MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 3, 2014, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

John Bachofner
Arwen Bird
Hon. Roger DeHoog
Jennifer Gates
Hon. Timothy Gerking
Hon. Jerry Hodson*
Hon. Jack Landau
Hon. Eve Miller
Mark Weaver*
Deanna Wray
Hon. Charles Zennaché*

*Appeared by teleconference

Members Absent:

Hon. Rex Armstrong
Hon. Sheryl Bachart
Jay Beattie
Hon. Paula Bechtold
Michael Brian
Brian Campf
Hon. Curtis Conover
Kristen David
Travis Eiva
Robert Keating
Maureen Leonard
Shenoa Payne

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

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 27 • ORCP 45 • ORCP 46 • ORCP 54 • ORCP 55 • ORCP 68 • ORCP 69	• ORCP 26 • ORCP 40 • ORCP 47 E • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery		

I. Call to Order (Ms. Bird)

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

II. Approval of April 5, 2014, Minutes (Ms. Bird)

No one present at the meeting noted any errors in the draft minutes from April 5, 2014 (Appendix A). A quorum was not present; therefore, a vote to adopt the minutes could not be taken.

III. Administrative Matters (Ms. Bird)

There were no administrative matters that required discussion.

IV. Old Business (Ms. Bird)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David was not present at the meeting. Judge Zennaché reported that the committee has not met and that there have not been any concerns raised related to last biennium's amendments of which the committee is aware.

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

Mr. Bachofner stated that the committee will report at the next Council meeting.

3. ORCP 15 D (Mr. Beattie)

Mr. Beattie was not present at the meeting. Judge Zennaché stated that the committee had met once, but that he was not able to attend. He stated that a draft was prepared and sent to the committee, but that he is unsure of the next step.

4. ORCP 27 (Mr. Weaver)

Prof. Peterson reported that the committee and the work group have had several meetings. He stated that the committee had met the previous Monday, but that the members had not had the opportunity to talk about the new draft that he prepared pursuant to the committee and work group discussions (Appendix B). Prof. Peterson stated that, nonetheless, he wanted to have the full Council look at the draft and provide input since there are only two meetings left before the September publication meeting. He noted that the initial work group meeting

included former Council members Judge Robert Herndon, Judge Lauren Holland, and Brooks Cooper, as well as attorney Erin Olson, who expressed concerns about the published ORCP 27 draft last biennium.

Prof. Peterson noted that he had provided both a copy that uses legislative drafting format and a "clean copy" for easier reading. He observed that this is a wholesale change to the rule, and that there has been some resistance among attorneys on the committee to making the change because it will involve more work for practitioners. However, at the first work group meeting, the judges made it very clear that there is enough abuse going on that it warrants a rule change, and that concern caused the attorneys on the committee to relent a bit about the change being burdensome. He stated that the primary change in the rule is to provide notice, and that the procedure would be to file the case, ask for a guardian ad litem to be appointed and, within a week, either give notice to a list of people (taken from the conservatorship statute) or ask the court for a ruling that some or all of those notices do not need to be sent. Prof. Peterson stated that Erin Olson had suggested adding section C, allowing for the discretionary appointment of a guardian ad litem, because it might be helpful to have someone to assist a disabled person (for whom a guardian ad litem is not mandated) in litigation. He explained that the biggest change is the notice provision, but that notice can be waived with good cause and that many of the persons or entities on the list would not be applicable in most cases.

Judge DeHoog asked who can request the appointment for the person with a disability and whether the person alleged to have a disability can object. Prof. Peterson stated that section C had just evolved over the last two committee meetings and that he was asking for Council input on such matters. He stated that it would appear to him that the disabled person, through their counsel, would be asking, but that the notice provisions would still apply. Judge Miller asked to whom the notice would be sent if the disabled person were an adult. Prof. Peterson stated that it would be sent to every applicable person in section E, including the party. Judge Miller noted that there are times when a person is brought into litigation who does not have the ability to comprehend what the litigation is about because of a disability - in this case, notifying the person would not be of any benefit if the person does not understand what is going on. Mr. Weaver stated that this raises an interesting question, as we still have to consider a number of statutes that deal with the appointment of a guardian ad litem. He stated that the committee has gone through the statutes to make sure that the proposed rule change does not conflict, but one issue is that a number of statutes allow the court under various circumstances to appoint a guardian ad litem. An important question is whether it will it be a good thing to force compliance with these various notice requirements in those cases.

Prof. Peterson stated that the committee has done a comprehensive search through the statutes and that ORS chapter 419 B's provisions for appointment of a guardian ad litem in termination of parental rights cases clearly outline a procedure that is distinct from the current or proposed Rule 27. The prior draft specifically excluded chapter 419 B cases. The current draft has removed that exclusion in section A in favor of more general language. He stated that there are a number of statutes where the court is directed to or authorized to appoint a guardian ad litem on its own initiative, and he wondered how the amended rule should handle such appointments.

Judge Miller expressed concern about victims of abuse who may not want their abuser - who may be included in the list of parties to be notified - to know about their litigation or to be able to find out where they are. Judge DeHoog stated that the "escape clause" in section H could be used in such a case. Judge Miller wondered who would bring it to the court's attention. Prof. Peterson expected that the petitioner would seek a waiver of notice in such a case. He stated that his assumption is that there will be forms for motions for waiver created for Elder and Disabled Abuse Prevention Act and Family Abuse Prevention Act cases.

Judge DeHoog expressed concern about the way subsections B(1) and B(2) were drafted, and stated that he found them difficult to follow. He stated that he had difficulty with whether the part about minors applied to the previous clause. Prof. Peterson noted that these subsections track the rule's existing language but that fact does not mean that the language is clear. Judge Miller suggested breaking the subsections down into paragraphs (a) and (b) dealing with minors over 14 years of age and those under age 14. Mr. Bachofner agreed that this would make it clearer.

Judge Miller thanked the committee and work group for its work, which is very important in terms of due process. Ms. Bird also expressed her thanks for helping to protect people who are either young or vulnerable for other reasons.

5. ORCP 45 (Ms. Wray)

Ms. Wray stated that the committee had finished its charge but that Mr. Bachofner had an additional suggestion. She stated that the committee had not had time to talk about Mr. Bachofner's suggestion (that Prof. Peterson had modified into legislative format - Appendix C), but that it is a fairly simple change and that perhaps the Council can take a few minutes to look at it. Mr. Bachofner stated that the draft that he sent to Council staff included an additional change in the new subsection F(1), "Excluding requests relating solely to authenticity of documents, as provided in subsection (2)," but perhaps it was not necessary. Prof. Peterson stated he had made an executive decision to modify Mr. Bachofner's draft in keeping with the formatting of the rules. Prof. Peterson asked whether

the words "reasonable number" are needed in subsection F(2) if the same subsection also uses the words "without limitation." Mr. Bachofner stated that he included the words "reasonable number" because he did not want a situation where a party attempts to burden the other party. He envisioned a request to authenticate a huge stack of largely irrelevant documents, and he wanted a judge to have the ability to limit this, particularly in the case of a self-represented litigant.

Judge Miller noted that she did not believe that the Council had received a lot of feedback on this kind of abuse in its survey. Ms. Wray also wondered where the idea came from, and wondered if the change would undermine the current section F, which gives the court the authority to allow more requests for admission if necessary. Mr. Bachofner stated that the reason he proposed the new section F(2) is that he often sees situations where he is getting ready for trial and wants to agree on the authenticity of documents to avoid the need to bring in a records custodian, which is time consuming for the court and expensive for the parties. He stated that, when the parties are reasonable, which is the majority of the time in Oregon, authenticity is stipulated, but occasionally the other side is difficult. If the other side takes an unreasonable position and a party has to go to the expense and time during trial to establish authenticity, this change would allow the court the authority under ORCP 46 to do something about it. Mr. Bachofner observed that the purpose of the 30 requests is for things for which a party typically wants to use admissions, such as admissions of fact, but this change would be to streamline the process for trial. He noted that it would be odd to include requests to admit the authenticity of documents in the 30 requests allowed in subsection F(1) when there may be hundreds of exhibits, and stated that a party should not be required to bring in a records custodian unless there really is a big issue about the authenticity of the records. He observed that, when he raised the issue a few meetings ago, Council members seemed to think the idea was worth considering.

Judge Miller remarked that often sees attorneys who, before trial, are apparently unreasonable, but when they get into the courtroom with the judge and the jury, often end up stipulating to the authenticity of documents. Mr. Bachofner agreed that this is what happens the majority of the time. Judge Miller stated that perhaps we should consider removing the number altogether. Judge DeHoog observed that he does not know how to interpret "without limitation" and "reasonable," in the same sentence, as they are contrary terms. Prof. Peterson asked whether the document requests count as part of the 30 requests. Mr. Bachofner reminded him that the language he originally included in subsection F(1) that talked about "excluding requests as to authenticity" made it clear that the requests regarding authenticity of documents were in addition to the 30 requests in subsection F(1). He stated that he has talked to plaintiffs' attorneys and defense attorneys and that everyone has universally agreed that the change would be a good idea. Prof. Peterson observed that the Council also has to

consider self-represented litigants, and having the rules make litigation reasonable for people who might not necessarily play by the rules of professionalism is a good idea.

Judge Miller suggested changing the wording in subsection F(2) so that it does not sound so affirmative. Ms. Gates suggested mirroring the same language as in subsection F(1), "a party may serve." Prof. Peterson stated that he originally took out Mr. Bachofner's language in subsection F(1) because he thought it looked like two lead lines and thought it was not necessary. He agreed that we do need to be more clear in subsection F(1) that the 30 requests is unrelated to documents. Mr. Bachofner observed that, if that language returns to subsection F(1), the "without limitation" language is not needed in subsection F(2). Mr. Bachofner, Judge Miller, and Ms. Gates crafted the following language for subsection F(1):

> "A party may serve more than one set of requested admissions upon an adverse party, but the total number of requests, excluding requests relating solely to authenticity of documents, shall not exceed 30…"

and the following language for subsection F(2):

> "Notwithstanding subsection F(1) of this section, a party may serve a reasonable number of requests for admission relating to the authenticity…."

Ms. Wray asked whether anyone has personally used the provision in existing section F, "unless the court otherwise orders for good cause shown." Judge Miller stated that she has never made such an order and wondered whether that suggests that a party could serve 30 more authenticity requests. Mr. Bachofner stated that a party would have to file a motion first to find out, which means adding cost and time to the procedure. He noted that, in Multnomah County, a party may not get a hearing for 30-45 days, and expedited hearings on discovery issues are discouraged. Judge Zennaché stated that, in Lane County, it could take five weeks for a hearing.

