MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 7, 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 Bachofner*
Michael Brian
Hon. Curtis Conover*
Hon. Roger DeHoog*
Travis Eiva*
Hon. Timothy Gerking
Hon. Jerry Hodson*
Hon. Jack Landau
Hon. Eve Miller
Shenoa Payne
Mark Weaver*
Deanna Wray
Hon. Charles Zennaché*

*Appeared by teleconference

Members Absent:

Jay Beattie
Hon. Paula Bechtold
Arwen Bird
Brian Campf
Kristen David
Jennifer Gates
Robert Keating
Maureen Leonard

Guests:

Matt Shields, Oregon State Bar
Channa Newell, Judiciary Committees,
Oregon Legislature

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 7 • ORCP 9 • ORCP 10 • ORCP 15 D • ORCP 27 • ORCP 45 • ORCP 54 E • ORCP 55 • ORCP 68 • ORCP 69	• ORCP 15 D • ORCP 26 • ORCP 40 • ORCP 47 E • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery		• ORCP 79-85

I. Call to Order (Mr. Brian)

Mr. Brian called the meeting to order at approximately 9:38 a.m.

II. Approval of April 5, 2014, and May 3, 2014, Minutes (Mr. Brian)

Mr. Brian called for a motion to approve the April 5, 2014, minutes (Appendix A). A motion was made and seconded, and the minutes were approved unanimously. Mr. Brian called for a motion to approve the May 3, 2014, minutes (Appendix B). A motion was made and seconded, and the minutes were approved unanimously.

Prof. Peterson reported that Aaron Crowe of Nationwide Process Service, Inc. thought that the March minutes had mischaracterized his position regarding ORCP 7. In an e-mail to Prof. Peterson, Mr. Crowe pointed out that he had made a distinction between a service involving certified mail that had a calculated date of perfected service on the date of mailing (whether pursuant to a court order as provided in ORCP 7 D(6)(a) or, if a motor vehicle case, ORCP 7 D(4)), versus mailings that result in perfected service only if signed for by the defendant (ORCP 7D(2)(d)). The minutes appeared to imply that he was suggesting that mailings made pursuant to ORCP 7D(2)(d) should be sent restricted delivery. It is now Prof. Peterson's understanding that Mr. Crowe believes that a restricted delivery requirement for Rule 7 D(2)(d) service directed to an individual would not improve the quality of service since the individual must sign the return receipt pursuant to Rule 7 D(3)(a)(i).

III. Administrative Matters (Mr. Brian)

A. Website (Ms. Nilsson)

Ms. Nilsson reported that part of the Lewis and Clark Law School's agreement with the Council for support services has been to provide hosting for the Council's website, which has been happening for the past several years. However, the law school has been migrating its hosted websites for staff and groups to Google Sites, and this migration would include the Council. Unfortunately, Google Sites has limitations that would not allow the current structure of the Council's website to remain intact– it has more of a plug-in template structure that would cause the loss of some of the flexibility and options currently employed on the site. Accordingly, Prof. Peterson and Ms. Nilsson have opted to move the site to an independent hosting company at a cost of a few hundred dollars for three years of hosting. The counciloncourtprocedures.org domain name remains in place and, in fact, the migration will avoid the confusion that sometimes arose when links were clicked and people were redirected to pages that included the lclark.edu web address.

IV. Old Business (Mr. Brian)

A. Committee Reports

1. Electronic Discovery (Ms. David)

Ms. David was not present at the meeting. Judge Hodson reported that the committee had not needed to meet because no issues relating to the electronic discovery changes made last biennium had been reported to it.

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

Mr. Bachofner reminded the Council that the committee had circulated drafts of changes to ORCP 7, 9, and 10 in March. He stated that he has not heard any feedback on additional changes from the Council, and that he believes that these drafts (Appendix C) are ready to be considered by the Council as a whole.

ORCP 7

Prof. Peterson reiterated that Aaron Crowe believed that it would be wise to require certified mail with restricted delivery only on cases under ORCP 7 D(4) and ORCP 7 D(6)(a) so there would be more certainty of service where someone signs the return receipt but the signature may be illegible. Mr. Brian asked whether, given Mr. Crowe's concerns, there were any wording changes that should be considered regarding Rule 7. Judge Miller noted that the bulk of the discussions with Mr. Crowe were not regarding this topic. Mr. Bachofner stated that Mr. Crowe thought of things a bit differently than the committee did, and the main discussion really came down to a philosophical difference of opinion about who is allowed to serve by mail. Prof. Peterson reminded the Council that Holly Rudolph of the Oregon Judicial Department (OJD) had raised one more issue – whether it is clear enough that a non-attorney can do follow up mailing for office and substituted service. He stated that the committee thought it was clear enough that anyone who is otherwise qualified to serve can mail the additional copies as long as they are not a party.

Judge Hodson stated that he was confused by the drafting of subparagraph D(2)(d)(i) and wondered what its intention is. Prof. Peterson stated that this is a policy choice, and that the intent of the sentence is that service by mail can be done by an attorney. Judge Hodson stated that the words "except as otherwise permitted" were confusing. Prof. Peterson noted that there are other provisions in Rule 7, such as office and substituted service, that allow service by certified mail, and the intention was not to affect those. Judge Hodson wondered whether the Council is trying to say that only an attorney can do this and, if so, perhaps the word "only" should be included. Judge Miller stated that, if the sentence seems

ambiguous, it needs to be clarified, because that was the whole point of the rule change. Judge Hodson stated that it does not say that somebody else can do it, but usually that language would introduce a concept that is different. Prof. Peterson pointed out that section E does say that, and that the two fit together, but that part of the reason this arose was because people were not sure what section E meant. He stated that Judge Hodson raised an important point and, if it is still not clear, it should be fixed. Judge Miller stated that she believes that a person may still have the ability to apply to a judge for an alternative method of service, but it has to be by court order, so that is another reason that the "except as otherwise permitted" remains in the subparagraph. Judge Hodson suggested "in addition to as otherwise permitted" because in these circumstances an attorney and only an attorney can do it, but there are other circumstances allowed by other parts of the rule that allow others to serve by mail. Mr. Shields agreed and stated that the language seems to say "you are permitted to do this, except as otherwise permitted," which does not make sense. Judge Miller suggested moving it to another part of the rule. Judge Hodson asked whether, in other parts of the rule, someone other than an attorney can serve by mail. Judge Armstrong stated that they can. Justice Landau asked what the phrase adds to the sentence when the beginning clause is "when required or allowed by this rule or statute." Judge Hodson stated that he does not have a problem with the goal, but that the language just does not make sense.

Judge DeHoog agreed that the clause is confusing. While he strongly disagrees with limiting service by mail to attorneys, which has already been discussed at other meetings, he thought that the clause needs to start with "when service by mail is required or allowed by this rule" because, when the original sentence was broken in half, the original meaning was lost. Prof. Peterson suggested the following language: "when service by mail is required or allowed by this rule," then remove the "except as otherwise permitted." Judge Hodson stated that he had read the rule as originally written and that it appeared that the "except as otherwise permitted" language was not intended to modify the person but, rather, the method of doing the service by mail. In that context it made sense, so he suggested keeping the language but moving it to the next sentence.

Judge Zennaché wanted to note for the record note his ongoing objection to limiting service by mail to attorneys. Judge Gerking, Ms. Payne, and Judge Armstrong agreed. Mr. Eiva wondered what problems exist that would lead to this limitation, beyond anecdotal evidence that non-attorneys are doing a bad job with mail service. Judge Miller stated that she does not know of any studies being done, but her experience is that self-represented litigants do not understand the technical aspects of service, or choose to ignore them, while some make inadvertent mistakes such as serving the summons but not the complaint and, when you are talking about due process and taking jurisdiction over a matter which can result in huge financial and other obligations, it is too important a

process to leave to non-attorneys. She stated that lawyers have a lot more to lose than a lay person. Mr. Eiva wondered whether there would be another way to create a protection against that. Judge Zennaché noted that the rule currently requires that, when an individual mails the summons and complaint to another individual, service is not effective unless the other individual signs for it. He stated that the Council could modify all of the mail service rules to require return receipt rather than saying to self-represented litigants that they cannot partake of service by mail. He noted that the original request came from a staffer at the OJD to make the rule more user friendly for self-represented litigants, and this change does the opposite.

