MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 6, 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
Arwen Bird*
Michael Brian*
Brian Campf* (arrived during ORCP 46 discussion and was present for that vote and votes held thereafter)
Hon. Curtis Conover
Kristen David
Hon. Roger DeHoog
Travis Eiva
Jennifer Gates
Hon. Timothy Gerking
Hon. Jerry Hodson
Robert Keating
Hon. Jack Landau
Maureen Leonard
Hon. Eve Miller
Shenoa Payne
Mark Weaver*
Hon. John A. Wolf
Deanna Wray
Hon. Charles Zennaché

*Appeared by teleconference

Members Absent:

Jay Beattie

Guests:

Mike Fuller, OlsenDaines PC
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 1 • ORCP 7 • ORCP 9 • ORCP 10 • ORCP 27 • ORCP 46 • ORCP 54 • ORCP 55 • ORCP 67 • ORCP 68 • ORCP 69 • ORCP 73	• ORCP 15 D • ORCP 26 • ORCP 40 • ORCP 47 E • ORCP 59 • ORCP 62 • ORCP 64 • General Discovery	• ORCP 1 • ORCP 7 • ORCP 9 • ORCP 10 • ORCP 27 • ORCP 46 • ORCP 54 • ORCP 55 • ORCP 67 • ORCP 68 • ORCP 69 • ORCP 73	• ORCP 7 • ORCP 10 • ORCP 45 • ORCP 47 • ORCP 55 • ORCP 79-85

I. Call to Order (Ms. David)

Ms. David called the meeting to order at 9:30 a.m.

II. Approval of September 6, 2014, Minutes (Ms. David) (Appendix A)

Prof. Peterson pointed out three errors in the September 6, 2014, minutes:

on the third line of page 7, the phrase “publication meeting” should be changed to “promulgation meeting”;

on the second to last line of page 12, the word “few” is left out (should read “very few”); and

in the second to last line of the ORCP 54 discussion on page 15, the phrase "should be spelled out” should read “should not be spelled out.”

Mr. Bachofner moved to approve the minutes with those changes. Ms. Gates seconded the motion, which was approved unanimously by voice vote.

III. Administrative Matters (Ms. David)

A. Set First Council Meeting for September 2015

Since the first Saturday in September of 2015 falls on Labor Day weekend, the first meeting of the 2015-2017 biennium was set for Saturday, September 12, 2015.

B. Legislative Advisory Committee

Prof. Peterson reminded the Council that the Legislative Advisory Committee is traditionally appointed at the last Council meeting of the biennium and serves the role of providing assistance to any legislators or legislative committees that might have questions during the legislative session. He stated that the Chair, Vice-Chair, and two judge members are usually appointed to the committee and noted that, in some sessions, the committee has been presented with questions but, in others, it has not been called upon for assistance.

Judge Zennaché and Judge Armstrong volunteered to serve on the committee along with Mr. Brian and Ms. David. Judge Gerking made a motion nominating the aforementioned members, and Mr. Bachofner seconded the motion, which was approved unanimously by voice vote.

C. Travel Expense Reimbursement

Ms. Nilsson explained that there are funds remaining in the travel expense fund that the Oregon State Bar provides for the Council, and that she had completed expense reports for each member who had traveled to a meeting during the biennium and had not yet claimed reimbursement. She stated that the tradition has been to take care of the public member and judge members first, and that there should be enough money in the budget to reimburse everyone through the September meeting, although the expenses may not be able to be reimbursed until January of 2015 due to the Bar's budget year. Ms. Nilsson stated that she would hand out the expense reports for signature at the end of the meeting.

IV. Old Business (Ms. David)

A. Committee Updates/Reports

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

Prof. Peterson explained that he had completed a report to be distributed to the Council prior to the meeting, but that it had inadvertently not been sent to the Listserv. He summarized the report as follows.

In a government of three branches, typically one branch has or takes authority to write rules of court, and it is handled differently in different jurisdictions. In no jurisdiction does the executive branch do it. Prof. Peterson explained that, in some states, the legislature makes the rules, in some, the judicial branch, but in most jurisdictions there is a hybrid. He noted that a Council member had recalled that, when Judge Henry Kantor was chair of the Council, the Council had affirmatively asked the Oregon Legislature to pass the Council's amendments. He stated that this seemed to indicate that there was a feeling at that time that the amendments of the Council should be affirmatively passed by the Legislature. However, when Prof. Peterson met with him, Judge Kantor recalled that the request for legislative enactment was included in the transmittal letter to the Legislature because the Council had made changes in Rule 32 that it felt might cross into substantive law. Therefore, the Council asked the Legislature to sign off on those amendments. Prof. Peterson reported that Judge Kantor feels strongly that the power to set rules is within the Judicial Department and that, even if the Legislature has usurped that power, the Judicial Department can take it back at any time.

Prof. Peterson stated that, in articles he has read including Judge Armstrong's, there seems to be consensus that, if the legislature has not acted, the judiciary has the power to make its own rules. If the legislature has created a rule that is

unworkable or unconstitutional, the judicial department and judges can go their own route. He stated that the question is, what exactly has happened in Oregon – Prof. Merrill says that it is the prerogative of the Judicial Department, but the history is that the Legislature has been usurping this power since before statehood. In his research, Prof. Peterson found that the Council is not an agency that makes rules but, rather, a collaborative department of government that makes rules. It is not a branch of the Legislature nor is it a branch of the Judicial Department. There is a rules-enabling statute from the Legislature in which, it could be argued, the Legislature realized that it had done a poor job of creating rules of civil procedure and ceded this power to an independent council. He stated that, if one looks carefully at the language used in the rules-enabling act, the words "laws" and "rules" are used rather carefully and the act creating the Council establishes that the then-existing civil procedure statutes were laws and that the Council would promulgate rules that had certain restrictions such as not enlarging the substantive rights of any party. Prof. Peterson noted that ORS 1.745 states specifically that the ORCP are deemed to be rules and that they remain in effect as rules unless modified pursuant to ORS 1.735, which includes both the Council making changes and the Legislature either rejecting or modifying those changes. It could be argued that, when the Council makes a rule, it is a rule; when the Legislature makes an amendment to the rule, that is also a rule; and, if the Council makes an amendment subsequent to a legislative amendment, that is also a rule. Whoever acts last, wins. He stated that several people he spoke with expressed some concern about ceding the power back to the Legislature, and he has scheduled a meeting with retired Judge John Beatty to talk about the matter as well.

Prof. Peterson stated that he will eventually write a law review article on the subject. Justice Landau stated that he was heartened by this research, and noted that it is even messier than what he originally thought when he wrote his concurring opinion in *State v. Vanornum,* 2013 [Reversing and Remanding 250 Or App 693, 282 P3d 908 (2012)]. Prof. Peterson noted that his analysis would resolve any separation of powers issue because the Council is neither the legislative nor the judicial department, but a hybrid. Judge Zennaché stated that he was very happy to hear those conclusions. Justice Landau stated that he writes concurring opinions rarely, but does so intentionally to be provocative when he believes that there is a serious issue that could make a difference in some future case. He stated that this type of discussion is exactly what he hopes will happen so that, in a future case when the issue might make a difference, it will be fully briefed and the court will have the benefit of that further thinking about it so that the justices can get it right. He stated that he does not know if his musings in the concurrence opinion were right, but that he put them out there so that people could take a look.

Prof. Peterson stated that he and Ms. Nilsson will send the memo to the entire

Council.

V. Discussion/Voting on Promulgation of Amendments Published on September 6, 2014 (Ms. David) (Appendix B)

Prof. Peterson gave a brief synopsis of the procedure for promulgation. He noted that the Council has been working on these rules for the biennium, and that a super majority is required to promulgate a rule so, if a member abstains from a vote or is not present, it could cause a rule to fail. He stated that, if the Council passes any or all of the published rules with a super majority, a transmittal letter will be prepared and the promulgated rules will be sent to the Legislature at the beginning of the session with a brief explanation as to what the changes are and why they were made. The letter is generally prepared by Council staff and approved and signed by the chair. If the Legislature does nothing, the amendments to the rules that the Council has written become effective January 1, 2016, and get published pursuant to statute in volume 1 of the Oregon Revised Statutes. Prof. Peterson noted that the Legislature, as always, retains the power to reject or modify any of the amendments.

Ms. David noted that the Council did not receive many comments this biennium, which was surprising. She asked Ms. Nilsson to point out any areas where comments were received.

A. ORCP 1

Ms. David stated that the main change to ORCP 1 was regarding declarations made outside of the United States. Ms. Nilsson explained that Judge Armstrong had asked whether the proposed amendment to replace "such" with "these" in the second sentence of section A should actually be "those." Judge Armstrong explained that Chief Judge George Joseph of the Court of Appeals had a clear guideline about when to use "these" vs. "those." Mr. Bachofner stated that the rule was that "these" refers to something you have yet to talk about, whereas "those" refers to something you have already talked about. Mr. Bachofner made a motion to change "these" to "those." Judge Miller seconded the motion, which passed unanimously by voice vote.

Judge Zennaché noted that there has historically been a limit on what kind of change the Council can make at its promulgation meeting, and that grammatical changes are fine but that substantive changes are not. Ms. David stated that this is the point of publishing the rules, so that there is a comment period on anything that is substantive and the Council is not making this type of change at the last minute without any input. Prof. Peterson noted that there will be an issue to discuss on Rule 68 that was raised by Judge Donald Letourneau of Washington County. He pointed out that, if the Council adds language to a rule in an attempt to make the rule more clear and then receives comments that the rule will be less clear, it is still within the Council's purview to remedy that at the promulgation meeting.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 1

Judge Zennaché made a motion to promulgate ORCP 1 as amended. Judge Gerking seconded the motion. A roll call vote was taken and the motion passed unanimously.

B. ORCP 7

Ms. Nilsson indicated that Aaron Crowe had expressed some additional concern about the amendments to Rule 7, namely that only attorneys would be allowed to serve by mail. Judge Zennaché stated for the record that the Council is not amending the rule to expressly limit service by mail to attorneys. Prof. Peterson noted that Mr. Crowe's concern was that the amendment would prevent even follow-up mail service by process servers, and stated that seeing the published version of the rule appeared to resolve Mr. Crowe's concerns.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 7

Mr. Bachofner made a motion to promulgate ORCP 7. Judge Armstrong seconded the motion. A roll call vote was taken and the motion passed unanimously.

C. ORCP 9

Ms. David stated that there were a few changes made to the rule regarding electronic service and updating facsimile service. Mr. Bachofner noted that there was also a change in section C to make clear that receiving an "out of office" message does not constitute effective service. Ms. Nilsson stated that Legislative Counsel had brought to her attention the previous day that in the fourth sentence of section B the Council had removed the word "documents" and then inadvertently inserted the word "documents" instead of "document."

Judge Zennaché made a motion to amend the published rule to correct the error. Judge Gerking seconded the motion. The motion passed unanimously by voice vote.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 9

Mr. Bachofner made a motion to promulgate ORCP 9. Judge Miller seconded the motion. A roll call vote was taken and the motion passed unanimously.

D. ORCP 10

Ms. David summarized that the main change was to ORCP 10 C to add in the additional three days for service by e-mail. Ms. Nilsson reported that Council staff had received no feedback on the published rule changes.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 10

Mr. Bachofner made a motion to promulgate ORCP 10. Ms. Leonard seconded the motion. A roll call vote was taken and the motion passed unanimously.

E. ORCP 27

Ms. David stated that some significant changes were made in section B regarding notice, along with rewriting of some sections to help guide practitioners on how to proceed in different scenarios. Ms. Nilsson reported that Council staff had received no feedback on the published rule changes. Prof. Peterson remarked that it is kind of astonishing that no comments were made because of the significant new notice requirements. He added that the changes also clarify when and how to get settlements that involve financial issues approved and adds a completely new provision, a new section C, to give the court the discretion to appoint a guardian ad litem when a person is disabled but not incapacitated.

Judge Zennaché asked about language in sections B and D that reads "as both terms are defined," particularly where it appears in section D. He wondered why the language "as defined" was not chosen instead. Ms. Nilsson explained that it was a suggestion from Legislative Counsel to be consistent with their drafting practices. Justice Landau agreed that there is an ambiguity in section D because there are actually three terms, not two. Judge Zennaché suggested striking "both terms" in section D and changing the language to "as defined." Judge Armstrong suggested using the actual words, as in "as the terms incapacitated and financially incapacitated are defined."