Ms. Wray expressed concern that the potential for abuse by self-represented litigants would be greater with subsection F(2) than the number of times an attorney would get to use it to his or her advantage. Judge DeHoog noted that, if the rule is being abused, a party can seek a protective order, but to require counsel to prepare a motion and affidavit in every instance when 99.9% are going to be allowed seems like an unnecessary step for counsel and the courts. He stated that there are other ways to address potential abuse, such as the provisions for a protective order. Ms. Wray stated that she would be curious to learn the history of why the rule is the way it is, as one has to assume that many hours of thought and crafting went into it. Prof. Peterson noted that the original charge of the committee was whether there should be more time or flexibility with regard to the

admissions being deemed admitted, and that he did look into the legislative history regarding that and did not find much. He stated that the committee's survey found that judges around the state are regularly following the rule and allowing parties to amend or to correct their responses. Prof. Peterson remarked that he did not look to see where the number 30 came from and whether it was well considered or borrowed from an existing Oregon statute or another jurisdiction, but that he is happy to do that. Ms. Wray asked that he look into not just the number of requests, but also the clause about the court otherwise ordering for good cause shown. She stated that times change and, if it is a matter of practicality now that the courts do not have time to entertain these motions and it has become a burden it is one thing, but before the Council takes an existing limitation out of the court's hands, the history should be examined.

Mr. Bachofner wondered exactly what concern Ms. Wray has about the authenticity issue. He stated that he understands that there may be a concern about abuse by self-represented litigants, but that a protective order can be sought in that case. Ms. Wray wondered, if it is a reasonable number, what purpose a protective order would serve. Judge DeHoog stated that a motion for a protective order would explain why the number was not reasonable and a judge would make the decision. Mr. Bachofner opined that the number of times that a self-represented litigant would abuse the rule would be few, but stated that he could think of many situations where the other side would not stipulate to authenticity of documents. He stated that he does not want to subpoena records custodians at a huge cost to his client if he can avoid it. Mr. Bachofner pointed out that this rule change would help both sides, as the plaintiffs' bar does not want to have to bring in a records custodian either.

Prof. Peterson wondered whether, since ORCP 36 C applies, a reference to this rule would be appropriate. Since a party is clearly entitled to ask for a protective order and the parties must confer under Uniform Trial Court Rule (UTCR) 5.010, presumably people would come to their senses and not want to take unreasonable requests for production in front of a judge. He observed that a reference to Rule 36 C might make it clear that there is a remedy in the case of abuse. Judge Hodson stated that he understood the reason for the suggestion but, from the standpoint of all of the rules, he would prefer not to make it a habit to cross-reference. He noted that Rule 36 applies whether we put a reference to it in ORCP 45 or not.

6. ORCP 46 and 55 (Judge Gerking)

Judge Gerking reported that the committee has been focusing on ORCP 55 H and attempting to determine whether notice is required prior to serving a subpoena duces tecum on a healthcare provider for production of records to a court for a hearing or trial. He noted that the plaintiffs' bar and defense bar are well represented on the committee, and that the committee has had great discussions

with respect to whether notice is required. While both sides feel that rule is clear, unfortunately both sides have diametrically opposite views, but the committee is nonetheless making progress. Judge Gerking stated that each side has submitted its own version of clarifying language to ORCP 55, but that he did not have a chance to distribute their respective drafts to the Council before the meeting. He brought copies for review (Appendix D). He stated that Ms. Payne's version is straightforward in that it adds a clarifying clause to subsection H(2) that states that the notice requirements apply in every situation, including those where the documents are being produced at a trial or hearing. Mr. Bachofner's suggestion is more detailed and attempts to make the rule clearly comply with HIPAA. Judge Gerking stated that, while he, Ms. Payne, and Mr. Bachofner were having a telephone conference the previous day, Ms. Payne seemed intrigued by Mr. Bachofner's language and thought that it might work. At the conclusion of that meeting, Ms. Payne also had another idea that might accommodate everyone's viewpoints. Judge Gerking noted that he had not had the opportunity to discuss this idea with Mr. Keating and Mr. Eiva yet, but he believes that the committee is on the right path.

Mr. Bachofner stated there has been a standard practice in Oregon for many years using a procedure for trial subpoenas that is different from other subpoenas for records. It is a common practice to subpoena records to the clerk of the court and, either examine them once the plaintiff or a doctor testifies and the privilege is waived, or agree to look at the records before the trial starts or during the trial. He stated that Mr. Eiva and Ms. Payne had significant concerns that this procedure was not compliant with HIPAA or ORCP 55 H(2). He noted that the concern that he and Mr. Keating have is that, if defendants are required to provide 14 days' notice, defense counsel will have to subpoena records custodians to trial, which is a waste of time. He would like a process similar to the Rule 45 F authenticity of records procedure he has proposed that would make the trial more streamlined. He stated that his draft attempts to preserve the status quo, where records can still be subpoenaed to trial, and to make certain that there is no question that this procedure will be in compliance with HIPAA, whereas Ms. Payne's approach is to make it clear that 14 days' notice to the party is required in advance in compliance with HIPAA. He stated that his interpretation of HIPAA is that it is disclosure to a third party that is prohibited, so his draft makes it clear in ORCP 55 H(2) that records subpoenaed to a trial or hearing must remain sealed, and gives assurances to the medical provider that the records will remain sealed until such time as the court issues a qualified protective order. The idea is that, once the trial starts, the parties will get together and look at the subpoenas and, if anyone has an objection, that objection can be taken before the judge. Until the court rules that the records may be opened in the presence of the court, or that the party may receive copies of the records, essentially there is no disclosure.

Judge Miller asked whether the plaintiffs' bar is also concerned about being

informed about who the defense bar is asking for records. She noted that this is completely different than HIPAA, and she still does not understand why the defense bar would not want this since there is no trial by ambush in these cases in Oregon. She wondered what the problem is with notifying the plaintiff in advance about a records subpoena. Mr. Bachofner stated that he wants to make sure that the playing field is level. He observed that the plaintiff does not have to give the defendant notice as to who they are going to get records from for the trial, because the plaintiff can authorize production of those records, and the plaintiff can set up their witnesses and have those witnesses at their command. He stated that there are times when the defense decides on what it is going to get and what it is not going to get, and that gives the plaintiff an advantage because the plaintiff will know what the defense strategy will be. Mr. Bachofner stated that, in the overwhelming majority of cases, it does not bother him; however, in some circumstances he will have subpoenaed records from a certain health care provider because he happens to know that the attorney on the other side has a habit of not giving him everything they are supposed to provide. Judge Miller stated that most judges will not allow a plaintiff to use records that have not been disclosed in their case. Mr. Bachofner stated that he was not referring to records that have not been disclosed, but the plaintiff has the benefit of knowledge if the defense has to seek an authorization. Judge Miller noted that the defendant would not necessarily know what the evidence will be until the plaintiff testifies, but the plaintiff will have egg on their face if the plaintiff's testimony fails to mention or contradicts information in the health care records. She stated that she did not see where giving notice does anything except to call to the plaintiff's attention that the plaintiff did not disclose and let the plaintiff know what it will be dealing with in trial.

Mr. Bachofner stated that the 14 days' advance notice approach basically allows the plaintiff those 14 days to prepare its strategy on dealing with the issue, and might even give the plaintiff an incentive not to disclose certain things. He stated that the defense strategy may suddenly have to change because, even though the plaintiff lied or did not tell the defense in advance, the plaintiff can now say to the jury "we produced it." He does not want to see the plaintiff rewarded for non-disclosure. Judge Miller opined that the plaintiff would not be rewarded because, when the record is damning, it discredits the plaintiff whether it is produced five minutes before the testimony or two weeks ahead of trial. Mr. Bachofner stated that he believes there is a difference. He stated that notice precludes an ambush because the plaintiff gets to prepare beforehand and gets to talk about the issue in the opening statement. He observed that, if the plaintiff does not disclose and the defense finds out at trial, there will be a bigger impact because the plaintiff failed to disclose. He stated that, if he is forced to give 14 days' notice, he will simply subpoena the records custodian to avoid giving away his trial strategy. Judge Miller wondered what the problem is with subpoenaing the records custodian. Mr. Bachofner answered that it is time consuming and

potentially expensive, and places the defense counsel in the same position as if they had used the typically-followed procedure of subpoenaing the records to trial without notice. Judge Gerking observed that the problem with notice is that it handicaps the defense from subpoenaing records into court either right before trial or during trial. Judge Miller noted that the defense can then subpoena the records custodian. Judge Gerking agreed that perhaps the defense can but, from the defense perspective, if the defense just learns about a doctor or treatment, under ORCP 55 H(2), there is nothing they can do about it. He stated that this is the issue the committee has been dealing with, and that Mr. Bachofner has incorporated a notice that is different than the 14 day notice that seems to be something that Ms. Payne is willing to discuss.

Judge Gerking noted that Ms. Payne's alternate idea was a qualified protective order that is obtained from the court at the outset of a case or during the progress of a case, well in advance of trial, which would allow defense counsel to use that order to obtain the records that they are seeking without actually identifying the healthcare providers in the order. He stated that this is a possibility because one of the options under HIPAA is to obtain the records with a qualified protective order. He stated that the committee is making progress and they are hopeful. Mr. Bachofner observed that it is incredibly burdensome to have an approach that requires in camera review by a judge every time medical records are subpoenaed for trial from a health care provider because, even then, there is a risk that things will not get disclosed that should be disclosed. He again expressed the need for a mechanism to keep the playing field even so that defense counsel can get access to records to defend the case without going too far into the privacy of the individual, but in a way that allows the defense to determine what the status quo was before the accident.

Mr. Bachofner stated that he thinks that the idea of a qualified protective order beforehand is an interesting one, but noted that it still does not resolve the issue of whether there needs to be notice before a subpoena. Prof. Peterson observed that healthcare providers should appreciate the approaches that are being taken by the committee and Council because it gives them more comfort that the records are going to be protected. He wondered when the Council might see a draft. Judge Gerking stated that Mr. Keating is on sabbatical until July 1, but that the remaining committee members will meet in May to try to come up with something. Prof. Peterson asked the committee to get any drafts to Council staff so that the drafts can be put in proper legislative drafting format.

7. ORCP 54 E (Ms. Gates)

Ms. Gates stated that the committee is proposing no changes regarding the two issues with which it was charged, and that she will write a report summarizing this decision. She reminded the Council that one of the questions before the

committee is whether an offer of judgment should be allowed to be reciprocal. She noted that the issue had come up in the 2009-2011 biennium and had no traction then either. Mr. Bachofner observed that the suggestion is based on the rule in California, where an award of expert witness fees is available by statute, which is not the case in Oregon. No one has identified a benefit that would be gained by making Rule 54 E reciprocal.

Ms. Gates stated that the second issue before the committee was whether to broaden the rule to encompass the award of costs or fees that may be awarded in every kind of case. She stated that, if the Council believed that this was a non-substantive change, it might work, but she stated that the committee feels that it is substantive. Mr. Bachofner agreed that, when the Council has discussed this matter in the past, the majority of the Council thought it was substantive. He noted that the purpose of ORCP 54 E is inconsistent with existing case law that says a party cannot make an offer to cut off attorney fees in cases where fees are available under ORS 742.061 or ORS 20.080. He believes that it would make sense to make Rule 54 apply in such cases because it gives an incentive for parties to settle. He has had cases where he has offered an amount well over what the opposing party would receive at trial, but the opposing attorney has driven the case forward because they knew they would get more fees when they tried the case. Ms. Gates agreed that there is a definite conflict between the purpose of ORCP 54 E and those statutory bases for attorney fees, but proposed that this would be an issue for the Legislature to tackle.

