AMENDED MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 9, 2018, 9:00 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Kelly L. Andersen
Jay Beattie
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva*
Jennifer Gates
Hon. Timothy C. Gerking
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. David E. Leith
Hon. Susie L. Norby
Hon. Leslie Roberts
Derek D. Snelling
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Hon. Lynn R. Nakamoto
Shenoa L. Payne
Sharon A. Rudnick
Deanna L. Wray

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Moved to Publication Docket this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 15 ORCP 16 ORCP 22 ORCP 23 ORCP 55		ORCP 7 ORCP 15 ORCP 16 ORCP 22 ORCP 43 ORCP 55	Discovery ORCP 15

I. Call to Order

Mr. Keating called the meeting to order at 9:02 a.m.

II. Administrative Matters

A. Approval of May 12, 2018, Minutes

Mr. Keating asked Council members if they had any comments or changes to the draft minutes from the May 12, 2018, meeting (Appendix A). Mr. Andersen questioned whether he had agreed with Judge Leith's comment in the second paragraph from the bottom on page six of the draft minutes. He stated that he may have disagreed. Judge Leith stated that his point was that the Council should make the history clear that the proposed amendment to Rule 16 is neither endorsing nor changing whatever authority the court has to allow a party to proceed using a pseudonym but, rather, just acknowledging that a procedure exists for a party to make such a motion. Mr. Andersen stated that, in that context, he did agree with Judge Leith's statement. He noted that he does not feel that the Council should try to create a hurdle that does not currently exist or expand the current law.

Judge Leith made a motion to approve the draft minutes from May 12, 2018. Mr. Crowley seconded the motion, which was approved unanimously without abstention.

B. Contacting Legislators

Judge Peterson stated that he had begun a draft e-mail template for Council members to send to legislators but, at this point, it might be better to wait until after the June meeting to give an update; then further updates can be done after both the September meeting and the December meeting. Council members agreed.

III. Old Business

A. Committee Reports

1. ORCP 7 Committee

Judge Norby explained that the committee had not met again since the last Council meeting but, at that Council meeting, Council members had requested changes and that she had made those and forwarded them to Council staff. She stated that the precise language was not agreed upon at the meeting, so she tried to implement the suggested ideas in the draft before the Council (Appendix B) and she welcomed the Council's input.

Judge Roberts pointed out that the lead line of part D(6)(a)(i)(B) is "Mailing summons and complaint may be required," but the language in the rule states that, if the court orders service by publication, the plaintiff must mail copies. Judge Wolf observed that this is because it is conditional on whether the plaintiff knows the defendant's address, and the plaintiff must mail only if they know the defendant's address. Judge Peterson agreed that, if the plaintiff does not know the address, he or she is excused from the requirement to mail a copy. Judge Norby noted that the word "may" is used in the lead line because it could happen under one circumstance but it may not happen under another circumstance. Judge Peterson suggested changing the lead line to, "When mailing summons and complaint required." Judge Hill suggested striking "may be required" from the lead line and leaving "Mailing summons and complaint."

Judge Roberts noted that the usual practice is to have a requirement and an exception to a requirement. She wondered why follow-up mailing is required only for publication and not for electronic service. Judge Peterson stated that paragraph D(6)(b) requires that the affidavit or declaration include verification that the residence address, mailing address, and place of employment are unlikely to achieve service, and the fact that the plaintiff has no valid address is part of what gets the plaintiff in the door for electronic service. Judge Roberts pointed out that any mailing requirement for service by posting is also not addressed. Judge Norby explained that the plaintiff must report whether they have a mailing address because that is part of the analysis for the judge in determining whether electronic service will be allowed so, if a plaintiff reports that there is no address to mail the summons and complaint to, having an absolute requirement that the plaintiff mail it would not make sense. Judge Roberts noted that the draft rule simply says the declaration must say that, but it does not say that the court cannot order alternative service unless the declaration shows that there is no known address. Judge Norby stated that a judge would probably want to order that a plaintiff do both. Judge Roberts agreed that a judge probably would, but reiterated that the rule does not say that. Judge Peterson noted that subsection D 6(B) does talk about a combination of methods. Judge Roberts observed that it is allowed and that perhaps a judge would do it, but it seems to her that there is a lot of difference between a rule that requires certain steps and a rule that simply relies on the idea that judges will be more careful than the Council has been in drafting the rule.

Judge Norby asked Judge Roberts to clarify her concerns. Judge Roberts pointed out that the rules for electronic service could be exactly the same as in paragraph A(1)(b), and she wondered why they are different. Ms. Weeks noted that the point of electronic service is that there is no known mailing address. Judge Roberts stated that the draft rule does not say that the court cannot order electronic

service if there is a known address; the draft talks about the contents of the declaration but does not say that, if a plaintiff does not check those boxes, a plaintiff does not get to attempt electronic service. Judge Norby noted that the committee wanted to leave discretion for the court. Judge Roberts pointed out that a plaintiff could be allowed to do electronic service without backup mailing even if there is, in fact, another mailing address. However, if service is by publication, a plaintiff would be required to do backup mailing. She stated that she did not understand why a plaintiff can avoid backup mailing in one method but not in another method. She suggested that a plaintiff should have to include backup mailing in all methods, if possible. Judge Wolf stated that the draft rule would allow for a situation where a plaintiff has a mailing address but does not believe that service is going to be effective there because the defendant will not sign the return receipt. In this case, a judge could permit the electronic service without backup mailing.

Judge Peterson stated that subparagraph D(6)(a)(ii) of the current rule states that a plaintiff may do service by posting and the rule does not say anything about what that entails; Council staff has added new language regarding posting in the draft now before the Council. He noted that Judge Roberts' criticism would also be appropriate under the current rule for posting, where a plaintiff could say that he or she has an address but that the address is not likely to achieve service so the plaintiff requests service by posting. He stated that there is no reason that the court cannot require backup mailing, but that the court is not compelled to order mailing when service is by posting.

Judge Roberts stated that she was simply wondering why the requirement of mailing, if there is another known address, does not apply to all of the alternative methods but, rather, just to publication. She opined that it would be simple to say that mailing is required if an address is known when the court orders service by publication or by any other method of alternative service under this rule. Judge Hill agreed. Judge Peterson stated that it might be a bit of an organizational challenge because it would need to be moved under subsection D(6). Judge Wolf suggested moving that paragraph in mass. Mr. Beattie suggested creating a new paragraph D(6)(a) with everything else following. Judge Wolf agreed and stated that this would maintain the integrity of the rest of the section. Judge Peterson stated that the existing language can be modified to apply not just to publication. The Council agreed.

Mr. Keating again asked about the current draft lead line for part D(6)(a)(i)(B): "Mailing Summons and Complaint." Judge Peterson again suggested changing it to, "When mailing summons and complaint is required." Given the other changes to the subsection, Judge Hill recommended going back to the original language of

"Mailing summons and complaint may be required." The Council agreed.

Mr. Keating asked whether the Council had any further suggestions for amendment. Judge Peterson summarized that staff would move part D(6)(a)(i)(B) under subsection D(6) and make it apply to all forms of alternative service. He also pointed out three other errors: a typographical error on page 14, line 22, with the word "commenced" misspelled; that the word "section" should be replaced by "paragraph" on page 5, line 19; and that paragraph D(6)(b) should use the phrase "affidavit or declaration" instead of just "affidavit" on page 15.

Judge Leith noted that, on line 17 of page 15, the word "and" is used in the subsection regarding posting. He asked whether, if a judge is ordering service at another location, that the amendment also requires posting at the courthouse. He stated that he thought the word "or" was more appropriate. He opined that a plaintiff should be able to serve by posting at a house that is being foreclosed on without having to also post at the courthouse. Judge Peterson wondered whether there are people who regularly check the board at the courthouse in foreclosure cases. Judge Roberts pointed out that, if the word is changed to "or" so that the documents could be served at one place or the other, a judge could simply order posting at the courthouse even though the plaintiff knows it is not going to come to anyone's attention. Judge Norby stated that the double posting does not seem like an onerous requirement, since parties are going to have to come to the courthouse anyway. Judge Leith observed that, in a foreclosure case where the reason a plaintiff is posting is to find unknown occupants, it would be silly to require posting at the courthouse as well as the house. Judge Norby stated that people have been known to remove posted summonses and complaints at houses, not at the courthouse. Judge Roberts noted that lien holders do not go to foreclosed houses every so often to see if something is posted, but they might go to the courthouse to do so. Judge Leith pointed out that there are typically unknown occupants in foreclosure cases, not unknown lien holders. Mr. Beattie asked whether there is a requirement in the foreclosure statute to post at the courthouse. Judge Roberts stated that there is not.

Judge Roberts noted that many foreclosure cases include all persons, wherever situated, who may have a claim on the property. Those people are always served by some form of alternative service, including the lien claimants. She stated that posting at the courthouse means, at least theoretically, that a lien claimant who is alert to looking there would know, whereas posting only at the foreclosed house means that a lien claimant might never know. Judge Hill agreed and opined that the additional posting requirement is not a burden and makes sense Judge Peterson asked whether there is a place designated at the various courthouses to post these things. The other judges indicated that there are such designated

places.

Judge Leith pointed out that this is a new requirement and that parties may not notice it at first, which raises the question of whether the alternative service is collaterally challengeable or vulnerable because it failed to comply with the requirement. Judge Peterson noted that there are two targets: the owner of the home being foreclosed on, where posting at the courthouse does no good; and people who have interest in the foreclosed property, where posting at the courthouse would be helpful. Judge Leith observed that plaintiffs will be required to do a lot of diligence to locate and personally serve every lien holder and, when judges approve service by posting, the expectation is not to actually reach every lien holder. Judge Roberts asked why Judge Leith was stating that service is only for unknown occupants when it is for anyone who is an unknown person. Judge Leith observed that the rule needs to deal with all situations that occur. Judge Norby stated that she has had cases where a judgment has been challenged because some occupants said that other occupants deliberately took down a posting and concealed from them the fact that a case was pending. With the rule change, in a case like that, a plaintiff could perhaps argue that those occupants could have learned about the case by looking at the posting at the courthouse.

Mr. Beattie clarified that the word "and" refers to additional service at another location that the affidavit or declaration indicates might be successful. He asked whether a plaintiff could just file an affidavit that says that service at any other location is unlikely to be successful and ask to post at the courthouse as a default. Judge Leith agreed that posting at the courthouse would be the default. He stated that, practically, it is not a big deal; however, he stated that it does not serve a purpose to post at both places when likely success would only be at one of them. Strong feelings among Council members did not coalesce after this discussion, but the consensus seemed to be to keep the word "and."

Mr. Snelling asked Judge Peterson to explain the change on page 11 where there appeared to be new language but he could not find a change from the old language. Judge Peterson stated that the formatting in the existing rule is not correct because part D(4)(a)(i)(C) was broken into a freestanding paragraph, contrary to Council drafting conventions. He stated that the words and punctuation are identical, but that the language has been moved into the existing paragraph. He noted that the same problem had been corrected on page 7 of the draft.

Judge Leith stated for the record that he still has the same objection to the section on electronic service and believes that the rule draft before the Council does not improve it. He stated that he believes that it is fine to identify the types of

electronic service that are currently common and to specify how it would be best to have information presented in an order allowing electronic alternative service. He noted that he is concerned that technical failure in compliance with the requirements in new subparagraph D(6)(b)(i) and subparagraph D(6)(b)(ii) might undo the alternative service. While he thought that it is fine to help people by specifying what steps might be required, it seems to him that the amendment is making electronic alternative service disfavored by imposing requirements rather than leaving it to the court's discretion. For example, the draft requires it to be likely for the recipient to receive the transmission, which is not the standard for any other form of alternative service. Judge Leith stated that he believes that the point of requiring an amended certificate may mean that alternative service was not effective if a plaintiff has to amend the certificate in that way, and that is different from any other form of alternative service, where service is not deemed ineffective if it turns out that nobody read the posting or publication.

Judge Peterson stated that, if a party serves by posting at the house but it later comes to the party's attention some time before judgment has been entered that the process server had posted at the wrong house, the party would have to correct the certificate because it was false. Judge Leith noted that the certificate does not become false because the person did not receive the electronic message. Judge Peterson observed that the situation with electronic service is similar to service at the wrong house because the plaintiff send it to an account that was assumed to be correct but later received a message saying that it had been sent to the wrong person. He stated that he believes that this does mean that the service is bad. Judge Leith opined that this means that every time someone does alternative service by electronic means, they also need to do it by publication so that, if it turns out that the message was not received through the ineffective electronic means, the party will at least be able to rely on the equally ineffective publication. Judge Wolf noted that the plaintiff can still rely on the "ineffective" electronic service as long as the plaintiff does not receive something back that says that the plaintiff sent the documents to the wrong party. If the plaintiff does not get that message back, the plaintiff is fine to go ahead with the default.