After some discussion, including the discovery that a "minor" is indeed defined in ORS 125.005, it was agreed that striking "both terms" was a good solution. Judge Armstrong moved to replace the word "both" with the word "those" in section B, subsection B(3), and subsection B(4), as well as to change the language in section D to "is a minor, is incapacitated or is financially incapable, as those terms are defined in ORS 125.005." Judge Zennaché seconded the motion, which passed unanimously by voice vote.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 27

Judge Miller made a motion to promulgate ORCP 27 as amended. Ms. Leonard seconded the motion. A roll call vote was taken and the motion passed unanimously.

F. ORCP 46

Ms. David stated that this rule had many grammatical and formatting changes, including lead line improvements. Ms. Nilsson reported that Council staff had received no feedback on the published rule changes. Judge Miller stated that she appreciates the change to the language in paragraph A(1)(a) to read “the circuit court for the county" where the person is located, because she recently encountered language similar to the existing language in a statute and it was confusing.

Prof. Peterson reported that Legislative Counsel provided the Council with a long list of small issues regarding the ORCP that they asked the Council to address, but Legislative Counsel actually asked that Rule 46 be rewritten.

Judge Hodson suggested that the lead line of section D should read "*to* respond to request for *production or* inspection..." He made a motion to amend accordingly. Judge Wolf seconded the motion, which passed unanimously by voice vote. Judge De Hoog also suggested changing the language in the same lead line from "attend at" to "attend.” He made a motion to amend accordingly. Judge Gerking seconded the motion, which passed unanimously by voice vote.

Judge Zennaché raised a concern regarding subsection B(2), and wanted to make clear that use of the language “among others” would not prevent the court from using escalating sanctions for the failure of a party to comply with an order of the court. Justice Landau asked whether Judge Zennaché was proposing a change or simply making legislative history. Judge Zennaché stated that he did want to make history, but he also suggested that the situation could be remedied by changing the language from “among others” to “but not limited to” to make it consistent with the language in section D. Ms. Payne asked whether that language change could be made at this point, or whether it is too substantive. Judge Zennaché replied that this would just be a language change for clarification and internal consistency. He made a motion to amend subsection B(2) accordingly. Judge Armstrong seconded the motion, which passed unanimously by voice vote.

Judge Zennaché expressed another concern with language in section D that refers to the sanctions authorized in paragraphs B(2)(a), B(2)(b), and B(2)(c) but not B(2)(d) of Rule 46. He pointed out that paragraph D(2)(d) addresses the right to hold a party in contempt for

violating the rule, and he did not understand why that paragraph was not included in the list since Rule 55 G expressly gives the court the right to hold a party in contempt for this very reason. Mr. Bachofner noted that sanctions authorized in paragraphs B(2)(a) through B(2)(c) are not imposed for a violation of an order but, rather, are imposed when a party fails to attend a deposition or to respond to a request for production or inspection. Judge Zennaché observed that the court always has the power to hold a party in contempt. Judge Hodson noted that it is not contempt if a party is not violating a court order, and that the whole premise of section D is not that a party is disobeying a court order but, rather, that the party did not show up at a deposition. He did agree, however, that a subpoena is an order of the court and, therefore, it could be considered contempt to not obey a subpoena. Judge Zennaché stated that Rule 55 allows the court to hold a person in contempt for failure to respond to a subpoena, and he did not want it to appear that he did not have that authority as a judge.

Ms. Nilsson pointed out that the reference to those paragraphs was existing language, and that the only change made by the Council was to the formatting of the text. Judge Zennaché reiterated that he wanted to make legislative history that this language is not intended to limit the power of the court. Ms. David suggested, if the language referred only to subsection B(2) rather than listing the three paragraphs, that might address Judge Zennaché's concern. Judge Miller stated that she feels that it is a completely separate remedy because paragraph B(2)(d) is making a reference back to orders already made in paragraphs B(2)(a), B(2)(b), and B(2)(c) and enforcing the court's orders, as opposed to addressing other bad behavior, such as a failure to produce.

Ms. David stated that her sense is to leave the language as it is, but to reiterate in the record that courts have the power to hold parties in contempt. Judge Zennaché also wanted to emphasize that the use of the singular in subsection B(2) is not intended to prevent the courts from using escalating orders. Prof. Peterson confirmed that the intent is to make the subsection consistent with the rest of the rule and noted that these orders are temporal so, if an order is made today, there could indeed be another order made the following week.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 46

Judge Gerking made a motion to promulgate ORCP 46 as amended. Judge Wolf seconded the motion. A roll call vote was taken and the motion passed unanimously.

G. ORCP 54

Ms. David noted that there were a number of grammatical and other housekeeping changes throughout the rule. Prof. Peterson pointed out that the word "compromise" was removed from the title of the rule to be consistent with a prior change to the

language within section E of the rule. Ms. Nilsson reported that Council staff had received no feedback on the published rule changes.

Ms. Gates observed that the word "application" is used in subsection B(3). She pointed out that the Council had replaced this word with "motion" in Rule 46. Prof. Peterson stated that it is basically a synonym and that changing "application" to "motion" would not be a substantive change. Ms. Gates made a motion to amend the rule accordingly. Ms. Leonard seconded the motion, which passed by voice vote with one abstention (Ms. Payne, as she was out of the room during the discussion).

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 54

Mr. Bachofner made a motion to promulgate ORCP 54 as amended. Judge De Hoog seconded the motion. A roll call vote was taken and the motion passed unanimously.

H. ORCP 55

Ms. David stated that there were many grammatical changes made to Rule 55, as well as insertion of lead lines and a reorganization of Section C to further clarify the process. Ms. Nilsson reported that Council staff had received no feedback on the published rule changes.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 55

Judge Gerking made a motion to promulgate ORCP 55. Mr. Bachofner seconded the motion. A roll call vote was taken and the motion passed unanimously.

I. ORCP 67

Ms. David reported that changes were made to Rule 67 based on suggestions from Legislative Counsel, including changes to lead lines, and that grammatical changes were also made. Ms. Nilsson reported that Council staff had received no feedback on the published rule changes.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 67

Ms. Leonard made a motion to promulgate ORCP 67. Judge Miller seconded the motion. A roll call vote was taken and the motion passed unanimously.

J. ORCP 68

Ms. David stated that there were several grammatical and lead line changes to Rule 68, but that the majority of the changes related to the timing of attorney fees after limited judgments. She noted that there was also a new subsection adding a procedure for seeking attorney fees and disbursements incurred in enforcing judgments. Ms. Nilsson stated that Legislative Counsel had pointed out a missing word deletion in subsection A(2), where [*subparagraph D(4)(a)(i)*] of Rule 7" should read [*subparagraph D(4)(a)(i) of*] Rule 7." Judge Armstrong made a motion to make this change. Ms. David seconded the motion, which passed unanimously by voice vote.

Ms. Nilsson also raised Judge Letourneau's concern regarding ORCP 68 (Appendix C). Mr. Weaver stated that he and Prof. Peterson had spoken and that his understanding is that the issue comes about because supplemental judgments in family law cases, and perhaps other cases, are being entered after entry of a general judgment. Parties are then petitioning for fees after the supplemental judgment is entered, and the published amendment to subsection C(4) seems to indicate that a party can only petition for fees after a general or a limited judgment. He stated that he and Prof. Peterson felt that a good way to remedy this problem would be to remove the words "a general or a limited" and leave "judgment," since "judgment," as defined in ORCP 67, includes the statutory definition, which includes supplemental judgments.

Mr. Bachofner pointed out that the statutory definition of "judgment" refers to a general judgment unless it specifically refers to a different type of judgment. Mr. Weaver stated that the term is a little ambiguous in ORCP 67, but "judgment" is defined in ORS 18.005(8) as "the concluding decision of a court on one or more requests for relief in one or more actions as reflected in a judgment document." He stated that the statute goes on to define different types of judgments, including general, limited, and supplemental. Judges Armstrong, Miller, and Wolf agreed that taking out the words "a general or a limited" might solve the problem. Judge Zennaché stated that this is what his court has been using as the basis for awarding attorney fees following supplemental judgments for years. Mr. Bachofner suggested leaving the words "a judgment" in to make it clear that it refers to any of the types of judgment. He again stated that he believes that there is a later statute that states that, if there is no title in front of the word "judgment," it is a general judgment unless it is otherwise designated. He made a motion to change the language in paragraph C(4)(a) accordingly.

Mr. Weaver noted that, under subparagraph C(5)(b)(i), any of these issues would have to come after entry of the general judgment, and then attorney fees, costs, or disbursements shall be made by supplemental judgment. Judge Miller pointed out that paragraph C(5)(a) refers to requesting attorney fees as part of the general judgment, so the Council would not need to worry about precluding a fee award for securing a supplemental judgment. Judge Wolf posited that one could end up in a situation where

there is a supplemental judgment that modifies support and the attorney fee award is made in and as a part of that judgment the same as a successful litigant could in a general judgment. Judge Miller replied that the judgment would need to be entered and then the Rule 68 procedure followed. Judge Wolf agreed that this is the typical procedure. He pointed out that, if there is a general judgment already entered and there is a motion to modify with an award of attorney fees, it must be a supplemental judgment rather than a limited judgment because the general judgment had already been entered. Judge Miller agreed that a motion that follows a general judgment would always result in entry of a supplemental judgment, and only by stipulation would a practitioner address both child support and attorney fees in the same judgment document.

Prof. Peterson observed that many litigants want to get a judgment entered as early as possible to lock it in, but a party could wait on entry of a general judgment until the attorney fees were adjudicated as part of the general judgment and lump it into one judgment document. Judge Wolf pointed out that, before this change, a party could be awarded attorney fees in a supplemental judgment but, if this change goes through as published, that process will not be available. Judge Armstrong agreed that the implication is that it will not be available. Judge Zennaché stated that paragraph C(5)(a) deals with attorney fees entered as part of the judgment and paragraph C(5)(b) deals with attorney fees entered after and not as a part of the judgment, but those are the only two possibilities. He believes that the language in paragraph C(5)(a) also needs to change to take out the "general or limited" language. Judge De Hoog asked whether the whole purpose of the change was to allow attorney fees to be awarded by supplemental judgment and to allow an award of fees by limited judgment in those instances where a party could not obtain a supplemental judgment for attorney fees because a general judgment had not yet been obtained. Judge Zennaché stated that removing the language from paragraph C(5)(a) would work because subparagraph C(5)(b)(i) talks about judgments entered after a general judgment and subparagraph C(5)(b)(ii) talks about limited judgments. He stated that what the Council was trying to do was to address a concern raised by a Court of Appeals ruling to the effect that a limited judgment for attorney fees cannot be awarded when a limited judgment has been entered to remove a party from a case. He pointed out that the Council was attempting to expressly add the ability to award attorney fees after entry of a limited judgment if the court felt there was good cause, and that the Council wants to confirm the ability to obtain an award of fees by supplemental judgment after entry of a general judgment or a supplemental judgment. The limited judgment for attorney fees following entry of a limited judgment is separate.

Judge Armstrong suggested deleting "general or limited" from paragraph C(5)(b). Judge Wolf also suggested adding the words "or supplemental" to the lead line and first sentence after the lead line in subparagraph C(5)(b)(i) so that the Council does not unintentionally eliminate the ability to obtain an award of fees after entry of a supplemental judgment. Mr. Brian asked the judges whether these changes make clear what they can do. The judges agreed that it did. Judge Wolf noted that, if the Council does not make these changes, there will be confusion and the Council will hear from

family law practitioners and judges.

Judge Zennaché made a motion to amend the rule accordingly. Judge Wolf seconded the motion, which passed unanimously by voice vote.

Ms. Nilsson stated that Mr. Shields had pointed out an instance in paragraph C(2)(a), third sentence after the lead line, where the Council had added the same word it removed (fees). Judge Wolf suggested changing the sentence from "No attorney [*fees*] **fees** shall be awarded unless a right to recover such fee is alleged as provided..." to "No attorney fees shall be awarded unless a right to recover [*such fee*] **fees** is alleged as provided..." Judge Armstrong seconded the motion, which passed unanimously by voice vote.

Prof. Peterson stated that he would e-mail Judge Letourneau to thank him for bringing his concerns to the attention of the Council and to let him know the resolution of the matter.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 68

   Judge Armstrong made a motion to promulgate ORCP 68 as amended. Mr. Bachofner seconded the motion. A roll call vote was taken and the motion passed unanimously.

K. ORCP 69

Ms. David stated that the primary change to this rule was to clarify that 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. Mr. Bachofner stated that he had encountered this problem again as recently as the previous week. Ms. Nilsson reported that Council staff had received no feedback on the published rule changes.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 69

   Judge Miller made a motion to promulgate ORCP 69. Mr. Bachofner seconded the motion. A roll call vote was taken and the motion passed unanimously.

L. ORCP 73

Mr. David explained that most of the changes to Rule 73 were based on suggestions from Legislative Counsel or were of a grammatical or formatting nature.