Judge Miller noted that, while she is generally sensitive and concerned about access to justice, service is a critical issue. She observed that, most times, the signatures are illegible when the return receipt cards are received anyway, so she wondered how helpful they are. She pointed out that a party can get a friend or a relative to attempt personal service and, at least in that case, there is a live person who can testify about service. Judge Miller stated that the proposed amendment also makes changes requiring that the server verify what he or she served, which is an important aspect since many people do not understand the difference between a summons and a complaint or leave off the exhibits. She stated that, during the committee process, she balanced access to justice with due process and came down on the side of due process.

Prof. Peterson noted that he does not have a vote, but he also believes that it is a good idea to restrict mail service to attorneys. He also pointed out the change requiring servers to list the specific documents served, which is an improvement. He noted that, embarrassingly, many second and third year law students do not know the difference between a summons and a complaint. He stated that most people equate the delivery of certified mail with bad news, and expressed concern that, if a party were to receive certified mail from a soon-to-be former spouse or business partner, the party might sign for it grudgingly and throw it in the wastebasket, whereas certified mail from a lawyer is more likely to be opened.

Mr. Brian observed that there seemed to be both a philosophical difference and a wordsmithing problem with Rule 7. He asked Prof. Peterson whether any changes can be made to rules voted to be put on the publication agenda between now and the September meeting. Judge Hodson noted that there have been times he has voted to put a proposed amendment on the September agenda that he did not necessarily think he would ultimately vote to publish, because it allows the entire Council to review it. He stated that he has also voted for amendments that he was not certain about so that they had a chance for public comment. Ms. Payne noted that there are proposed non-substantive changes to the rule as well, and wondered whether, if the substantive change is voted against, the whole rule gets killed. She stated that she would like to put the other parts of the amendment on

the September agenda but not the service by mail part, and that it was her understanding from the Council meeting held in Eugene that certain parts of amendments could be added to the agenda and not others. Prof. Peterson stated that the Council can reconsider up to September but, if the Council votes against an amendment now, it might be an indication that nothing in the rule will be amended this biennium. He noted that a simple majority is required to put a proposed amendment on the September docket, a simple majority is required to publish an amendment, and a supermajority is required to promulgate an amendment.

Judge Zennaché asked for clarification about whether, if the Council votes to put Rule 7 on the September meeting docket and then votes to publish it, a rule could ultimately be promulgated that would have all of the changes except for the one that says only an attorney may serve by mail. Prof. Peterson noted that there is nothing in the Council's rules or authorizing statutes that says that the Council cannot amend a rule in September, but stated that it is obviously good to let the Council know about any errors or clarifications well in advance of the September meeting, and then propose those at the September meeting. Judge Armstrong stated that, in theory, publishing and input could lead the Council to make changes to the published amendment. Mr. Bachofner noted that there are changes that need to be made for the electronic issues regardless of whether people are in agreement with the issue of only attorneys serving or not, and he encouraged everyone to vote for putting the amendment on the September agenda so that those issues can move forward. Prof. Peterson pointed out that, once a rule is published, the Council should not be changing the substance because that is what is put out for public comment. If it turns out that there is an error, that can be fixed, but once the amendment goes public the substance should remain the same. He stated that the Council can make all kinds of changes up to September, but making a 180 degree change after publication would be wrong.

Mr. Brian called for a motion on the suggested modifications to the language in the ORCP 7 amendment. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously. Mr. Brian called for a motion to move the proposed amendment to the September agenda. A motion was made and seconded, a vote was taken, and the motion was approved with one vote against (Ms. Payne).

ORCP 9

Prof. Peterson stated that the Council was asked by the OJD and Legislative Counsel to make some changes, and that staff had made some additional changes. Some of these changes were related to e-court. Prof. Peterson reminded the Council that Legislative Counsel wanted references to "e-mail" changed to the more formal term "electronic mail," but that the Council had decided that the

terms “electronic mail” and “electronic service” were very close and could be confusing, so decided not to make that change. When the rule was written the language regarding facsimiles referred to “machines” and, since technology has changed, that language has been updated. He noted that other changes included fixing indefinite pronouns, changing age limits to be consistent with other places in the rules, and replacing the word “papers” with “documents.” Prof. Peterson stated that it is now clear that fax and e-mail service allows an additional 3 days, like mail service. Judge Miller noted that the committee had Ms. David, who is on the e-court task force, look at the language and she had no concerns. She observed that, now that Multnomah County has rolled out e-court, the Council should hear feedback right away if there is something that is not workable. Prof. Peterson stated that some of the changes in section G, as well as the new section H, were requested by the OJD. The language in section H was modified by the Council because it seemed to allow attorneys to opt out of electronic service.

Mr. Brian stated that his general impression is that there are no substantive changes to the rule. Mr. Bachofner stated that the change that makes service by e-mail equivalent with service by fax mail, with the 3 additional days, is substantive. Mr. Shields asked whether the term "electronic service" was the term the Chief Justice wanted used in section H. Prof. Peterson stated that it was. Mr. Shields thought that there was a proper name for the e-service system. Ms. Wray noted that the federal rules also say “electronic service.” Judge Zennaché noted that the term is defined in the rule.

Judge DeHoog suggested that section E might be easier to understand if the word "thereof" was replaced with "of the document."

Mr. Brian called for a motion to approve the language change suggested by Judge DeHoog. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously. Mr. Brian called for a motion to put the modified amendment on the September agenda. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously.

ORCP 10

Prof. Peterson reported that the staff had made a few changes, but that the main change was to replace the word “paper” with "document." He stated that the main policy change was to make clear that e-mail and facsimile service include the additional 3 days, like mail service.

Mr. Brian called for a motion to put the amendment to Rule 10 on the September agenda. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously.

3. ORCP 15 D (Mr. Beattie)

Mr. Beattie was not present at the meeting. Judge Armstrong reported that the conclusion of the committee was that it will take no action, as any change properly belonged in ORCP 68. The committee will present a formal report at the next meeting.

4. ORCP 27 (Mr. Weaver)

Mr. Weaver reported that the changes to this rule (Appendix D) have taken two biennia to craft. This biennium, the committee has received philosophical and policy comments from former Council members Judge Robert Herndon, Judge Lauren Holland, and Brooks Cooper, as well as input from attorney Erin Olson, whose practice includes cases involving disabled parties, and the Council's own committee members. He stated that there are many complicated changes, and that he and Prof. Peterson have been trying to make a readable rule. He believes that the committee has come up with a version that satisfies the concerns of the judges about giving appropriate notice and satisfies some of the concerns from practitioners about delays and additional costs.

Prof. Peterson reminded the Council that Mr. Cooper had led the charge on this rule change last biennium, but that Ms. Olson had come to the Council's promulgation meeting and pointed out that there were some flaws in the amendment as published. This biennium, Ms. Olson and Mr. Eiva had misgivings about adding burdens on litigators and possible unintended consequences, but the judges on the committee and in the work group convinced them that there are significant abuses happening in the guardian ad litem (GAL) appointment process. Prof. Peterson stated that one of the other concerns of the plaintiffs' bar was focused on cases that come in shortly before the deadline for filing imposed by the statute of limitations. There was concern that a judge might believe that the GAL should have been applied for a long time ago and might, therefore, deny the motion, resulting in the case not being filed. Prof. Peterson stated that, early in committee discussions, the committee arrived at a solution for this – the case can be filed immediately but, within seven days, there is a list of people and/or entities that must be notified. He pointed out that there is a fairly easy procedure for objections and, if an objection is filed, the judge must hold a hearing and make such orders as are appropriate. He also noted that many of the listed entities will not apply in most cases. Prof. Peterson stated that Judge Holland actually wanted service of notice to some of the persons or entities who will now receive notice to be made by certified mail, but stated that the committee decided against requiring certified mail because it is an additional burden on practitioners.

Prof. Peterson stated that the committee made a late change with regard to settlements. Section I helps to clarify that there is a statutory provision for

relatively small settlements where a guardian ad litem can be used but, otherwise, section I alerts the parties they are generally going to have to get a conservator for the settlement process.