Ms. Gates noted that the only remaining issue for the committee is that Legislative Counsel would like a lead line inserted that describes the statute and an internal reference to the paragraph numbers changed, and that the committee will have a draft available at the next Council meeting.

8. ORCP 68 (Mr. Weaver)

Mr. Weaver stated that the committee had provided two alternate drafts of ORCP 68 for the Council's feedback (Appendix E). He reported that one issue before the committee is limited judgments and attorney fees. As the rule stands now, one strong interpretation suggests that, if a party wants to get attorney fees as part of the limited judgment, the fees have to be included in the limited judgment or the party cannot apply to get attorney fees until the case is concluded with a general judgment. He stated that some judges and practitioners have been confused about this, and that a limited judgment following a motion for summary judgment will be entered and the court then entertains a statement of attorney fees following the traditional ORCP 68 rule, when in fact the rule does not allow it. Mr. Weaver specified that one proposal is to make a change that would say the court has discretion to entertain a request for attorney fees following the entry of a limited judgment, which would be entered as a second limited judgment. He

stated that the second proposal is to never allow attorney fees after a limited judgment. In this case, the party would be required to include the fees as a part of the limited judgment; otherwise they could not get an award of fees until the case concluded, possibly a year or more later when the remaining parties and the remaining claims are resolved in a general judgment.

Mr. Weaver stated that the other issue with which the committee is dealing is to clarify existing case law that interprets ORCP 68 to allow a party that has a judgment that includes an award of attorney fees, and then incurs additional attorney fees trying to enforce the judgment, to petition the court for a supplemental judgment for post-judgment collection fees. The existing Rule 68 does not specifically allow this, but case law has interpreted it in this way. Mr. Weaver stated that the committee was thinking about including such language in the rule to let parties know they have the right or ability to do so. A question that has arisen is whether there should be limitations as to how often a party can request such fees, or whether that right should be unlimited.

Judge Zennaché clarified that version A includes the limitation that makes it clear that a party may only get attorney fees if included in a limited judgment and otherwise cannot apply until the general judgment is entered. He observed that it also includes a limitation on the number of times a party can apply for attorney fees for post-judgment collection efforts. He pointed out that version B says that a party can get a second limited judgment for attorney fees and can apply for post-judgment attorney fees as often as desired. Judge Zennaché noted that current law is that a party cannot apply as often as desired for an award of post-judgment collection fees, but that it is within the discretion of the court to waive the requirement that a request for fees must be filed within 14 days after entry of the general judgment. He stated that this makes a significant difference in interpreting which of the two versions the Council should pursue. He suggested that it is not that a party can apply for post-judgment collection fees as often as desired but, rather, it is up to court whether to even consider a request for such fees. He stated that, from the court's perspective, attorney fee petitions take a significant amount of time, and he is not supportive of allowing unlimited applications for post-judgment attorney fees.

Judge Miller wondered how a party would go about getting attorney fees and a limited judgment dismissing them from a case all at once. Mr. Weaver stated that a party would seek an award of fees before the limited judgment is entered. A party would have to make sure to let the court know of the desire to apply for attorney fees and have any required hearing before entering the limited judgment. Judge Miller observed that this may delay getting the limited judgment entered, because parties often cannot agree on the form of judgment anyway, and adding the attorney fee process would not be helpful. She stated that she understands Judge Zennaché's position, but that she would rather see parties get dismissed

from cases and have the attorney fee process be separate, because at least this would not hold up getting the person out of the litigation. She expressed concern about limiting post-judgment collection efforts because the process of trying to reach someone's assets may be burdensome and time-consuming, and suggested that the Council be sensitive to attorneys who do collections.

Prof. Peterson stated that, with regard to the limited judgment aspect in ORCP 68 C(4)(a), version A makes it very clear that costs and fees can only be obtained after entry of a general judgment, while version B makes it clear that costs and fees can be obtained after entry of either a limited or a general judgment. As to ORCP 68 (C)(5), version A states that, if a party does not get attorney fees included in the limited judgment, that party has to wait until the general judgment is entered. Version B incorporates language from ORCP 67 B and states that, in appropriate instances, attorney fees may be obtained after a limited judgment.

Prof. Peterson stated that, in terms of post-judgment enforcement or collection fees, there is a new subsection, ORCP 68 C(7). Version B states that a party can ask for additional costs and fees, and it is up to a judgment debtor to say if the process is being abused, while version A allows a party to ask for additional costs and fees at any time during the first year, and then once a year thereafter unless the court gives permission to seek a supplemental judgment for costs and fees more frequently. Prof. Peterson noted that the full committee was not able to meet to look at the two different versions before the full Council meeting, and that the committee would like feedback from the full Council.

Judge Gerking opined that, for sake of simplicity, the 14 day rule that is already in ORCP 68 should apply to both general and limited judgments so that the process is identical. Prof. Peterson noted that Judge Armstrong had suggested that flexibility in the 14 days in which the statement of attorney fees must be filed and served should be allowed, and that option is included in ORCP 68 C(4)(a)(iii) and ORCP 68 C(4)(b)(ii) on versions A and B. He stated that Mr. Weaver had suggested that, if this route is used, such language can all be placed into the ORCP 68 C(4)(d) paragraph on amendments. Prof. Peterson noted that he has taken it as an article of faith that, if a party misses the 14 day deadline, that party does not get another opportunity. Judges Miller, Gerking, and Zennaché agreed that they have always treated requests for attorney fees that way. Prof. Peterson stated that the committee has crafted the language based on Judge Armstrong's suggestion, and that the Council needs to decide whether to include it or not.

Judge Gerking contended that, when a motion for partial summary judgment is granted that carves out an issue or party from the case, but does not resolve the entire case, that prevailing party ought to be able to apply for fees in the same way as a prevailing party in a regular case. Prof. Peterson observed that this is the process included in version B. Judge Gerking stated that he likes this. Judge

Zennaché stated that his sense is that most people are fine with letting people apply for a second limited judgment for attorney fees. Mr. Weaver stated that he would like the entire Council's opinion on that.

Judge Miller stated that she understands the impact on the court very well, but that she is concerned that the Council has not heard from attorneys who work with debtor-creditor issues. Mr. Weaver stated that, if the Council decides to put a limitation on how often a party can apply for post-judgment fees, it will need to get input from these attorneys because the Council may be impacting an industry. He noted that he has had cases where he has had to apply for post-judgment attorney fees more than once in a year. Judge Zennaché maintained that, under the current rules, a party does not have a right to apply – a party may apply, but it is within the trial court's discretion whether to allow it. He stated that, under either of these drafts, parties would be obtaining a right that they do not otherwise have. The case law is that the trial court can waive the 14 day requirement, not that a party has a right to have it waived. Judge Gerking asked whether the discretion of the judge comes outside the scope of ORCP 68. Judge Zennaché replied that it has come from case law, because ORCP 68 specifies 14 days. Mr. Weaver noted that many practitioners believe that, a year later, they have the right to petition the court for supplemental fees and assume they are not limited by time constraints. He stated that, to the extent that the Council puts a limitation in the rule, whether or not it exists now, most practitioners would see it as change from existing law.

Prof. Peterson stated that some court of appeals decisions state that there is a right to seek post-judgment costs and fees, and that these decisions are a little troubling in light of ORCP 68 C(1), which states that, notwithstanding another statute, Rule 68 is the procedure for pleading, proving, and obtaining an award of attorney fees. He noted that, if it is a practice the courts allow, it should be included in the rule so that there is some authority for doing it. He stated that the UTCR have a form for a statement of attorney fees which includes a paragraph for an award of fees in anticipation of collection activities. He stated that he has heard from Clackamas and Multnomah counties that they do not award such fees, so it would seem not to be the best practice to ask for anticipated collection fees.

Judge Miller stated that, following the law in *McCarthy v. Oregon Freeze Dry* [327 Or 84, 957 P2d 1200, *clarified* 327 Or 185, 957 P2d 1200 (1998)], the court must analyze the actual fees rather than awarding an anticipated amount. She noted that attorneys who practice debt collection may have a different spin on this issue than other attorneys because of the different needs inherent in collection practice. Mr. Bachofner stated that he does a lot of collection work where a party frequently has a contractual right to fees, including the costs and fees of pursuing collection, so he opined that there needs to be some mechanism as additional costs and fees are incurred to enforce the judgment.

Prof. Peterson stated that he has heard a general consensus from the Council that getting attorney fees after entry of some limited judgments has some traction, and that having something in the rule formalizing the procedure for asking for fees for post-judgment enforcement seems to have traction, but wondered whether Council members are in favor of having limitations on requests for post-judgment fees. Judge Gerking felt that there should be some limitation. Prof. Peterson encouraged everyone to look at the different versions of ORCP 68 C(7) to see if either of them would work.

Prof. Peterson noted that it was Judge Armstrong's suggestion that trial courts should be given some authority to expand the timeline for the initial statement of attorney fees in paragraph C(4)(a). Judge Zennaché stated that making a modification to Rule 15 is the better way to answer that question rather than putting it in ORCP 68 and opening the floodgates. Prof. Peterson observed that Judge Armstrong felt the opposite way. Judge Gerking stated that giving the trial judge the authority to enlarge the 14 days is fine as a long as the application for the enlargement occurs before the expiration of the 14 day period. He stated that allowing the application after that time could open the floodgates, emasculate the rule, and we might as well not have a 14 day period in that case. Judge DeHoog agreed. Prof. Peterson noted that *Johnson v. Best Overhead Door, LLC* [238 Or App 559, 242 P3d 740 (2010)] seemed to state, and Judge Armstrong's opinion was, that the request to enlarge the time for seeking an award of fees could come after.

Mr. Weaver pointed out that the Council's discussion may be putting attorney fees in a different class than every other pleading and motion that is filed. He noted that, at the last Council meeting, someone had made the point that, under Rule 15, the court has discretion to change the time lines for everything else but, since a statement of attorney fees does not qualify as a pleading or motion under Rule 15, there is no room there. He wondered whether it makes sense to treat statements of attorney fees differently from everything else. Judge Zennaché stated that this is why he would like to put any change in ORCP 15. Mr. Weaver wondered what the ramifications of enlarging ORCP 15 would be. Judge Zennaché pointed out that we would not have to use the language, "pleadings, motions, and everything else" but, rather, use "pleadings, motions, and statements of attorney fees." Prof. Peterson stated that this is something that the Council needs to make a decision on because it is a significant break from practice. Judge Gerking reflected that he was not sure why he felt so strongly, perhaps because it feels almost like rewarding the unprepared or the practitioner who is not sufficiently familiar with the rules.