1. ACTION ITEM: Vote on Whether to Promulgate Published Amendment to ORCP 73

Judge Armstrong made a motion to promulgate ORCP 73. Judge Miller seconded the motion. A roll call vote was taken and the motion passed unanimously.

VI. New Business (Ms. David)

A. Proposed Amendment to ORCP 47 (Ms. Payne)

Ms. David stated that Ms. Payne had received an e-mail from attorney Dallas DeLuca regarding ORCP 47 (Appendix D) stating that an argument had been made (and was being accepted by some courts) that, because ORCP 47 does not include the word "defense" (unlike its FRCP 56 counterpart), a plaintiff should not be allowed to move for summary judgment in its favor against a defendant's affirmative defenses. Ms. David and Ms. Payne both felt that the issue should be put on the agenda for consideration next biennium. Judge Miller stated that she had never had this issue come up. Ms. David stated that she has heard of it before. Mr. Eiva commented that he ran into this issue this summer when he filed a motion for summary judgment against an affirmative defense for which there was no evidence. He stated that the argument suggested in Mr. DeLuca's e-mail was raised and he was very surprised by it. The court pondered it for a while but did not accept the argument, and Mr. Eiva did come across the same argument during his research. He stated that he would be happy to be a part of this committee next biennium.

Ms. David reminded the Council that its members are its walking ambassadors, and that the website has a form to fill out for suggestions, comments, questions, or concerns. She recommended telling concerned lawyers or judges that a suggested change is always helpful, not just a complaint.

VII. Adjournment

Ms. David adjourned the meeting at 11:35 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 6, 2014, 9:30 a.m.
Oregon State Bar
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

ATTENDANCE

Members Present:

Hon. Sheryl Bachart
Jay Beattie
John Bachofner
Michael Brian
Brian Campf
Kristen David
Hon. Roger DeHoog
Hon. Timothy Gerking
Hon. Jerry Hodson
Robert Keating
Hon. Jack Landau
Maureen Leonard
Shenoa Payne
Mark Weaver*
Deanna Wray
Hon. Charles Zennaché

Members Absent:

Hon. Rex Armstrong
Hon. Paula Bechtold
Arwen Bird
Hon. Curtis Conover
Travis Eiva
Jennifer Gates
Hon. Eve Miller

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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I. Call to Order (Ms. David)

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

II. Approval of June 7, 2014, Minutes (Ms. David) (*Appendix A*)

Ms. David called for a motion to approve the June 7, 2014, minutes. Mr. Bachofner so moved and Judge Gerking seconded. The minutes were approved unanimously by voice vote.

III. Administrative Matters (Ms. David)

A. Election of Officers

Prof. Peterson reminded the Council that, pursuant to ORS 1.730(2)(b), officers must be elected annually. He explained that this is traditionally done in September and that, in September of even-numbered years, the tradition is to re-elect the existing officers to serve for the remainder of the biennium, which includes the off-year term. The duties of the officers would include assisting with any questions from legislators during the legislative session or from the public during the off-year.

Judge Gerking moved to re-elect Ms. David as Chair, Mr. Brian as Vice Chair, and Ms. Bird as Treasurer. Mr. Beattie seconded the motion, which was passed unanimously by voice vote.

B. Upcoming Promulgation Meeting

Ms. David reminded the Council that the upcoming meeting on December 6, 2014, is the most important meeting of the biennium and that, in order to promulgate a rule change, that change must be passed by a super majority of the Council. She noted that, if a super majority does not attend the meeting, either in person or by telephone, the work of the entire biennium will come to nothing.

C. Changes at Lewis & Clark Law School

Prof. Peterson observed that there has been a crisis in legal education over the past several years, with fewer people taking the LSAT and applying to attend law schools, and law schools therefore are competing for students. He noted that this has put extreme financial pressure on law schools. Prof. Peterson stated that Lewis & Clark offered him an incentive to retire and he opted to take that incentive – he will be retiring effective December 31, 2014. The Law School subsequently announced that it would be closing the legal clinic after 43 years, and that it will no longer fund any clinics that are paid for by student tuition dollars but, rather, will only run those clinics funded by outside sources.

Prof. Peterson went on to say that he had negotiated an agreement whereby he will

remain affiliated with the Law School, have an office there, and continue to teach Oregon Pleading and Practice as an adjunct professor, and the Law School will to continue to support the Council with him as Executive Director. Mr. Brian asked Prof. Peterson to confirm that these changes will have no effect on the Law School's relationship with the Council, and Prof. Peterson confirmed this. Mr. Brian asked for clarification of Prof. Peterson's position with the Law School. Prof. Peterson stated that he will not be on the payroll and will not have voting rights, but that he will have an office and other accoutrements. Mr. Brian asked whether the change would affect Ms. Nilsson. Prof. Peterson stated that it will not.

D. Website

Ms. David asked how the change from the website being hosted by the Law School to a private web provider had gone. Ms. Nilsson stated that the change had gone smoothly. Prof. Peterson stated that the Law School's change to Google Sites had necessitated the change, because Google Sites was not flexible enough for us to keep the website the way we wanted it. Mr. Beattie asked whether the change was a cost saving measure by the school. Ms. Nilsson opined that the college-wide change to Google Mail and Google Sites was likely a cost saving measure. She noted that the cost to the Council to change to a private provider was minimal, but that it allows much more flexibility.

IV. Old Business (Ms. David)

A. Committee Updates/Reports

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

ORCP 1 (*Appendix B*)

Ms. David stated that, in addition to suggestions made by Legislative Counsel, the proposed amendment also includes a change to include language about declarations made outside of the United States due to some new statutory language. Prof. Peterson clarified that the Oregon Law Commission and the Legislature had previously passed new language regarding declarations made outside of the U.S., and did not include the required language for such declarations in Rule 1.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 1

Judge Zennaché moved to publish the draft amendment to ORCP 1. Mr. Brian seconded the motion. The motion passed unanimously by roll call vote.

ORCP 67 (*Appendix C*)

Ms. David noted that there was a change to the lead line for section C suggested by Legislative Counsel and grammatical changes from Council staff. Judge Gerking wondered why, in the second sentence of subsection F(1) (Appendix C, page 2, line 10), the language reads "the stipulation shall be of" instead of "the stipulation shall be by." After a brief discussion, Mr. Brian moved to change the word "of" to "by." Mr. Bachofner seconded the motion and it passed unanimously by voice vote.

b. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 67

Judge Gerking moved to publish the amended version of the draft amendment of ORCP 67. Mr. Keating seconded the motion, which passed unanimously by roll call vote.

ORCP 73 (*Appendix D*)

Ms. David stated that this amendment contained a number of grammatical changes as well as some suggestions by Legislative Counsel, including lead line amendments.

c. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 73

Judge Zennaché moved to publish the amendment to ORCP 73. Mr. Keating seconded the motion, which passed unanimously by roll call vote.

2. Electronic Discovery (Ms. David)

Ms. David stated that the committee still had not heard any comments from the bench or bar regarding the changes made to the ORCP in the area of electronic discovery. She stated that the committee had concluded its work for the biennium and that it could convene again next biennium if it seems necessary.

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

ORCP 7 (*Appendix E*)

Mr. Bachofner stated that the draft amendment of Rule 7 contained numerous grammatical changes and suggestions made by Legislative Counsel, but that the primary substantive change was to clarify that only an attorney may perform mail service when mail is the only method of service. Prof. Peterson noted three additional substantive changes: 1) in subparagraph F(2)(a)(i), adding the

requirement that the person who serves documents must indicate exactly what documents were served; 2) in paragraph C(3)(b), including cross-claims in the language for the "notice to defendant"; and 3) in paragraph C(3)(c), changing the language in the "notice to defendant" from "Should plaintiff in this case not prevail, a judgment for reasonable attorney fees shall be entered against you" to "Should plaintiff in this case not prevail, a judgment for reasonable attorney fees may be entered against you."

Judge Hodson wondered why cross-claims were added to the notice, because he thinks of Rule 7 as typically bringing a new party into a case, whereas a cross-claim is against someone already in the case. He stated that he believes that counterclaims make sense but not necessarily cross-claims. Mr. Bachofner suggested that it would be a third party claim if the party is not a party to the suit already. Prof. Peterson stated that the language mirrors that in ORCP 22 D(1), which reads: "Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 28 and 29." He noted that he had cross-referenced the rule and that he is not sure how often it happens, but that the language is there. Judge Hodson and Judge Zennaché both agreed that the rule does allow it. Ms. David agreed that she was not sure where a cross-claim would be applicable, but the also agreed that the change is consistent with the current rules.

Judge Zennaché asked for clarification about the "or other persons authorized to receive service" language in subparagraph D(3)(a)(i) – he was unsure who or what would be another person authorized to receive service on behalf of another party. Ms. David stated that this could be a person over the age of 18 at the party's home. Mr. Beattie observed that this example would be substitute service. Prof. Peterson stated that, since that language is in other parts of Rule 7 and was not in subparagraph D(3)(a)(i), he assumed that it was someone who had had a guardian or conservator appointed for them.

Judge Zennaché expressed concern regarding the removal of the "where otherwise permitted" language in subparagraph D(2)(d)(i) (Appendix E, page 7, line 17) regarding service by mail because, elsewhere in the rule, the court is allowed to order service by another means if service is not possible by the means specified in Rule 7. Since that otherwise ordered service is sometimes by mail, he worried that this change implies that the court cannot do this, and he wanted to be clear on the record that this change is not intended to limit a court's discretion under subsection D(6). Prof. Peterson noted that this was a staff change that was made when attempting to un-contort the sentence, and agreed that the Council does not want to have an unintended consequence. He pointed out that, at the last Council meeting, no one present could determine where the "except as otherwise permitted" language would be applicable, but suggested that perhaps Judge Zennaché had found it. Prof. Peterson stated that, pursuant to paragraph D(6)(a),

the court can order any service likely to provide notice, so if the minutes reflect that the Council did not intend to usurp that authority it may be enough. Mr. Beattie suggested that there is no harm in retaining the language. Mr. Bachofner agreed and made a motion accordingly. Ms. Payne seconded the motion, which passed unanimously by voice vote.

Judge Zennaché noted that the rules that require a notice to be printed on the summons, e.g., paragraph 7 C(3)(a), require that the notice be in 8 point font and, since it is such an important notice, he wondered whether the font size should be larger. Mr. Bachofner pointed out that the rule says that the font should be "at least" 8 point, and stated that he would suggest not setting the minimum any larger than 10, since many practitioners use that font size. Ms. David stated that her recollection was that the purpose of setting the font size was so that the summons could fit on one page and still be read. Ms. Payne observed that the summons is one document, and that the language is not hidden in another document. Mr. Bachofner wondered whether anyone was aware of a situation where someone had argued that the font is too small. Judge Zennaché stated that he was not. Mr. Beattie pointed out that the notice section of the summons also clearly states: "Read These Papers." Judge Zennaché withdrew his concern.

Judge Zennaché reiterated his concern related to section E, about making the right to serve by mail exclusive to attorneys. He noted that what prompted the examination of the rule was the suggestion to open it to self-represented litigants so that they could serve by mail, and pointed out that service by mail on individuals requires that they sign for what they receive. Mr. Bachofner explained that the committee had considered this issue at length and its primary concern was the importance of the commencement of an action and making sure that personal jurisdiction is acquired correctly. He stated that, with self-represented litigants, there is a strong concern that many things do not get done correctly.

Judge De Hoog echoed Judge Zennaché's concerns and asked whether, if he were to vote to publish, would that be considered a statement of approval. Ms. David stated that the purpose of publishing is to receive comment from the bench and bar. Ms. Payne asked whether the Council would ever split something up, or whether amendments are always voted on in their entirety. Judge Zennaché noted that Rule 69 has two versions of amendments that will be up for a vote at this meeting. Ms. Nilsson stated that this could potentially happen today, if someone wanted to make a motion to create a version of the Rule 7 amendment with the word "only" in section E taken out. Ms. David observed that the Council's purpose throughout the year is to get feedback early on so that the Council can put forth the best version, but clearly that is not to say that the Council does not ever publish two versions. Ms. Payne asked how the voting would work in December if the Council were to publish the existing amendment and receive negative comments from the bench and bar. She wondered whether the Council

could vote to not include that portion but accept the rest, or whether it is "all or nothing" at that point. Prof. Peterson stated that, in his experience, the Council would not engage in rewriting a rule completely at the publication meeting but, if a rule is essentially good but there is a part that is in error, a minor change can be made. He noted that, if the Council were to publish the "only" version, he would have concerns about promulgating a version that did not include the word "only" because that had not been previously available to the bench and bar for review.