Prof. Peterson stated that a major contribution from Ms. Olson allows discretionary appointment of a GAL for disabled persons (section C) on pretty much the same terms if it seems as though a GAL would promote the prosecution or defense of the civil action. He stated that this also required a change in section I to make it clear that, if a GAL is appointed for a disabled person, a conservator could be appointed for him or her. He noted that Elderly Persons and Persons With Disabilities Abuse Prevention Act and Family Abuse Protection Act cases are supposed to be summary proceedings designed to prevent abuse, but that these are some of the very cases where abuse of the process is happening, and he anticipated that the OJD will create forms to make compliance with the changes to Rule 27 easier. He also anticipated that, just like the forms for restraining order petitions, the OJD will also craft form motions to waive or modify some of these notice requirements. Judge Miller stated that the court will need to have a procedure to keep addresses confidential. Prof. Peterson agreed that there are cases where a listed person should not get notice or should get restricted notice because that person would be a danger to the petitioner.

Mr. Brian asked for clarification about the new procedure. He asked whether, if he files a complaint on behalf of a minor two days before the statute of limitations runs, he must send notice to everyone before he can serve the summons and complaint. Prof. Peterson stated that he can file and serve right away, but then either file a motion to waive the notice requirement or send the notifications. Mr. Eiva expressed concern about sending notice of the motion seeking appointment of a GAL. He stated that his current procedure is to go ex parte on the morning of the filing and get an order for the GAL and file under the GAL's name. He opined that the GAL should be appointed and the notice should occur after the order appointing the GAL, not while the motion is pending. Judge Zennaché observed that he would have to file for appointment of a GAL anyway. Mr. Eiva agreed, but stated that the GAL would be appointed the same day, and that the rule does not make that clear. He stated that he would like to change language in section E from "after filing the motion" to "after an order appointing a guardian ad litem." Judge Zennaché disagreed that the rule is unclear. He noted that Section D states "the court may appoint a person, however, the appointment shall be reviewed if an objection is received as specified...." He stated that he believes that the rule as written gives the court the authority to enter an order appointing a GAL that day, subject to the objections of the people to whom the notice is being sent. He did not understand why requiring that the notices be sent within so many days of filing the motion was problematic and noted that, if the Council were to adopt Mr. Eiva's suggestion and the court then appointed a different GAL, that appointment could trigger the need to send another set of notices. Mr. Eiva stated that he does

not want the court to feel it cannot grant the order without notice first being provided.

Judge Hodson suggested that the final sentence in section D be changed to: "The court may appoint a suitable person as a guardian ad litem before notice is given pursuant to section E of this rule." Prof. Peterson stated that, as a practical matter, an attorney will need to go to ex parte and present a motion and get an order because his or her client does not have the capacity to file the suit, so the motion and order are going to happen simultaneously. He observed that, if the client does not have the capacity to file, the attorney would need to get the order approved to get the GAL appointed. He wondered whether there is a circumstance where an attorney might file a motion and not get an order and still file the lawsuit. Judge Miller stated that she cannot envision where the case could ever be filed without the GAL being appointed. Mr. Eiva suggested that the language should be in section E because that is the notice section. Judge Zennaché stated he believes it should stay in Section D. Ms. Payne agreed.

Mr. Eiva suggested adding language in section H to clarify that there is no need for notice if conservator proceedings have been initiated. Judge Zennaché stated that this would fall under “good cause.” Prof. Peterson noted that it seems to go without saying that, if the notice has been sent, the court would not require the notice to be sent again. Mr. Eiva stated that the conservatorship is a different case filed under a different case number, and that he does not feel confident that the courts will consistently rule that way. Judge Zennaché wondered why he did not feel confident about it, and asked whether he had ever experienced it. Mr. Eiva noted that, in general, he has received different rulings from different courts on different days. Prof. Peterson noted that he could not imagine a judge requiring a party to send out the same notice in both actions and, even if the judge did, the only adverse consequence is that the attorney would have to kill another tree to send out the same notice in the same envelope to all these people. Mr. Eiva stated that he is worried about the appellate level, since “good cause” is a legal term of art and it is not discretion, so perhaps we should just strike the for “good cause shown.” He stated that it is not judicial discretion, it is a legal standard. He suggested language such as, “The court may waive such notice entirely or make such other orders as it judges proper under the circumstances, which may give the court more discretion.” Judge Zennaché stated that his concern about Mr. Eiva’s scenario is that it is perhaps going too far. He noted that this rule has been worked on over two biennia by a lot of people and that he is disinclined to make further changes. The Council agreed not to make any further changes in this regard.

Judge DeHoog noted that the language in subsection E(2), should probably be changed to read "18 years of age or older” to maintain consistency with the way ages are listed in other parts of the rule.

Mr. Brian called for a motion to approve the language change suggested by Judge Hodson. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously. Mr. Brian called for a motion to approve the language change suggested by Judge DeHoog. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously. Mr. Brian called for a motion to put the modified amendment on the September agenda. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously.

5. ORCP 45 (Ms. Wray)

Ms. Wray stated that the committee is currently looking at a change proposed by Mr. Bachofner regarding extending requests for admissions beyond the thirty currently allowed specifically for authenticity of documents, but has nothing to present to the Council right now. Prof. Peterson noted that Ms. Wray, in committee discussions, had also wondered whether the Council wants to stop with authenticity or whether we want to include foundation. He observed that the committee could likely get a draft put together by September if it could manage a meeting. Prof. Peterson pointed out that there is nothing in the Council's authorizing statute that requires items to be placed on the September docket at the preceding meeting, so a new issue can be raised at that meeting. Judge Miller stated that the question is pretty simple and she does not feel like she needs a lot more discussion, and that the only thing left open was whether the Council should consider other hearsay objections. Ms. Wray noted that the proposal on the table was mixing authenticity and the business records exception to hearsay. Those are different concepts and the wording would need to be sorted out, and she would be happy to do that over the summer with Mr. Bachofner and bring the issue back to the full Council in September. Mr. Bachofner stated that he would hate to see the Council not be able to consider something like this in September because it would be of benefit to both sides of the bar.

6. ORCP 46 and 55 (Judge Gerking)

Judge Gerking reported that the committee is still working on a possible amendment to ORCP 55 H, an effort to clarify what notice, if any, is required when serving a subpoena on a healthcare provider. He noted that the committee has been working hard on a possible compromise, and that there is a potential amendment before the Council (Appendix E), but that this is still a work in progress. He stated that the committee has not discussed this proposal with either Mr. Bachofner, who was not able to attend the last meeting, nor Mr. Keating, who is currently on sabbatical until July. Judge Gerking stated that the committee will meet again and continue to work on it.

Prof. Peterson stated that he and Ms. Nilsson had looked over the committee's draft and made some minor modifications to the committee's language and the structure of the amendment Judge Gerking noted that, since the draft is a work in progress, it may be premature to tweak the language. Ms. Payne observed that the language in the amendment before the Council was actually not the committee's most recent draft. Judge Zennaché asked the committee to try to get the Council a copy of any draft at least a few weeks before the September meeting. Judge Gerking agreed to try.

Mr. Bachofner noted that the committee has had a lot of disagreement, but that it has tried to come up with a reasonable compromise. He stated that he is not sure if the committee will ultimately succeed. Judge Miller asked whether there is anything other Council members can do to be helpful, since the Health Insurance Portability and Accountability Act of 1996 (HIPAA) rule was included with the draft. Judge Gerking stated that he just wanted to provide the HIPAA rule for context. Ms. Payne asked whether, if a draft amendment is not put on the September meeting docket, it is dead. Prof. Peterson stated that it is possible to submit an amendment in September and move by majority vote to publish it, but it is best to give Council members time to be comfortable with it before the meeting. Judge Armstrong confirmed that our failure to do something now does not foreclose the Council from publishing something in September.

Prof. Peterson directed the Council's attention to the most recent proposed draft of ORCP 46 (Appendix F), which consists of primarily staff changes. He reminded the Council that it had approved a draft to be put on the September docket at the Council's March meeting, but staff belatedly realized that the Council had not examined all of the sections in the rule. The staff has now gone through sections C and D and made changes, mostly to internal references. He noted that, in section E(4), the lead line reference had not been changed since the material it referred to was moved to Rule 36 years ago.