Judge DeHoog noted that, if discretion is included in ORCP 68, he favors more consistent, simple language such as, "the court may, for good cause shown." He noted that both versions of proposed ORCP 68 C(7) seem to reflect back to the 14

day rule with the initial request, and there appears to be a need to clarify that the 14 day requirement of subsection C(4) does not apply for the request for enforcement fees. Mr. Weaver agreed wholeheartedly and stated that there is already a proposed change for that but that the committee needs more clarification on which direction it should pursue. He stated that it sounds like the committee should draft a version that allows a limited judgment for attorney fees after a limited judgment and look at a version that includes limitations on post-judgment fees, and that the committee will discuss as whether it makes sense to have the modification or discretion language in ORCP 15, ORCP 68, or at all.

9. ORCP 69 (Prof. Peterson)

Prof. Peterson stated that he had submitted a draft amendment to the committee, but that the committee has not had a chance to meet. He recounted that some practitioners believe the 10 day notice of intent to take default can be served concurrently with the 30 days allowed in the summons to answer or otherwise defend. He submitted that the wording of the rule is not as clear as one would think, and that the committee would like to make clearer that those time frames are consecutive, not concurrent. Prof. Peterson reminded the Council that Holly Rudolph of the Oregon Judicial Department had also raised an issue relevant to family law cases, and that he had proposed some language to the Rule 13 committee requiring that, before a party takes default on a motion to show cause, the party would be required to follow the default procedures in Rule 69. He stated that the Service Members Civil Relief Act seems to require following its procedures before obtaining a supplemental judgment, and it seems appropriate to have some procedures in place to ensure that a person has been served with a motion to show cause and that person is not incompetent, and Rule 69 does all of that. The committee will discuss this at its next meeting.

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

Prof. Peterson reported that he has reached out to various sections of the bar and that those sections have not gotten back to him. He stated that the committee has not met either. As noted at the last Council meeting, revising these rules will likely be a massive undertaking, and will probably have to wait until next biennium.

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

Prof. Peterson stated that he will try to get a report written before the next Council meeting.

V. New Business (Ms. Bird)

There was no new business raised.

VI. Adjournment

Ms. Bird adjourned the meeting at 11:50 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 5, 2014, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Rex Armstrong
Hon. Sheryl Bachart
John R. Bachofner
Jay W. Beattie
Michael Brian*
Brian S. Campf*
Hon. R. Curtis Conover
Kristen S. David
Hon. Roger J. DeHoog*
Travis Eiva*
Jennifer L. Gates*
Hon. Eve L. Miller
Shenoa L. Payne
Mark R. Weaver*
Deanna L. Wray
Hon. Charles M. Zennaché*

Members Absent:

Hon. Paula M. Bechtold
Arwen Bird
Hon. Timothy C. Gerking
Hon. Jerry B. Hodson
Robert M. Keating
Hon. Jack L. Landau
Maureen Leonard

Guests:

Mike Fuller, OlsonDaines
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 13 • ORCP 15 • ORCP 17 • ORCP 46 • ORCP 55 • ORCP 68	• 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 9:35 a.m.

II. Approval of March 8, 2014, Minutes (Ms. David)

Ms. David called for a motion to approve the March 8, 2014, minutes (Appendix A). Mr. Brian asked that the word "plaintiff" be changed to "defendant" on page 14. A motion to approve the minutes with that change was made and seconded, and the minutes were approved unanimously.

III. Administrative Matters (Ms. David)

A. Council Website

Ms. David asked Council members to remind their colleagues that the Council website exists and that it is a good reference point for legislative history of the ORCP. Judge Zennaché remarked that the link to the current ORCP leads to a link on the Oregon Legislature website that is just a plain text file which is hard to read and use. Ms. Nilsson agreed that it is not ideal, but stated that it would take some time for Council staff to set up a better format on the Council's website. Mr. Bachofner wondered whether a PDF document with bookmarks would be helpful. Ms. Nilsson agreed that this was the format she had in mind for ease of searching, copying, and pasting. Judge Zennaché asked whether the project was something that a law student might be able to help with. Prof. Peterson and Ms. Nilsson stated that, while that might be a good theory, the project would take a certain level of technical detail that a law student might not have. They emphasized the importance of having the correct, current rules with no errors. Ms. Nilsson stated that she will look into how quickly the project can be done.

B. ORCP E-Book

Ms. Nilsson informed the Council that Laura Orr of the Washington County Law Library had let her know that the Fastcase has been working with the Oregon State Bar and the Fastcase ORCP e-book is anticipated in late April or early May. It will be in the standard e-book format, so it should be available on any e-book reader on any smartphone or tablet device. The Council will make an announcement on its website when the e-book is released.

C. Upcoming Council Meetings

Ms. David reminded the Council that the May and June meetings will be busy. She stated that, since the goal is to not have meetings in July or August, all material should be sent to Ms. Nilsson by the middle of May so that the June meeting is organized and informed and deliberative votes can be taken about what to put on the September agenda.

IV. Old Business (Ms. David)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David reported that the committee has continued to monitor whether any issues have come up in relation to electronic discovery and the ORCP, but that it has not heard of any major problems. She stated that the committee will likely prepare a final report by the May meeting.

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

Mr. Bachofner referred the Council to the committee's draft amendments to ORCP 7, 9, and 10 (Appendix B) and asked whether Council members have any suggested changes or corrections. Mr. Brian stated that, in reading the proposed new section H of Rule 9 from the perspective of a new lawyer, rather than that of a committee member, he is confused as to the meaning.

Prof. Peterson stated that the new language in section H had been provided by the E-Court Task Force but, at the last Council meeting, the concern was expressed that the language might be contrary to the Uniform Trial Court Rules in Chapter 21; these rules appear to enable the court to order an attorney to accept electronic service. He stated that he failed to look into this matter after the last Council meeting. Mr. Shields noted that, once any document filed electronically is accepted, the lawyer is deemed to be accepting electronic service from that point forward. Ms. David quoted from UTCR 21.010(5) and 21.100(1):

UTCR 21.010(5)

> "Electronic service" means the electronic transmission of a notice of filing by the electronic filing system to the electronic mail (email) address of a party who has consented to electronic service under UTCR 21.100(1). The notice will contain a hyperlink to access a document that was filed electronically for the purpose of accomplishing service.

UTCR 21.100

(1) Consent to Electronic Service and Withdrawal of Consent

> (a) A filer who electronically appears in the action by filing a document through the electronic filing system that the court has accepted is deemed to consent to accept electronic service of any document filed by any other

registered filer in an action, except for any document that requires service under ORCP 7 or that requires personal service.

(b) A filer who is dismissed as a party from the action or withdraws as a lawyer of record in the action may withdraw consent to electronic service by removing the filer's contact information as provided in subsection (2)(a) of this rule.

(c) Except as provided in subsection (b) of this section, a filer may withdraw consent to electronic service only upon court approval based on good cause shown.

Ms. David observed that the rules state that an attorney who avails himself or herself of the system has given consent to electronic service and needs the court's permission to withdraw. Judge Armstrong observed, however, that the court cannot require one to use the system initially.

Mr. Beattie wondered whether the last sentence in section H is necessary and whether a reference to the UTCR would be better. Mr. Bachofner asked whether there is anything preventing a reference to the UTCR. Prof. Peterson stated that, although it is not routine, the Council has cross-referenced a UTCR in other rules. Mr. Bachofner observed that this proposal came word for word from the E-Court Task Force. Judge Miller agreed that a cross-reference could be useful for both new lawyers and non-lawyers. Ms. David observed that, in the next several years, there may be additional UTCR changes, so it may not be wise to reference just one UTCR. In addition, local courts may also make supplemental local rules. Ms. David stated that she likes the "any other rule that is consistent with this section" language.

Judge Zennaché noted that he would like it to be clear in the minutes that, despite the proposed language that says that electronic service is prohibited unless the person being served agrees, nothing in this rule trumps the requirement that, once a party has agreed, a court order is required to allow the party to stop receiving service in this way. He observed that the hierarchy is that the ORCP trumps the UTCR if there is an inconsistency, and he would not want a lawyer arguing that they are withdrawing pursuant to the ORCP regardless of what the UTCR say. Mr. Beattie expressed the same concern with the last sentence: inconsistency with the UTCR. He also wondered what is the definition of "rules promulgated by the Chief Justice." Mr. Bachofner answered that they are the UTCR because those rules only go into effect when approved by the Chief Justice. Mr. Beattie opined that the last sentence is then redundant. Prof. Peterson noted that the Chief Justice can also promulgate other rules, which may leave a practitioner confused. Prof. Peterson noted that the UTCR are changed every 2 years, and this could leave people having to search to find any interim rules the Chief Justice has promulgated. Judge

Zennaché pointed out that a temporary UTCR can also be issued in an off-cycle. Mr. Beattie stated that parties need to look at the rules in any case.

Mr. Bachofner and other Council members talked about various ways to streamline the language and came up with the following: "Service by electronic service. As used in this section, electronic service means using an electronic filing system provided by the Oregon Judicial Department. Electronic service is permitted only as prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court."

Prof. Peterson noted that the committee had added a sentence to section G of ORCP 9 regarding notification of e-mail changes because the E-Court Task Force thought it was a good idea. He stated that UTCR 2.010 already requires such changes to be reported and wondered if it was redundant. Ms. David stated that she believes it is necessary, analogous to ORCP 43 stating that the duty to provide discovery is an ongoing duty. She noted that it is good to remind people, since e-mail addresses can change pretty regularly. Mr. Bachofner wondered whether the Council would consider changing the language to "the party's e-mail address," to include self-represented litigants. Judge Zennaché pointed out that only attorneys can serve by e-mail under this rule. Judge Miller wondered whether there might be a situation where an attorney who consented to e-mail service would have to notify a non-attorney. Judge Armstrong stated that the rule seems to envision that the only time e-mail service is a possibility is when there are attorneys representing parties on the case. Judge Miller wondered what would happen if a self-represented litigant consented to e-mail service. Ms. David stated that she could envision a scenario where one plaintiff is represented by an attorney and there are four defendants, three of whom are represented and one who is not, and all four attorneys have consented to e-mail service. If a party serves a request for production, that party could technically serve the request by e-mail service but, under Rule 9, the party would be required to send a copy by regular mail to the self-represented party. In that case, if the attorney is changing e-mail addresses, the self-represented party should at least be given notice of the email address change.

Judge Zennaché suggested changing the language to "service by e-mail is prohibited unless the parties agree." Ms. David's recollection was that the decision to limit e-mail service to attorneys was made because of concern from the E-Court Task Force. Attorneys are bound by rules of professional responsibility and have either agreed to maintain an office or agreed to maintain an e-mail address and check it regularly. This heightened duty does not exist on the part of a self-represented litigant. Ms. Payne asked whether unrepresented parties are precluded from serving attorneys by e-mail. Ms. David stated that this is correct. Ms. Payne expressed concern that this was a step too far. Mr. Bachofner stated that, regardless, self-represented litigants should still receive notice of a change of

e-mail address of the opposing attorney and suggested removing the words “the attorneys for.” Ms. David stated that she believes that this rule, along with many others, will have to be looked at again in the future because of the growing number of self-represented litigants.