Judge Zennaché suggested that the Council could delete the word "only" in section E, but not make the affirmative change of saying anyone could serve by mail. Mr. Beattie observed that there would have to be a completely new version if we wanted to affirmatively say that anyone could do it. Ms. Payne stated that she did not want a situation where the Council could not approve the other changes in the rule if there is concern with this one change. She suggested that it might be a good idea to propose one version without the substantive change. Mr. Bachofner wondered whether removing the word "only" and having a second version implies that there is a substantive change to the existing rule. He expressed concern that people might think that this opens up mail service to anybody, which is not what the current rule says. Ms. David stated that, in the suggested amendment to Rule 7 E, adding the word "only" was an attempt to clarify, but seems to serve to bring more emphasis to the issue. She stated that the existing rule is somewhat unclear, and suggested that the Council can perhaps deal with this issue next biennium. Ms. Payne pointed out that she did not want to have to throw the baby out with the bath water by keeping the word "only" and having it the only version. Ms. David agreed that, if the Council were to publish one version with the word "only" and one without adding that word, the assumption may be that one means attorneys may serve by mail and the other means anyone may serve by mail. Judge Hodson stated that, by removing the word "only" and voting on the amendment without it, we are just putting off to another day whether to clarify the rule or to change it.

Prof. Peterson stated that Holly Rudolph of the Oregon Judicial Department (OJD) had expressed concern that there may be the implication that only an attorney may "cause to be mailed by first class mail" regarding substituted (ORCP 7 D(2)(b)) and office (ORCP 7 D(2)(c)) service as well. He stated that he feels that Rule 7 E makes it clear that only attorneys can perform service by mail related to Rule 7 D(2)(d)(i), so a person could clearly have someone else do the follow up service for office and substituted service since that is not service under subparagraph 7 D(2)(d)(i).

Judge Zennaché stated that he reads the language in section E as an exception to the rule set forth in the sentence immediately preceding that says that service has to be made by someone who is not a party or an attorney. He noted that self-represented litigants can always get a friend, relative, or process server to mail

service to the other side, and wondered whether the intent of adding the word "only" was to say that self-represented litigants cannot have a third party serve by mail in accordance with subparagraph 7 D(2)(d)(i). Mr. Bachofner recalled that when the committee looked at that issue, there was some disagreement as to the interpretation. Judge Zennaché stated that he was not sure what case law says. Justice Landau stated that this is one more reason to take the word "only" out now and examine the rule further next biennium. Mr. Beattie stated that he felt that this is the reasonable interpretation of the rule when you read it altogether: all of these people can do this, but in this case only a lawyer can do it. Mr. Bachofner stated that his recollection is that the committee's intent was that limiting mail service to attorneys applied only to service by mail, not to follow up mailings.

Prof. Peterson summarized what removing the word "only" does: all of those persons specified in section 7 E who cannot serve the summons still cannot serve by mail, and the party will still have to find someone above the age of 18 who is not a party to serve by mail; however, a lawyer is still allowed to serve by mail even though he or she cannot personally serve the summons. Mr. Brian made a motion to remove the word "only" from section E of the amendment (Appendix E, page 15, line 1). Ms. Payne seconded the motion, which was passed unanimously by voice vote.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 7

Mr. Bachofner made a motion to publish the amendment to Rule 7 as amended. Mr. Beattie seconded the motion, which passed unanimously by roll call vote.

ORCP 9 (*Appendix F*)

Mr. Bachofner stated that the amendment contains changes to deal with electronic filing and e-court, as well as changes suggested by Legislative Counsel. He stated that the rule was updated to treat equally service by facsimile, e-mail, and electronic service, and that the committee had decided it wanted to continue to have the time necessary, the three days in Rule 10 C, to be able to respond. He noted that the amendment also more clearly defines facsimile communication, requires attaching a confirmation of a receipt to a faxed document, deals with the issue of receiving an "out of office" e-mail reply for e-mail service, requires that an attorney who consented to e-mail service must notify the other parties in writing of changes to his or her e-mail address, and defines service by electronic service. Prof. Peterson noted that the language in section E was also updated to make it more clear what the document must contain in order for the clerk to receive it for filing.

Mr. Brian expressed concern about the language in section H (Appendix F, page 4, lines 5-7). He asked whether the Council can set up a rule where it gives the Chief Justice authority to set up rules, and wondered whether this is a separation of powers issue, since the Council is an arm of the Legislature and it appears that we are giving rulemaking authority to the person that runs the judicial branch of our government. Judge Zennaché disputed the notion that the Council is a branch of the Legislature and noted that Fred Merrill's law review article [65 Or. L. Rev. 527 1986] says that the Council is a joint judicial and legislative branch body. He noted that both branches have the authority to make rules, so to him there is a strong argument to be made that the Council is exercising inherent judicial authority as well as legislative authority. If not, he should leave the meeting because he would be violating his oath.

Mr. Bachofner stated that he is not sure that the language is deferring rulemaking authority because it is more of a definitional thing, not a grant of authority. Mr. Beattie agreed and stated that the language basically states that a party may file electronically using the judicial department's system, but that party must follow the rules of that system. Prof. Peterson observed that the system may be changed a few times as it continues to roll out. Ms. David asked why language such as, "pursuant to the Uniform Trial Court Rules," could not be used, since the Chief Justice has authority to make out-of-cycle determinations through the UTCR. Prof. Peterson stated that the Council had done something similar when it last amended Rule 1 F, using the language "as may be permitted by rules of the court in which the action is pending." He stated that he likes the transparency of identifying the Chief Justice because there may be interim changes that govern electronic filing in place before the UTCR can be changed. He observed that it is the Judicial Department's system, so that department is going to establish the rules by which it is used.

Mr. Beattie stated that *when* electronic service is permitted is within the Council's purview, and the *manner* in which it is accomplished is set forth by rule by the court. He suggested that the second sentence could begin, "Electronic service is completed when done in accordance with..." Mr. Bachofner disagreed and stated that *how* electronic filing is accomplished is governed by the ORCP, and the permission as to *whether* or not one can use electronic service under the court system is determined by the Judicial Department in implementing the electronic filing system. Mr. Keating compared the situation to the U.S. Postal Service – the post office determines the rules by which mail is delivered so, when we do service by mail, does that mean we are delegating a legislative responsibility to the post office? Mr. Beattie stated that he just needed to be clear on whether or not the last sentence is proscribing; he assumed that the ORCP is authorizing the use of electronic service and then saying, if it is to be used, it must be used in accordance with the OJD.

Ms. David suggested using the same language used in ORCP 1 F, and then making a notation that the Council anticipates that the Chief Justice may prescribe additional rules for electronic service. Prof. Peterson stated that this type of notation would be unique in the rules. Mr. Bachofner suggested adding the words, "as prescribed and adopted by the Chief Justice of the Oregon Supreme Court" to the end of the existing sentence. Judge Hodson asked whether we need to permit it. Ms. David stated that this was a request that the E-Court Task Force had made of the Council. Prof. Peterson stated that the language came directly from the E-Court Task Force. Judge Hodson suggested adding the word "but" after the word "permitted."

Justice Landau pointed out that any agency authorized to adopt administrative rules cannot delegate to another agency the authority to fill in the gaps in those rules. For example, the state Department of Environmental Quality cannot prospectively adopt standards that have not been adopted by the federal Environmental Protection Agency. He stated that he believes that this is the concern – that the Council is saying that electronic filing is authorized to the extent the that the chief Justice says it may be done. Ms. Leonard stated that she believes that the Council is saying that electronic filing is authorized and that it has to be carried out in the manner that the court says it needs to be carried out. Prof. Peterson and Justice Landau both agreed that the postal service analogy is apt. Ms. Payne asked why the last sentence needs to be there, because electronic service cannot be used in any other way. Judge Zennaché stated that the Council was asked to authorize electronic service, so suggested that we can delete all language that comes after "electronic service is permitted." He noted that the first sentence says what constitutes electronic service, and the second sentence authorizes it. Mr. Bachofner pointed out that it is only authorized if it complies with the OJD system.

Ms. David stated that ORCP 9 B already states that service may be made by electronic service as provided in section H, and suggested that the last sentence in section H could be removed. Judge De Hoog suggested amending section B to read "by electronic service as defined in section H" and removing the second sentence from section H. Mr. Bachofner reiterated that the language in section H came from the E-Filing Task Force, not from the committee. Judge Gerking stated that he did not like the idea of eliminating the second sentence of section H, because he thought it could lead to confusion. He suggested language such as, "the filing system provided by the UTCR." Ms. David observed that the rules that are adopted out-of-cycle by the chief justice are part of the UTCR. Mr. Beattie noted that service does not have the same impact as filing, and stated that what typically happens is that one serves the document and there is a contemporaneous e-mail confirmation to the parties.

Justice Landau observed that this seems to be a wording issue and that the

situation is analogous to the issue of service by mail and the procedures required by the post office. He agreed that, the way the section is phrased right now, it raises some question about whether the Council is waiting for the chief justice to authorize this. He stated that he is not sure what the second sentence really accomplishes. Mr. Beattie stated that he would feel more comfortable if it said "in the manner prescribed by the Oregon Judicial Department." Ms. David posited that the OJD has no authority of its own, since the UTCR provides this authority. Judge Zennaché disagreed and stated that the UTCR committee has delegated authority from the Chief Justice, who then approves all of the UTCR. He stated that the Chief Justice embodies the Judicial Department, since he is the head of it. Prof. Peterson asked how far astray an attorney could go without the second sentence in section H since, if a party uses the electronic filing system, it will prompt the party to do certain things, just like putting a stamp on a letter and dropping it in a mailbox. Judge Gerking stated that it is possible to go astray without the explicit instructions that the party needs to use a system from the OJD or consult the UTCR. Ms. Leonard suggested adding the language, "and in the manner prescribed in rules adopted by the Chief Justice of the Oregon Supreme Court" to the end of the last sentence of section H (Appendix F, page 4, line 7). She made a motion for this change, Mr. Bachofner seconded the motion, and the motion passed unanimously by voice vote.

b. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 9

Judge Zennaché made a motion to publish the draft amendment to Rule 9 as amended. Mr. Bachofner seconded, and the motion passed unanimously by roll call vote.

ORCP 10 (*Appendix G*)

Mr. Bachofner stated that, in addition to staff changes, the amendment clarifies that the three additional days applied to mail service and facsimile service also apply to e-mail service. Ms. Leonard asked whether electronic service should be included. Judge Zennaché noted that UTCR 21.100(5) states that "electronic service is complete when the electronic filing system sends the e-mail to selected..." and UTCR 21.100(6) states, "electronic service performed in accordance with this chapter is the equivalent of service by mail as provided in ORCP 10 C," so he was not sure it was necessary to add it. Ms. Payne suggested including it just to be safe. Mr. Beattie stated that he could see good reason for treating e-mail service and electronic service differently, because an attorney can set up his or her e-mail to automatically copy a secretary or assistant when an e-mail notice from the court is received, but it is more difficult with e-mails from individual parties. Mr. Beattie moved to amend to include electronic service twice in section C (Appendix G, page 1, line 23; Appendix G, page 2, line 1). Mr.

Bachofner seconded the motion, which passed unanimously by voice vote.

Judge Gerking expressed concern regarding language in sections B and C that refers to "taking" a proceeding (Appendix G, page 1, line 21; Appendix G, page 1, lines 24-25). Council members agreed that the language seemed odd or archaic, but could not come to a consensus on whether the word "take" meant "initiate" or "conduct" or something different, and the Council agreed to put the matter on the agenda for next biennium for further research in order to make sure to avoid unintended consequences.

c. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 10

Judge Zennaché moved to publish the amendment as amended. Ms. Leonard seconded and the motion was passed unanimously by roll call vote.

4. ORCP 15 D (Mr. Beattie)

Mr. Beattie stated that the committee had concluded its work regarding this topic. He stated that the committee had been reconstituted when Judge Armstrong had observed that ORCP 15 gave the court the authority to extend the time for filing pleadings and motions and responses, but made no mention of statements of attorney fees. He stated that the committee had agreed that the issue was specific to attorney fee provisions and passed the issue on to the ORCP 68 committee to consider making specific changes to that rule instead of a more global change to Rule 15.