Judge Gerking suggested that language in section A(2) of the rule be changed from "or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection...." to "or if a party in response to a request for production or inspection submitted under Rule 43 fails to produce or to permit inspection...." He also suggested replacing the words "set out" with the word "identify" in the same section, as well as changing language in section D from "to comply with or serve objections to a request for production and inspection submitted under Rule 43...." to "to comply with or serve objections to a request for production or inspection under Rule 43...."

The Council discussed references to courts in paragraphs A(1)(a) and A(1)(b) and subsection B(1), and expressed confusion over use of the terms "court of competent jurisdiction" and "political subdivision." Judge Armstrong observed

that the first term may relate to a time when both district and circuit courts existed, although he was uncertain of the origin of the "political subdivision" language. He noted that all courts in which motions would be made are circuit courts and that, because of the way judicial districts are divided, it is possible that a circuit court judge might not be in a particular county at a given moment. The following language was therefore suggested:

> A(1)(a) "...a motion may also be made to [*a court of competent jurisdiction in the political subdivision*] **the circuit court for the county** where the deponent is located."
>
> A(1)(b) "...shall be made to [*a court of competent jurisdiction in the political subdivision*] **the circuit court for the county** where the non-party deponent is located."
>
> B(1) "by a circuit court judge [*in*] **of** the county in which the deponent is located."

Mr. Brian called for a motion to approve the language changes outlined above. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously. Mr. Brian called for a motion to put the modified amendment on the September agenda. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously.

7. ORCP 54 E (Ms. Gates)

The Council examined the proposed amendment to ORCP 54 E (Appendix G). Judge Armstrong suggested changing the word "such" to the word "the" each time it appears in subsection E(2), as well as changing the phrase "the same" to "the accepted offer" in the same subsection.

Judge DeHoog noted that the title of the rule includes the phrase "Compromise"; however, the Council had changed this in other parts of the rule to "offer to allow judgment." Judge Zennaché stated that he was certain that the title had already been changed to reflect this. Prof. Peterson observed that perhaps the working copy of the amendment was not accurate. In any case, the Council agreed that the title should read: "Dismissal of Actions; Offer to Allow Judgment."

Mr. Brian called for a motion to approve the language changes suggested by Judge Armstrong. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously. Mr. Brian called for a motion to put the modified amendment on the September agenda. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously.

8. ORCP 68 (Mr. Weaver)

Mr. Weaver explained to the Council that the committee's draft amendment (Appendix H) includes four categories:

a. changes to allow a party to request attorney fees and costs after a limited judgment has been entered if the court finds it to be appropriate. This would use the same standard as the court uses for entering a limited judgment in first place - no just reason for delay;
b. changes to allow the trial court discretion to modify the timelines for filing the statement of attorney fees and for filing an objection thereto and any response;
c. changes to specify that a party may request attorney fees and costs incurred in collecting a judgment, with the limitation that such a request may only be filed once per year unless good cause is shown; and
d. non-substantive changes proposed by Council staff.

Mr. Weaver noted that not everyone on the committee was in agreement with the proposal to allow for the filing of a statement of attorney fees in some cases after entry of a limited judgment. Some committee members were undecided about permitting a party to ask for attorney fees after the entry of a limited judgment because of the fear that it would open the door to an increased number of hearings over attorney fees.

Judge Miller stated that, when she is deliberating about attorney fees, she often asks the parties about settlement negotiations to see if people acted reasonably. She expressed concern that, if this happens at the limited judgment level before the remaining parties have resolved all of the claims, she might hear things that could influence how she feels about the claim of a party that is still in the litigation. Judge Zennaché pointed out that, under the current rule, a party can seek attorney fees at the time they submit their limited judgment; the change merely allows a party to petition for another limited judgment for attorney fees after a limited judgment is entered. Mr. Weaver noted that, if there were circumstances where there was a concern about dealing with an issue of attorney fees after a limited judgment, a judge could can say there is a just reason for delay and choose to deal with all claims for attorney fees after entry of the general judgment.

Judge Zennaché noted that, even if the Council adopts this change allowing entry of a limited judgment for attorney fees after a limited judgment dismissing a party from a case, the intent is not to make a sea change that people would suddenly be able to get attorney fees after every limited judgment. He stated that the intent is for it to be a limited circumstance on an interim basis, not an opening of the floodgates. Prof. Peterson observed that there is a tension between the speedy, just, and inexpensive administration of justice and the workload of the courts. He

noted that there is currently a kind of trap where, if a party obtains a limited judgment and has not dealt with fees, that party may have to wait a year or more depending on what is going on with the case before the general judgment will be entered. The proposed change would allow a party who did not think to get attorney fees included in the limited judgment of dismissal to ask if they can be awarded a second limited judgment for attorney fees and gives the court the authority to award fees on a case-by-case basis.

Judge Miller asked whether, if an attorney does not do anything more than get his or her client out of the case with a limited judgment of dismissal as to one party, can that attorney wait until the general judgment is issued and start the attorney fee process over again under ORCP 68. Judge Armstrong affirmed that this is the case. Judge Miller observed that, theoretically, the whole case could settle and a party could submit a general judgment of dismissal because that party had settled the rest of the case and another party could come back and ask for attorney fees, even though that party had been dismissed from the case months ago. Judge Armstrong stated that the parties certainly entitled to do this. Judge Zennaché agreed that this is the way the law currently works. Judge Armstrong noted that an attorney may not even realize the general judgment has been entered and may miss their time to file the statement of attorney fees. Judge Miller asked whether there is an obligation to notify a dismissed party that a general judgment has been entered. Judge Armstrong stated that he does not practically know how much continued communication by rule is required to serve parties that have been dismissed by limited judgment, and that a general judgment may well be entered without notice to the dismissed parties. Judge Miller asked whether, in a motion for summary judgment, the party dismissed by limited judgment is still getting notice. Judge Zennaché stated that they would. Prof. Peterson observed that Chapter 18 of the Oregon Revised Statutes requires the clerk of the trial court to send out a notice of entry of judgment. Mr. Brian stated that, in his experience, it does not always happen. Judge Armstrong agreed and stated that the dismissed party has to keep track. Judge Miller noted that this may be an education issue to bring to the attention of the bar and the Professional Liability Fund. Mr. Weaver stated that, from a practical standpoint, if an attorney is waiting for fees, either for the attorney or for the client, either the client is calling frequently or the attorney's accountant or partner is wondering the same thing.

Prof. Peterson pointed out another significant policy change – Judge Armstrong suggested adding the language in subparagraph C(4)(d)(ii) which gives the court discretion to consider and grant attorney fees when a statement of attorney fees is filed after the 14 days, and would also potentially allow otherwise untimely objections and responses. He noted that this is consistent with *Johnson v. Best Overhead Door, LLC* [238 Or App 559, 242 P3d 740 (2010)]. Prof. Peterson stated that many practitioners take it as an article of faith that, if it is the 15th day and you have not filed it, you are done. He noted that this would give judges discretion to

treat statements of attorney fees like many other documents filed by attorneys. Judge Miller confirmed that this change is not referring to a request before time runs out but, rather, after the time has expired. Judge Armstrong stated that both are possible with this change, as in ORCP 15 D. Judge Zennaché wondered why someone would think it was acceptable for judges to allow it after the fact for other kinds of motions but not for this kind. Judge Miller noted that it irritates lawyers when there is a specific deadline and judges give someone a pass, so it would presumably be even more irritating to non-lawyers because they might think that judges are favoring lawyers. She noted that lawyers are expected to be pretty good about managing their calendars, so the notion that statements of attorney fees could be filed after the 14 days has expired is annoying.

Ms. Payne stated that she appreciated Judge Miller's argument, but she does not mind giving judges discretion. What bothers her is when someone does not file within the deadline and judges as a matter of course allow them to file late. She observed that the proposed rule change would allow for someone to present a reason to a judge and for the judge in his or her discretion to consider the reason – it does not automatically allow for late filing but, rather, just allows the issue to be presented. Judge Miller expressed concern about the potential for negative feedback from both practitioners and self-represented litigants about the point of having deadlines if judges are going to be wishy washy about them. Judge Armstrong wondered if the purpose being served by deadlines is to create fixed points to rely on that, if they are not followed, end the case. Judge Miller observed that she has never known appellate rules to be flexible. Judge Armstrong noted that they are not, necessarily, but that the appellate courts do have that discretion. He observed that, in terms of liability, perhaps the slippage of a day should not make a difference in terms of whether fees should be awarded. Judge Miller and Judge Zennaché both agreed that ORCP 68 can be a thorn in trial judges' sides.