Judge Peterson pointed out that a plaintiff still has refuge in Rule 7 F that says that minor errors that do not affect the substantial rights of a party are waived. He stated that he understands Judge Leith's concerns that the rule is being loaded with technical requirements. Judge Leith expressed concern that the Council is comically fearful of the unknown electronic future. He stated that he thinks that electronic service is useful and that he does not like that the Council is disfavoring it and creating higher burdens. Judge Roberts pointed out that, if personal service is ineffective, a judge would not approve it because it is not good service. Judge Leith observed that personal service is primary service, whereas electronic service

is not. Judge Roberts noted that alternative service is disfavored inherently. Judge Leith agreed that he continues to disfavor it but, once other methods are exhausted and a plaintiff gets to the point of alternative service, we do not continue to expect success for service. Judge Wolf noted that we are nonetheless hoping for success.

Judge Norby observed that most of this boils down to the lowered expectation the legal community has developed regarding service by publication: it is the default despite the fact that it is accepted that it hardly ever works. She stated that the Council has been having a philosophical debate about whether the starting point is the assumption of failure or, alternatively, trying everything to make alternative service successful. She stated that her approach was to assume success and to write a rule that reflects that intention, which is how the current draft came to be. Judge Peterson observed that he believes that there is consensus that, if there is a small glitch in electronic service, just as if there is a small glitch in other service, that does not affect a substantial right of a defendant, it should be overlooked. He stated that the draft rule does not call for strict scrutiny but, rather, gives guidelines. He noted that he has inherited the alternative service queue in Multnomah County and that he has been referring to the Council's draft as a helpful guideline when plaintiffs want to serve by e-mail. Judge Leith noted for the record that the other thing he objects to is the micromanagement of what the declaration has to contain.

Judge Peterson reminded the Council of a change on page 17 in new paragraph D(6)(d) regarding defending before or after the judgment, which currently is limited specifically and only to service by publication, but in the new draft would be applicable to all manner of alternative service. Judge Norby stated that she appreciates this change. Judge Peterson also pointed out that, on pages 17-18, the rule is now absolutely clear that a lawyer can serve the follow-up mailing for office service, substituted service, and service on a tenant of a mail agent, because the rule says "the plaintiff shall cause copies to be mailed" to the defendant.

Mr. Beattie asked about the language on the bottom of page 15, line 25 that says "reliably accomplish service." He wondered what that means. Judge Norby stated that she included the word ‘reliably" because of the Council's conversations about mailing addresses for the defendant that a plaintiff may have, but may have reason to believe will not work. She stated that she was trying to come up with the best way to articulate that. Judge Peterson asked Mr. Beattie if he thought that the language creates mischief. Mr. Beattie stated that the language seems to be unique and that the declaration usually does not recite facts indicating that any method used is not likely going to accomplish actual service. Judge Gerking asked whether the appropriate term under the ORCP would be "reasonably." He stated

that this term has definitional consistency whereas "reliably" is unique. Judge Wolf suggested simply removing the word "reliably." The Council agreed, and also agreed by consensus to adopt the other changes discussed earlier in the meeting to be incorporated into a draft for the September publication docket.

Mr. Beattie asked Judge Peterson whether the draft rules will go through another review and reading process even after Council members have agreed to send them to the publication docket. Judge Peterson agreed that this will happen, including spell check and word searches to ensure that any changes work consistently internally and with all of the other rules. Mr. Beattie asked whether there will be another iteration after all of the ministerial changes have been made. Judge Peterson stated that there would be and that those drafts would be circulated to Council members well before the September meeting.

Judge Gerking asked Judge Peterson to remind the Council what would happen after the June meeting. Judge Peterson stated that Council members do not have meetings during July or August but that Council staff will circulate any new drafts from the June meeting. After the September meeting, any rule that has been voted on for publication (with a simple majority vote) will be put out for public comment on the Council's website, in the Advance Sheets, and in e-mail blasts by the Oregon State Bar to its members. The December promulgation meeting requires a super majority of 15 votes. Any rule change that is promulgated then goes to the Legislature. Mr. Keating stated that he is hopeful that whatever comes out of this meeting is clean so that the Council does not spend a lot of time amending on the fly in either the September or December meetings. Judge Norby noted that she will be out of the country in September and December and unable to participate in the publication or promulgation votes.

Mr. Keating reiterated that changes made today will be voted on at the September publication meeting. Judge Peterson asked Council members to take a careful look at the new drafts that he and Ms. Nilsson will send to them and to bring up any concerns early so that any unintended consequences can be dealt with and that there is no need to amend drafts during the September meeting.

2. ORCP 15 Committee

Judge Gerking stated that he has no comments regarding Rule 15 in addition to those made at the last meeting. As chair of the committee, he thought that the Council was in a position to vote to put the proposed rule (Appendix C) on the docket for the September publication meeting. Judge Peterson reminded Council members that the change to section A was in response to a suggestion from the Oregon State Bar's Procedure and Practice Committee, which thought that the

section does not quite make sense in its current form because some of the documents mentioned are not served with a summons. He explained that the section has been rewritten so that the time to respond to each pleading does make sense now, whether that pleading is served with a summons or not. He noted that one other change is to modify the last sentence of section A, which seems to be a vestige of the ten day response time that used to exist for counterclaims. He stated that the new language makes clear that there is a 30 day response time for each pleading, including a reply to an affirmative defense.

Judge Leith stated that he is confused about section D. He stated that he believes that the word "to" is needed in front of the word "enlarge," and he also did not understand how the two clauses fit together. Judge Peterson stated that he had argued in favor of amending section D for that very reason, but he could not get the committee to agree. He observed that, when Judge Gerking had suggested changing the very last clause in section D to "or by an order to enlarge such time," the committee could not even agree on that. He agreed that the existing language is not ideal, but he stated that he does believe that it conveys that one can, by an order, enlarge the time. Judge Gerking stated that Judge Peterson's explanation is actually the first time that he has understood that sentence. Judge Leith suggested changing "any terms as may be just" to "any just terms" in the new language. Judge Peterson stated that he had no position on that suggestion but that his thought was to change as little as possible in section D so as not to give the impression that any substantive changes were being made. Judge Leith agreed with that idea.

Judge Wolf made a motion to approve the draft amendment of Rule 15 for the September publication docket. Mr. Crowley seconded the motion, which was approved unanimously with no abstentions.

3. ORCP 16 Committee (Fictitious Names/Pseudonyms)

Mr. Crowley explained to the Council that the question before it is whether to adopt the bolded, underlined new language in the draft of Rule 16 (Appendix D). It is a slight adjustment of the committee's proposed new section B from the last Council meting, after discussion by the Council and committee. Mr. Crowley also thanked Judge Norby for her e-mail exchange with Judge James Hargreaves about the Council's work on this issue (Appendix D).

Mr. Crowley stated that, during committee meetings, Ms. Holley had brought forward some concerns from the plaintiff's bar and the committee had discussed those. While the committee is on board with the language in the draft before the Council, Ms. Holley is suggesting two changes to show that the Council is not

creating or limiting any right to file or proceed using a pseudonym for a party's name. Instead of saying "and must cite the statute, rule, or other legal authority," Ms. Holley suggested tracking the Uniform Trial Court Rules' language about "a memorandum of law or statement of authority." She noted that the Council is not trying to create a higher standard for a motion under Rule 16 B than exists for any other motion. Judge Roberts noted that the point of the language in the current draft is to say that a party must cite some substantive law. She stated that changing the language to say "submit a memorandum," gives no requirement to cite anything. She opined that the Council is trying to avoid a rule that suggests that a party does not need law and that the ORCP is the only law that a party needs. She stated that this is the opposite of what she thought was the import of the Council's whole conversation at the last meeting. Ms. Holley stated that she thought that the idea was that the Council cannot create substantive law and, to her, adding a layer of a requirement that does not exist in any other rule does create a substantive barrier. Judge Roberts noted that no other motions are filed without foundation in law. She stated that it has to be clear that the Council is not creating a substantive right but, rather, providing a procedure for rights that are otherwise created. She observed that the Multnomah County presiding court rule regarding sealing proceedings requires citing the statute, rule, or other legal authority, which is precisely the idea here.

Mr. Eiva stated that the committee had reached out to the crime victim's bar and had also gone through federal case law that is analogous. He observed that the Federal Rules of Civil Procedure, as do the ORCP, use language that all parties must be named and the federal courts also recognize that there is a public right of access to judicial proceedings, but there is no particular legal authority to allow the use of pseudonyms. He stated that a Ninth Circuit court rule permits parties to proceed anonymously when special circumstances justify secrecy. Mr. Eiva explained that different factual circumstances have been utilized throughout the country where parties are being allowed to proceed anonymously, such as embarrassment, further injury, retaliation, or proprietary information. He noted that a party could cite any one of those factual circumstances, but he questioned whether legal authority exists that would allow a party to proceed anonymously. He stated that a Ninth Circuit case might be persuasive authority, but asked whether that is really legal authority. Judge Norby observed that case law is legal authority. Judge Roberts pointed out that it is not when it is a case from another jurisdiction. Judge Norby agreed that a case from another jurisdiction is not binding, but stated that this does not mean that it is not legal authority. Mr. Eiva stated that the phrase, "cite the statute, rule, or other legal authority,"does not make sense because he would not need to cite to a Ninth Circuit case. He stated that the Council could not sanction any right way to do this, because no one knows what that right way is.

Mr. Beattie pointed out that the Council is merely trying to eliminate the argument that the rule itself creates authority for a pleading under a pseudonym. He explained that it is a long parenthetical that basically says, "where otherwise allowed by law, the court may..." Mr. Eiva opined that "where otherwise allowed by law" is a better phrase. He expressed concern over the language "and must cite," and a rule that says that the factual basis and the legal authority are two different things, when the factual basis may be all that is necessary. Judge Gerking stated that he has a problem with the rule stating that the party must cite *the* statute or *the* rule, because that assumes that there is a statute or rule. Judge Roberts suggested that the first two items could be dropped and the phrase "legal authority"could simply be used. Judge Hill recommended simply using the language "a party may seek a court order to permit use of a pseudonym where otherwise allowed by law" and eliminating the rest of the paragraph. Mr. Andersen agreed and felt that requiring citation to a rule changes the whole dynamic and removes any inherent authority that a judge has. He stated that he feels that we proceed with peril when we put a straightjacket on a judge and fail to allow some discretion under the circumstances. Judge Roberts noted that, if allowing a party to proceed under a pseudonym is part of a judge's inherent authority, then it is otherwise allowed by law, but that *this* particular rule is not that law.

Ms. Holley observed that a party would have to accomplish this by motion. Judge Hill pointed out that seeking a court order is a motion. Judge Leith asked whether a rule would usually say "move" rather than "seek a court order." Judge Conover suggested adopting the language from Multnomah County's supplemental local rules, which is the whole reason the discussion arose in the first place:

> In civil actions, the designation of a known party by a name other than the party's true name shall be allowed only upon an order of the court. If ordered, the designation of such party shall be by use of such party's initials or a fictitious name other than "Jane Doe" or "John Doe." The name "Jane Doe" or "John Doe" is reserved to be used for a party whose identity is unknown and the party is being designated as provided in ORCP 20 H.

Judge Hill pointed out that this could be problematic because it implies that the rule gives a party the authority to authorize use of a pseudonym in the first place.

Mr. Andersen suggested that this may be a solution searching for a problem. He noted that the issue does not come up very often and it is harmless nearly any time it does. He stated that he has filed a case under a pseudonym three or four times, each time for compelling reasons, and that he does not know why there is

such a worry about it. Mr. Beattie observed that it is not so rare and that he can think of attorneys who file cases under pseudonyms frequently because of the nature of their practice. He stated that there is currently a large problem in California because there are some scurrilous attorneys filing under pseudonyms and following up with extortive letters threatening to file a child abuse case, for example. He stated that there are many professional responsibility decisions issued in California on this subject, and it also comes up in the context of anti-strategic lawsuits against public participation (SLAPP). While it is not currently a problem in Oregon, potential problems can be illustrated by problems in other states. Judge Peterson observed that Judge Hargreaves is correct that the ORCP now seem to prohibit the practice so, on the occasions that Mr. Andersen filed under a pseudonym, he probably technically was not allowed to do so.