5. ORCP 27 (Mr. Weaver) - *Appendix H*

Mr. Weaver stated that the changes to this rule have been two biennia in the making, and that the judges involved in the work group are concerned that the rule be put in place as soon as possible to avoid some of the abuses they have seen in their courtrooms. He noted that the two committees had received a lot of input from judges and practitioners. Prof. Peterson pointed out that the amendment sets out rather detailed guidelines of how to give notice when someone is seeking to have a guardian ad litem (GAL) appointed. He stated that the rule includes a provision whereby the notice can be either limited or waived in appropriate cases. He observed that the intent is to not impact any plaintiff close to the statute of limitations, so within 7 days of filing a party must ask the court for permission to either not send notices or to send fewer notices but, otherwise, that party would be required to send notice to the same people who would receive notice in a guardianship case. Prof. Peterson stated that there would be very cases where all of the persons or entities specified in section E would be applicable, so the number

of notices to be sent in a typical case would not be that extensive. He noted that one other change the committee included was that, for someone clearly disabled but not incapacitated, a request can be made to appoint a GAL at the court's discretion to assist in the litigation.

Prof. Peterson stated that the committee made an additional change to section I, suggested by attorney work group member Erin Olson, to make a provision for relatively small matters to be settled by a GAL. He noted that the amendment gives guidance to practitioners that, if there is going to be money changing hands, they will probably have to have a conservator appointed and have the court involved. Mr. Brian observed that section I does not specifically refer to cases of small monetary value. Mr. Bachofner pointed out that there is a new statute that allows small cases – $10,000 and under – to be settled. Prof. Peterson stated that the new language gives the court authority – on the right facts and in its discretion – to approve settlements, and stated that the example that Ms. Olson gave regarded a case where more than $10,000 was involved but time was of the essence and a conservatorship would serve no purpose. He stated that the rule guides practitioners to the fact that ORS chapter 126 has a provision in it for small cases and that is a route one can go. He noted that, two years ago, there were attorneys on the Council who were surprised to learn that, when they were negotiating with a GAL, that GAL did not have the authority to settle a case. He stated that the amendment does make it clear that the court's approval is required. Mr. Beattie summarized: in any case, you have to have court approval but, under certain circumstances, the court may approve a settlement negotiated by a GAL rather than by a conservator.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 27

Mr. Beattie moved to publish the amendment to ORCP 27. Ms. David seconded the motion, which passed unanimously by voice vote.

6. ORCP 45 (Ms. Wray)

Ms. Wray stated that, at its last meeting, the Council had talked about Mr. Bachofner's idea of the possibility of extending requests for admissions beyond the thirty currently allowed and to provide for additional requests limited to the authenticity of documents and, possibly, foundation. She stated that the committee had discovered that the idea is a little more complicated than initially believed, and it would have required extensive discussion by the Council at this meeting in order to prepare a draft amendment. She stated that the committee is recommending that the issue be tabled and re-examined next biennium to ensure that enough time is devoted to it.

7. ORCP 46 and 55 (Judge Gerking)

ORCP 46 (*Appendix J*)

Judge Gerking stated that the draft amendment contains many changes, mostly those recommended by Legislative Counsel, and that they are not substantive. Prof. Peterson noted that Legislative Counsel had basically asked the Council to rewrite the rule for clarity.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 46

Mr. Keating made a motion to publish the draft amendment. Ms. Payne seconded the motion and it passed unanimously by roll call vote.

ORCP 55 (*Appendices I & K*)

Judge Gerking reported that the committee had determined that it was unable to conclude whether or not clarifying language needed to be added to ORCP 55 H(2) concerning whether pre-subpoena notice is required for subpoenaing medical records into court. With respect to the balance of the changes, he stated that the committee agreed that those changes are appropriate with regard to clarification of the rule. The committee felt that the rewrite of section C does add clarity and had only one minor concern – that, as rewritten, it may be redundant with respect to the first sentences in section 55 A.

Mr. Campf remarked that, in sections C and H, the word "officer" is used generally to talk about someone authorized to administer oaths or take testimony, but later the word officer is used when talking about law enforcement officers and when talking about officers and directors. He wondered whether the word is defined anywhere or whether there is a better way to express it, since it is used three different ways in the rule. Justice Landau agreed that it seemed clear in the context of law enforcement officers or officers and directors, but perhaps was not so clear in sections C and H. Mr. Beattie noted that it only comes into play in terms of a self-represented party because attorneys can issue subpoenas. Ms. David suggested that a committee look into it next biennium to see if there is a definition or any case law.

Judge Zennaché had a question regarding the language in subsection C(2)(a). He wondered whether any courts that issue subpoenas do not have clerks, since the subsection specifies that a judge or justice of the court may issue a subpoena if there is no clerk. The consensus of the Council was that this may be archaic language, but Council members agreed to leave it there in case there may be unintended consequences from removing it. He also expressed concern about the

language in subparagraph C(2)(a)(i) that states that a subpoena “shall" be issued in blank – he worried that this is inconsistent with the prior section that says that it “may” be issued, and it is also a concern with self-represented parties who may get subpoenas issued in blank and serve them on financial institutions or medical providers without complying with the requirements of ORCP 55. He stated that, in his court, they have adopted an administrative rule that requires that self-represented litigants to make a request to the judge to authorize the use of a subpoena to make sure that notice is properly provided. Judge Zennaché therefore moved to change "shall" to "may" (Appendix K, page 3, line 19). Judge Gerking seconded the motion, which passed unanimously by voice vote.

b. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 55

Judge Gerking made a motion to publish the draft amendment as amended. Judge Zennaché seconded the motion, which passed unanimously by roll call vote.

8. ORCP 54 A / ORCP 54 E (Ms. Leonard / Ms. Gates) (*Appendix L*)

Ms. Nilsson explained that both committees had concluded their work and recommended no changes, but there were suggestions from Legislative Counsel as well as some staff changes to ORCP 54 and these are in the draft amendment to be voted on. Judge Gerking suggested changing the language “of the party” to “from the party” in the last sentence of subsection E(3) (Appendix L, page 4, line 7), and made a motion accordingly. Judge Zennaché seconded the motion, which passed unanimously by voice vote.

Mr. Bachofner asked why the word “seven” is not spelled out but, rather, the numeral is used. Prof. Peterson explained that a goal of the Council is to try to make the rules consistent and, strangely and unfortunately, it has been the convention in the ORCP to spell out *all* numbers, which goes against the grammatical rule that single digit numbers should be spelled out.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 54

Ms. Leonard made a motion to publish the draft amendment as amended. Mr. Bachofner seconded the motion, which passed unanimously by roll call vote.

9. ORCP 68 (Mr. Weaver) (*Appendix M*)

Mr. Weaver explained that the draft amendment allows a party the ability to ask

the court for attorney fees after the entry of a limited judgment; however, the court has to find no just reason for delay. Mr. Weaver noted that the committee wanted to be very clear that it was not saying entry of a limited judgment awarding attorney fees is appropriate in all cases or even in most cases, but that there are cases where a party may or even should have the right to request attorney fees. He stated that the committee is also specifying that, if such a judgment is granted, it will be entered as another limited judgment, not a supplemental judgment. Mr. Weaver stated that there is a statutory reason for that – the statute specifies that a supplemental judgment can be entered only after the entry of a general judgment. He noted that the committee also changed the rule to specify that the court would have discretion to modify the timelines for filing a statement of attorney fees, an objection, or a response. He noted that subsection C(7) was to clarify what the rule has always stated – if a party has a right to attorney fees and incurs collection costs or attorney fees after a judgment, that party has the ability to request another judgment for those additional fees. The committee also included some limitations so that a party cannot file a request more than once annually after the entry of the original judgment unless the court modifies that timeline.

Mr. Weaver suggested a friendly amendment, in subparagraph C(5)(b)(ii) (Appendix M, page 5, line 18), to change the word "judge" to "court" because, in most other references in the rule, the word “court” is used. Judge De Hoog made a motion to make this change. Ms. Leonard seconded the motion, which passed unanimously by voice vote.

Mr. Beattie asked whether there is any problem in designating attorney fees as a limited judgment in terms of the definition of limited judgments in ORS chapter 18. Mr. Weaver stated that there is not, in his opinion. He stated that not doing so has created a problem in the past because the rule specified that any subsequent judgment would be a supplemental judgment, and that conflicted with the statute that says that a supplemental judgment can only be entered after a general judgment. He noted that the committee found some court of appeals cases where the court said neither a supplemental judgment for attorney fees nor a limited judgment for attorney fees was allowed, which is one of the reasons that the committee worked on the rule.

Judge Bachart stated that, in family law, there are show cause filings that seek to modify the underlying judgment, and a party alleges a right to attorney fees on a general judgment but also alleges that right when they modify. She wondered, since the amendment specifically sets forth a manner in which to enforce a judgment in subsection C(7), how it will affect family law. Mr. Weaver asked how it is accomplished now in family law cases. Judge Zennaché stated that a party asserts the right to attorney fees in a motion or affidavit filed at the end of the case and the court allows the party to apply for attorney fees, unless it is a

contempt proceeding, which is handled in a different manner. Ms. Payne wondered whether the amendment is too limited in the way that it is written. She stated that it is pretty clear that a party can also file a supplemental statement of attorney fees in the process of contending with objections to the request for an award for fees if the dispute goes to a hearing, and wondered whether that is considered enforcing a judgment. Judge Zennaché stated that it is not, because that is part of prosecuting the statement of attorney fees and case law allows a party to supplement the statement for the time spent getting an award approved. Ms. Payne posited that the amendment may make people think that supplemental statements of attorney fees are limited to collecting or enforcing a judgment.

Judge Zennaché clarified that the only intent was to make clear that there is case law that says that courts have the discretion to allow a party to come in and apply for attorney fees associated with enforcing a judgment, and the committee felt it was appropriate to place language in the rule giving notice of that opportunity, because reading the rule without that language would lead a party to believe that the court might not have that authority. He stated that the amendment was not intended to limit any other authority but, rather, was just intended to make clear that, in the context of attorney fees incurred in enforcing the judgment, a party has the right to come in and apply for those fees at a later date. Ms. Payne presented a scenario where a party submits a supplemental statement of attorney fees as part of litigating their statement of attorney fees, and the party also wants to submit a supplemental statement for enforcing a judgment, and those happen to be in the same year. She wondered whether the party would be violating the rule of only filing one annually. Judge Zennaché stated that the party would not be, because this supplemental statement relates to the procedure for fees incurred in enforcing the judgment, while the other supplemental statement of attorney fees would have been an application for attorney fees that applies to obtaining an award of attorney fees at the conclusion of the trial or other disposition of the case.

Judge Gerking asked how a party would collect fees for an extended, protracted hearing relating to the fees the party is claiming. Prof. Peterson stated that a party would amend its previous statement of attorney fees under subparagraph C(4)(d)(i) to add additional time and expenses in arguing over appropriate fees. Judge Zennaché noted that the rule has always allowed the court discretion to allow a party to modify its application. Mr. Weaver stated that his practice is to do that in his response – he noted that since the other side is are objecting and additional time will be necessitated, he adds attorney fees in the response to the objection, so it is all dealt with as part of the original supplemental judgment. Ms. Payne observed that some people file supplemental statements of attorney fees, and asked whether some statement needs to be made to the effect that this subsection is not intended to affect a party's right to seek supplemental attorney fees as part of their original application for attorney fees, since the intent of the

rule is not to affect that right or to limit the number of such a party's supplemental statements for attorney fees. Prof. Peterson replied that the intent of the language of limitation was to prevent abuse from either a malcontent party or certain debt collectors. He stated that a party could state that their good cause is that they are filing a new supplemental statement of attorney fees for the time and effort expended in arguing over the attorney fee statement that they filed five months ago. He stated that he would assume that a court would approve that. Mr. Weaver stated that the rule specifies that it is only for attorney fees, costs, and disbursements incurred in collecting and enforcing judgments.

Ms. Payne stated that she is worried that it will cause confusion to the bench and bar that a party can only submit a supplemental statement if it is enforcing a judgment. Judge Zennaché stated that it is not the Council's intent to do that, and he does not necessarily share her concern. Prof. Peterson stated that the Council is trying to make it clear that the time collecting and enforcing the judgment is allowed. He noted that Ms. Payne is referring to securing a supplemental judgment rather than enforcing it. Judge De Hoog suggested that the concern could be alleviated by changing the language in paragraph C(7)(a) (Appendix M, page 6, lines 12-15) from, "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," to "however, unless good cause is shown, not more than one supplemental statement may be filed and served under this paragraph in the first year after entry of that judgment, and only one such supplemental statement may be filed and served annually after the filing of the previous supplemental statement."

Mr. Bachofner asked whether this problem is not solved by the "unless good cause is shown" language. Prof. Peterson stated that this was the intent – to prevent abuse but to allow the court to let people come in as appropriate. Mr. Bachofner stated that he did not feel the need to make a change. Ms. Leonard stated that she felt that Judge De Hoog's suggested change clarified the idea that you could have a packet of requests for attorney fees that were supplemented, but that is a different process than this particular process which is simply to enforce the judgment. Mr. Beattie made a motion to amend the draft accordingly. Ms. Leonard seconded the motion, which passed unanimously by voice vote.