Justice Landau asked whether there is an ambiguity in the way the proposed change is drafted. He pointed out that, in Rule 15, it specifically says that the trial court can allow extra time after the time limited by the procedural rules or by an order enlarging the time, either before or after, but the proposed change does not say that. He suggested writing the change in the same way Rule 15 D is written. Prof. Peterson stated that the committee talked about discretion and wanted to make it clear that there were some limitations on that, but he did not recall why they did not parallel the language in Rule 15 D. Mr. Weaver stated that he was uncertain as to whether "or by an order enlarge such time" is necessary, as the language stating that the court can allow a pleading to be filed after the time limited by the procedural rules would seem to encompass both situations. He stated that he believes he initially proposed including this language in the draft. Justice Landau stated that appellate judges tend to look at the difference between two rules and try to explain a reason for the difference.

Mr. Brian called for a motion to approve the language change suggested by Justice Landau. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously. Mr. Brian called for a motion to put the modified amendment on the September agenda. A motion was made and seconded, a voice vote was taken, and the motion was approved unanimously.

9. ORCP 69 (Prof. Peterson)

Prof. Peterson reported that the committee had provided the Council with two versions of proposed changes to ORCP 69 (Appendix I), with two different approaches for the same concept. He stated that, pursuant to subsection B(2), some attorneys are giving the notice of intent to take default before the thirty days provided in Rule 7 C(2) has run, and attempting to run them concurrently. He noted that Ms. David has reported that there are some attorneys who serve the notice of intent to take default with the summons and complaint and, while he thought that the rule was clear that this is not an acceptable practice, it apparently is not clear. The change adds as many as 10 days; if the defendant waits until the 29th or 30th day and then asks, the defendant is going to get forty days. The change is intended for the defense attorney whose client comes in on the 29th day to have an opportunity to fairly respond to the allegations. Prof. Peterson explained that Version A is more active and states that, if the defendant has made contact but has failed to file a motion or an answer within the time required, the movant may file and serve the notice of intent to take default. He stated that Version B is the same concept, but explains it in a shorter sentence. More committee members seemed to prefer Version B during the last committee teleconference.

Ms. Payne stated that this seems like a shady kind of defense practice to get a 10 day extension to file an answer and, in order to prevent that, plaintiffs will end up filing their notice of default 10 days before the answer is due. Judge Miller pointed out that, under the current rule, the defendant could seek to set aside the default, and the chance of a default being set aside is 99%. Ms. Payne stated that the defendant is not actually going to default; rather they are simply not going to file their answer within the amount of time afforded them in Rule 7 C(2). Judge Zennaché and Mr. Bachofner wondered how prejudiced a plaintiff would be by those 10 days. Ms. Payne suggested that it would be more collegial for a defendant to just pick up the telephone and ask the plaintiff. Judge Miller observed that, just because some attorneys are acting badly, it does not mean opposing counsel has to.

Mr. Brian stated that, as a plaintiffs' lawyer who has been on the receiving end of delaying tactics, he still thinks the Council should modify Rule 69 to say that a plaintiff cannot file a notice of default at the time the summons is served. Prof.

Peterson stated that most practitioners think they either are entitled to, or have to give, forty days if the other side asks for it, but the rule does not clearly say that the plaintiff cannot run the thirty days and the 10 days concurrently.

Prof. Peterson reported that the committee had made one other change which was brought to the Council by Ms. Rudolph of the OJD. He noted that the issue has come up over the last two biennia, particularly in family law cases, where there is a judgment and then there is a motion for an order to show cause. Case law says that it is sort of a new case, but it is the same case number and can happen years later and, in response to the motion to show cause, some people are filing what they call "counterclaims," which are really cross-motions. Judge Miller stated that the Council discussed this issue last biennium but received resistance from some judicial districts regarding the designation of cross-motions. Prof. Peterson stated that Ms. Rudolph had pointed out that, if a party is getting a ruling on one of these motions for show cause, that would implicate the Servicemembers Civil Relief Act, 50 App. U.S.C.A. §521 (SCRA), and that there is nothing in ORS Chapter 107 or ORCP 69 that would raise the SCRA for the parties or the court. This amendment would require that, when a party appears on a show cause order, that party would have to satisfy the same criteria that every other litigant has to satisfy.

Judge Zennaché stated that this is exactly the issue that the Rule 13 committee was addressing and he believed that the consensus of that group was that, since different courts set motions for orders to show cause on different kinds of dockets, the committee did not want to have people go through the Rule 69 default process but, rather, if the party did not appear, the movant could put on a prima facie case and get the relief sought. He observed that the SCRA is an independent federal obligation which must be complied with, but he thought that the Council was not going to graft the default process onto the order to show cause process. He stated that he is opposed to that change. Judge Zennaché believed that the Rule 13 committee was pretty clear that it did not want to do that because different counties around the state handle orders to show cause in different ways.

Prof. Peterson stated that these show cause motions can be handled either way, but his concern is that neither the statute nor the rule tells people that they need to satisfy the SCRA, and there is no guidance for them. He stated that it seems that if the requirements in Rule 69 are appropriate for an order to show cause – that the non-movant is under the jurisdiction of the court and not incapacitated, and that the requirements of the SCRA have been met – the process could be handled in either one hearing at one time or it could be broken into two hearings. Judge Zennaché stated that the problem is that there are a number of courts saying that they do not want to have to deal with show cause orders in this manner because they set the motions on an actual docket on an actual day and people show up in court and make a record then; there is no paperwork but, rather, the party

appears and presents their prima facie case and, if the other side does not appear, the filing party just has to comply with the SCRA and they are done. Judge Miller stated that, in Clackamas County, when a party files a motion for modification and asks for a show cause hearing, the day of the hearing is when the judge decides whether there is jurisdiction, etc. and, even if there is an empty chair for the non-movant, the judge still goes through that analysis. Prof. Peterson observed that there still must be a piece of paper stating that the website of the Department of Defense has been checked. Judge Zennaché noted that this may be true, but that it is a requirement of federal law. He stated that the amendment says that parties must comply with all the requirements of Rule 69, including filing a motion for an order of default, submitting an affidavit or declaration, plus having a motion for entry of the default judgment, which is not how it is done in many counties.

Prof. Peterson observed that each question from the judge could easily be put in an affidavit or declaration. Judge Miller asked where in Rule 69 the SCRA requirement appears. Prof. Peterson stated that it appears in paragraph C(1)(e). He stated that Rule 69 D(1)(a) includes a provision for when the order of default has been granted or is being applied for contemporaneously; the Council thought that through the last time it made a change in Rule 69 so that a party can appear with all of his or her motions at the same time and get in front of the court all of the necessary information. He stated that it seems that this would be useful for practitioners and the bench. Judge Miller stated that there does not need to be a different hearing date or process, because people coming in just need to be prepared to search the Department of Defense website and say that the person is not a member of the military. She asked whether this amendment would mean that a party has to bring a declaration before they get a hearing. Judge Zennaché again warned that, if this were to be adopted, all the procedures in ORCP 69 would apply. He noted that, while motions for an immediate danger order may fit within the definition of an order to show cause modifying a judgment, they follow an entirely different process.

Mr. Brian called for a motion to put the Version B amendment to Rule 69 on the September agenda. A motion was made and seconded, a voice vote was taken, and the motion was approved with two votes against (Judge Hodson and Judge Zennaché).

Mr. Brian called for a motion to put the Version A amendment to Rule 69 on the September agenda. The motion was not seconded.

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

Prof. Peterson stated that he had reached out to three bar committees that were interested in assisting with provisional process and other consumer issues, but they were never able to connect for a meeting. His suggestion is to get a work

group together during the interim, since it is such a large undertaking, and bring the issue back to the Council next biennium. Mr. Brian agreed that this is a good idea.