Judge Hill restated his suggested new language for section B: "Each party must be identified by the party's legal name except that a party may seek a court order permitting use of a pseudonym when otherwise permitted by law." Mr. Eiva wondered whether the phrase "legal name" creates any mischief. He stated that we may think of this new language as being something that a party does to protect himself or herself but, when filing a pleading for the first time and naming the opposing party, it would be possible to accidentally use someone's former name if their legal name had changed. Judge Hill asked whether there is a distinction between the phrase "true name" and "legal name." He stated that the term "true name" is used in the criminal context. Mr. Eiva pointed out that, looking at current section A for consistency, the language "setting forth the names of the parties" is used. Judge Leith suggested simply striking the word "legal." Judge Hill noted that the whole purpose of section B is to create a distinction for when something other than the party's true or legal name is used, so that distinction is important. Judge Leith observed that the phrase "party's name" has the same intent without adding the ambiguous word "legal." Mr. Beattie pointed out that a party's name on an order becomes something else, so we are distinguishing between the name that is in the caption, and that is ultimately allowed, and the person's actual legal name. Mr. Andersen asked about well-known nicknames. Judge Hill stated that the goal is to not create a malpractice trap where a plaintiff thinks the defendant's name is "Billy" but his true legal name is "Archibald," and the plaintiff serves "Billy" but does not have service because the defendant had to be named by his true, legal name. Judge Leith asserted that the phrase "party's name" takes care of that problem.

The Council agreed on the following new language for section B: "Each party must be identified by the party's name except that a party may seek a court order permitting use of a pseudonym when otherwise permitted by law."

Judge Peterson pointed out a few other staff changes, including six instances of the word "shall" that were changed to the word "must" and an instance of the word "upon" that was changed to "on." Judge Roberts pointed out that staff had missed another instance of the word "upon" on page 1, line 23. She suggested simply removing it. The Council agreed.

Judge Roberts made a motion to approve the revised draft amendment of Rule 16 to the September publication docket. Judge Norby seconded the motion, which was approved unanimously with no abstentions.

4. ORCP 22 Committee

Mr. Beattie reminded the Council that the primary change to Rule 22, that the Council had already approved for the September publication docket (Appendix E), was the elimination of the veto power of the other party, so that it is up to the court to allow the filing of a third-party complaint after 90 days from the service of the summons and complaint on the party wishing to file a third-party complaint. He stated that this conforms the rule with basically all of the rules that allow the court discretion to add or subtract parties.

Judge Roberts explained that, after the last Council meeting, an additional change had been made to paragraph B(3) to clarify that answers containing cross-claims must be served on parties against whom relief is sought in the cross-claim, including those who are in default. She explained that a real problem in foreclosure cases is defendants who do not respond and are defaulted, and who are thus unaware that a money cross-claim has been filed against them because, under the current subsection, it does not appear that such claims need to be served on parties who are in default. She explained that residential foreclosures do not result in any deficiency judgment so, if a house is deeply underwater, defendants can and do walk away because they have no response. However, there may be a junior creditor who asks for a money judgment. She stated that the goal of the new change to Rule 22 B(3) is to make sure that these defendants get service of a claim asking for additional relief. However, she expressed concern that there remains an ambiguity about the method of service.

Judge Hill noted that, if a defendant has already appeared, that defendant should not have to be served again by Rule 7 standards because he or she is already in the case. He stated that the claim has to be served, but that does not answer the question of how it should be served. He observed that he does not believe the question should be answered in Rule 22 but, rather, by going back to Rule 7 that says that defendants who have already appeared may be served by mail because personal jurisdiction exists, but defendants who have not appeared must be

personally served because there is no personal jurisdiction. Judge Roberts stated that she did not believe that the rule says that; she believes that it says that, after the complaint has been served under Rule 7, subsequent service can be made under Rule 9. Judge Peterson noted that Rule 9 A says, "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 on them in the manner provided for service of summons in Rule 7." Judge Hill opined that the situation is therefore already resolved under Rule 9.

Judge Peterson reminded the Council of some other small staff changes, including instances where the word "shall" should be "must" and one instance where the word "shall" should be "will." Mr. Beattie asked about the animus for the word "shall." Judge Peterson explained that Professor Bryan Garner's legal style manual explains that the word "shall" is an ambiguous word for statutory drafting and noted that the appellate rules have seen a wholesale removal of the word "shall" in a recent revision.

The Council agreed by consensus to adopt the draft of ORCP 22 for the September publication docket.

5. ORCP 23 C/34 Committee

Mr. Andersen explained that the committee has not been able to work through the language that it would like to suggest to the Legislature. He asked whether that needs to come back through the Council in September. Judge Peterson stated that this is the best course.

Judge Tookey asked how often the Council makes friendly suggestions to the Legislature. Judge Peterson stated that he cannot recall it having happened during his tenure as Executive Director, but he has seen previous transmittal letters to the Legislature that include suggestions for changes to a statute. His recollection was that those statutory changes went through without any hearings, probably because they made sense in light of a rule change that the Council had made.

6. ORCP 55 Committee

Judge Gerking explained to the Council that both the existing rule and the draft rule are encompassed in Appendix F. He stated that, as the committee has said several times now, it embarked on the adventure of rewriting Rule 55 in order to improve clarity, organization structure, and titling, and to eliminate redundancies. He pointed out that the committee did not deliberately make any substantive changes and that there were hopefully no inadvertent changes. He suggested

approaching the rule in sections.

Judge Norby pointed out that page 36 of the attachment is where the new language starts and it is an annotated copy with cross-referencing built in. She stated that Ms. Nilsson put in a remarkable amount of work in assembling these documents. The first part of the attachment is the rule draft, the next is the cross-reference chart, and the third is a beautiful work of art with the cross-references built into it.

Judge Peterson stated that he was not entirely pleased with the lead line for paragraph A(6)(d): "Obedience of subpoena." Judge Wolf noted that this sounds like the subpoena is being obedient. Judge Norby suggested, "Obligation to obey subpoena." Judge Hill suggested, "Obligation created by subpoena." Other suggestions offered by Council members included, "Witness obligations," and "Compliance with subpoena." Ms. Holley wondered whether the word "compliance" is used in the rule. Judge Norby stated that, if the lead line crystallizes the concept into fewer words, that is ideal. Mr. Andersen noted that the rest of the rule does use the word "obedience" several times, so he thought that the word "obedience"was necessary. Judge Gerking stated that he did not like the word, "obey." Judge Hill suggested the lead line, "Compliance with subpoena." He then suggested that the first sentence read, "A witness is obligated to comply with a subpoena."

Judge Norby noted that the words "obey" and "disobey" seem more true to the original language. Mr. Beattie stated that his only concern would be potentially disconnecting the rule from other rules that may refer to "obeying" and "disobeying" a subpoena. Judge Peterson noted that Rule 46 B uses the language "failure to comply with order." Mr. Andersen pointed out that the word "obey" is heavily embedded in the statutes. Judge Wolf suggested, "Duty to obey subpoena." Judge Hill suggested, "Obedience to commands of subpoena." Judge Leith suggested, "Obligation to obey subpoena." Mr. Crowley stated that he liked the word "comply" better than "obey" and that the dictionary definition for "compliance" seemed to fit better than that for "obedience." Judge Hill stated that he liked "obey" better than "comply." Judge Gerking agreed. Mr. Eiva suggested the language, "A witness must obey a subpoena," for the first sentence of the section. He stated that "comply" tends to indicate passively going along with what someone else is doing, whereas "obey" suggests that an active step is being taken, which is what a subpoena is.

The Council agreed on the following lead line and first sentence: "Obedience to subpoena. A witness must obey a subpoena."

Judge Conover asked what was wrong with the language in section G of the current rule. He observed that the entire description of a subpoena from section G of the current rule seems to be left out of the draft and he wondered whether that was intentional. Judge Norby explained that this language is included in paragraph A(1)(a) and that the new section A now acts as a sort of table of contents for the four subsections of the rule.

Mr. Eiva asked what the difference is between a subpoena that is a writ and one that is an order. Mr. Beattie explained that the difference is about 150 years, and his experience is that writs are not widely used in modern times. Mr. Eiva stated that, pursuant to the rule governing service on the opposing party, a party must serve every document that the party files. However, in practice, many attorneys do not serve trial subpoenas on the other party. He wondered whether those are writs. Judge Norby explained that she left intact in the reorganized rule anything she did not fully understand because she did not want to unintentionally change the meaning. She noted that improving clarity without changing meaning was a hard line to walk. She wanted the focus to be on the clarity of the rule and to save any more fine tuning for the next biennium.

Judge Peterson expressed concern about the language at the end of subsection A(6)(d): "At a hearing or trial, if a witness who is a party disobeys a subpoena or refuses to be sworn or to answer as a witness, then that party's complaint, answer, or reply may be stricken." He agreed that it is important to try to stay with the existing language of the rule where it makes sense but, in this case, it would make sense to use the language "complaint, answer, or other pleading" because it seems like that is what the intent is. The Council agreed.

Judge Peterson asked a philosophical question about subsection A(7). He stated that the subsection talks about subpoenas for production but then does not seem to have a parallel for trial subpoenas. Judge Norby explained that it was not applied to subpoenas to appear in the original rule, only to subpoenas for production. She noted that this might be a change for another biennium. Judge Peterson pointed out that such choices might not have been intentional in the past since the rule was so poorly organized.

Judge Peterson observed that, if a party wants to serve an objection under paragraph A(7)(a), that party must do it no later than 14 days after receiving a subpoena or before production is required. However, under paragraph A(7)(b), there is no time limit for a motion to quash or to modify, so a party can wait literally right until the day production is due and then surprise the party serving the subpoena with a motion to quash. He stated that there is no logical sense to say that a written objection has a time frame, but a party can sit on a motion to

quash or to modify and surprise the requester. Judge Wolf stated that, after the 14 days, a party can serve the subpoena on an e-mail provider and the provider will give the party the documents and, without an objection within 14 days, you are out of luck.

Judge Norby noted that one benefit of adopting a more clear and organized rule is that the clarity of the reorganization makes these inconsistencies apparent. Judge Hill asked the difference between a motion to quash and an objection in this context. Mr. Beattie explained that a party can veto the subpoena being served in the first place if they object to it, as the objection places the burden on the party issuing the subpoena to go to court to justify it. Otherwise, with a motion to quash, it is the party receiving the subpoena that must go to court and seek protection. Judge Norby stated that quashing gets rid of a subpoena altogether, whereas objecting can change it. Judge Hill opined that these terms are being used but their definitions are not clear from the rule. Judge Norby explained that these terms are in the existing rule. Judge Hill wondered whether there is a practical difference between a motion to quash, a motion to modify, and an objection to a subpoena. Judge Norby stated that there is potentially a difference and, if there is a potential that there is a difference, the language should stay the same until the Council comes back to make substantive changes in the future. Judge Wolf explained that a party has 14 days to object, in which case the requesting party has to go to court. If the party does nothing, the party's e-mail provider can file a motion to quash. So the two things are different.

Judge Hill wondered, if the Council is making changes to the rule to make it clearer, why is it not addressing this issue so it makes sense. He observed that a party could not come to the distinction that Judge Wolf explained by looking at the plain text of this rule. Judge Gerking stated that it is through rearrangement of the rule that the extent of the problem that Judge Hill has identified becomes more manifest. He stated that the committee looked at Rule 55 as a two-step process, and reorganization is step one. Ms. Holley noted that the rule does say that a written objection should be served on the party who issued the subpoena; the objection is not a motion to the court. Judge Hill stated that the draft language presumes that the subpoena has been issued, but it does not say anything about the notice of deposition. Mr. Crowley stated that, in terms of practice, sometimes attorneys in his office will object to the subpoenaing party and put them on notice that the state objects to the subpoena, as opposed to filing a motion to quash. Judge Peterson observed that it is a question of burden: if a party files a motion to quash, that party must prevail on the motion; if a party objects, that party throws the ball into the other side's court and the requesting party has to move to compel. Judge Hill pointed out that nothing in Rule 55 says that. Judge Wolf agreed that it is definitely not clear from the rule.