Prof. Peterson noted that the change regarding the 14 day rule is a sea change – that many believe that if a party does not get their statement filed and served within 14 days, they are toast. Ms. Payne stated that case law already says that Rule 15 applies to attorney fees. Judge Gerking and Mr. Bachofner disagreed. Mr. Beattie stated that the suggestion from the reported cases is that the language is missing from Rule 15, and that was the impetus for the Rule 15 committee to consider adding it. He stated that it is now included in Rule 68 so, to the extent

there was any question in the past, judges now have the discretion to extend the time. Mr. Weaver stated that he and others on the Council had wondered why the ORCP would allow the court to modify every other timeline but, for some reason, not attorney fees, and he thought that this change made sense. Judge Hodson hypothesized that perhaps the reason it had not been changed until now was because these cases are not fun for judges to deal with.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 68

Mr. Weaver moved to publish the draft amendment as amended. Mr. Beattie seconded the motion, which passed unanimously by roll call vote.

10. ORCP 69 (Prof. Peterson) (*Appendices N & O*)

Prof. Peterson reported that there are two versions of draft amendments for the Council to consider. The change that is on both versions is intended to make it clear that a party must wait until the time for an answer, 30 days, has come and gone before serving notice of intent to take a default. Prof. Peterson stated that version 1, which includes family law cases in the default process, was his suggestion and he believes that it will get no votes. He stated that Holly Rudolph from the OJD agreed that there will be backlash from various quarters about having a default procedure for family law cases. He suggested that perhaps a statutory change is needed to require following of the Service Members Civil Relief Act (50 App. U.S.C. §521) and informing the court if the person is incapacitated in family law cases.

Judge Zennaché stated that he was on the Rule 13 committee, which formed a work group with family law practitioners, and that the committee and workgroup had looked at the general issue of whether the ORCP should be amended to specifically provide that they apply to family law cases. They chose not to do that, in part because they did not want to have the Rule 69 process apply to orders to show cause – which is the way a lot of family law practice is done – because different courts deal with the practice in different ways around the state. He stated that some courts treat motions to show cause more like pleadings, while some have a separate show cause docket. He stated that, since there is no consistency, trying to fit everyone into the default requirements would not work. He therefore opposed version 1. Judge Zennaché noted that the Court Re-Engineering Efficiencies Workgroup recently was asked to take a look at idea of modifying the forms that the OJD makes available to self-represented litigants to provide for the Rule 69 default process to apply to motions and orders to show cause, and that committee rejected that request for the very same reasons that his committee did. He urged adoption of the second version. Ms. David observed that, if no one made a motion on the first version, it would die.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 69

Mr. Brian moved to publish the version 2 draft amendment of ORCP 69. Mr. Beattie seconded the motion, which passed unanimously by roll call vote.

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

Prof. Peterson stated that he is still working on a memo to the Council and that he was attempting to set up a meeting with Judge Kantor to discuss his thoughts on the matter, but the judge was on vacation.

V. New Business (Ms. David)

No new business was raised that required the attention of the Council.

VI. Adjournment

Ms. David adjourned the meeting at 12:20 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

2014 PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

Comments regarding the proposed amendments to the Oregon Rules of Civil Procedure may be sent by mail, by e-mail, or through the form available on the Council's website:

Mark A. Peterson
Executive Director

Shari C. Nilsson
Administrative Assistant

Council on Court Procedures
310 SW 4th Avenue, Suite 1018
Portland, OR 97204
ccp@lclark.edu
www.counciloncourtprocedures.org

or by mail to:

Kristen S. David
Chair, Council on Court Procedures
Bowerman & David PC
1001 Molalla Ave Ste 208
Oregon City OR 97045

The Council meeting at which the Council will receive comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 6, 2014 — Oregon State Bar Center
16037 SW Upper Boones Ferry Rd.
Tigard, Oregon

The Council will take final action on the proposed amendments at its December 6, 2014, meeting.

2014 PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION

RULE 1

A Scope. These rules govern procedure and practice in all circuit courts of this state, except in the small claims department of circuit courts, for all civil actions and special proceedings whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by statute or rule. These rules shall also govern practice and procedure in all civil actions and special proceedings, whether cognizable as cases at law, in equity, or of statutory origin, for the small claims department of circuit courts and for all other courts of this state to the extent they are made applicable to [*such*] **these** courts by rule or statute. Reference in these rules to actions shall include all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin.

B Construction. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

C Application. These rules, and amendments thereto, shall apply to all actions pending at the time of or filed after their effective date, except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

D "Rule" defined and local rules. References to "these rules" shall include Oregon Rules of Civil Procedure numbered 1 through 85. General references to "rule" or "rules" shall mean only rule or rules of pleading, practice, and procedure established by ORS 1.745, or promulgated under ORS 1.006, 1.735, 2.130, and 305.425, unless otherwise defined or limited. These rules do not preclude a court in which they apply from regulating pleading, practice, and procedure in any manner not inconsistent with these rules.

E Use of declaration under penalty of perjury in lieu of affidavit[*; "declaration" defined*].

E(1) Definition. As used in these rules, "declaration" means a declaration under penalty of perjury. A declaration [*under penalty of perjury, or an unsworn declaration under ORS 194.800 to 194.835, if the declarant is physically outside the boundaries of the United States,*] may be used in lieu of any affidavit required or allowed by these rules. A declaration [*under penalty of perjury*] may be made without notice to adverse parties[,].

E(2) Declaration made within the United States. A declaration made within the United States must be signed by the declarant[,] and must include the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury." [*As used in these rules, "declaration" means a declaration under penalty of perjury.*]

E(3) Declaration made outside the boundaries of the United States. A declaration made outside the boundaries of the United States as defined in ORS 194.805(1) must be signed by the declarant and must include the following language in prominent letters immediately following the signature of the declarant: "I declare under penalty of perjury under the laws of Oregon that the foregoing is true and correct, and that I am physically outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States. Executed on the _____ (day) of _____ (month), _____ (year) at _____ (city or other location), _____ (country)."

F Electronic filing. Any reference in these rules to any document, except a summons, [*which*] **that** is exchanged, served, entered, or filed during the course of civil litigation shall be construed to include electronic images or other digital information in addition to printed versions[*of such items*], as may be permitted by rules of the court in which the action is pending.

G Citation. These rules may be referred to as ORCP and may be cited, for example, by citation of Rule 7, section D, subsection (3), paragraph (a), subparagraph (iv), part (A), as ORCP 7 D(3)(a)(iv)(A).

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*] **C(2) of this rule** and a notification to defendant that**,** in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

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

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

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

C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph [*(b) or (c) of this subsection*] **C(3)(b) or C(3)(c) of this rule**, shall contain a notice printed in type size equal to at least 8-point type [*which*] **that** 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 or cross-claim.** A summons to join a party to respond to a counterclaim **or a cross-claim** pursuant to Rule [*22 D (1)*] **22 D(1)** shall contain a notice printed in type size equal to at least 8-point type [*which*] **that** 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."*] **"motion," a "reply" to a counterclaim, or an "answer" to a cross-claim.** The [*"motion" or "reply"*] **"motion," "reply," 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 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*] **that** 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*] **may** be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be

in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

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

D Manner of service.

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

D(2) **Service methods.**

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

D(2)(b) **Substituted service.** Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the

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

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

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

the addressee.

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

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

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

D(3)(a)(i) **Generally.** Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to [*such*] **the** defendant or other person authorized by appointment or law to receive service of summons on behalf of [*such*] **the** 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*] **D(3)(a)(ii) nor D(3)(a)(iii) of this rule** applies by a mailing made in accordance with paragraph [*(2)(d) of this section*] **D(2)(d) of this rule** 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 **of age**, by service in the manner specified in subparagraph [*(i) of this paragraph*] **D(3)(a)(i) of this rule** upon [*such*] **the** minor**;** [*and, also,*] **and additionally** upon [*such*] **the** 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*] **the** minor resides, or in whose service [*such*] **the** minor is employed, or upon a guardian ad litem appointed pursuant to Rule [*27 A(2)*] **27 B**.

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

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)*] **D(3)(a)(iv)(A)** the plaintiff makes a diligent inquiry but cannot find the defendant; and

[*(B)*] **D(3)(a)(iv)(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)*] **D(3)(b)(ii)(A)** by substituted service upon [*such*] **the** registered agent, officer, or director;

[*(B)*] **D(3)(b)(ii)(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)*] **D(3)(b)(ii)(C)** by mailing in the manner specified in paragraph [*(2)(d) of this section*] **D(2)(d) of this rule** 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)*] **D(3)(b)(ii)(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)*] **D(3)(c)(ii)(A)** by substituted service upon [*such*] **the** registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

[*(B)*] **D(3)(c)(ii)(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)*] **D(3)(c)(ii)(C)** by mailing in the manner specified in paragraph [*(2)(d) of this section*] **D(2)(d) of this rule** 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)*] **D(3)(c)(ii)(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)*] **D(3)(d)(ii)(A)** by substituted service upon [*such*] **the** registered agent or general partner of a limited partnership;

[*(B)*] **D(3)(d)(ii)(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)*] **D(3)(d)(ii)(C)** by mailing in the manner specified in paragraph [*(2)(d) of this section*] **D(2)(d) of this rule** 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)*] **D(3)(d)(ii)(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*] associations 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*] **the** owner's or charterer's employment or any agent authorized by [*such*] **the** 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*] **D(3) of this rule** except service by mail pursuant to subparagraph [*(3)(a)(i) of this section*] **D(3)(a)(i) of this rule** 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*] **D(2)(d) of this rule** addressed to that defendant at:

[*(A)*] **D(4)(a)(i)(A)** any residence address provided by that defendant at the scene of the accident;

[*(B)*] **D(4)(a)(i)(B)** the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

[*(C)*] **D(4)(a)(i)(C)** any other address of that defendant known to the plaintiff at the time of making the mailings required by [*(A) and (B)*] **parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule** 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 [*(A), (B), and (C) above*] **parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule** 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 [*(A), (B), and (C) above*] **parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule** is made. If the mailing required by [*(C)*] **part D(4)(a)(i)(C) of this rule** is omitted because the plaintiff did not know of any address other than those specified in [*(A) and (B) above*] **parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule**, 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*] **D(4)(a)(i) of this rule** 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*] **D(4)(a)(i) of this rule** are as provided in Rule 69 **E**.

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*] **the** 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*] **The summons shall be published** 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*] **D(6)(a) of this rule**, and the court may order publication in a comparable manner at [*such*] **that** location in addition to, or in lieu of, publication in the county [*where*] **in which** 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*] **that** 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 **ascertain** 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*] **had been** brought against [*such*] **those** defendants by name.

D(6)(f) **Defending before or after judgment.** A defendant against whom publication is ordered or [*such*] **that** 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*] **that** defendant's representatives may, upon good cause shown and upon [*such terms as*] **any terms that** 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*] **that** 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*] **D(3) of this rule** if: [*(i)*] service pursuant to subparagraph [*(4)(a)(i) of this section*] **D(4)(a)(i) of this rule** is not authorized, and the plaintiff attempted service of summons by all of the methods authorized by subsection [*(3) of this section*] **D(3) of this rule** and was unable to complete service[**,**]**;** or [*(ii)*] if the plaintiff knew that service by [*such*] **these** 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 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*] **in that capacity** 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*] **that** person shall be affixed to the affidavit. The signature of [*such*] **the** notary or other official, when so attested by the affixing of the official seal, if any, of [*such*] **that** person, shall be prima facie evidence of authority to make and certify [*such*] **the** 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*] **that** may be heard ex parte; and every written request, notice, appearance, demand, offer [*of*] **to allow** 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*] **that** attorney or party[*,*]**;** by mailing it to [*such*] **the** 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*] **section** 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*] **the** person's office with [*such*] **the** 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*] **the** person's dwelling house or usual place of abode with some person [*over*] 14 years of age **or older** then residing therein. A party who has appeared without providing an appropriate address for service may be served by filing a copy of the pleading or other [*documents*] **documents** with the court. Service by mail is complete upon mailing. Service of any notice or other document to bring a party into contempt may only be upon [*such*] **that** party personally.

C Filing; proof of service. Except as provided by section D of this rule, all [*papers*] **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*] **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 **by** e-mail, proof of service shall be made by affidavit or **by** 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*] **the** 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 out of 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*] **the** pleading or document the time of day, the day of the month, the month, and the year. The clerk or person exercising the duties of that office is not required to receive for filing any document unless **a caption that includes** the name of the court[**,**]**; the 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*] **of the document** 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 **indicating** that the recipient is out of the office or **is** otherwise unavailable.