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

Prof. Peterson stated that he and Ms. Nilsson are preparing a short report from the committee's teleconference regarding our options. Judge Hodson stated that he had brought up this issue in a judges' roundtable and Judge Kantor had mentioned that, when he was on the Council, whenever the Council was amending something that the Legislature had done, the Council specifically asked the Legislature to approve those changes. Prof. Peterson stated that he will reach out to Judge Kantor for more information about this.

V. New Business (Mr. Brian)

There was no new business requiring discussion.

VI. Adjournment

Mr. Brian adjourned the meeting at 12:51 p.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

Council on Court Procedures
June 7, 2014, Meeting
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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

DRAFT 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

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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 ORCP 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

SUMMONS

RULE 7

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

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

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

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

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

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

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

C(3) **Notice to party served.**

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

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given

to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

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

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

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

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

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

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toll-free elsewhere in Oregon at (800) 452-7636.

D Manner of service.

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

D(2) **Service methods.**

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

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

by statute, substituted service shall be complete upon such mailing.

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

D(2)(d) **Service by mail.**

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

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

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

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D(3)(a) **Individuals.**

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

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

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

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

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

(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the

summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D(3)(d)(ii) **Alternatives.** If a registered agent or a general partner of a limited

partnership cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

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

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

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

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

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

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

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

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

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

D(4) **Particular actions involving motor vehicles.**

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

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

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

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

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

Sufficient service pursuant to this subparagraph may be shown if the proof of service

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

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

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

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

D(5) **Service in foreign country.** When service is to be effected upon a party in a foreign country, it is also sufficient if service of true copies of the summons and the complaint is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases such service shall be reasonably calculated to give actual notice.

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

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

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

D(6)(c) **Where published.** An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. Such publication shall be four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county [*where*] **in which** the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in the affidavit or declaration required by paragraph (a) of this subsection, and the court may order publication in a comparable manner at such location in addition to, or in lieu of, publication in the county where the action is commenced.

D(6)(d) **Mailing summons and complaint.** If the court orders service by publication and

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

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

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

be affected thereby.

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

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise. However, service pursuant to subparagraph D(2)(d)(i) of this rule may be made **only** by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F Return; proof of service.

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

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

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

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

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

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

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

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

Affidavit of Publication

State of Oregon)

) ss.

County of)

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

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

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

_____

Notary Public for Oregon

My commission expires

___day of _____, 2___.

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

Declaration of Publication

State of Oregon)

) ss.

County of)

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

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

_____

___day of _____, 2___.

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

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

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

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

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

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

RULE 9

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

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

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

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documents required to be served upon a party by section A of this rule shall be filed with the court within a reasonable time after service. Except as otherwise provided in Rule 7 and Rule 8, proof of service of all [*papers*] **documents** required or permitted to be served may be by written acknowledgment of service, by affidavit or declaration of the person making service, or by certificate of an attorney. Such proof of service may be made upon the [*papers*] **document** served or as a separate document attached [*to the papers*] **thereto**. [*Where*] **If** service is made by [*telephonic*] facsimile communication [*device*] or e-mail, proof of service shall be made by affidavit or declaration of the person making service, or by certificate of an attorney or sheriff. [*Attached*] **If service is made by facsimile communication under section F of this rule, the person making service shall attach** to such affidavit, declaration, or certificate [*shall be the*] printed confirmation of receipt of the message generated by the [transmitting machine, if facsimile communication is used] **transmitting technology**. If service is made by e-mail under section G of this rule, the person making service must certify that he or she received confirmation that the message was received, either by return e-mail, automatically generated message, [*telephonic*] facsimile **communication**, or orally**; however, an automatically generated message indicating that the recipient is not in the office or is otherwise unavailable cannot support the required certification**.

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

E Filing with the court defined. The filing of pleadings and other documents with the court as required by these rules shall be made by filing them with the clerk of the court or the person exercising the duties of that office. The clerk or the person exercising the duties of that office shall endorse upon such pleading or document the time of day, the day of the month, the

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

F Service by [*telephonic*] facsimile communication [*device*]. Whenever under these rules service is required or permitted to be made upon a party, and that party is represented by an attorney, the service may be made upon the attorney by means of [*a telephonic*] facsimile communication [*device*] if the attorney [*maintains such a device at the attorney's office and the device*] **has such technology available and said technology** is operating at the time service is made. Service in this manner shall be [*equivalent to service by mail for purposes of*] **subject to** Rule 10 C. **Facsimile communication includes: a telephonic facsimile communication device; a facsimile server or other computerized system capable of receiving and storing incoming facsimile communications electronically and then routing them to users on paper or via e-mail; or an internet facsimile service that allows users to send and receive facsimiles from their personal computers using an existing e-mail account.**

G Service by e-mail. Service by e-mail is prohibited unless attorneys agree in writing to e-mail service. This agreement must provide the names and e-mail addresses of all attorneys and the attorneys' designees, if any, to be served. **Any attorney who has consented to e-mail service must notify the other parties in writing of any changes to the attorney's e-mail address.** Any attorney may withdraw his or her agreement at any time, upon proper notice via e-mail and any one of the other methods authorized by this rule. [*Service*] **Subject to Rule 10 C, service** is effective under this method when the sender has received confirmation that the

attachment has been received by the designated recipient. Confirmation of receipt does not include an automatically generated message that the recipient is out of the office or **is** otherwise unavailable.

H Service by electronic service. As used in this section, electronic service means using an electronic filing system provided by the Oregon Judicial Department. Electronic service is permitted only as prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court.

TIME

RULE 10

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

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

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

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facsimile communication, 3 days shall be added to the prescribed period.

MINOR OR INCAPACITATED PARTIES

RULE 27

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

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

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

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

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litem appointed by the court. The court shall appoint some suitable person to act as guardian ad litem:]

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

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

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor 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

B(2)(b) 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] **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] **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 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 is 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 subsections 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 of this rule, no later than 7 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 of this rule.

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)(c) 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 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. Except as permitted by ORS 126.725, in cases where settlement of the action will result in the receipt of property or money by a party for whom a guardian ad litem was appointed under section B of this rule, court approval of such settlement must be sought and obtained by a conservator unless the court, for good cause shown and on such terms as the court may require, expressly authorizes the guardian ad litem to enter into a settlement agreement.

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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. The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

B Appointment of guardian ad litem for minors; incapacitated or financially incapable parties. When a minor or a person who is incapacitated or financially incapable, as defined in ORS 125.005, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule, as follows:

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

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

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor 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

B(2)(b) 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

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other interested person; or

B(4) when the defendant or respondent is a person who is incapacitated or financially incapable, as defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, filed within the period of time specified by these rules or any other 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 is 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 subsections F(2) or F(3) of this rule.

E Notice of Motion Seeking Appointment of Guardian ad Litem. Unless waived under Section H of this rule, no later than 7 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 of this rule.

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)(c) 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 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. Except as permitted by ORS 126.725, in cases where settlement of the action will result in the receipt of property or money by a party for whom a guardian ad litem was appointed under section B of this rule, court approval of such settlement must be sought and obtained by a conservator unless the court, for good cause shown and on such terms as the

court may require, expressly authorizes the guardian ad litem to enter into a settlement agreement.

SUBPOENA

RULE 55

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

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

D(2) **Service on law enforcement agency.**

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

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

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

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

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

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

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

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

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

three days prior to trial.

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

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

*****

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*] **that** identifies an individual or [*which*] **that** could be used to identify an individual; [*which*] **that** has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and [*which*] **that** 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*] **that** requires the return to the original custodian of such information or the destruction of the individually identifiable health information (including all copies made) at the end of the litigation.

H(2) **Mode of Compliance.** Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted

or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.

H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information **to an attorney's office, 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:*]

H(2)(a)(i) a qualified protective order;

H(2)(a)(ii) a copy of a pending motion for a qualified protective order; or

H(2)(a)(iii) an affidavit or a declaration, together with attached supporting documentation, demonstrating that:

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

[*H(2)(a)(ii)*] **H(2)(a)(i)(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; [*and*]

[*H(2)(a)(iii)*] **H(2)(a)(i)(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[.]**; and**

H(2)(a)(i)(D) [*The*] **the** party issuing a subpoena [*must also certify*] **certifies** that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

H(2)(b) Within 14 days from the date of a notice requesting individually identifiable health information, the individual or the individual's attorney objecting to the subpoena shall respond in writing to the party issuing the notice, stating the reason for each objection.