Judge Norby explained that anything she could not cross reference, she did not include. Judge Hill stated that he was not criticizing the product, but noted that his fear is that the bar will question it. He noted that this could be a perfect time on this discrete issue to stop and clarify what the objection is for and what the motion to quash is for. He agreed that this would require more than mere reorganization. Mr. Beattie stated that he understands the objection part because the Council amended the rule 20 years ago to allow subpoenas that call only for production of documents by a third party, without witness attendance. His understanding was that this could be responded to much like a regular request for production of documents, so a party would not necessarily move to quash but, rather, just state an objection. He stated that he could see how the objection fits in subsection A(7), specific to those circumstances with a third-party request for documents, but stated that he cannot remember how the rule reads now whether that is apparent from the rest of the rule. Judge Hill stated that, under subsection A(7), it is the recipient's option to object, to move to quash, or to move to modify a subpoena for production. He asked whether subsection A(7) only applies to subpoenas for production of documents unaccompanied by a requirement to appear and give testimony. Mr. Beattie agreed that subsection A(7) gives the laundry list of things the recipient can do, and they are not available in every case. The objection is only available in the case of a third-party document request.

Judge Norby explained that page 26, line 21 of Attachment F is where this subject starts in the current rule, and it is part of a very long paragraph on production of books, papers, documents, and tangible things. Mr. Beattie noted that the current section B just gives a recipient the right to object, so it is just like responding to a request for production of documents for a third party. Ms. Holley noted that this is implied because a party would not serve a subpoena on a party but, rather, a request for production. Mr. Beattie explained that the recipient would have the same sort of written objection option but, with the new language, it is perhaps not as clearly identified as with the current Rule 55 B process. Judge Hill clarified that, in the new subsection A(7), it is the recipient's option to object, not the opposing party. Mr. Beattie agreed. Judge Hill observed that the recipient can serve a written objection, and stated that perhaps the language is more clear than he thought.

Mr. Andersen stated that subparagraph A(7)(a)(ii) states that a copy of the motion to compel must be served on the objecting person and then talks about a motion to quash or to modify, but it seems like it should be a "motion to compel," since "quash" is sort of an ancient term. Judge Gerking stated that it has a distinct meaning. A motion to quash is jurisdictional and makes a subpoena void because there is something wrong. Mr. Andersen asked whether there is an intention that there be a distinction between paragraph A(7)(a) and paragraph A(7)(b) because

one talks about a motion to compel and the other a motion to quash. Mr. Crowley stated that it is consistent with his understanding of the law as it exists today to have those two options. Judge Hill clarified that a third party who receives a request for records has two options: 1) give an objection to the issuing party, similar to a request for production and, if the issuing party wants to challenge the objection to producing the record, it is their burden to file a motion to compel a response to the subpoena; or 2) file their own motion to quash the subpoena in whole or in part and bring it before the court.

Mr. Beattie stated that it is implicit in the rule that one would not file a motion to quash if the subpoena is not requiring personal attendance, since the recipient could easily just object. He stated that he has always thought that quashing is used when the party is required to attend the deposition or hearing. Judge Hill pointed out that the recipient has that choice, however. Mr. Beattie noted that, if it is a subpoena duces tecum, the recipient cannot just object. Judge Gerking asked whether it would it make more sense in subparagraph A(7) to rearrange the options to say, "recipient's option to move to quash, object, or modify." Ms. Holley agreed that it would make sense to have objecting separate from moving to quash or to modify because the objection is directed to the party subpoenaing whereas the motion goes to the court. The Council disagreed.

Judge Hill withdrew his concern. He explained that the way that the language was broken up in the new language was not clear but that the Council's explanation clarified things.

Mr. Beattie had a question about paragraph A(6)(b). He wondered whether language such as "declines payment of fees and mileage or makes payment agreement" could be used, because the witness could say they did not want anything or the lawyer could say they would bring a check when the witness appears. Judge Norby noted that the Council had a pretty long discussion about this issue and the language was changed to try to accommodate the consensus on that issue. Mr. Beattie noted that the old "tender" was confusing. He stated that he was just pointing out that declining fees is not the only option; the party issuing the subpoena can bring a check at trial or mail a check or e-deposit it. Judge Norby explained that, in the existing language, it is an absolute duty. Judge Leith stated that the new language stays true to the existing language by allowing the witness to decline. Judge Peterson stated that the idea was to make it black and white as to whether the party is compelled to obey or not; if the subpoenaing party did not tender the check, then there was no dispute. Mr. Beattie stated that giving or offering was problematic, but noted that there could be an agreement that the person subpoenaed declines payment or agrees to a payment arrangement that is not just a unilateral tendering. Judge Norby stated that the existing language

makes it a duty and does not talk about the option to decline but, rather, says that service is not effective unless the fee is delivered or offered. She stated that the question is whether the payment must be offered at the moment the subpoena is delivered, which is how it sounded, or whether the fee can be offered in advance and be declined, in which case it does not have to be offered at the time of delivery of the subpoena.

Judge Peterson reiterated that the goal was to be quite objectively clear as to whether service that compels attendance has been made or not. He noted that a presumed agreement might be subject to some confusion, as opposed to handing the subpoenaed party a check and having the fee refused. The former is a case of what people thought, whereas the latter is a case of what actually happened. Judge Norby stated that, from an enforcement perspective, it is perhaps trying to forestall the risk of one person thinking there is an agreement and the other side believing there is not. Mr. Beattie explained that he was not trying to belabor the point because, as a practical matter, if a party has the agreement of the subpoenaed party, that party should not move to quash. Judge Hill noted that, the more objective the rule can be, the better, because it can otherwise be a trap. He stated that it is important to set an expectation that, to be safe, this is the procedure, and parties can act accordingly.

Judge Peterson wondered about the lead line "Where attendance may be required" in subsection B(1), since paragraphs B(1)(a) and B(1)(b) do not have any geographical references. He wondered if the existing language refers to geography. Judge Wolf stated that the language comes from existing paragraph C(1)(b) and refers to "in this state." Judge Peterson stated that the new language does not seem to answer "where," for example, whether one can be required to appear as a witness at an administrative hearing in Malheur County. Mr. Andersen noted that the existing C(1)(a) states: "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."

Judge Peterson observed that there is a provision in the draft rule, in paragraph A(6)(c), that clearly specifies that a witness cannot be required to appear for a deposition outside of a county in which they reside or do business. He noted that this is a big improvement because in the current rule one has to jump around in the rule a lot to try to figure out what the limitations are. Judge Roberts wondered whether subsection B(1) is really indicating proceedings to which attendance can be compelled. Judge Peterson agreed that the proceedings define it more than the geography. Ms. Nilsson suggested, "Proceedings at which attendance may be

required." Judge Leith noted that this does not include the most usual case, which is a case that is pending in the county in question. Judge Wolf pointed out that this is covered in section A. Judge Norby stated that she had difficulty figuring out where to place what is now in paragraph B(1)(a) and paragraph B(1)(b) and that she may have inadvertently created the problem that Judge Leith noted. However, she pointed out that the language used is "including," which is not exclusive.

Judge Tookey stated that he found the word "including" confusing. He wondered why the language from existing paragraph C(1)(a) was not included in the new draft; "Civil actions" seems to have been dropped altogether. Judge Norby stated that she originally thought that this was all covered in a prior draft of the new section A, but that the committee thought that the part about depositions was not covered and had to be included. After discussion at a Council meeting, she and Judge Wolf had an e-mail exchange and had a difficult time figuring out where to put the part about administrative and other out-of-court proceedings and depositions. The language from existing C(1)(a) may have inadvertently been omitted.

Judge Roberts agreed that the existing paragraph C(1)(a) covers all of those things. Judge Leith concurred that, in the new draft, existing paragraph C(1)(a) seems to have been lost and existing paragraph C(1)(c) became “administrative.” Judge Wolf opined that the intent could be captured more clearly if the new subsection B(1) were titled "Permissible purposes of subpoena" and recaptured the language from existing paragraph C(1)(a). Judge Leith suggested that using the lead line, "Permissible purposes of subpoena" and including the language regarding civil actions from paragraph C(1)(a) of the existing rule, thereby making "Foreign depositions," paragraph B(1)(b), would be a good way to proceed. Judge Norby and the rest of the Council agreed.

Mr. Beattie asked whether the language "tendering fees" in subsection B(2) could be changed to "payment of fees," since tendering is no longer applicable. The Council agreed. Judge Leith wondered whether the word "declined" in subsection B(2)(a) and B(2)(b) should be changed to the present tense "declines." The Council agreed.

Judge Peterson asked about an incongruity between the phrases, "service of subpoenas requiring appearance or testimony of individuals," and "whether personal attendance is required or not," in paragraph B(2)(b). He noted that the language is in the existing rule. Judge Roberts asked whether payment of mileage is required if attendance is not required. Judge Norby responded that, strangely, it is. Ms. Gates pointed out that the word "be" is missing in paragraph B(2)(c), where the sentence should read, "The subpoena may be mailed to the witness..." She

also suggested changing the end of the same sentence from "but mail service is only valid if all of the following circumstances exist:" to "but mail service is valid only if all of the following circumstances exist."

Judge Peterson wondered about subparagraph B(2)(c)(iii), which seems to require proof of the signed mail receipt more than three days before the date to appear and testify. He asked whether it really means that the subpoena is not any good if the postal service receipt is received the day before the date to appear and testify. He stated that he could understand why a party would want to send it out in advance, but opined that it seems like it would be good enough to receive the return receipt on the date of trial. Judge Hill agreed that the language makes no sense. Judge Wolf stated that he is not sure what it was intended to protect against. Judge Peterson suggested the language "on or before," since a party must have the receipt, but would not have to have it three days prior to the appearance. Judge Roberts suggested that the three days before refers to when it is signed for, not when the return receipt is received. She agreed that it is ambiguous the way it is written. Judge Hill noted that this is a perfect place for clarification. He suggested breaking it into two sentences to make it clear. He then instead suggested striking the phrase "the attorney received the" and adding "is" between "receipt" and "signed." The Council agreed.

Mr. Beattie noted that subparagraph B(2)(c)(i) regarding willingness of a witness states that the party's attorney or attorney's agent must certify to the willingness of the witness. He wondered whether "the party" should be added. Judge Peterson stated that he believed that the intent was that it was only available to attorneys. Mr. Beattie noted that B(2)(c)(i) is only dealing with lawyers but B(2)(c)(iii) talks about receipts signed by witnesses and this creates confusion. Judge Norby stated that all three of the circumstances must exist to accomplish waiver. Mr. Eiva pointed out that mail service is only valid if agreed to by the witness to the attorney or if all of the listed circumstances exist. Mr. Beattie stated that he was misreading the language. Judge Peterson noted that mail service is only available to people represented by attorneys, but the witness need not be represented by an attorney.

Judge Leith stated that he believes that, when the language now found in subparagraph B(2)(c)(i) was initially drafted, it was intended to be universal and describing all types of contact. He suggested striking the clause "during personal or telephonic contact." Judge Hill wondered what it actually means to "communicate a willingness to appear" in subparagraph B(2)(c)(i). He suggested simply, "agrees to appear." The Council agreed to these language changes.

Judge Peterson pointed out a friendly grammatical disagreement between Council staff and Judge Norby that appears in subsection B(3), among other places. Judge Norby likes the phrase "serve to" rather than "serve on." Judge Norby explained that the word "on" as a preposition means laying on top of, whereas "to" means delivering to. She stated that "to" is more accurate in this case, even though, for time immemorial, "on" has been used. Judge Leith noted that, as a point of common legal usage, "on" is accepted. The Council agreed that "on" is the appropriate usage.

Mr. Snelling pointed out that the lead line for subparagraph B(2)(c)(i) is "Willingness communicated by witness," which conflicts with the language change the Council had just made. Judge Wolf asked whether the lead line needs to be changed as well. Mr. Eiva suggested "Witness consent." Judge Hill suggested, "Need affirmative agreement by witness." Judge Tookey suggested that the Council should be careful with lead lines, as lawyers will sometimes rely on them when they also need to read the text of the rules. Judge Peterson noted that the lead lines in the ORCP are part of the rules because the Council writes them, whereas legislative staff writes the lead lines for the statutes and they therefore do not carry the same weight. Judge Tookey noted that the current rule reads "indicate willingness to appear." Judge Hill suggested "Witness agreement" as the lead line. The Council agreed, although Ms. Holley wondered whether that might be interpreted as needing to make a contract with the witness. Judge Roberts stated that she hoped not. Judge Hill observed that when the lead line is "Witness agreement," wise lawyers will look to the rule for further guidance.

