being defined by ORCP 36 B, i.e. admissible or likely to lead to the discovery of admissible evidence.

The proponents argued that both provisions provide for a limited waiver of the medical privilege, as originally adopted by the legislature. Both provisions provide for the discovery of the same material. 44 C deals with the health information the plaintiff must produce on request. 44 E provides for the discovery of health information by subpoena. Only 44 E defines the scope of the limited waiver. They should be consistent.

Those opposed take the position that all the material under 44 C and 44 E are privileged and it is beyond the role of the Council to deal with privilege which is a matter of substantive law. Issues raised by Justice Landauer's recent concurring opinion were referenced as support for the contention that this is an issue for the legislature to determine. It was suggested that 44 E might not address more than hospital records but simply have been an attempt to comply with the HIPAA statute.

The committee remains split and it does not appear consensus can be reached. We ask for the Council's input and guidance as to any other efforts the Council might suggest we undertake.

Memorandum

To: CCP

From: ORCP 45 subcommittee

Date: 2/21/2014

The subcommittee was charged with addressing the following concerns:

- Whether ORCP 45 should state that the time for responding to or objecting to requests for admission starts to run after a party is represented by counsel or after they have indicated they are going to be representing themselves pro se.

- What can we do about judges not enforcing requests for admission.

- Whether ORCP 45 should specify that requests for admissions and their responses are to be filed with the court.

The subcommittee met twice on these issues, received input from OTLA and the PLF. The subcommittee presents the following comments and recommendations:

1. The "problem" presents itself when a plaintiff serves an RFA with the complaint, and the RFA does not make its way to defense counsel before the time to respond to the RFA expires. Hence, the response time to the RFA should only start to run once a party is represented.

   Most of the responding plaintiffs' attorneys said that they rarely serve RFAs with the complaint. Further, the PLF informed us that RFAs being admitted by failing to respond timely is not something they have seen.

   We also received lots of feedback that Judges are very willing to grant a party an extension of time (retroactively) to respond to the RFAs in cases where the party simply failed to respond timely. In other words, the court would rather a party have an opportunity to substantively respond to an RFA versus that party being "stuck" with admissions.

   After consideration of all the feedback, the subcommittee does not see this as a prevalent problem with ORCP 45 that would lend itself to a rule change.

2. The complaint seemed to be that Judges don't impose sanctions / fees when a party has to put on trial evidence to prove something that the other party refused to admit.

   The subcommittee sees this as a training issue for the bench, and that there is no appropriate rule modification that would address this concern.

3. ORCP 9 makes clear that RFAs should be filed. So the comment is suggesting that ORCP 45 itself restate the filing requirement. The subcommittee is not recommending this sort of "cross-referencing" between ORCP 9 and 45.

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SUBPOENA

RULE 55

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H Individually identifiable health information.

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

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

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

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

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

H(2)(a)(i) the party has made a good faith attempt to provide written notice to the individual or

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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 date 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, stating the reason for each objection.

H(2)(b)(i) The party issuing the notice may at any time file a motion with the court to have objections resolved or to otherwise seek compliance with the rule.

H(2)(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)(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: if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; 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; in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records 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)(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 who produced them.

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

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

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

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

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

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

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

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

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

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

_____

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

_____

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

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

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

Early Assignment of Cases/Scheduling

Final Committee Report

I proposed last fall that the CCP give consideration to adding a new rule that mirrors or is similar to Federal Rules of Civil Procedure 16 that grants authority to the court to conduct, among other things, discovery scheduling conferences and settlement conferences. I discovered, however, that such a rule would be superfluous in light of UTCR 6.010 which provides:

UTCR 6.010 Conferences in civil procedures:

1. In any civil proceeding the court may, in its discretion, direct the parties to appear before the court for a conference to consider:
    a. The simplification of the issues;
    b. The necessity or desirability of amendments to the pleadings;
    c. The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof or delay;
    d. The limitation of the number of expert witnesses;
    e. The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
    f. a reference in whole or in part;
    g. the possible settlement of the case; and
    h. such other matters as may aid in the disposition of the action.

2. All conferences may be by personal appearance except that any party may apply, or the court may arrange for, a conference by telecommunication.

I recommend that no further action be taken with respect to this Agenda item.

Hon. Tim Gerking