Ms. Payne pointed out that a change discussed by the Council at its last meeting had not been made: in section E, the new word “only” needs to be moved to follow the words “may be.” Ms. Nilsson and Prof. Peterson apologized for missing this change and stated that the next draft will contain this correction. Prof. Peterson noted that the new language “register number” in section E is taken from existing language in ORCP 16 A. Judge Armstrong stated that there may be an instance somewhere that the word "register" has significance, perhaps filings once were recorded in a "case register." He opined that it will probably cause no mischief to change the language to the more familiar “case number.” Ms. David stated that UTCR 2.010 specifies what needs to be in caption and uses the term, "the case number."

Referring to Rule 7 D(2)(d), Judge Zennaché reiterated that he does not agree that only attorneys should be able to serve by mail. Judge Armstrong and Ms. Payne agreed with Judge Zennaché about not limiting service by mail to attorneys. Mr. Bachofner stated that initial service is such an important matter that we do not want to risk someone being wrongly defaulted. Judge Zennaché pointed out that this issue did not come to the Council from a complaint about self-represented litigants improperly serving people but, rather, it was a request to expand the rule to allow self-represented litigants to serve by mail. He stated that service by mail on individuals still requires a return receipt and, if the concern is that service by mail is fraught with problems, perhaps we should require a signed return receipt for service by mail on other entities, as well as individuals, rather than simply precluding self-represented litigants from serving by mail. Mr. Bachofner stated that this is an interesting approach and suggested that the committee talk about it at its next meeting. Judge Miller pointed out that judges often allow alternate methods of service – she has seen instances where service by Facebook was allowed – so there is no absolute preclusion but, rather, a form of quality control. Judge Zennaché opined that putting a barrier to self-represented litigants is a policy choice that he does not support. Mr. Bachofner noted that, while the majority of the committee agrees that not allowing self-represented litigants to serve by mail is the correct decision, ultimately this will be a decision for the entire Council.

Prof. Peterson pointed out that the language agreed upon at the last Council meeting requiring the sheriff to indicate what documents had been served was not included in the draft distributed to the Council. He apologized and stated that this proposed change would be included in the next version. He stated that Holly Rudolph of the Oregon Judicial Department had raised one more issue – whether it

is clear enough in Rule 7 that the follow-up mailing for office and substitute service can be done by a party or by a non-attorney and can be first class. He stated that he believes it is clear enough now. Mr. Bachofner stated that the committee will discuss this at its next meeting. Ms. David suggested that the committee re-examine all of the rules and bring them back to the full Council in May.

3. ORCP 13 (Judge Zennaché)

Judge Zennaché stated that the committee has determined that no changes to ORCP 13 are required at this time, and has prepared a report (Appendix C) that states this. He noted that the changes that are sought by some members of family law bar are probably best addressed by seeking legislative change to ORS 107.135. Judge Miller asked that the minutes reflect that, where the committee report refers to "affidavits," it includes both affidavits and declarations. Ms. David stated that she was a member of this committee even though she has no experience with family law, and that she and the other committee members appreciated the helpful feedback they received from various family law sections. She stated that, when one specialty wants to make changes, there could be a snowball effect which negatively impacts the entire bar, and the committee did a good job taking this into consideration. She stated that the committee's report does a good job of laying out where there could be some legislative changes even though Council is not able to take any action at this time. Judge Zennaché wanted to state as a historical note that the last time the Council modified ORCP 68 to change the attorney fee provision to talk about the need to plead the right to recover attorney fees in domestic relations cases to make it clear.

4. ORCP 15 (Mr. Beattie)

Mr. Beattie reported that the committee was submitting a report (Appendix D) recommending that no action be taken to modify ORCP 15.

5. ORCP 27 (Mr. Weaver)

Mr. Weaver stated that the committee had met with former Council members Hon. Lauren Holland, Hon. Robert Herndon, and Brooks Cooper, as well as attorney Erin Olson who had raised some concerns about the Council's published amendment of ORCP 27 last biennium. He noted that the judges reiterated how important it is to adopt changes because of abuses with the guardian ad litem process, while practitioners have concerns that such modifications will add a level of complication to their practice. He stated that Prof. Peterson has been working on another version of an amendment and that the committee will have one or two more meetings before May and, hopefully, at that point they will have a version for the full Council to look at, if not to vote on. Prof. Peterson stated that the committee was very grateful to have Ms. Olson's comments sooner rather than

later, as they were helpful. He stated that perhaps not everyone will be completely happy with the amendment, but that the goal is to alleviate the abuses and find a workable solution for all.

6. ORCP 44 (Mr. Keating)

Mr. Keating was not present at the meeting. Ms. David stated that, at the March meeting, the Council took an informal vote and determined not to take any further action, but if any absent Council member had questions or concerns those questions or concerns could be submitted in writing either to her or to the committee. Since no questions or concerns were raised, the work of the committee has been completed and this item can be removed from the agenda.

7. ORCP 45 (Ms. Wray)

Ms. Wray reminded the Council that the committee had completed its work but that Mr. Bachofner had raised an additional issue regarding requests for admission relating to the authenticity of documents and was going to submit a proposed amendment to the committee for its review. Mr. Bachofner apologized for not doing so earlier and stated that he would do so before the May meeting.

8. ORCP 46 and 55 (Judge Gerking)

Ms. Payne stated that the two opposing factions on the committee have been trying to come up with some language that they might be able to agree on. She stated that, at the last committee meeting, there was discussion about case law in other jurisdictions that looked at whether it was a violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to not give notice, even if the documents are being subpoenaed into court. She stated that there was some case law that suggested so, but there is also a court of appeals decision that *in dicta* looked at Oregon's rule and said that advance notice was not required if the records were being subpoenaed into court. Ms. Payne related that there was also discussion among the committee as to what the term "disclosure" meant. Some committee members felt that there was no disclosure if the records were sent to the court sealed, while others felt that, as soon as the records leave the provider, they have been disclosed under the plain language of HIPAA. She stated that there is also disagreement as to whether Oregon's rule is in compliance with HIPAA as written, or whether changes need to be made in that regard.

Ms. Payne observed that committee members who are members of the defense bar feel that it is unworkable to be required to give notice prior to subpoenaing the documents to trial, whereas committee members who are members of the plaintiffs' bar feel that HIPAA requires such notice and an opportunity to object or, alternatively, a qualifying protective order. She stated that both sides will come up

with competing drafts to discuss at the next committee meeting, and that they perhaps will be able to agree on a period of notice that may be workable for both sides. She feels that there will probably be no change to the rule, but stated that the committee is still trying.

Mr. Beattie noted that the federal rules and most state rules of which he is aware do not try to conform to HIPAA. Mr. Bachofner pointed out that HIPAA was designed around the disclosing party – the medical provider. He stated that the bottom line is that, in Oregon, there has been a process for in place for many years for trial subpoenas that does not require notice. He feels that there needs to be some sort of compromise so that court time is not wasted. He noted that the Council previously created an efficiency process in ORCP 55 but, if it is non-compliant with HIPAA, the defense bar will end up having to call records custodians as witnesses. Judge Miller observed that Mr. Beattie's point was that the Council cannot create governing rules or procedures if it is not our issue as judges or lawyers – it is the medical providers that get in trouble under HIPAA for disclosing someone's records. She stated that, regardless of any rule the Council passes, the provider is either going to say, "It is a subpoena; I will obey it," or, "I do not think I can obey this because of HIPAA." Mr. Bachofner stated that HIPAA allows a provider to comply if the provider has reasonable assurances that there will not be disclosure without the opportunity for notice. He thought that it would be possible to include in the rule a provision that requires that the medical provider must be given some sort of assurance that the records will not be opened or disclosed to any third party until such time as the judge allows it. He expressed confusion as to how it could be considered disclosure if the provider receives assurance that a judge will vet the records before they are shown to anyone. He stated that he understands that the plaintiffs' position is that disclosure happens whenever the records leave the medical provider's possession, even if they are sealed, but the committee has not found a case that addresses that issue.

Mr. Beattie wondered why the Council is picking nits over HIPAA, and why a federal law is even a part of an Oregon rule. He stated that he would rather see an Oregon rule that addresses the peculiarities of Oregon practice in being one of four states that does not waive the physician/patient privilege on the filing of a lawsuit, and have a particular rule relating to medical records that perhaps protects the state interest in allowing plaintiffs to have some control over the release of otherwise protected information. He stated that his preference would be to clean the whole meta issue of HIPAA out of the rule. Mr. Beattie stated that his sense in reading through the rule is that it seems to address issues that are far beyond ordinary discovery issues and starts treading into issues of federal law that should be raised like any other privilege issue. Mr. Beattie observed that HIPAA is also capable of being changed and that, if HIPAA remains in ORCP 55, the Council may have to change the rule to follow changes in HIPAA.

Judge Bachart stated that she understands that the argument is that ORCP 55 H(2)(c) is inconsistent with the federal law and that you cannot provide the documents in the manner prescribed in ORCP 55 H(2)(c) and comply with the HIPAA law. Prof. Peterson stated that, if one side is looking at it from the perspective of the records provider and wanting some assurance that the provider is protected, it seems to him that a small adjustment could be made in the rule to give the provider that assurance. He also wondered about how records subpoenaed from third parties are protected. Ms. Payne stated that the rule requires two different types of notice. ORCP 55 H(2)(a) talks about giving good faith notice to the individual whose records are being subpoenaed, who could be a third party, and this is the notice required by HIPAA. ORCP 55 H(2)(d) talks about giving reasonable notice in writing to all parties who have appeared of the time and place of inspection. She stated that there may seem to be an inconsistency in the rule, but that there really is not – there is always the 14 day good faith notice to the individual. Mr. Bachofner stated that he reads HIPAA as non-exclusive, in that the 14 day notice is not the only way you can provide a medical provider with the reasonable assurance required therein. He noted that the purpose of HIPAA is to prevent inadvertent disclosure without some vetting process, so as long as the medical provider receives some reasonable assurance that this vetting will occur – for example, by telling a medical provider that the records are to be sealed when they are provided to the court, and that the seal will not be broken until such time as the court says it shall – the purpose of HIPAA is served. Advance notice is not required because the individual will have the opportunity to tell the judge why he or she feels the records should not be opened.