H(2)(c) Except as provided in subsection **H**(4) of this [section] **rule**, when a subpoena is served upon a custodian of individually identifiable health information in an action in which the entity or

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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*] **with the subpoena** if a custodian delivers by mail or otherwise a true and correct copy of all of the records responsive to the subpoena within five days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection **H**(3) of this [section] **rule**.

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

H(2)(e) After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The records shall be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records

[*which*] **that** are not introduced in evidence or required as part of the record shall be returned to the custodian who produced them.

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

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

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

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

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

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

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

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

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

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

_____

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

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

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

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

Shari Nilsson <nilsson@lclark.edu>

Fw: ORCP 55H

1 message

Tim.Gerking@ojd.state.or.us <Tim.Gerking@ojd.state.or.us> Fri, Jun 6, 2014 at 1:02 PM
To: Shari Nilsson <nilsson@lclark.edu>, spayne@hk-law.com, teiva@corsonjohnsonlaw.com, John Bachofner <john.bachofner@jordanramis.com>

----- Forwarded by Tim Gerking/JAC/OJD on 06/06/2014 01:00 PM -----

From: "Travis Eiva" <teiva@corsonjohnsonlaw.com>
To: <Tim.Gerking@ojd.state.or.us>, "Shenoa Payne" <SPayne@HK-LAW.COM>,
Date: 06/06/2014 12:42 PM
Subject: FW: ORCP 55H

H(2)(a) The attorney for the party issuing a subpoena requesting production of individually identifiable health information **to an attorney office, hearing or otherwise** must serve the custodian or other keeper of such information either with

(i) a qualified protective order**,**

(ii) **a copy of a pending motion for a qualified protective order,** or

(iii) an affidavit or declaration together with attached supporting documentation demonstrating that:

(A) 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;

(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; and

(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.

Travis S. Eiva
THE CORSON & JOHNSON LAW FIRM, P.C.
940 Willamette St., Suite 500
Eugene, OR 97401

Council on Court Procedures
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Shari Nilsson <nilsson@lclark.edu>

Fw: HIPAA RULE

1 message

Tim.Gerking@ojd.state.or.us <Tim.Gerking@ojd.state.or.us> Fri, Jun 6, 2014 at 1:03 PM
To: Shari Nilsson <nilsson@lclark.edu>, teiva@corsonjohnsonlaw.com, John Bachofner <john.bachofner@jordanramis.com>, spayne@hk-law.com

----- Forwarded by Tim Gerking/JAC/OJD on 06/06/2014 01:03 PM -----

From: "Travis Eiva" <teiva@corsonjohnsonlaw.com>
To: <Tim.Gerking@ojd.state.or.us>, "Shenoa Payne" <SPayne@HK-LAW.COM>,
Date: 06/06/2014 12:52 PM
Subject: HIPAA RULE

45 CFR 164.512 - Uses and disclosures for which an authorization or opportunity to agree or object is not required.

(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:
(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or
(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.
(iii) For the purposes of paragraph (e)(1)(ii)(A) of this section, a covered entity receives satisfactory assurances from a party seeking protecting health information if the covered entity receives from such party a written statement and accompanying documentation demonstrating that:
(A) The party requesting such information has made a good faith attempt to provide written notice to the individual (or, if the individual's location is unknown, to mail a notice to the individual's last known address);

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(B) The notice included sufficient information about the litigation or proceeding in which the protected health information is requested to permit the individual to raise an objection to the court or administrative tribunal; and
(C) The time for the individual to raise objections to the court or administrative tribunal has elapsed, and:
(*1*) No objections were filed; or
(*2*) All objections filed by the individual have been resolved by the court or the administrative tribunal and the disclosures being sought are consistent with such resolution.
(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) Nothwithstanding 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)(iv) of this section.
(2) *Other uses and disclosures under this section.* The provisions of this paragraph do not supersede other provisions of this section that otherwise permit or restrict uses or disclosures of protected health information.

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FAILURE TO MAKE DISCOVERY; SANCTIONS

RULE 46

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

A(1) **Appropriate court.**

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

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

A(2) **Motion.** If a party fails to furnish a report under Rule 44 B or C, or if a deponent fails to answer a question propounded or submitted under [*Rules*] **Rule** 39 or **Rule** 40, or if a corporation or other entity fails to make a designation under Rule 39 C(6) or Rule 40 A, or if a party fails to respond to a request for a copy of an insurance agreement or policy under Rule 36 B(2), or if a party in response to a request for inspection submitted under Rule 43 fails to permit inspection as requested, the discovering party may move for an order compelling discovery in accordance with the request. Any motion made under this subsection shall set out at the beginning of the motion the items that the moving party seeks to discover. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

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

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

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

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

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

B **Failure to comply with order.**

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

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

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

B(2)(b) **Designated matters.** An order refusing to allow the disobedient party to support or

oppose designated claims or defenses, or prohibiting the disobedient party from introducing designated matters in evidence.[*;*]

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

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

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

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

C Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter, as requested under Rule 45, and if the party requesting the [*admissions*] **admission** thereafter proves the genuineness of the document or the truth of the matter, the party requesting the [*admissions*] **admission** may apply to the court for an order requiring the other party to pay the party requesting the [*admissions*] **admission** the reasonable expenses incurred in making that proof, including reasonable [*attorney's*] **attorney** fees. The court shall make the order unless it finds that**:** [*(1)*] the request was held objectionable pursuant to Rule 45 B or C[*, or (2)*]**;** the admission sought was of no substantial importance[*, or (3)*]**;** the party failing to admit had

reasonable [*ground*] **grounds** to believe that such party might prevail on the matter[*, or (4)*]**; or** there was other good reason for the failure to admit.

D Failure of party to attend at own deposition or respond to request for inspection [*or to inform of question regarding the existence of coverage of liability insurance policy*]. If a party or an officer, director, or managing agent of a party or a person designated under Rule 39 C(6) or **Rule** 40 A to testify on behalf of a party fails [*(1)*] to appear before the officer who is to take the deposition of that party or person, after being served with a proper notice, or [*(2)*] to comply with or serve objections to a request for production and inspection submitted under Rule 43, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just[*, including among others it may take*] **including, but not limited to,** any action authorized under [*subsection*] **paragraphs** B(2)(a), **B(2)**(b), and **B(2)**(c) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising such party or both to pay the reasonable expenses, including [*attorney's*] **attorney** fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described in this section may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 36 C.

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DISMISSAL OF ACTIONS; COMPROMISE

RULE 54

* * * * *

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

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

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

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

* * * * *

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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 party shall also have a right to recover disbursements.

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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] **such** items are claimed as damages arising prior to the action;

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

C(1)(c) [A] **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 fee[*s*] shall be awarded unless a right to recover such fee is alleged as provided in this [*subsection*] **paragraph** 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

in the manner provided by subsection **C**(4) of this [*section*] **rule**, 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:] **specified in this subsection.**

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*] **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*] **serve**, in accordance with Rule 9 B, a copy of the statement on all parties who are not in default for failure to appear.

C(4)(b) **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. 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)(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 and enlargements of time.**

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

C(4)(d)(ii) The court may, in its discretion, and upon such terms as may be just, allow a statement, an objection, or a response to be filed and served after the time specified in paragraphs C(4)(a), C(4)(b), or C(4)(c) of this rule.

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*] **caption** of the statement of attorney fees or costs and disbursements, objection, or response filed pursuant to paragraph

C(4)(a), **C(4)**(b), or **C(4)**(c) of this [*subsection*] **rule**. 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 general or limited 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 **are** 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.

C(7)(a) If a party has alleged a basis for the award of fees as provided in paragraphs C(2)(a) or C(2)(b) of this rule, and the party incurs fees or costs and disbursements in collecting or enforcing a judgment, that party may file a supplemental statement of attorney fees or costs and disbursements. A party may file a supplemental statement at any time after entry of the judgment being enforced; however, unless good cause is shown, not more than one supplemental statement may be filed and served in the first year after entry of that judgment, and only one supplemental statement may be filed and served annually after the filing of the previous supplemental statement.