Mr. Eiva wondered whether the title of subparagraph B(2)(c)(ii) should be "Payment of fees." Judge Norby noted that there would not necessarily be payment. Judge Hill suggested, "Fee arrangements." The Council agreed. Judge Hill also suggested changing the phrase, "made arrangements for the payment of fees and mileage satisfactory to the witness" to "made satisfactory arrangements with the witness for the payment of fees and mileage." Mr. Eiva then suggested the following language: "made satisfactory arrangements with the witness to ensure the payment of fees and mileage." The Council agreed.

Ms. Weeks noted that the lead line of subparagraph B(2)(c)(ii) in the original draft mirrored the lead lines in the corresponding subparagraphs B(2)(c)(i) and B(2)(c)(iii) but, with the changes just made by the Council, this was no longer the case. She suggested that the lead line for subparagraph B(2)(c)(iii) could be changed to "Signed receipt." Judge Norby suggested "Signed mail receipt." Ms. Weeks asked whether the word "obtained" would also be removed. Judge Norby wondered what "signed mail receipt" means without the word "obtain." Ms. Weeks noted that, if the lead line for subparagraph B(2)(c)(i) is changed to

"Witness agreement," and the lead line for subparagraph B(2)(c)(ii) is changed to "Fee arrangements," it would be appropriate to change the lead line for subparagraph B(2)(c)(iii) to "Signed mail receipt" without a verb. The Council agreed. Judge Norby stated that the important thing about lead lines is that each section lead line mirrors the index-like breakdown laid out in section A.

Mr. Keating asked whether anyone had comments regarding new section C. Mr. Beattie stated that he assumes that the payment obligation is implicit because a party must send out a check with any subpoena. Judge Norby stated that payment is in section A because it defines all four sections, whereas section B only covers production of documents that are not health related. Judge Gerking opined that the word seven and all other numbers that are 10 or lower should be written as an arabic numeral, not spelled out. Judge Hill agreed, even though the grammar rules say otherwise, because it makes deadlines easier to find within the rules. The Council agreed.

Judge Gerking explained that section D mostly tracks the current section H. Judge Wolf noted that this section is pretty self-contained. Judge Norby stated that the shortest committee meeting was the one dealing with section D. She observed that the lead line of subsection D(10) is "Tender and payment of fees" and expressed concern that the word "tender" might not be appropriate since the Council had just discussed the inappropriateness of tender in the context of subsection B(2). She suggested changing the lead line to "Payment of fees." Judge Leith noted that the term "tender" was avoided before because it was a change to make it "tender," but this time it would be keeping it the same by saying "tender." Mr. Andersen stated that he thinks that "tender" is necessary because a party can offer to pay and the person may decline but, if that language is removed, a party really does not have the witness secured unless the witness has cashed the check. He agreed that he does not like the word tender, but he believes that it is necessary. Mr. Beattie agreed, particularly when it comes to responding to subpoenas for medical records that are now going to medical records companies who may reject a subpoena because they are going to ask for an up-front charge and a per-page charge. He opined that "tender" is appropriate with this section. The Council agreed.

Mr. Beattie observed that it might be helpful to have paralegals involved in medical malpractice litigation who work with Rule 55 every day look particularly at Section D of this draft and give their input.

IV. New Business

No new business was raised.

V. Adjournment

Mr. Keating adjourned the meeting at 11:59 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 12, 2018, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Kelly L. Andersen*
Hon. D. Charles Bailey, Jr.
Troy S. Bundy*
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer Gates
Hon. Timothy C. Gerking
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. David E. Leith*
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling*
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf
Deanna L. Wray

Members Absent:

Jay Beattie
Sharon A. Rudnick

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Moved to Publication Docket this Biennium	ORCP/Topics to be Reexamined Next Biennium
Discovery Fictitious Names ORCP 15 ORCP 22 ORCP 23/34 ORCP 55 ORS 12.190	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 68 ORCP 71 ORCP 79	ORCP 15 ORCP 22 ORCP 43	Discovery ORCP 15

I. Call to Order

Mr. Keating called the meeting to order at 9:30 a.m.

II. Administrative Matters

A. Approval of April 14, 2018, Minutes

Mr. Keating asked whether anyone had changes or corrections to the draft April 14, 2018, minutes (Appendix A). Hearing none, he asked for a motion to approve the minutes. Judge Roberts made a motion, seconded by Judge Wolf, and that motion to approve the minutes was approved unanimously with no abstentions.

B. Contacting Legislators

Judge Peterson explained that the Council has not had a lot of communication with legislators this biennium. He stated that he was in the process of drafting an e-mail for Council members to share but that a fuller picture will be available after this meeting. He stated that the goal is to let legislators know what the Council is working on so that they are not surprised when they receive the transmittal letter with the Council's promulgated amendments and to demonstrate the value of funding the Council.

III. Old Business

A. Committee Reports

1. Discovery Committee

Judge Bailey stated that the committee had another meeting to discuss whether any action is possible this biennium. He explained that the committee had started pursuing the idea of making language changes to clarify the rule regarding e-discovery. Mr. Crowley and Ms. Payne met to try to craft language that both the plaintiffs' and defense bar could agree on, but there has not been enough time to complete this task. Judge Bailey stated that his frustration as a judge is that everyone on the Council says that judges have authority to control discovery, but lawyers come in to court and argue as if they do not. He stated that the committee feels that it should disband at this time, but that the committee should be re-formed next biennium. The Council agreed.

Mr. Keating thanked all committee members for their efforts.

2. Fictitious Names Committee

Mr. Crowley distributed a report from the committee (Appendix B) that included a suggested draft amendment to Rule 16. He explained that the committee had met the previous week in addition to exchanging ideas via e-mail. He reminded the Council of its lengthy discussion at the last Council meeting and stated that the committee came away from that meeting with the thought that it was now in a position to make a suggestion for a rule change; the proposed draft is the result. The draft includes a new section that speaks to the issue of fictitious names:

> B Pseudonyms. Each party must be identified by the party's legal name, except that a party may seek a court order to permit use of a pseudonym instead. A request to substitute a pseudonym must include a description of good cause, and must cite the statute, rule or legal authority that supports use of a pseudonym under the circumstances. Mere citation to this Rule is not sufficient legal authority to secure a court order approving use of a pseudonym.

Mr. Crowley noted that, at the last Council meeting, there was much discussion about not creating a new substantive right but, rather, creating an opportunity for those who believe that they need to use a pseudonym to bring that issue to the court's attention. At the beginning of the biennium, there was a question as to whether the ORCP even provided the opportunity, but the committee believes that the proposed change can provide that opportunity. Mr. Crowley pointed out that there is only so far that the Council can go in terms of spelling that out, and it may be that each of the different counties can spell out the process for how it may work in a Supplemental Local Rule (SLR), or it may be something that should be provided for in the Uniform Trial Court Rules (UTCR).

Ms. Payne asked why the committee chose to include the requirement of a description of good cause in addition to a statute, rule, or legal authority. For example, if a federal statute permits the use of a pseudonym, why would a party additionally have to show good cause? She stated that it seems like the "good cause" language adds a substantive standard in addition to the citation to legal authority that would permit use of a pseudonym. Ms. Holley stated that the committee originally talked about good cause being the factual reasoning behind it, so the facts would have to apply to the law, and asked whether there were suggestions on how to better phrase this language. Ms. Payne stated that the statute would provide the requirements in and of itself and it seems like the proposed amendment is adding some sort of substantive layer or requirement that maybe a statute is not requiring. She expressed concern that a court would see the good cause language as some sort of additional requirement, but she was

not certain. Judge Roberts wondered whether there is there any such statute that allows for the use of a pseudonym. Ms. Payne stated that the Violence Against Women Act (VAWA) allows it. Ms. Holley stated that some statutes also allow it in juvenile cases. Judge Roberts pointed out that, even in those examples, good cause would be that it is a case filed under VAWA or the juvenile statute. She stated that not only is the statutory citation required but, further, a party must state that the statute is applicable.

Ms. Payne stated that the use of the word "and" makes her think that citing the statute is a different requirement than good cause. Judge Roberts explained that a party must say both: 1) this is the statute; and 2) this is why it applies here. Ms. Wray stated that, as lawyers, we cite statutes and, by definition, we are saying that the statutes apply. Judge Roberts stated that this is not necessarily true. Ms. Wray stated that she is making this representation to the court when she cites a statute and it seems like this is asking for more than that. Ms. Payne explained that, because of the use of the word "and," there appears to be an additional good cause requirement. Judge Bailey stated that, according to the Supreme Court, the word "and" means "or" in Oregon. Ms. Holley asked whether it would be more clear if the language stated, "a description of good cause citing the statute." Judge Gerking suggested substituting the word "or" for "and." Justice Nakamoto suggested striking the whole description of good cause and the word "must," because the sentence ends with "under the circumstances." Judge Tookey recommended simply stating that a party must cite the statute, rule, or other legal authority. Mr. Eiva wondered whether the last sentence in the new section was superfluous. Ms. Holley agreed that it might be superfluous, but recalled the Council's long conversation about not wanting to create a substantive right. Justice Nakamoto stated that she felt that the last sentence makes it nicely clear that this is not the Council's intention.

Mr. Eiva asked whether the draft is saying that a judge has no inherent discretion to allow the use of a pseudonym. Ms. Holley stated that she has always cited a law when making this request. Mr. Eiva opined that the language in the draft appears to very much say that the judge has no inherent discretion. Judge Roberts explained that, if the judge is bound by having good cause, that is the basic stricture. She stated that inherent authority does not mean arbitrary authority. Judge Hill expressed concern that, by changing this language, the implication is that judges do not have discretion to allow it unless they are pointed to a specific statute. Ms. Payne pointed out that the language suggested is "statute, rule, or other legal authority." She observed that this could be other authority within the ORCP or inherent authority.

Ms. Gates stated that, if the court finds the circumstances are warranted, the

court has the discretion to allow it, so she was not certain that "legal authority" was the best term. Mr. Eiva stated that good cause is not a discretionary standard but, rather, a legal standard. He explained that he was just raising a question, not a challenge: does a judge not have discretion to allow a pseudonym? He asked whether this is the Council's consensus. Ms. Holley stated that it is not. Judge Peterson pointed out Judge Hill's strongly stated point at the last Council meeting was that Oregon has an open court system and that a party had better bring some authority. He stated that he believes that the new language is a distillation of a long discussion at the Council's last meeting. Mr. Crowley agreed that this was the committee's intent.

Judge Peterson asked the committee how the term "fictitious names" became "pseudonyms." Judge Norby noted that the word "fictitious" is loaded and that people react to it negatively before they think about what the content is. She stated that the committee had also discussed how "fictitious" usually refers to fictitious characters such as Bugs Bunny, and a name that is not a person's real name is not "fictitious" but, rather, is a pseudonym. She also pointed out that it is not good to refer to anything in court to be "fiction" as part of Oregon's commitment to open courts. Judge Bailey stated that "pseudonym" is more of an umbrella term that could include initials, which do not count as a "fictitious name." Judge Conover noted that the term "fictitious names" could also be confused with Rule 20 H that refers to cases where the identity of the individual is not known. Judge Peterson suggested using the phrase "motion to substitute" rather than "request to substitute" because the requesting party is asking for an order.

Judge Leith returned the conversation to the topic of inherent authority and stated that he thought that he heard a consensus from the Council that judges do not have the inherent authority to allow parties to file under a pseudonym. He stated that he does not agree with that. Ms. Holley stated that she did not believe that the Council had agreed on that, and that this was not the intention. Mr. Eiva expressed concern that this amendment creates that assumption. Judge Hill explained that he does not believe that the new language creates that assumption. He stated that he had real concerns with the Council saying that a judge can decide to allow a party to file under a pseudonym simply because a case is sensitive but, the way the new language is crafted, the Council is not taking a position one way or the other. He stated that, by using the language "other legal authority," it is an open question that the court can resolve and neither argument is foreclosed. Mr. Crowley agreed. He stated that it is his hope that this rule change will not open the floodgates but, rather, will create a cautious rule that allows a process. Judge Wolf observed that the original concern was that the ORCP do not allow parties to file under a pseudonyms and, with this amendment,

now the rules do if a party is otherwise allowed to. The rules have gotten out of the way of the argument. Judge Tookey agreed that this is a good way to explain it.

Judge Peterson summarized the discussion by stating that the rule change does not create inherent authority to file a case under a pseudonym but, rather, it creates a mechanism so that, if a party has authority from any source, including a judge, that party may ask for permission to do so.