H Service by electronic service. As used in these rules, "electronic service" means using an electronic filing system provided by the Oregon Judicial Department and in the manner 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*] **that** is pending before it.

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

document is served by mail**, e-mail, facsimile communication, or electronic service**, 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*] **that person's** estate or a guardian[,] is a party to any action, [*such minor*] **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. **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 **both terms are** defined in ORS 125.005, [*who has a conservator of such person's estate or a guardian,*] is a party to [*any*] **an** action **and does not have a guardian or conservator**, the person shall appear by [*the conservator or guardian as may be appropriate or, if the court so orders, by*] a guardian

ad litem appointed by the court in which the action is brought[.] **and pursuant to this rule, as follows:** [*If the person does not have a conservator of such person's estate or a guardian, the person shall appear by a guardian ad litem appointed by the court. The court shall appoint some suitable person to act as guardian ad 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 **both terms are** 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 is financially incapable, as both terms are 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 both terms are 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 before notice is given pursuant to section E of this rule; however, the appointment shall be reviewed by the court if an objection is received as specified in subsection F(2) or F(3) of this rule.

E Notice of motion seeking appointment of guardian ad litem. Unless waived under section H 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 of this rule. 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, any supporting affidavits or declarations, 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 18 years of age or older, 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 practicable after any objection is filed, the court shall hold a hearing at which the court will determine the merits of the objection and make any order that is appropriate.

H Waiver or modification of notice. For good cause shown, the court may waive notice entirely or make any other order regarding notice that is 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 any settlement must be sought and obtained by a conservator unless the court, for good cause shown and on any

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

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*] **the circuit court for the county** 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*] **the circuit court for the county** 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*] **served** 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 **production or** inspection submitted under Rule 43 fails to **produce or 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*] **identify** 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.

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*] **of** 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] **that caused the motion for the sanction** or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order[*;*]**.**

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

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

B(2)(d) **Contempt of court.** In lieu of **or in addition to** any of the [*foregoing orders or in addition thereto*] **orders listed in paragraph 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*] **Any of the orders** [*as are*] listed in [*paragraphs (a), (b), and (c) of this subsection*] **paragraph B(2)(a), B(2)(b), or B(2)(c) of this rule**, [*where*] **when** a party has failed to comply with an order under Rule 44 A requiring the party to produce another **person** for examination, unless the party failing to comply shows inability to produce [*such*] **the** person for examination.

B(3) **Payment of expenses.** In lieu of **or in addition to** any order listed in subsection [*(2) of this section*] **B(2) of this rule,** [*or in addition thereto,*] the court shall require the party failing to obey the order or the attorney advising [*such*] **that** 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*] **it** 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 to 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 **to** serve objections to a request for production [*and*] **or** inspection submitted under Rule 43, after proper service of the request, the court [*in which*] **where** the action is pending on motion may make [*such orders*] **any order** in regard to the failure as [*are*] **is** just[*, including among others it may take*] **including, but not limited to,** any action authorized under [*subsection B(2)(a), (b), and (c)*] **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*] **that** 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.

DISMISSAL OF ACTIONS; [*COMPROMISE*] OFFER TO ALLOW JUDGMENT

RULE 54

A Voluntary dismissal; effect thereof.

A(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 32 D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court[*: (a)*] by filing a notice of dismissal with the court and serving [*such*] **the** notice on all other parties not in default not less than [five] **5** days prior to the day of trial if no counterclaim has been pleaded, or [*(b)*] by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, a party shall submit a form of judgment and the court shall enter a judgment of dismissal.

A(2) **By order of court.** Except as provided in subsection [*(1) of this section*] **A(1) of this rule**, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon [*such*] **any** terms and conditions [*as*] **that** the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

A(3) **Costs and disbursements.** When an action is dismissed under this section, the judgment may include any costs and disbursements, including attorney fees, provided by contract, statute, or rule. Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party.

B Involuntary dismissal.

B(1) **Failure to comply with rule or order.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against [*such*] **that** defendant.

B(2) **Insufficiency of evidence.** After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B(3) **Dismissal for want of prosecution; notice.** Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice that a judgment of dismissal will be entered in each such case by the court for want of prosecution unless, on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If [*such*] **an** application is not made or good cause **is not** shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time for want of prosecution of any action upon motion of any party thereto.

B(4) **Effect of judgment of dismissal.** Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication without prejudice.

C Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this

rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

D Costs of previously dismissed action.

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

D(2) **Previous claim dismissed with prejudice.** If a party who previously asserted a claim, counterclaim, cross-claim, or third party claim that was dismissed with prejudice subsequently files the same claim, counterclaim, cross-claim, or third party claim against the same party, the court shall enter a judgment dismissing the claim, counterclaim, cross-claim, or third party claim and may enter a judgment requiring the payment of reasonable attorney fees incurred by the party in obtaining the dismissal.

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

E(1) **Offer.** Except as provided in ORS 17.065 [*through*] **to** 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*] **the** party's attorney shall endorse [*such*] **the** acceptance thereon and file the [*same*] **accepted offer** with the clerk before trial, and within [*seven*] **7** days from the time the offer was served upon [*such*] **the** party asserting the claim; and thereupon judgment shall be given accordingly as a stipulated judgment. If the offer does not state that it includes costs and

disbursements or attorney fees, the party asserting the claim shall submit any claim for costs and disbursements or attorney fees to the court as provided in Rule 68.

E(3) **Failure to accept offer.** If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence at trial and may be filed with the court only after the case has been adjudicated on the merits and only if the party asserting the claim fails to obtain a judgment more favorable than the offer to allow judgment. In such a case, the party asserting the claim shall not recover costs, prevailing party fees, disbursements, or attorney fees incurred after the date of the offer, but the party against whom the claim was asserted shall recover [*of*] **from** the party asserting the claim costs and disbursements, not including prevailing party fees, from the time of the service of the offer.

F Settlement conferences. A settlement conference may be ordered by the court at any time at the request of any party or upon the court's own motion. Unless otherwise stipulated to by the parties, a judge other than the judge who will preside at trial shall conduct the settlement conference.

SUBPOENA

RULE 55

A Defined; form. A subpoena is a writ or order directed to a person and may require the attendance of [*such*] **the** person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require [*such*] **the** person to produce books, papers, documents, or tangible things and permit inspection thereof at a particular time and place. A subpoena requiring attendance to testify as a witness requires that the witness remain until the testimony is closed unless sooner discharged[,] but**,** at the end of each day's attendance**,** a witness may demand of the party, or the party's attorney, the payment of legal witness fees for the next following day and**,** if not then paid, the witness is not obliged to remain longer in attendance. Every subpoena shall state the name of the court [*and the title of the action*]**, the case name, and the case number**.

B For production of books, papers, documents, or tangible things and to permit inspection. A subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things in the possession, custody or control of that person at the time and place specified therein. A command to produce books, papers, documents, or tangible things and permit inspection thereof may be joined with a command to appear at trial or hearing or at deposition or, before trial, may be issued separately. A person commanded to produce and permit inspection and copying of designated books, papers, documents**,** or tangible things but not commanded to also appear for deposition, hearing**,** or trial may, within 14 days after service of the subpoena or before the time specified for compliance if [*such*] **that** time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court in whose name the

subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move for an order at any time to compel production. In any case, where a subpoena commands production of books, papers, documents, or tangible things the court, upon motion made promptly and, in any event, at or before the time specified in the subpoena for compliance therewith, may [*(1)*] quash or modify the subpoena if it is unreasonable and oppressive or [*(2)*] condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

[***C Issuance.***]

[***C(1) By whom issued.*** *A subpoena is issued as follows: (a) to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents or tangible things and to permit inspection thereof: (i) it may be issued in blank by the clerk of the court in which the action is pending, or if there is no clerk, then by a judge or justice of such court; or (ii) it may be issued by an attorney of record of the party to the action in whose behalf the witness is required to appear, subscribed by the signature of such attorney; (b) to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony, it may be issued by the clerk of a circuit court in the county in which the witness is to be examined; (c) to require attendance out of court in cases not provided for in paragraph (a) of this subsection, before a judge, justice, or other officer authorized to administer oaths or take testimony in any matter under the laws of this state, it may be issued by the judge, justice, or other officer before whom the attendance is required.*]

[*C(2)* ***By clerk in blank.*** *Upon request of a party or attorney, any subpoena issued by a clerk of court shall be issued in blank and delivered to the party or attorney requesting it, who shall*

fill it in before service.]

C Purpose; issuance.

C(1) Purpose.

C(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein or, if separate from a subpoena commanding the attendance of a person, to produce books, papers, documents, or tangible things and to permit inspection thereof.

C(1)(b) Foreign depositions. A subpoena may be issued to require attendance before any person authorized to take the testimony of a witness in this state under Rule 38 C, or before any officer empowered by the laws of the United States to take testimony.

C(1)(c) Other uses. A subpoena may be issued to require attendance out of court in cases not provided for in paragraph C(1)(a) or C(1)(b) of this rule, before a judge, justice, or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

C(2) By whom issued.

C(2)(a) By the clerk of the court, or a judge or justice of the court for civil actions. A subpoena may be issued in blank by the clerk of the court in which the action is pending or, if there is no clerk, by a judge or justice of that court.

C(2)(a)(i) Requirements for subpoenas issued in blank. Upon request of a party or attorney, any subpoena issued by a clerk of the court may be issued in blank and delivered to the party or attorney requesting it, who shall before service include on the subpoena the name of the person commanded to appear; or the books, papers, documents, or tangible things to be produced or inspected; and the particular time and location for the attendance of the person or the production or the inspection, as applicable.

C(2)(b) By the clerk of the court for foreign depositions. A subpoena for a foreign

deposition may be issued as specified in Rule 38 C(2) by the clerk of a circuit court in the county in which the witness is to be examined.

C(2)(c) By a judge, justice, or other officer. A subpoena to require attendance out of court in cases not provided for in paragraph C(1)(a) or C(1)(b) of this rule may be issued by the judge, justice, or other officer before whom the attendance is required.

C(2)(d) By an attorney. A subpoena may be issued by an attorney of record of the party to the action on whose behalf the witness is required to appear, subscribed by the attorney.

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*] **subsection D(2) of this rule**, 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 **the** 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 [*(b) of this subsection*] **D(2)(b) of this rule** may be made upon the officer in charge of the law enforcement agency.

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

D(2)(c) **Notice to officer.** When a subpoena has been served as provided in [*paragraph (b) of this subsection*] **paragraph D(2)(b) of this 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*] **3** 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; qualifications.** 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.

E Subpoena for hearing or trial; prisoners. If the witness is confined in a prison or jail in this state, a subpoena may be served on [*such*] **that** person only upon leave of court[,] and attendance of the witness may be compelled only upon [*such*] **the** terms [*as*] **that** the court

prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or may order that testimony only be taken upon deposition at the place of confinement. The subpoena and court order shall be served upon the custodian of the prisoner.

F Subpoena for taking depositions or requiring production of books, papers, documents, or tangible things; place of production and examination.

F(1) **Subpoena for taking deposition.** Proof of service of a notice to take a deposition as provided in [*Rules*] **Rule** 39 C and **Rule** 40 A, or of notice of subpoena to command production of books, papers, documents, or tangible things before trial as provided in subsection D(1) of this rule or a certificate that [*such*] notice will be served if the subpoena can be served, constitutes a sufficient authorization for the issuance by a clerk of court of subpoenas for the persons named or described therein.

F(2) **Place of examination.** A resident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein [*such*] **the** person resides, is employed**,** or transacts business in person, or at [*such*] **any** other convenient place [*as*] **that** is fixed by an order of **the** court. A nonresident of this state who is not a party to the action may be required by subpoena to attend an examination or to produce books, papers, documents, or tangible things only in the county wherein [*such*] **the** person is served with a subpoena, or at [*such*] **any** other convenient place [*as*] **that** is fixed by an order of **the** court.

F(3) **Production without examination or deposition.** A party who issues a subpoena may command the person to whom it is issued to produce books, papers, documents, or tangible things, other than individually identifiable health information as described in section H **of this rule**, by mail or otherwise, at a time and place specified in the subpoena, without commanding inspection of the originals or a deposition. In such instances, the person to whom the subpoena is directed complies if the person produces copies of the specified items in the specified manner and certifies that the

copies are true copies of all **of** the items responsive to the subpoena or, if [*all*] **any** items are not included, why they are not.