Ms. Payne stated that the vetting process cannot happen until the records are opened, and an in camera review is disclosure of private health information that is not allowed until the patient has had an opportunity object to a subpoena, or there is a qualified protective order in place. Mr. Bachofner observed that the judge does not have to open the sealed envelope, because the individual knows what is in the records and can object. Mr. Bachofner stated that, from the defense perspective, the defense does not need to do this with its witnesses, just as plaintiffs do not need to give notice of the doctors they intend to call – this is the way we do business in Oregon. He wondered why advance notice for a records subpoena should be different. Judge Miller wondered what the harm would be in having records that were not provided to the defendant, either by inadvertence or deliberately, because those documents already should have been produced in discovery. Ms. Payne stated that it is not about whether somebody failed to disclose but, rather, about the individual having notice and being able to object. Judge Armstrong noted that it does not always follow that a court will open the records first. He stated that, if the sealed records appear in court, the individual has the opportunity to say, “Your Honor, you should not open this and here is why.” He noted that there is a step in advance of the records being opened. Ms. Payne stated that Mr. Eiva’s position is that he needs to have time to see the

records himself to know how to object to them, and he cannot do that if he does not have 14 days' notice.

Judge Bachart brought up the example of a criminal case involving domestic violence with a reluctant victim where the state subpoenas the victim's records to court – the victim may not even know that her records have been subpoenaed, so how can she object? Mr. Beattie opined that the records custodian at the hospital would not even produce the records without a release from the patient. Judge Miller stated that, more likely than not, the medical provider will not release such records without a court order.

Ms. David stated that she looks forward to seeing what the committee members propose, and that at least there should be a way to craft some language that gives clarity to the rule.

9. ORCP 54 A (Ms. Leonard)

Ms. Leonard was not present at the meeting. Judge Armstrong reported that the committee had concluded that there was no need to do anything, since the rule seems to be functioning in a way that is satisfactory. The committee's report is attached as Appendix E. Prof. Peterson noted that the survey the committee sent to bench and bar was a very helpful tool, and that other committees should consider using such surveys if the need arises.

10. ORCP 54 E (Ms. Gates)

Ms. Gates stated that her committee should be able to look at the additional issue suggested by Legislative Counsel and present a final report by the May Council meeting.

11. ORCP 68 (Mr. Weaver)

Mr. Weaver stated that the committee has held several meetings, and that Judge Zennaché had helped prepare a survey for trial judges. The first issue the committee is addressing seems non-controversial and involves adding language specifying that practitioners are allowed to request post-judgment attorney fees related to their collection efforts. He stated that this procedure is occurring now, mainly by virtue of case law, and the thought is that it would be good to put it in the rule. He stated that the committee is trying to sort out whether there are limitations so that fees are not being requested every week following judgment, and that it is probably a good idea to run these proposals by the Debtor Creditor Section of the Bar so that any potential amendment does not interfere with any long-established processes of collection attorneys. He stated that the committee will send out another survey once this language is drafted and, hopefully, the

committee will have something for the full Council to look at in May.

Mr. Weaver stated that the second issue the committee is addressing is limited judgments. As it stands now, there is some confusion as to whether, after a limited judgment is entered, a party is permitted to submit a request for attorney fees. Mr. Weaver gave the following example from his practice: a foreclosure involving 30 defendants and 1 plaintiff where his defendant client got dismissed entirely by way of a limited judgment. There was a right to attorney fees and the court wanted Mr. Weaver to follow the traditional ORCP 68 process and submit a statement of fees within 14 days, but the plaintiff pointed out that, under ORCP 68, that would not be permitted. The plaintiff's position was that, if the court has not decided attorney fees in the limited judgment, there is no right to attorney fees until after the general judgment is entered at the end of a case. Judge Armstrong stated that he did not believe this to be true. Mr. Weaver stated that some judges are concerned that, if the rule specifies that a second limited judgment is allowed after the entry of a limited judgment, it may create more work for the courts, as there are many situations where limited judgments are entered on each claim, and no one wants to deal with attorney fee petitions as each claim is dismissed in a case. He noted that the committee had drafted two alternate proposals: one says that under no circumstances can a party apply for attorney fees after a limited judgment is entered until after the general judgment; and the other specifies that a party is permitted to apply for fees subject to the court's discretion.

Judge Armstrong stated that there does not need to be language in any judgment that says the prevailing party can get attorney fees before that party submits an ORCP 68 attorney fee request. He stated that he does not see a reason to wait for the rest of the litigation to be complete – when you are done, you have a right to fees, and the plaintiff may have no money left by the time the entire case is over. Mr. Beattie stated that there may be an ORS chapter 18 problem, since that chapter defines a supplemental judgment as a judgment entered after entry of the general judgment. Mr. Bachofner noted that this is a separate issue, and the party can still have a limited judgment on the first case. Mr. Beattie stated that a party cannot get a supplemental judgment to a limited judgment. Judge Armstrong stated that attorney fees have to be put into either a general judgment or a supplemental judgment and, if there is something in ORS chapter 18 that says you can only get a supplemental judgment after a general judgment, we are stymied under the current structure. Mr. Beattie agreed that, under ORS chapter 18, it is conceptually possible to get an attorney fee award embedded into a limited judgment but, once a limited judgment is entered, a party cannot seek a supplemental judgment to the limited judgment.

Prof. Peterson remarked that the problem is that, if a party is thinking ahead enough, that party can get attorney fees included in the limited judgment but, if

the same party gets a limited judgment entered without including fees, that party may be waiting several years. Mr. Bachofner stated that, from a creditors' rights standpoint, there could be a substantial change in the person's financial circumstances during that wait, and the early exiting party might not be able to collect if it had to wait until the entry of the general judgment.

Judge Armstrong stated that, when the rule was drafted, it did not necessarily intersect with and has not necessarily been maintained in a way that appreciates some of the tension as the world has moved on. He noted that the terminology of "limited," "general," and supplemental" judgments was a statutory change as part of an overall Oregon Law Institute initiative after ORCP 68 was written. Judge Armstrong observed that, while some of the structure may not mesh well, there is a path that would conceptually allow a party to get attorney fees in advance of any general judgment, as long as the party avoids stumbling by waiting. Mr. Beattie pointed out that, to the extent that the Council amends this rule, it needs be aware of ORS Chapter 18. Mr. Weaver stated that the committee is aware of the ORS Chapter 18 issue.

Judge Zennaché stated that most judges who responded to the survey indicated that they were not in the practice of granting attorney fee awards for limited judgments other than in situations where the limited judgment eliminates the party entirely. He remarked that no one wants to open the door to a claim-by-claim application for attorney fees by a party, and that ORCP 67 B states that the court does not have to grant a limited judgment unless there is good cause. Judge Armstrong stated that, while each claim gives rise to its own entitlement to attorney fees pursuant to *Wilkes v. Zurlinden* [146 Or App 371, 932 P2d 584 (1997)], one can conceive of litigation in which there is only one claim for which attorney fees are available, that claim ends in a limited judgment, and there are other claims remain to be litigated. Nominally it might make sense to get that attorney fee claim out of the way, but such cases may arise so infrequently that it is not worth worrying about.

Mr. Bachofner pointed out that there may also be an option of getting a corrected limited judgment to include the attorney fees. Mr. Weaver noted that his firm has done this before, but it is not without problems, because the Court of Appeals may say that it does not believe the limited judgment for fees is allowed, and you have to go back to the trial court and get it included. He stated that he just believes that the rule should be more clear.

Prof. Peterson remarked that most judges in the survey replied that the issue had not arisen but, in limited circumstances, they would not have a problem hearing a request for attorney fees and they did not see it as a burden in appropriate cases.

12. ORCP 69 (Prof. Peterson)

Prof Peterson stated that the committee did not meet, but that he had proposed some language for an amendment and that a meeting will be held before the May Council meeting.

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

Prof. Peterson reported that the committee did not meet, but that he will schedule a meeting before the May Council meeting. Judge Zennaché stated that his sense is that there will not be time to deal with amendments to all of these rules this biennium, as it will be too much work to tackle at this late date. Ms. David wondered if we can ask that various consumer law groups work on language over the interim and bring it back to the Council. Prof. Peterson stated that the committee should still plan a meeting to scope out the issues so it will have some kind of report to give. Judge Zennaché observed that it is an effort that is worthy of work group participation. Mr. Bachofner opined that the committee may be able to get some work done between now and the end of the biennium. Ms. David suggested that the committee scope out the issues and get a work group together that should plan on working for next 12-18 months.

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

Prof. Peterson stated that he will have a report drafted for the Council next month.

V. New Business (Ms. David)

A. ORCP 15 (Judge Armstrong)

Judge Armstrong referred the Council to his e-mail exchange with Prof. Peterson (Appendix F). He stated that, when ORCP 68 was written, it was focused on particular problems that were the impetus for it, which principally had to do with when a party can seek attorney fees, how to do it, and when they are proven. Prior to ORCP 68, there was a body of law that said a party can either plead and prove attorney fees during the trial itself and the fact finder has to determine fees as part of the normal litigation, or a party can do it at the end of the trial and it is treated as a cost feature. Because of these twin paths and the dysfunction it was creating, Judge Armstrong, Bruce Hamlin, and Fred Merrill created ORCP 68 when the Council was created. He stated that it was not really drafted with the thought of issues of adjustments of timelines. The rule on extensions of time, ORCP 15, predated ORCP 68 and speaks to pleadings and motions. The ORCP 68 process by which a party submits statements and thereby obtains an award of attorney fees is not a pleading or a motion aspect but, rather, a proof aspect. Over time, there have

been cases in the Court of Appeals where ORCP 15 has been used to extend times or to allow late filings under ORCP 68. The question is whether ORCP 15 works for that purpose.

Judge Armstrong stated that the case cited in his e-mail exchange with Prof. Peterson, *Johnson v. Best Overhead Door, LLC* [238 Or App 559, 242 P3d 740 (2010)], involved an instance in which the trial court allowed an extension of time under ORCP 15 for an ORCP 68 issue and, belatedly, the non-prevailing party tried to say in its reply brief that there was no authority to do this under ORCP 15. Then-Judge Kistler wrote a footnote that basically said, "it is too late, the Court is not going to resolve this issue, but the trial court did not err in applying ORCP 15 for this extension." Judge Armstrong stated that the footnote implies that Rule 15 can be used, but does not resolve whether it can. He stated that attorneys think of what goes on in statements of attorney fees and objections thereto as somehow of the nature of pleadings and motions, which is not unreasonable because they have that quality. However, they are not, in fact, pleadings or motions, so there is a good question about whether Rule 15 has any application. He noted that the provision in ORCP 68 which gives 14 days may not admit to any adjustment, but that it should in principle.

Judge Armstrong stated that this is a policy question that should be sorted out and resolved. Prof. Peterson stated that last biennium's Rule 68 committee had talked about calling it a "motion for attorney fees" but elected not to because "statement" is well-used and entrenched now. He agreed that the statement for attorney fees is like a "case after a case" – in some respects it is very motion like, in some very pleading like. Judge Armstrong stated that, in light his of exchange with Prof. Peterson, it might be good to address in ORCP 68 that these timelines can be changed with court approval rather than making amendments to ORCP 15, which has its own history and function. He stated that he has no doubt that there should be the ability to adjust the timeline for ORCP 68 statements of attorney fees. He stated that, when the Council wrote the rule in 1980, it was not in any manner thought to intersect with other aspects of the pleading process in ORCP 10 or 15 but, rather, it was conceived as an independent and self-contained on how to prove attorney fees. He noted that the entitlement to fees has already been pleaded in a separate process.