Mr. Eiva asked whether the language should read "statute, rule, or legal or judicial authority, to the extent any exists." He stated that, if he were a judge and saw the language "legal authority," he would assume case law, ORCP, or statute, not necessarily thinking that someone would cite inherent judicial discretion. Judge Bailey asked where that authority comes from. Mr. Eiva stated that judges have authority that is not completely defined about ways they can manage their courtroom and their cases. Judge Bailey stated that the authority must come from somewhere; otherwise, judges are just legislators. Judge Roberts noted that judges do not have a divine right. Ms. Holley stated that a judge's inherent authority here is akin to ORCP 36 C and the court's discretion to limit and extend discovery. Judge Hill opined that simply using the term "other legal authority" is elegant and it works. It encompasses all of those other things and gives parties the space to make whatever argument they want to make. Ms. Gates asked whether, if factual circumstances are cited but no case law or rule is given, that means that the judge cannot grant the order. Justice Nakamoto disagreed and stated that this would limit the universe of legal authority, and that is not what this rule says. Ms. Gates wondered whether requiring a citation to "legal authority" could be problematic. Ms. Payne suggested removing the word "legal" and using the language "other authority."

Judge Leith stated that he was satisfied with the discussion that the intention is not to preclude an argument that a judge has inherent authority. He stated that, if the staff comments reflect that the Council is not foreclosing or endorsing any arguments for the existence of any source of authority, including inherent authority, then the language suffices. His initial concern was that the Council was creating the opposite history but, as long as that is not the case, he is satisfied. Mr. Andersen agreed. Ms. Payne stated that the goal is to not take a position at all on the substantive right. She agreed that, if the Council makes that clear in the staff comments, that goal would be met.

Judge Peterson stated that there is adequate information to make that clear but that the ultimate goal is not having to explain a rule, just to make the rule clear on its face. He opined that the draft creates a process, not an authority, and does not

restrict any existing authority that exists. He wondered about the words “to substitute” and stated that the most effective way for a party to proceed would be to go to ex parte before filing the case, with notice to the other side so that the other side would have the opportunity to be heard. He noted that defendants should also have the right to be heard about whether they should be allowed to use a pseudonym. The word “substitute” implies that it would occur after the case had been filed. Judge Norby stated that the committee had begun discussing timing but that they were not certain how the Council would feel about their proposal so they had held off. She explained that her thought was that the process should be timeless: a party can try to do it before the case is filed, during the case, or right before an appeal. She stated that she had made an effort to not be specific about the timing and that the committee had not gone into a lot of detail about timing.

Judge Roberts suggested perhaps using the word "use" instead of "substitute" because it would not have a timing implication. Ms. Payne agreed and stated that it seems like a party could not file a complaint with a pseudonym unless that party had a court order. Ms. Holley agreed that this is an easier process and that this is how it is done in Multnomah County. When she tried to file a case with a pseudonym in Lane County she had to file the complaint under the pseudonym with no argument, and she would rather have the argument prior to filing the case. Ms. Payne stated that, logistically, sometimes a court will not let a party file a motion until that party has a complaint and case number. Judge Bailey explained that this is where ex parte applies, because a party can come to ex parte and make that request. Judge Wolf noted that going to ex parte assumes a court that has a regularly scheduled ex parte docket, and not all counties do. Judge Bailey stated that there could be statute of limitations issues if a party does not have time to get in to ex parte. Judge Norby opined that the Council is not the right place to solve these problems. Judge Wolf stated that local rules can be helpful here. Judge Tookey agreed that this is a problem best addressed by SLR. Judge Hill noted that the process may be very different from county to county and stated that it is important to build that flexibility into the rule.

Ms. Payne suggested the following language change, “A motion to use a pseudonym must cite the statute, rule, or other legal authority...” Judge Roberts objected to that deletion because a bare citation without any explanation of how it applies to the particular case would be poor practice and does not guide the circumstances at all. Judge Norby asked whether Judge Roberts wants the rule to tell practitioners everything they must include in the motion. Judge Hill noted that the language “under the circumstances” is present. Judge Roberts pointed out that, as the draft is written, the phrase “under the circumstances” only modifies “other legal authority that supports the use of a pseudonym,” and does not

modify “the statute.” Judge Peterson noted that this is true because the draft uses the word "or." Ms. Holley suggested the following language: “a motion to use a pseudonym under the circumstances of the case must cite...” Judge Norby suggested adding “and explain how it applies” to the end of the sentence. Judge Roberts noted that it is unfortunately possible for a lawyer to file a motion asking to use a pseudonym and cite a statute without saying how that statute applies. Ms. Payne suggested adding a comma after the word “authority.” Judge Hill suggested using the following language: “a motion to use a pseudonym must include a factual basis for the request and must cite the statute, rule, or legal authority that supports the use of the pseudonym under the circumstances.”

Judge Bailey made a motion to use the language suggested by Judge Hill. Judge Roberts seconded the motion, which was approved unanimously.

Judge Peterson asked the committee to clarify whether the change to Rule 16 negates the need to make a change to Rule 26 regarding the real party in interest that was discussed at the last Council meeting. The committee and Council agreed that a change to Rule 26 is not needed.

Ms. Payne asked whether it is appropriate to vote to move the draft of Rule 16 to the September publication docket. Judge Peterson suggested that, because several changes had been made during the meeting, Ms. Nilsson should put the new language into legislative drafting format and circulate it to the Council for review before the June meeting. He stated that he is uncomfortable doing this kind of amendment at the publication meeting and that he would feel more comfortable if the Council had more time to review the language. Ms. Nilsson stated that she would circulate the new language before the next meeting. Mr. Crowley thanked the Council for its assistance.

3. ORCP 7 Committee

Judge Norby explained that, after the last Council meeting, it was her understanding that the Council wanted the committee to use the language drafted by Judge Peterson and Ms. Nilsson but to condense it to avoid repetition. She directed the Council to Appendix C and its rewrite of subsection D(6) and asked whether the Council had any comments or concerns. She stated that the primary notable change is that the committee removed the specific size limitation for e-mail and replaced it with generic language that applies to all forms of electronic service.

Judge Peterson thanked Judge Norby for her efforts and stated that the rewrite captures the idea of making the subsection shorter and gets it right by using

generic terms. He agreed that the e-mail limitation that was originally suggested could become obsolete and appreciated the new universal parameters that will not need to be tinkered with every two years as technology changes.

Judge Roberts asked for clarification of what is being proposed. Judge Norby explained that all of the bolded language is new. Judge Roberts stated that it was her understanding at the end of the last Council meeting that electronic service would always have to be accompanied by non-electronic service, like mailing, as well. Judge Norby stated that this was not her understanding. Ms. Gates asked whether the language "most reasonably calculated" in subsection D(6) means that electronic service is supposed to be more reasonable than other reasonably calculated methods. Judge Norby explained that she thought that this was the language that is always used for alternative service. Judge Wolf stated that the language is taken from the current rule. He emphasized that electronic service is just a backup alternative service similar to publication.

Judge Peterson agreed that "most reasonably" is language in the existing subsection D(6). With reference to Judge Roberts' question, he noted that paragraph D(6)(a) says that alternative service can be a combination of measures. He stated that he would expect that a party would have to tell the judge if the party has absolutely no address for mailing; the affidavit or declaration would say that the best way for contact is via e-mail or Facebook, particularly for domestic relations cases where people are still communicating. He stated that this may be a way to get adequate service on an opposing party without having to pay for publication.

Ms. Gates noted that she was not objecting to the words but, rather, just asking for education. She raised a second question about referring specifically to a social media account and whether the committee has considered broader language. She pointed out that some services that are universally agreed upon as social media among the general public may not be considered by the companies that offer them as social media. She wondered whether we are opening a door to the argument that some forms of online participation that allow others to send information are not social media. Judge Norby replied that she did not believe that requests to serve by electronic service encounter a lot of argument in court. She stated that she has never seen one contested. Once a judicial order is in place, it would be difficult for someone to argue later that it was not a social media account.

Judge Roberts again raised the question of other means of service in addition to electronic service. With respect to publication, she stated that paragraph D(6)(d) does provide that, if the court orders service by publication and the plaintiff

knows or can ascertain the defendant's address, the plaintiff shall also mail the documents. She noted that this is limited to publication, but wondered why there should not be a similar, parallel requirement for service by social media. Judge Leith stated that this would make it most likely to achieve actual notice and make it the form of alternative service for that case. Judge Roberts suggested that it is a good idea to have this backup. Judge Norby asked whether Judge Roberts was suggesting language up front in subsection D(6) that states that electronic service should always be accompanied by actual mailing. Judge Hill stated that it would be treating electronic service the same way as publication. Judge Wolf agreed that this change might be appropriate but noted that the language regarding what a party needs to show to obtain court permission for electronic service would also need to be changed, because it currently requires that a party cannot find a current mailing address to qualify to use electronic service. Judge Norby agreed that paragraph D(6)(b) states that a party must assert that the mailing address cannot be ascertained, but she stated that this language could be removed.

Judge Peterson noted that this raises a question: is the bar for using electronic service too high? For example, if a party has a mailing address, even though that party is pretty sure it will not be good, does that mean that the party does not qualify for an order allowing electronic service? He suggested changing the language to "cannot be reliably obtained." Ms. Payne raised the example of a party who has a reliable address but the person on whom service is being attempted is evading service. Judge Norby suggested "cannot reliably accomplish service at the defendant's residence address or place of employment." Judge Wolf observed that, at the end of the same paragraph, it states the certificate of service must state facts that indicate the intended recipient actually personally received the electronic transmission. He pointed out that this raises the bar to actual service, and stated that he was not sure if this was the Council's intention. Judge Peterson stated that this question was left open at the last Council meeting, but agreed that this almost rises to Judge Hill's suggestion of calling this kind of electronic service actual service. He stated that he does like the idea expressed in the last sentence that requires that, if a party discovers after the fact that someone other than the intended recipient received the electronically served document, the serving party should have to amend the certificate to clarify that. He observed that, if there is an affidavit or declaration requirement that gets the plaintiff into the ballpark in terms of getting to use electronic service, we want to have a method that sends a true copy where it can somehow be determined that the opposing party could have received it, but he wondered if we want to go as far as actual service.

Judge Hill suggested changing the word "actual" to "likely." Judge Norby agreed with this idea and stated that the word "personally" helps address the concern

about a child or someone else receiving a message and deleting it. Judge Wolf stated that he likes the concept of "likely personally received" because makes it more likely that it was received.

Judge Leith reiterated his disagreement with the requirement that electronic service must be likely to be successful, because success is not generally expected with alternative service. He stated that he thinks that subparagraph D(b)(6)(i) through subparagraph D(b)(6)(iii) help with the details of how to technologically accomplish getting a true copy to the defendant, but that he would want to delete everything in the primary paragraph D(6)(b) after the first sentence. He stated that the description of the declaration seems like unnecessary micromanagement of what the court should consider and what the plaintiff should present and he disagreed completely with the certificate requirement to demonstrate some success. Judge Hill stated that the flip side to that is that electronic service is different for the simple reason that the Council cannot foresee what format it will take in the future. He pointed out that it is different from every other form of service that now exists. Because it is different, it is more fair to require that a party at least must show in the certificate of service what system was used and that there is likelihood that the other party received it. Judge Leith opined that judges can figure out what is most likely to be successful in a given case. Judge Roberts pointed out that the requirement of proof is not unique to electronic service; with service by certified mail with return receipt requested a party must show that the document was actually received. With regard to micromanaging, she pointed out that electronic service is absolutely new and, if the Council just allows it and sees what happens, there will be results all over the map. She stated that the Council should be cautious and, if a pattern eventually emerges, it would be acceptable to leave it completely to the court's discretion. However, since we really do not know how meticulous anyone is going to be in receiving motions and acting on them or acting to get service, it might be necessary to exert a little more control here.

Justice Nakamoto suggested taking what has been described as the "back end" certificate after service and instead placing those requirements in the "front end," in the application for alternative service by electronic means. She stated that the application might not need to include all of the details currently included in the draft amendment but, if such details are required up front, the certificate of service can be like any other one, where a party attests that they did what they said they were going to do. Ms. Payne stated that she liked this approach and, if a party has to prove that the defendant actually received service, it is shifting a burden, whereas right now the rules provide a defendant an opportunity to challenge service if they contend that they were not served. To provide a showing up front that someone is likely to receive service and that this is an adequate way

to achieve service is a good idea.