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

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."** "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."** "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*] **the** information was requested and [*which*] **that** requires the return to the original custodian of [*such*] **the** 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.*] Procedure.** 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) **Supporting documentation.** The attorney for the party issuing a subpoena requesting production of individually identifiable health information must serve the custodian or other keeper of [*such*] **that** information either with a qualified protective order or with an affidavit or declaration together with attached supporting documentation demonstrating that:

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

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

H(2)(a)(iii) the individual did not object within the 14 days or, if objections were made, they were resolved and the information being sought is consistent with [*such*] **that** resolution[.]**; and**

H(2)(a)(iv) [*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) **Objection.** 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) **Time for compliance.** Except as provided in subsection [*(4) of this section*] **H(4) of this rule**, when a subpoena is served upon a custodian of individually identifiable health

information in an action in which the entity or person is not a party, and the subpoena requires the production of all or part of the records of the entity or person relating to the care or treatment of an individual, it is sufficient compliance [*therewith*] **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*] **5** days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection [*(3) of this section*] **H(3) of this rule**.

H(2)(d) **Method of compliance.** The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the [*title*] **name of the court, case name** 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) **Inspection of records.** 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) **Service of subpoena.** For purposes of this section, the subpoena duces tecum to the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection [*(3) of section D*] **D(3) of this rule**.

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

H(3)(a) **Content.** The records described in subsection [*(2) of this section*] **H(2) of this 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 **the** person**,** acting under the control of either[*,*]**; prepared** in the ordinary course of the entity's or **the** person's business[*,*]**; and prepared** at or near the time of the act, condition, or event described or referred to therein.

H(3)(b) **When custodian has no records or fewer records than requested.** 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) **Multiple affidavits or declarations.** 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) **Required statement.** 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) **Multiple subpoenas.** If more than one subpoena duces tecum is served on a custodian of records and personal attendance is required under each pursuant to paragraph [*(a) of this subsection*] **H(4)(a) of this 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.

JUDGMENTS

RULE 67

A Definitions. "Judgment" as used in these rules has the meaning given that term in ORS 18.005. "Order" as used in these rules means any other determination by a court or judge that is intermediate in nature.

B Judgment for less than all claims or parties in action. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may render a limited judgment as to one or more but fewer than all of the claims or parties. A judge may render a limited judgment under this section only if the judge determines that there is no just reason for delay.

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

D Judgment in action for recovery of personal property. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession **of the property**, or **for** the value of the property[,] in case a delivery cannot be had**,** and **for** damages for the detention of the property. If the property has been delivered to the plaintiff and the defendant claims a return of the property, judgment for the defendant may be for a return of the property, or the value of the property in case a return cannot be had, and damages for taking and withholding the [*same*] **property**.

E Judgment in action against partnership, unincorporated association, or parties jointly indebted.

E(1) **Partnership and unincorporated association.** Judgment in an action against a partnership or unincorporated association [*which*] **that** is sued in any name [*which*] **that** it has assumed or by which it is known may be entered against [*such*] **that** partnership or association and

shall bind the joint property of all of the partners or associates.

E(2) **Joint obligations; effect of judgment.** In any action against parties jointly indebted upon a joint obligation, contract, or liability, judgment may be taken against less than all [*such*] **of those** parties and a default, dismissal, or judgment in favor of or against less than all of [*such*] **those** parties in an action does not preclude a judgment in the same action in favor of or against the remaining parties.

F Judgment by stipulation.

F(1) **Availability of judgment by stipulation.** At any time after commencement of an action, a judgment may be given upon stipulation that a judgment for a specified amount or for a specific relief may be entered. The stipulation shall be [*of*] **by** the party or parties against whom judgment is to be entered and the party or parties in whose favor judgment is to be entered. If the stipulation provides for attorney fees, costs, and disbursements, they may be entered as part of the judgment according to the stipulation.

F(2) **Filing; assent in open court.** The stipulation for judgment may be in a writing signed by the parties, their attorneys, or their authorized representatives**.**[*, which*] **That** writing shall be filed in accordance with Rule 9. The stipulation may be subjoined or appended to, and part of, a proposed form of judgment. If not in writing, the stipulation shall be assented to by all parties thereto in open court.

G Judgment on portion of claim exceeding counterclaim. The court may direct entry of a limited judgment as to that portion of any claim [*which*] **that** exceeds a counterclaim asserted by the party or parties against whom the judgment is entered, if [*such*] **the** party or parties have admitted the claim and asserted a counterclaim amounting to less than the claim.

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 **D(4)(a)(ii)**; 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] **that** party shall

also have a right to recover disbursements.

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

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

C(1)(a) [Such items] **attorney fees** are claimed as damages arising prior to the action;

C(1)(b) [Such items] **attorney fees** 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 [*fees*] **fees** 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) **Alternatives.** 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*] **the party's** motion or response, in similar form to the allegations required in a pleading.

C(2)(c) **Specific amount not required.** 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) **Pleadings or motions responding to allegations of right to attorney fees.** 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*] **or** costs and disbursements shall be submitted in the manner provided by subsection [*(4) of this section*] **C(4) of this 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) Amendments; supplements. Statements, objections, and responses may be amended or supplemented in accordance with Rule 23.

C(4)(d)(ii) Discretion related to time of filing. The court may, in its discretion and upon any terms that may be just, allow a statement, an objection, or a response to be filed and served after the time specified in paragraph C(4)(a), C(4)(b), or C(4)(c) of this rule, or by an order enlarge such time.

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) **How determined.** 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) **Court's ruling.** 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 [*(a), (b), or (c) of this subsection*] **C(4)(a), C(4)(b), or C(4)(c) of this 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 **general or a limited** 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 or costs and disbursements may be awarded or denied following entry of a limited judgment if the court determines that there is no just reason for delay. In such cases, any award or denial of attorney fees or 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*] **any steps that are** necessary to avoid the multiple taxation of the same attorney fees [*and*] **or** 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*] **or** 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) Frequency. If a party has alleged a basis for the award of attorney fees as provided in paragraph C(2)(a) or C(2)(b) of this rule, and the party incurs attorney 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 under this paragraph in the first year after entry of that judgment, and only one such supplemental statement may be filed and served annually after the filing of the previous supplemental statement.

C(7)(b) Procedure. 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.

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.

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.

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.*] **U.S.C.** §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.

JUDGMENTS BY CONFESSION

RULE 73

A Judgments [*which*] that may be confessed.

A(1) **For money due; where allowed.** Judgment by confession may be entered without action for money due in the manner prescribed by this rule[*. Such judgment*] **and** may be entered in any court having jurisdiction over the subject matter. The application to confess judgment shall be made in the county in which the defendants, or one of them, reside or may be found at the time of the application. A judgment entered by any court in any other county has no force or validity, notwithstanding anything in the defendant's statement to the contrary.

A(2) **Consumer transactions.** No judgment by confession may be entered without action upon a contract, obligation, or liability [*which*] **that** arises out of the sale of goods or **the** furnishing of services for personal, family, or household use[*, or*]**;** out of a loan or other extension of credit for personal, family, or household purposes[,]**;** or upon a promissory note [*which*] **that** is based upon such sale or extension of credit.

B Statement by defendant. A statement in writing must be made, signed by any party against whom judgment is to be entered or a person authorized to bind [*such*] **that** party, and verified by oath, as follows:

B(1) [*It*] **it** must authorize the entry of judgment for a specified sum;

B(2) [*It*] **it** must state concisely the facts out of which [*it*] **the judgment** arose, and show that the sum confessed therefor is justly and presently due;

B(3) [*It*] **it** must contain a statement that the person or persons signing the judgment understands that [*it*] **the statement** authorizes entry of judgment without further proceeding [*which*] **that** would authorize execution to enforce payment of the judgment; and

B(4) [*It*] **it** must have been executed after the date or dates when the sums described in the statement were due.

[*C Application by plaintiff.*] **C Filing of statement by plaintiff; entry, enforcement of**

judgment. Judgment by confession may be ordered by the court upon the filing of the statement required by section B of this rule. The judgment may be entered and enforced in the same manner and with the same effect as a judgment in an action.

D Confession by joint debtors. One or more joint debtors may confess a judgment for a joint debt due. Where all **of** the joint debtors do not unite in the confession, the judgment shall be entered and enforced against only those **debtors** who confessed it and [*it*] **the judgment** is not a bar to an action against the other joint debtors upon the same demand.

Shari Nilsson <nilsson@lclark.edu>

Re: Amendments to ORCP 68

Shari Nilsson <nilsson@lclark.edu> Fri, Dec 5, 2014 at 1:35 PM
To: Donald.R.LETOURNEAU@ojd.state.or.us
Cc: cocp-list <cocp-list@lclark.edu>

Judge Letourneau,

Thank you for your prompt response. We will relay your concerns to the Council (via copy of this e-mail and at tomorrow's meeting). We appreciate your bringing this to our attention.

Regards,
Mark

On Fri, Dec 5, 2014 at 1:31 PM, <Donald.R.LETOURNEAU@ojd.state.or.us> wrote:

> Thank you for responding.
>
> No, the email does not allay my concerns.
>
> In family law, all post-general judgment hearings result in a supplemental judgment. For example, a party may request a show cause to modify support or to modify custody. It should be clear in ORCP 68 that a party can obtain attorney fees and costs after a supplemental judgment, not just a general judgment or a limited judgment. I am sure the issue would come up in other areas, but family law cases are what spawned my concern.
>
> Section C(7) refers to a different process altogether.
>
> Shari Nilsson ---12/05/2014 01:25:22 PM---Judge Letourneau, Thank you for reading and commenting on the proposed amendments to the
>
> From: Shari Nilsson <nilsson@lclark.edu>
> To: Donald.R.LETOURNEAU@ojd.state.or.us
> Cc: cocp-list <cocp-list@lclark.edu>
> Date: 12/05/2014 01:25 PM
> Subject: Re: Amendments to ORCP 68
>
> ---
>
> Judge Letourneau,
>
> Thank you for reading and commenting on the proposed amendments to the Oregon Rules of Civil Procedure. The reference in ORCP 68 C(4)(a) to limited and general judgments is meant to clarify the procedure in seeking an award of attorney fees or court costs at the conclusion of a case (general judgment) or at the conclusion of the case as to some parties or some claims and defenses (limited judgment). The award of attorney fees and court costs will be in the general judgment or, more frequently, in a supplemental judgment. A new provision, subsection C(7), provides a procedure for seeking an additional award of attorney fees or costs incurred in enforcing the judgment.
>
> Does this explanation address your concern? The Council on Court Procedures' promulgation meeting is tomorrow, December 6, 2014. If your concern has not been adequately addressed, please contact me

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promptly.

Mark A. Peterson
Executive Director
503-768-6500
mpeterso@lclark.edu

On Thu, Dec 4, 2014 at 4:51 PM, <Donald.R.LETOURNEAU@ojd.state.or.us> wrote:

> Council on Court Procedures:
>
> I am a judge in Washington County. In reviewing the proposed amendments to ORCP 68, I note that C(4)a references only general and limited judgments, and omits supplemental judgments. Of course, attorney fee procedures relate to supplemental judgments as well. Likely this has already been addressed.

--

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ORCP 47 proposed change for next biennium

1 message

Shenoa Payne <SPayne@hk-law.com> Thu, Nov 20, 2014 at 5:53 PM
To: "nilsson@lclark.edu" <nilsson@lclark.edu>, "mpeterso@lclark.edu" <mpeterso@lclark.edu>

Shari and Mark:

This was forwarded to me and I would like it if we could put it on the list for consideration for the next biennium. Thanks.

Shenoa

From: Dallas DeLuca [mailto:dallasdeluca@markowitzherbold.com]
Sent: Thursday, November 20, 2014 5:09 PM
To: Shenoa Payne
Cc: Cody Hoesly (choesly@larkinsvacura.com)
Subject: ORCP 47 change

Hi Shenoa – In 2013 in the OADC magazine there was an article arguing that because ORCP 47 does not include the word "defense" (unlike the FRCP 56 counterpart), a plaintiff should not be allowed to move for summary judgment in its favor against a defendant's affirmative defenses. Instead, a plaintiff is limited by the plain words of ORCP 47 to moving on a claim, counterclaim or cross claim. The article stated that several judges in Washington County had accepted this argument and were denying summary judgment motions filed by plaintiffs on this basis.

Earlier this year (February), I checked with Cody on whether he had seen other articles on this topic or ran across this response to a plaintiff's SJ motion in state court. Cody suggested that I email to you (because you are an ORCP committee member) and suggest that the CCP could do an amendment on ORCP 47 to make this a non-issue. The change would make ORCP 47 align with FRCP 56 so that it is explicit that a party can move for SJ against a another party's affirmative defenses. Personally, I think a fix is helpful so that the pleadings can be cleared up long before trial and reduce the issues for trial, if a party will not agree to drop frivolous affirmative defenses.

Sincerely,

Dallas

Dallas DeLuca | Lawyer

Markowitz Herbold PC

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