Judge Miller agreed that any change belongs in ORCP 68 rather than in ORCP 15. Mr. Bachofner wondered whether the problem could be solved in ORCP 13 by including statements for attorney fees in section B under "pleadings allowed." Judge Armstrong stated that he believes this would be a simple fix but a bad idea. Judge Zennaché agreed. Judge Armstrong stated that the change could easily be put into ORCP 68, rather than trying to amend ORCP 15 and trying to make attorney fee statements fit within pleadings and motions. Judge Zennaché stated that there is a committee working on ORCP 68 now, and it would be easy enough to add such language. Mr. Bachofner asked what would happen if the parties themselves agreed they wanted additional time. Judge Armstrong stated that, at the appellate level, they can agree all they want, but they still need to ask the court. Mr. Bachofner suggested we may want to include that in the language. Ms.

Payne asked Judge Armstrong whether, if a statement for attorney fees is not a pleading or motion and is self-contained, a party can move to strike portions of the statement under Rule 21. Judge Armstrong stated that he doubted it, but had not looked at it. Ms. Payne stated that she had someone object to a statement of attorney fees by saying that portions of what the jury said would be inadmissible, so it could be stricken. Judge Armstrong stated that the Rule 68 documents are in the nature of evidence, and you can strike just as you can move to strike any type of evidence – it does not have to be "striking" as in a pleading concept.

Ms. David stated that she has a slightly different take on ORCP 15 D and would not mind having the Council make a slight modification. She stated that, when working on Professional Liability Fund cases where someone forgot to respond to a request for admissions, she asks for an enlargement of time under ORCP 15. Judge Zennaché stated that he favors Ms. David's suggestion to modify ORCP 15 D to make clear that trial judges have the authority to modify the timelines under the rules. Mr. Bachofner asked whether we need to spell it out because some are jurisdictional. Prof. Peterson stated that, in the Court of Appeals, most written requests are received from attorneys, but many requests in the trial courts may not be coming from lawyers. He wondered whether the ask, the motion, needs to be made before the time runs out, or whether this is this a fix that can occur after the time has run. Judge Armstrong stated that ORCP 15 allows for a belated fix, and he thinks it should, but not everything should be subject to that. He noted that it would be good to get ORCP 68 in a self-contained, explicit way to permit flexibility with timelines, then to grapple with ORCP 15 as well.

Ms. David asked that Prof. Peterson look at ORCP 68 and see if he can craft appropriate language. She stated that she would like to see a committee take a look at ORCP 15 D. She asked that Mr. Beattie convene an ORCP 15 D committee with Judge Armstrong, Ms. Leonard, and Judge Zennaché as additional members.

B. ORCP 17 (Ms. David)

Ms. David pointed out the inquiry that was received by Drew Taylor, Judicial Clerk to Clackamas County Presiding Judge Robert Herndon, regarding ORCP 17 (Appendix G). She asked Prof. Peterson to draft a response that refers the inquirer to the minutes of the relevant meeting explaining why the change was made. Prof. Peterson noted that the Council has contemplated going back to issuing Council-approved staff comments to each rule change so that there would be an easier reference each time the Council makes an amendment – such a comment may have proved helpful in this case. He stated that his recollection was that Leslie O'Leary had raised the issue of amending ORCP 17 specifically to address instances where an attorney was not available in the office to sign a pleading, but that the Council had ultimately decided that the rule should not be changed in this manner. He stated that he would draft a response.

C. Interpleader Rules (Mr. Bachofner)

Mr. Bachofner stated that he had recently encountered an issue where an ORCP 54 E offer to allow judgment was accepted, inclusive of liens, and he has been asking for satisfaction of the liens so he can pay the amount. He stated that the other attorney is demanding payment and threatening litigation, but will not give the satisfaction of liens as the offer specified. Mr. Bachofner stated that he would like to do a motion to allow interpleader so he can deposit the funds specified in the offer with the court and the court can sort out those issues. He wondered whether the Council would consider a change in the interpleader rule to allow a motion so there does not have to be a separate action. He stated that, the way the current rule reads, a complaint, cross-claim, or counterclaim is required for interpleader. He would prefer that the parties do not need to file a whole new action – the party that owes the money should be able to get out, and the parties that are fighting over the funds should be left to fight over them. Ms. David wondered why Mr. Bachofner would not want a separate case. Judge Armstrong noted that a new case means new filing fees for the court as well. The Council did not express interest in taking up this matter.

VI. Adjournment

Ms. David adjourned the meeting at 12:00 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

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 unless the appointment is made on the court's motion or otherwise as provided by statute.

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, as follows:

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

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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 Discretionary Appointment of Guardian Ad Litem for a Party With a Disability. When a person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of Seeking Appointment of Guardian Ad Litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order 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 facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor or is incapacitated or financially incapable, as defined in ORS 125.005, or a person with a disability as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem; however, the appointment shall be reviewed by the court if an objection is received as specified in subsection F(2) or F(3) of this rule.

E Notice of Motion Seeking Appointment of Guardian ad Litem. Unless waived under Section H, 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 H. Notice shall be provided 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 F below.

E(1) If the party is a minor, notice shall be provided 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.

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

E(2)(a) To the person;

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

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

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

E(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;

E(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;

E(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;

E(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;

E(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;

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

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

F **Contents of Notice.** The notice shall contain:

F(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;

F(2) A statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than 14 days from the date of the notice; and

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

G 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.

H Waiver or Modification of Notice. For good cause shown, the court may waive notice entirely or make such other orders regarding notice as are just and proper in the circumstances.

I 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, or settlement may be accomplished pursuant to ORS 126.725, if applicable.

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 unless the appointment is made on the court's motion or otherwise as provided by statute**. [*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, as follows:** [*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*

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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(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 Discretionary Appointment of Guardian Ad Litem for a Party With a Disability. When a person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of Seeking Appointment of Guardian Ad Litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the

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proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor or is incapacitated or financially incapable, as defined in ORS 125.005, or a person with a disability as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem; however, the appointment shall be reviewed by the court if an objection is received as specified in subsection F(2) or F(3) of this rule.

E Notice of Motion Seeking Appointment of Guardian ad Litem. [*At the time*] Unless waived under Section H, 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 H. Notice shall be provided 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 F below.

E(1) If the party is a minor, notice shall be provided 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.

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

E(2)(a) To the person;

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

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

E(2)(d) To any person who is cohabiting with the person and who is interested in the

affairs or welfare of the person;

E(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;

E(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;

E(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;

E(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;

E(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;

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

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

F Contents of Notice. The notice shall contain:

F(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;

F(2) A statement indicating that objections to the appointment of the guardian ad

litem must be filed in the proceeding no later than 14 days from the date of the notice; and

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

G 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.

H Waiver or Modification of Notice. For good cause shown, the court may waive notice entirely or make such other orders regarding notice as are just and proper in the circumstances.

I 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, or settlement may be accomplished pursuant to ORS 126.725, if applicable.

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REQUESTS FOR ADMISSION

RULE 45

A Request for admission. After commencement of an action, a party may serve upon any other party a request for the admission by the latter of the truth of relevant matters within the scope of Rule 36 B specified in the request, including facts or opinions of fact, or the application of law to fact, or of the genuineness of any relevant documents or physical objects described in or exhibited with the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. Each matter of which an admission is requested shall be separately set forth. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request for admissions shall be preceded by the following statement printed in capital letters of the type size in which the request is printed: "FAILURE TO SERVE A WRITTEN ANSWER OR OBJECTION WITHIN THE TIME ALLOWED BY ORCP 45 B WILL RESULT IN ADMISSION OF THE FOLLOWING REQUESTS."

B Response. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney; but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon such defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify the answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the

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remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the answering party states that reasonable inquiry has been made and that the information known or readily obtainable by the answering party is insufficient to enable the answering party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 46 C, deny the matter or set forth reasons why the party cannot admit or deny it.

C Motion to determine sufficiency. The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a designated time prior to trial. The provisions of Rule 46 A(4) apply to the award of expenses incurred in relation to the motion.

D Effect of admission. Any matter admitted pursuant to this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the case will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice such party in maintaining such party's case or such party's defense on the merits. Any admission made by a party pursuant to this rule is for the purpose of the pending action only, and neither constitutes an admission by such party for any other purpose nor may be used against such party in any other action.

E Form of response. The request for admissions shall be so arranged that a blank space shall be provided after each separately numbered request. The space shall be reasonably calculated to enable the answering party to insert the admissions, denials, or objections within

the space. If sufficient space is not provided, the answering party may attach additional papers with the admissions, denials, or objections and refer to them in the space provided in the request.

F Number.

F(1) A party may serve more than one set of requested admissions upon an adverse party, but the total number of requests shall not exceed 30, unless the court otherwise orders for good cause shown after the proposed additional requests have been filed. In determining what constitutes a request for admission for the purpose of applying this limitation in number, it is intended that each request be counted separately, whether or not it is subsidiary or incidental to or dependent upon or included in another request, and however the requests may be grouped, combined, or arranged.

F(2) Notwithstanding subsection F(1) of this section, a party is permitted to serve, without limitation, a reasonable number of requests for admission relating to the authenticity of specified documents for the purpose of establishing that such documents are kept in the ordinary course of business.

Whereas, 45 CFR §164.5(e) contains HIPPA restrictions on the disclosure of individually identifiable health information as follows:

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"(e) Standard: Disclosures for judicial and administrative proceedings.

(1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

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(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

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(iv) For the purposes of paragraph (e)(1)(ii)(B) of this section, a covered entity receives satisfactory assurances from a party seeking protected health information, if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:

(A) The parties to the dispute giving rise to the request for information have agreed to a qualified protective order and have presented it to the court or administrative tribunal with jurisdiction over the dispute; or

(B) The party seeking the protected health information has requested a qualified protective order from such court or administrative tribunal.

(v) For purposes of paragraph (e)(1) of this section, a qualified protective order means, with respect to protected health information requested under paragraph (e)(1)(ii) of this section, an order of a court or of an administrative tribunal or a stipulation by the parties to the litigation or administrative proceeding that:

(A) Prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested; and

(B) Requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation or proceeding.

(vi) Notwithstanding paragraph (e)(1)(ii) of this section, a covered entity may disclose protected health information in response to lawful process described in paragraph (e)(1)(ii) of this section without receiving satisfactory assurance under paragraph (e)(1)(ii)(A) or (B) of this section, if the covered entity makes reasonable efforts to provide notice to the individual sufficient to meet the requirements of paragraph (e)(1)(iii) of this section or to seek a qualified protective order sufficient to meet the requirements of paragraph (e)(1)(v) of this section."