C(7)(b) The procedure for seeking attorney fees or costs and disbursements in collecting or enforcing judgments shall otherwise be as specified in subparagraph C(4)(a)(i) through paragraph C(4)(g) of this rule.

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A In general.

A(1) When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to appear by filing a motion or answer, or otherwise to defend as provided in these rules or applicable statute, the party seeking affirmative relief may apply for an order of default and a judgment by default by filing motions and affidavits or declarations in compliance with this rule.

A(2) The provisions of this rule apply whether the party entitled to an order of default and judgment by default is**:** a plaintiff[*,*]**;** a third party plaintiff[*, or*]**;** a party who has pleaded a counterclaim or cross-claim**; or a party who has filed a motion and obtained an order to show cause seeking to set aside, alter, or modify a judgment in a domestic relations proceeding, or a party who has filed a cross-motion to such a motion**.

A(3) In all cases a judgment by default is subject to the provisions of Rule 67 B.

B Intent to appear; notice of intent to apply for an order of default.

B(1) For the purposes of avoiding a default, a party may provide written notice of intent to file an appearance to a plaintiff, counterclaimant, [*or*] cross-claimant**, or movant**.

B(2) If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance **but has failed to appear by filing a motion or answer or otherwise to defend within the time required by Rule 7 C(2) or other applicable rule or statute**, [*then*] **the movant must file and serve a** notice of [*the*] intent to apply for an order of default [*must be filed and served*] at least 10 days, unless shortened by the court, prior to applying for the order of default. The notice of intent to apply for an order of default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must be filed with the court and served on the party against whom an order of default is

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sought.

C Motion for order of default.

C(1) The party seeking default must file a motion for order of default. That motion must be accompanied by an affidavit or declaration to support that default is appropriate and contain facts sufficient to establish the following:

C(1)(a) that the party to be defaulted has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court;

C(1)(b) that the party against whom the order of default is sought has failed to appear by filing a motion or answer, or otherwise to defend as provided by these rules or applicable statute;

C(1)(c) whether written notice of intent to appear has been received by the movant and, if so, whether written notice of intent to apply for an order of default was filed and served at least 10 days, or any shortened period of time ordered by the court, prior to filing the motion;

C(1)(d) whether, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is or is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005; and

C(1)(e) whether the party against whom the order is sought is or is not a person in the military service, or stating that the movant is unable to determine whether or not the party against whom the order is sought is in the military service as required by Section 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. §521, as amended.

C(2) If the party seeking default states in the affidavit or declaration that the party against whom the order is sought:

C(2)(a) is incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005, an order of default may be

entered against the party against whom the order is sought only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27;

C(2)(b) is a person in the military service, an order of default may be entered against the party against whom the order is sought only in accordance with the Servicemembers Civil Relief Act.

C(3) The court may grant an order of default if it appears the motion and affidavit or declaration have been filed in good faith and good cause is shown that entry of such an order is proper.

D Motion for judgment by default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration. Specifically, the moving party must show:

D(1)(a) that an order of default has been granted or is being applied for contemporaneously;

D(1)(b) what relief is sought, including any amounts due as claimed in the pleadings;

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case a party may include costs, disbursements, and attorney fees to be awarded pursuant to Rule 68.

D(2) The form of judgment submitted shall comply with all applicable rules and statutes.

D(3) The court, acting in its discretion, may conduct a hearing, make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper, in order to enable the court to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter. The court may determine the truth of any matter upon affidavits or declarations.

E Certain motor vehicle cases. No order of default shall be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(i) unless, in addition to the requirements in

Rule 7 D(4)(a)(i), the plaintiff submits an affidavit or a declaration showing:

E(1) that the plaintiff has complied with Rule 7 D(4)(a)(i);

E(2) whether the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff; and

E(3) if the identity of the defendant's insurance carrier is known, that the plaintiff not less than 30 days prior to the application for an order of default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, registered, or express mail, return receipt requested; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

F Setting aside an order of default or judgment by default. For good cause shown, the court may set aside an order of default. If a judgment by default has been entered, the court may set it aside in accordance with Rule 71 B and C.

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A In general.

A(1) When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to appear by filing a motion or answer, or otherwise to defend as provided in these rules or applicable statute, the party seeking affirmative relief may apply for an order of default and a judgment by default by filing motions and affidavits or declarations in compliance with this rule.

A(2) The provisions of this rule apply whether the party entitled to an order of default and judgment by default is**:** a plaintiff[*,*]**;** a third party plaintiff[*, or*]**;** a party who has pleaded a counterclaim or cross-claim**; or a party who has filed a motion and obtained an order to show cause seeking to set aside, alter, or modify a judgment in a domestic relations proceeding, or a party who has filed a cross-motion to such a motion**.

A(3) In all cases a judgment by default is subject to the provisions of Rule 67 B.

B Intent to appear; notice of intent to apply for an order of default.

B(1) For the purposes of avoiding a default, a party may provide written notice of intent to file an appearance to a plaintiff, counterclaimant, [*or*] cross-claimant**, or movant**.

B(2) If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance, then notice of the intent to apply for an order of default must be filed and served at least 10 days, unless shortened by the court, prior to applying for the order of default. **The notice of intent to apply for an order of default cannot be served before the time required by Rule 7 C(2) or other applicable rule or statute has expired.** The notice of intent to apply for an order of default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must be filed with the court and served on the party against whom an order of default is sought.

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C Motion for order of default.

C(1) The party seeking default must file a motion for order of default. That motion must be accompanied by an affidavit or declaration to support that default is appropriate and contain facts sufficient to establish the following:

C(1)(a) that the party to be defaulted has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court;

C(1)(b) that the party against whom the order of default is sought has failed to appear by filing a motion or answer, or otherwise to defend as provided by these rules or applicable statute;

C(1)(c) whether written notice of intent to appear has been received by the movant and, if so, whether written notice of intent to apply for an order of default was filed and served at least 10 days, or any shortened period of time ordered by the court, prior to filing the motion;

C(1)(d) whether, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is or is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005; and

C(1)(e) whether the party against whom the order is sought is or is not a person in the military service, or stating that the movant is unable to determine whether or not the party against whom the order is sought is in the military service as required by Section 201(b)(1) of the Servicemembers Civil Relief Act, 50 App. U.S.C.A. §521, as amended.

C(2) If the party seeking default states in the affidavit or declaration that the party against whom the order is sought:

C(2)(a) is incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005, an order of default may be entered against the party against whom the order is sought only if a guardian ad litem has

been appointed or the party is represented by another person as described in Rule 27;

C(2)(b) is a person in the military service, an order of default may be entered against the party against whom the order is sought only in accordance with the Servicemembers Civil Relief Act.

C(3) The court may grant an order of default if it appears the motion and affidavit or declaration have been filed in good faith and good cause is shown that entry of such an order is proper.

D Motion for judgment by default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration. Specifically, the moving party must show:

D(1)(a) that an order of default has been granted or is being applied for contemporaneously;

D(1)(b) what relief is sought, including any amounts due as claimed in the pleadings;

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case a party may include costs, disbursements, and attorney fees to be awarded pursuant to Rule 68.

D(2) The form of judgment submitted shall comply with all applicable rules and statutes.

D(3) The court, acting in its discretion, may conduct a hearing, make an order of reference, or order that issues be tried by a jury, as it deems necessary and proper, in order to enable the court to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter. The court may determine the truth of any matter upon affidavits or declarations.

E Certain motor vehicle cases. No order of default shall be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(i) unless, in addition to the requirements in Rule 7 D(4)(a)(i), the plaintiff submits an affidavit or a declaration showing:

E(1) that the plaintiff has complied with Rule 7 D(4)(a)(i);

E(2) whether the identity of the defendant's insurance carrier is known to the plaintiff or could be determined from any records of the Department of Transportation accessible to the plaintiff; and

E(3) if the identity of the defendant's insurance carrier is known, that the plaintiff not less than 30 days prior to the application for an order of default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, registered, or express mail, return receipt requested; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

F Setting aside an order of default or judgment by default. For good cause shown, the court may set aside an order of default. If a judgment by default has been entered, the court may set it aside in accordance with Rule 71 B and C.