Judge Norby stated that the committee had discussed this issue but, because Judge Peterson was not at the meeting, they used his suggestion to separate it in this way. Judge Peterson explained that he used the language in the draft because he thought that it represented one of two strong views of the Council. He stated that he likes the idea of having to amend the certificate for this kind of service if a party finds that what they did was not correct. He agreed with Judge Roberts' assertion that a party must show that the person being served received a certified letter and stated that, in some forms, it will be difficult to show that electronic service was received so he does not want to make that a requirement. He agreed with Justice Nakamoto that loading up a little more on the affidavit or declaration supporting the motion for alternative service is good. He stated that it might warrant a certificate to say that you did it but you need to amend the certificate if you find it was ineffective in achieving actual service, like a misnomer with a certified letter. Ms. Holley stated that you can have the same problem with a certified letter where a son signs for it and throws it away.

Judge Hill suggested modifying the second to last sentence and to say: "the declaration must state facts indicating that the intended recipient will likely receive the electronic transmission." Judge Norby stated that the change may not be made in that place, but it will be made. She asked whether, with those changes, the Council would like to move forward at the next meeting. Judge Peterson stated that he would like to make sure that the rule is in proper legislative drafting format and that everyone on the Council has an early opportunity to review the rule.

Judge Roberts asked Judge Norby to restate the concept being considered. Judge Norby stated that the idea is to modify subsection D(6) to allow for a formalization of a party's ability to seek alternative service through electronic means and to help, in the most minimalist way, guide judges who may receive such requests. Judge Roberts stated that she opposes the most minimalist way because she does not want to see electronic service turned loose with no supervision. Judge Norby stated that there are specific things that have to be in a declaration for a judge to consider before allowing it. Judge Leith stated that the components being proposed in the rule are: 1) formal recognition of the availability of alternative electronic service; 2) a description of the minimum requirements for the declaration; 3) a proposal for substantive requirements for electronic service; and 4) a requirement for proof of likely success.

Ms. Weeks stated that she did not completely understand the point of the suggested change to the language regarding the declaration. She pointed out that

asking a party to state that service is reasonably believed to have occurred because the receiving party uses a social media platform or an e-mail address seems duplicative since the language in subparagraph D(6)(b)(2) already says that. Judge Hill noted that it is not a restatement, because the mere fact that a party has a social media account or e-mail address does not tell a judge that it is likely that the party will receive a document. He stated that it is important to have something, even if it is prospective, that explains why a party believes that the intended recipient is likely to get the document. Ms. Weeks then suggested that the language regarding an account that has been used within the past year should be removed. Judge Norby agreed and stated that she would like to add language about the likelihood of service and remove the language that refers to a time frame. No one on the Council objected.

Judge Peterson called attention to paragraph D(6)(f) of the current rule that talks about defending after judgment and it is now limited to a defendant against whom publication was the method of service ordered. He changed that to "service pursuant to this subsection." He stated that it seems to him that, whether service occurs by letter or posting, a defendant should be on the same footing to come in and say that they did not get notice. He asked Council members to be sure to look at the next draft to make sure that today's discussion is accurately reflected. He also called the Council's attention to section E, where the language has been amended to make it clear that an attorney can do the follow-up mailing, and asked that Council members also review that language carefully.

Judge Leith asked whether the Council has confirmed consensus to proceed with the changes discussed today. Mr. Keating asked whether the Council would like the committee to go ahead with these changes. Judge Roberts and Judge Leith stated that they did not agree with certain changes such as proof of success. The rest of the Council agreed that the committee should proceed in drafting the changes discussed today.

4. ORCP 15 Committee

Judge Gerking explained that the committee's attempt to come up with alternative language in section D has been a very frustrating process. He stated that the committee has met several times but has not been able to reach consensus on language. The committee is currently leaning toward leaving the existing language as is, and this is clearly Mr. Bundy's and Ms. Payne's preference. Judge Gerking stated that the committee has provided some alternatives for the Council's perusal (Appendix D). The final alternative is to leave the existing language in Section D as is. He stated that the committee has struggled with various aspects of the section, including whether enlarging time or permitting

expanded time relates only to this rule (the restrictive interpretation) or whether it applies to all rules (the omnibus interpretation). Judge Gerking explained that Judge Peterson's proposal, the first one, is the more restrictive interpretation that states that the section only applies to pleadings and motions defined in Rule 15 A. He noted that all committee members, with the exception of Judge Peterson, are leaning toward leaving section D in its current format.

Judge Peterson stated that he shared Judge Gerking's frustration. He pointed out that the final draft before the Council, while leaving section D as it is currently, does incorporate all of the prior suggestions recommended by the committee. He stated that it is clear to him that the rule, as currently written, does not read clearly, and this is borne out by the discussion in the minutes from the last three Council meetings. The committee's Draft 5B(1) and Draft 5B(2) (identical except for the phrase "prohibited by" versus "provided in" in section D) represent the worst of all possibilities, because they say that section D applies to any late filing of a motion, even though it seems obvious to him that section D does not apply to every motion. In his opinion, it would be better to do nothing than to do something that looks like it materially changes section D.

Judge Gerking stated that one committee member mentioned in the last meeting that there really was no concern raised by a bar member regarding section D. He wondered, if there is no problem being reported, whether it is wise for the Council to create one. Judge Peterson agreed that there is a concern that we may be searching for a problem, but stated that he has also heard from judges that this is a rule that causes self-represented litigants to question the fairness of court procedures. He also related a recent case before him where an attorney filed a response (that should have been labeled a motion to strike) to a reply that was filed well after 10 days following service of the counterclaim. A lawyer with 40 years experience had not filed a reply on time and, under Rule 19 C, the counterclaiming attorney was asking to treat all allegations of the counterclaim as admitted. The judge who handled that aspect of the case did not say anything and let it go on.

Judge Peterson explained that he had gone through Rule 1 through Rule 55 in an attempt to identify those rules with timelines specified within them that have discretion versus those that do not have discretion (Appendix D). He stated that, at the last Council meeting, there was discussion as to whether Rule 15 D could specify those rules to which it does apply. It seemed clear that Rule 63, Rule 64, and Rule 71 have hard deadlines but, for those rules that do not provide judicial discretion within the language of the rule, you cannot see a dime's worth of difference between hard deadlines and discretionary deadlines. It is regrettable that the Council would choose to say "these are the rules and, if you want to know

what they mean, you should read the Court of Appeals and Supreme Court decisions because the rules are not clear and we do not intend to make them clear." However, he agreed that it would be impossible to make a list of those rules that are not covered by Rule 15 because the Council would have to make a lot of substantive choices about whether numerous rules contain hard deadlines or not. Last biennium, the Council changed the electronic discovery rules to state that, on the court's order or if any party requests, parties have to meet regarding electronically stored information within 21 days. He wondered whether that would be considered a hard deadline. Judge Peterson stated that he understood that some members of the Council were in agreement that it is important keep Rule 15 flexible to remedy mistakes attorneys might make. Examples members had used included summary judgment and requests to admit, but he noted that those rules have discretion built right into them and, if a party is citing Rule 15, that party is not citing the best authority. If a party needs to file a motion for summary judgment close to the trial, that party may ask the court for permission. He noted that the Council is proposing a change to Rule 22 D so that section will no longer require all parties and the judge to agree for a third-party complaint to be filed after 90 days after service of the original summons and complaint. If that amendment goes through, it will become completely discretionary with the judge. He opined that section D is still problematic.

Mr. Keating stated that it appears that the consensus is that this complex problem cannot be solved this biennium. Judge Peterson agreed that this unfortunately appears to be the case. He suggested putting the last proposed version of Rule 15 (Appendix D, Draft 5C) that leaves section D in its current form on the September publication docket. He noted that it fixes the problem in section A that the Procedure and Practice Committee sent to the Council, as well as other small issues.

Judge Peterson reminded Council members that there is another small change to section A proposed by the committee. At one time, Rule 15 A allowed just 10 days to respond to counterclaims. A vestige remains in the last sentence, as there is still a 10 day response time for a reply to an affirmative defense. The last sentence is just a trap for the unwary. The committee's proposal is to change that to 30 days to be consistent with the other deadlines in the section.

Judge Roberts noted that the current rule provides that an answer to a cross-claim should be also responded to within the time required by Rule 7 C(2) to appear and defend but, in the revision, the reference to the cross-claim as governed by Rule 7 C (2) is dropped. She explained that there is a continuing issue in foreclosure claims, where a great many residential foreclosures happen by default. The plaintiff will file for residential foreclosure and there are a number of junior

leinors, many of whom have a right to a money judgment as well as foreclosure. The junior leinor will file a cross-claim but, if the original defendant was served and has already defaulted, the defendant need not receive actual service of that cross-claim by any method because, under Rule 9, a party only has to serve those who have appeared. It looks like a plaintiff can get a money judgment against a defendant who has never been served with any form of complaint for that money judgment. She stated that she has struggled with this issue, and has sometimes refused to grant a default judgment on a cross-claim unless the cross-claim has actually been served on the defendant, in an effort to preserve the defendant's basic constitutional rights. She stated that, if the case goes to trial, the plaintiff will get a judgment on a cross-claim that has never been served, and that is deeply wrong. She expressed concern that the revision of ORCP 15 A would drop the reference to Rule 7 C(2) and it just goes back to service of the cross-claim as required by Rule 9, which is service on parties who are not in default.

Judge Peterson stated that he is not on the foreclosure panel and asked Judge Roberts for clarification of the issue that is causing her concern. He noted that Rule 9 says that a party does not have to serve a document on someone who is in default unless that party is alleging an additional claim. Judge Roberts noted that a cross-claim is, by definition, something that is not in the original claim. Judge Hill recited part of Rule 9 A: "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 on them in the manner provided for service of summons in Rule 7." Judge Roberts stated that she supposes that one could say that this includes a cross-claim. Judge Peterson stated that he typically thinks of a cross-claim as being a pleading filed against a party who is already in the litigation, so the proposed change to Rule 15 A makes sense.

Judge Roberts localized her concern to ORCP 22 B(3), which states that an answer containing a cross-claim shall be served on the parties who have appeared. Judge Peterson noted that an amendment to Rule 22 had already been moved to the September publication docket and suggested that Judge Roberts propose a change to subsection B(3), even though it is a bit late in the biennium. Judge Wolf agreed that the language is inconsistent and needs to be fixed. Judge Hill observed that the language not necessarily inconsistent, since the rules are doing two different things. He noted that Rule 22 says that an answer containing a cross-claim should be served on all of the parties who have appeared, but that does not necessarily mean it is going to be effective under Rule 9 if the cross-claim asserts a different claim and the person against whom that claim is asserted has not been personally served. Judge Roberts pointed out that this is a very subtle nuance. Judge Hill posited a situation where there are five defendants but the cross-claim only affects one defendant. Under the rule, everyone must be served,

other than defendants who have been defaulted and from whom relief is not being sought. But, to the extent that the cross-claim is seeking affirmative relief from this one party, that is different from what is in the plaintiff's complaint, then Rule 9 says that the person must be personally served. He stated that he thinks that Rule 9 and Rule 23 B(3) can be interpreted together.

Judge Roberts stated that she would likely suggest changing "shall be served on the parties who have appeared," to read, "shall be served on parties against whom relief is sought and other parties who have appeared." Judge Wolf stated that this makes perfect sense. Judge Peterson asked Judge Roberts to send draft language to Ms. Nilsson so that she can put it into proper legislative format and circulate it to the Council well in advance of the June meeting to make sure there are no unintended consequences.

5. ORCP 23 C/34 Committee

Ms. Payne stated that she was not at the April Council meeting but that it was her understanding that the Council's consensus was that any change regarding the problem at issue needs to be statutory, perhaps a change to ORS chapter 12 that could be suggested to the Legislature. She stated that she and Mr. Andersen have been working on a draft amendment to the language in ORS 12.190 and that they hope to bring something for discussion at the June Council meeting. She stated that her suggestion would be to add language regarding the date of the discovery of the death of the proposed defendant, and that Mr. Andersen is considering other language. Mr. Andersen stated that Judge Leith has also made another suggestion and that the committee hoped to come up with compromise language when they next meet.

6. ORCP 55 Committee

Mr. Keating reminded the Council that the purpose of the ORCP 55 committee is not to make any substantive changes but, rather, to organize the rule so that it is much more user friendly than the existing rule. He stated that Judge Norby did amazing work in putting together the drafts, and that the latest draft before the Council (Appendix E) had been fully discussed by the committee in a number of meetings.