I propose that we modify ORCP 55 to provide a mechanism for providing satisfactory assurances to health providers receiving a trial subpoena that there shall be no disclosure until the court approves a qualified protective order. In that way, the rule achieves the purpose of HIPPA, and provides the protected party with an opportunity to be heard. My proposed changes appear below.

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H Individually identifiable health information.

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

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

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

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

H(2)(a)(i) The attorney for the party issuing a subpoena requesting production of individually identifiable health information to a location other than the clerk of a court in which a trial or a hearing is pending, ~~or otherwise~~ 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: (iA) the party has made a good faith attempt to provide written

Comment [JXB1]: This distinguishes between records subpoenas in discovery and trial subpoenas, creating a different mechanism to preserve the right for trial subpoenas.

notice to the individual or the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object; (~~ii~~B) 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; (~~iii~~C) 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)(a)(~~ii~~). The attorney for the party issuing a subpoena requesting production of individually identifiable health information to the clerk of a court in which a trial or hearing is pending, must serve the custodian or other keeper of such information with instructions that the requested individually identifiable health information must only be produced to the clerk of the court in which a trial or hearing is pending in a sealed envelope bearing only the court case number, the name of party to whom the records pertain, and the dates of trial or hearing. The attorney must also serve the custodian or other keeper of such information with an affidavit or declaration together with attached supporting documentation demonstrating reasonable assurances that:(A) the seal of the envelope containing the individually identifiable health information shall not be broken, and the individually identifiable health information shall not be disclosed, until such time as the court in which a trial or hearing is pending issues a qualified protective order instructing the clerk of the court to release the sealed envelope; (B) the court shall not be requested to issue a qualified protective order in the litigation without first providing notice to the individual or the individual's attorney of the request: (C) the notice for seeking a qualified protective order shall include 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 (D) The party issuing the subpoena will, upon request, promptly permit the patient or the patient's representative to inspect and copy the records received under such a qualified protective order. For purposes of this subsection only, notice of a request for a qualified protective order shall be any notice that provides the individual or the individual's attorney with an opportunity to be heard by the court.

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

Comment [JXB2]: This new section applies only to trial or hearing subpoenas. It protects the medical provider by giving them reasonable assurance that the records shall not be disclosed because they remain sealed until a court issues a qualified protective order. They protect the individual by requiring that some notice and an opportunity to be heard is provided. However, the notice and opportunity to be heard does not have to occur in advance of trial, preserving the confidentiality of the defendant's case.

Comment [JXB3]: This protects to providers since no disclosure occurs unless the seal is broken.

Comment [JXB4]: This provision protects the individual by requiring some notice before any request is made to unseal the records.

Comment [JXB5]: This also protects the individual by providing info about what was obtained.

Comment [JXB6]: This provision clarifies that 14 days notice is not required. Any notice that provides an opportunity to be heard is sufficient. This allows for short trials, and situations where subpoenas need to be issued close to or during trial.

H(2)(c) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(c)(iv), then the party issuing the subpoena shall, in addition to complying with subsection H(2)(a), ~~a copy of the proposed subpoena~~ shall ~~be served~~serve a copy of the subpoena 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 request the court for a qualified protective order allowing inspection and/or copying of the subpoenaed records, ~~provided and/or request a complete copy of the records~~provided the individual or the individual's attorney is notified of the request and provided an opportunity to be heard. ~~Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.~~

Comment [JXB7]: These changes by Travis and Shenoa, only apply to when no hearing is scheduled.

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

H(2)(e) 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: (i) that the affiant or declarant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (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.

H Individually identifiable health information.

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

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

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

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

H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information to a hearing or otherwise 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: (i) the party has made a good faith attempt to provide written notice to the individual or the individual's attorney that the individual or the attorney had 14 days from the date of the notice to object; (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; (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) Except as provided in subsection (4) of this section, when a subpoena is served upon a custodian of individually identifiable health information in an action in which the entity or person is not a party, and the subpoena requires the production of all or part of the records of the entity or person relating to the care or treatment of an individual, it is sufficient compliance therewith if a custodian delivers by mail or otherwise a true and correct copy of all the records responsive to the

Comment [SLP1]: This clarifies what we think the rule already requires – H(2)(a) applies in all situations.

Comment [SLP2]: The rule already incorporates HIPAA by requiring that the party either serve a qualified protective order or an affidavit showing a good faith attempt to provide 14 days notice to the individual. Another section regarding qualified protective orders is not necessary.

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subpoena within five days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection (3) of this section.

H(2)(c) The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the title and number of the action, name of the witness, and date of the subpoena are clearly inscribed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows: (i) if the subpoena directs attendance in court, to the clerk of the court, or to the judge thereof if there is no clerk; (ii) if the subpoena directs attendance at a deposition or other hearing, to the officer administering the oath for the deposition, at the place designated in the subpoena for the taking of the deposition or at the officer's place of business; (iii) in other cases involving a hearing, to the officer or body conducting the hearing at the official place of business; (iv) if no hearing is scheduled, to the attorney or party issuing the subpoena. If the subpoena directs delivery of the records in accordance with subparagraph H(2)(c)(iv), then a copy of the proposed subpoena shall be served on the person whose records are sought and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the entity or person. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the requesting party's expense.

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

H(2)(e) 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: (i) that the affiant or declarant is a duly authorized custodian of the records and has authority to certify records; (ii) that the copy is a true copy of all the records responsive to the subpoena; (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.

Comment [SLP3]: This requires something in *addition* to the requirement in H(2)(a). It requires actual service of the proposed subpoena. If there is a hearing, that does not obviate the requirement in H(2)(a) of serving the medical provider with a qualified protective order or an affidavit that good faith attempt was made to provide 14 days' notice to the individual only (not a party).

Comment [SLP4]: The rule already requires that REASONABLE NOTICE be provided to parties to the litigation. This does not exclude hearings or trials.

Comment [SLP5]: The rule already contemplates that the records will remained sealed until the time of trial or hearing. The rule does not need amending to provide direction to the medical provider in that regard.

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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.

PLEADING, ALLOWANCE, AND TAXATION OF ATTORNEY FEES

AND COSTS AND DISBURSEMENTS

RULE 68

A Definitions. As used in this rule:

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

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

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

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party shall also have a right to recover disbursements.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C(4)(a)(iii) The court may, in its discretion, and upon such terms as may be just, allow a statement of attorney fees and costs and disbursements to be filed and served after the time specified in paragraph C(4)(a) of this rule.

C(4)(b) **Filing and serving objections. [*Objections.*]** A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by a written objection to the statement.

C(4)(b)(i) The objection and supporting documents, if any, shall be **filed and** served within 14 days after service on the objecting party of a copy of the statement. The objection shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. The objecting party may present affidavits, declarations, and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other

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statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

C(4)(b)(ii) The court may, in its discretion, and upon such terms as may be just, allow an objection to be served after the time specified in subparagraph C(4)(b)(i) of this rule.

C(4)(c) **Response to objections.** The party seeking an award of attorney fees may file a response to an objection filed pursuant to paragraph C(4)(b) of this rule. The response and supporting documents, if any, shall be **filed and** served within [*seven*] **7** days after service of the objection. The response shall be specific and may address issues of law or fact. The party seeking attorney fees may present affidavits, declarations, and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

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

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

C(4)(e)(i) If a hearing is requested the court, without a jury, shall hear and determine all issues of law and fact raised by the objection.

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

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

C(4)(g) **Findings and conclusions.** On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party must make a request pursuant to this paragraph

by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements, objection, or response filed pursuant to paragraph (a), (b), or (c) of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

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

C(5)(a) **As part of judgment.** If all issues regarding attorney fees or costs and disbursements are decided before entry of a **limited or a general** judgment [*pursuant to Rule 67*], the court shall include any award or denial of attorney fees or costs and disbursements in that judgment. **As a party may not request attorney fees or costs and disbursements after entry of a limited judgment, the statement of attorney fees and costs and disbursements must be filed not later than 14 days after entry of the general judgment.**

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

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

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

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

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C(7) Procedure for seeking attorney fees or costs and disbursements incurred in enforcing judgments. If a party has alleged a basis for the award of fees as provided in paragraph B(2)(a) of this rule, the procedure for seeking attorney fees or costs and disbursements incurred in collecting or enforcing judgments shall be as specified in subsection C(4) of this rule except that, unless good cause is shown, only one statement of attorney fees or costs and disbursements may be filed and served within the first year after the entry of the judgment being enforced, and one statement of attorney fees or costs and disbursements may be filed and served annually thereafter.

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PLEADING, ALLOWANCE, AND TAXATION OF ATTORNEY FEES

AND COSTS AND DISBURSEMENTS

RULE 68

A Definitions. As used in this rule:

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

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

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

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party shall also have a right to recover disbursements.

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

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

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

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

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

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

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

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

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

C(3) **Proof.** The items of attorney fees and costs and disbursements shall be submitted

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in the manner provided by subsection (4) of this section, without proof being offered during the trial.

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

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

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

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

C(4)(a)(iii) The court may, in its discretion, and upon such terms as may be just, allow a statement of attorney fees and costs and disbursements to be filed and served after the time specified in paragraph C(4)(a) of this rule.

C(4)(b) **Filing and serving objections. [*Objections.*]** A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by a written objection to the statement.

C(4)(b)(i) The objection and supporting documents, if any, shall be **filed and** served within 14 days after service on the objecting party of a copy of the statement. The objection shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. The objecting party may present affidavits, declarations, and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees

or costs and disbursements.

C(4)(b)(ii) The court may, in its discretion, and upon such terms as may be just, allow an objection to be served after the time specified in subparagraph C(4)(b)(i) of this rule.

C(4)(c) **Response to objections.** The party seeking an award of attorney fees may file a response to an objection filed pursuant to paragraph C(4)(b) of this rule. The response and supporting documents, if any, shall be **filed and** served within [*seven*] **7** days after service of the objection. The response shall be specific and may address issues of law or fact. The party seeking attorney fees may present affidavits, declarations, and other evidence relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

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

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

C(4)(e)(i) If a hearing is requested the court, without a jury, shall hear and determine all issues of law and fact raised by the objection.

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

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

C(4)(g) **Findings and conclusions.** On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party must make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees

or costs and disbursements, objection, or response filed pursuant to paragraph (a), (b), or (c) of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

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

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

C(5)(b) **[By supplemental] After entry of a limited or general judgment; notice.**

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

C(5)(b)(ii) After entry of a limited judgment. Attorney fees and costs and disbursements may be awarded or denied following entry of a limited judgment if the judge determines that there is no just reason for delay. In such cases, any award or denial of attorney fees and costs and disbursements shall be made by limited judgment.

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

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

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

included in all other judgments.

C(7) Procedure for seeking attorney fees or costs and disbursements incurred in enforcing judgments. If a party has alleged a basis for the award of fees as provided in paragraph B(2)(a) of this rule, the procedure for seeking attorney fees or costs and disbursements incurred in collecting or enforcing judgments shall be as specified in subsection C(4) of this rule.