Judge Gerking noted that the irony has not escaped him that, as the chair of the ORCP 15 committee, he was incapable of marshaling consensus for a change to a one-paragraph section, but that the Rule 55 committee was able to reach consensus on reorganization of a nine-page rule. He congratulated Judge Norby on the time she spent reorganizing and restructuring Rule 55 from an eight-

section rule to a four-section rule. He explained that current section H had become section D, and that the other current sections are combined in new sections A through C. He stated that titles and wording had been changed but that the goal was not to change any substantive aspect; if this occurred, it was inadvertent. He noted that the committee has no recommendations as to how the Council should tackle the proposed revision except to suggest that, if most Council members have not really studied the proposed amendment in a comprehensive way and compared the amendment with the original text, comprehensive discussion today would be pointless. He suggested that all Council members should take on this individual responsibility of a thorough comparison and be prepared to discuss the rule at the June meeting.

Judge Norby stated that, at the last Council meeting, there was discussion regarding a couple of isolated points with which the committee believes it has now dealt. One was the "tender" question, and she tried to crystallize the Council's consensus. There was also some concern about the fact that section D used to use the phrase "protected health information" and that is now "confidential health information" which is defined to include both protected information as defined by statute and also individually identifiable health information. She noted that the committee meeting on section D was actually shorter than the meetings on sections A through C, even though the section consists of half of the rule. She was particularly excited about that, because Judge Gerking was on the committee that handled section H originally and he did not express that much concern. She explained that the committee has now gone through the entire rule line by line and made several adjustments. Judge Gerking stated that he is not convinced that the draft is perfect in its current form. Judge Norby agreed and reminded the Council that the goal is not perfection but, rather, dramatic improvement and making the rule user friendly by getting rid of a lot of duplication and grouping together items that belong together.

Ms. Payne asked whether a cross-reference chart to the existing rule was available. Judge Norby stated that she had previously sent one to the Council but that so many changes had been made since that version that it is no longer accurate. She stated that she could try to make a new one if she has time, but that it might not be that difficult to identify where things are located. Judge Gerking stated that a cross-reference chart would be helpful. Judge Tookey stated that he had looked back at his notes from the September meeting and the original catalyst to take a look at this rule, and he wondered whether the Council's survey respondent, Mr. Skillman, had identified any specific problems. Judge Norby stated that the committee originally read the suggestion and kind of brushed it off because it was not specific, but she took it up after further review because she was stunned at how poorly constructed Rule 55 was.

Judge Peterson stated that he had noticed at the last meeting that the word "substantive" had been used a lot, and of course the Council does not make substantive changes to the law. Judge Norby clarified that the committee had tried not to make the value and meaning of the content different. Judge Peterson stated that, if the Council agrees generally that we should go forward with these four sections replacing the existing rule, he and Ms. Nilsson will need a little time to put that into legislative drafting format. He asked Judge Norby if she could try to create a new cross-reference chart to ensure that this new cleaner, clearly more intelligible rule does not miss anything. He noted that the Council does not want to create any ambiguity. Judge Norby stated that she would probably not be able to attempt a cross-reference chart for at least two weeks.

Judge Gerking asked Council members to let the committee know right away if they notice any problems with Rule 55 so that it can be dealt with quickly and a new draft can be created as soon as possible.

IV. New Business

Mr. Keating reminded the Council that the June meeting will be important and that the purpose is to decide what amendments the Council wants to publish. He suggested starting the June meeting at 9:00 a.m. instead of 9:30 a.m. The Council agreed.

Judge Peterson asked Council members to carefully look at all drafts that are sent to them, and stated that staff will try to get drafts to them as early as possible. He reminded the Council that the preference is not to edit on the fly during the September publication meeting.

No other new business was raised.

V. Adjournment

Mr. Keating adjourned the meeting at 11:09 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

SUMMONS

RULE 7

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

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

C Contents, time for response, and required notices

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 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)*] **subparagraph D(6)(a)(i)** 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.

Council on Court Procedures
June 9, 2018, Meeting
Appendix B-1

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

C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph 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 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) shall contain a notice printed in type size equal to at least 8-point type 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," a "reply" to a counterclaim, or an "answer" to a cross-claim. The "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 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 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,

Council on Court Procedures
June 9, 2018, Meeting
Appendix B-4

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 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 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 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 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 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.

Council on Court Procedures
June 9, 2018, Meeting
Appendix B-5

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 the defendant or other person authorized by appointment or law to receive service of summons on behalf of 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 D(3)(a)(ii) nor D(3)(a)(iii) of this rule applies by a mailing made in accordance with paragraph 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 14 years of age, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the minor; and additionally upon 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 the minor resides, or in whose service the minor is employed, or upon a guardian ad litem appointed pursuant to Rule 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 D(3)(a)(i) of this rule upon the person and, also, upon the conservator of the person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 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:

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

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.**

[*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:

D(3)(b)(ii)(A) by substituted service upon the registered agent, officer, or director;

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;

D(3)(b)(ii)(C) by mailing in the manner specified in paragraph 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(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:

D(3)(c)(ii)(A) by substituted service upon the registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

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;

D(3)(c)(ii)(C) by mailing in the manner specified in paragraph 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(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:

D(3)(d)(ii)(A) by substituted service upon the registered agent or general partner of a limited partnership;

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;

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

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

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

D(4)(a)(i)(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by 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 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 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 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 parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.**

[*Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by parts 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 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 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 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 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 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 the person's address occurring within three years after 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 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 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. The summons shall be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county 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 D(6)(a) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county 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 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 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) Court order for service by other method. When it appears that service is not possible under any method otherwise specified in these rules or other rule or statute, then a motion supported by affidavit or declaration may be filed to request a discretionary court order to allow alternative service by any method or combination of methods that, under the circumstances, is most reasonably calculated to apprise the defendant of the existence and pendency of the action.

D(6)(a) Non-electronic alternative service. Non-electronic forms of alternative service may include, but are not limited to publication of summons; mailing without publication to a specified post office address of the defendant by first class mail as well as either by certified, registered, or express mail with return receipt requested; or posting at specified locations. The court may specify a response time in accordance with subsection C(2) of this rule.

D(6)(a)(i) Alternative service by publication. In addition to the contents of a summons as described in section C of this rule, a published summons must 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 must 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 must also contain the date of the first publication of the summons.

D(6)(a)(i)(A) Where published. An order for publication must direct publication to be made in a newspaper of general circulation in the county where the action is sommenced 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. The summons must be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county in which the action is commenced where publication might reasonably result in actual notice to the

defendant, the plaintiff must so state in the affidavit or declaration required by paragraph D(6) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county in which the action is commenced.

D(6)(a)(i)(B) Mailing summons and complaint may be required. If the court orders service by publication and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff must mail true copies of the summons and the complaint to the defendant at 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, the current address of any defendant, true copies of the summons and the complaint must 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)(a)(ii) Alternative service by posting. The court may order service by posting true copies of the summons and complaint at a designated location in the courthouse where the action is commenced and at any other location that the affidavit or declaration required by subsection D(6) of this rule indicates that the posting might reasonably result in actual notice to the defendant.

D(6)(b) Electronic alternative service. Electronic forms of alternative service may include, but are not limited to: e-mail; text message; facsimile transmission as defined in Rule 9 F; or posting to a social media account. The declaration filed with a motion for electronic alternative service must include: verification that diligent inquiry revealed that the defendant's residence address, mailing address, and place of employment are unlikely to reliably accomplish service; the reason that plaintiff believes the defendant has recently sent and received transmissions from the specific e-mail address or telephone or facsimile

number, or maintains an active social media account on the specific platform the plaintiff asks to use; and facts that indicate the intended recipient is likely to personally receive the electronic transmission. The certificate of service must verify compliance with subparagraph D(6)(b)(i) and subparagraph D(6)(b)(ii) of this rule. An amended certificate of service must be filed if it later becomes evident that the intended recipient did not personally receive the electronic transmission.

D(6)(b)(i) Content of electronic transmissions. If the court allows service by a specific electronic method, the case name, case number, and name of the court in which the action is pending must be prominently positioned where it is most likely to be read first. For e-mail service, those details must appear in the subject line. For text message service, they must appear in the first line of the first text. For facsimile service, they must appear at the top of the first page. For posting to a social media account, they must appear in the top lines of the posting.

D(6)(b)(ii) Format of electronic transmissions. If the court allows alternative service by an electronic method, the summons, complaint, and any other documents must be attached in a file format that is capable of showing a true copy of the original document. When an electronic method is incapable of transferring transmissions that exceed a certain size, the plaintiff must not exceed those express size limitations. If the size of the attachments exceeds the limitations of any electronic method allowed, then multiple sequential transmissions may be sent immediately after the initial transmission to complete service.

[*D(6)(e)* ***Unknown heirs or persons.***] **D(6)(c) 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 Rule 20 I and J, the action [*shall*] **will** proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any 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*] **will** 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 had been brought against those defendants by name.

[*D(6)(f)* ***Defending before or after judgment.***] **D(6)(d) Defending before or after judgment.** A defendant against whom [*publication*] **service pursuant to this subsection** is ordered or that defendant's representatives, on application and sufficient cause shown, at any time before judgment [*shall*] **will** be allowed to defend the action. A defendant against whom [*publication*] **service pursuant to this subsection** is ordered or that defendant's representatives may, upon good cause shown and upon 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 that judgment, to a purchaser in good faith, [*shall not be*] **will not be** affected thereby.

[*D(6)(g)* ***Defendant who cannot be served.***] **D(6)(e) Defendant who cannot be served.** Within the meaning of this subsection, a defendant cannot be served with summons by any method authorized by subsection D(3) of this rule if[*:*] service pursuant to subparagraph D(4)(a)(i) of this rule is not [*authorized*] **applicable**, [*and*] the plaintiff attempted service of summons by all of the methods authorized by subsection D(3) of this rule**,** and **the plaintiff** was unable to complete service; or if the plaintiff knew that service by 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.*] **is neither a party to the action, corporate or otherwise, nor any party's officer, director, employee, or attorney, except as provided in ORS 180.260.** However, service pursuant to subparagraph D(2)(d)(i)**, as**

well as the mailings specified in paragraphs D(2)(b), D(2)(c), and part D(3)(a)(iv)(B) 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 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 that person shall be affixed to the affidavit. The signature of the notary or other official, when so attested by the affixing of the official seal, if any, of that person, shall be prima facie evidence of authority to make and certify 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.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. [*A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim shall*] **An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, must** be filed with the clerk [*by*] **within** the time required by Rule 7 C(2) to appear and defend. **If the summons is served by publication, the defendant must appear and defend within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.** [*Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.*]

B Pleading after motion.

B(1) If the court denies a motion, any responsive pleading required [*shall*] **must** be filed within 10 days after service of the order, unless the order otherwise directs.

B(2) If the court grants a motion and an amended pleading is allowed or required, [*such*] **that** pleading [*shall*] **must** be filed within 10 days after service of the order, unless the order otherwise directs.

C Responding to amended pleading. A party [*shall*] **must** respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

D Enlarging time to plead or do other act. The court may, in its discretion, and upon [*such*] **any** terms as may be just, allow an answer or reply to be made, or allow any other

Council on Court Procedures
June 9, 2018, Meeting
Appendix C-1

pleading or motion after the time limited by the procedural rules, or by an order enlarge such time.

FORM OF PLEADINGS

RULE 16

A Captions; names of parties. Every pleading shall contain a caption setting forth the name of the court, the title of the action, the register number of the cause, and a designation in accordance with Rule 13 B. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

B Each party must be identified by the party's legal name, except that a party may seek a court order to permit use of a pseudonym instead. A motion to use a pseudonym must include a factual basis for the request and must cite the statute, rule, or other legal authority that supports the use of a pseudonym under the circumstances. Mere citation to this rule is not sufficient legal authority to secure a court order approving use of a pseudonym.

[*B*] C Concise and direct statement; paragraphs; separate statement of claims or defenses. Every pleading shall consist of plain and concise statements in paragraphs consecutively numbered throughout the pleading with Arabic numerals, the contents of which shall be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Each separate claim or defense shall be separately stated. Within each claim alternative theories of recovery shall be identified as separate counts.

[*C*] D Consistency in pleading alternative statements. Inconsistent claims or defenses are not objectionable, and when a party is in doubt as to which of two or more statements of fact is true, the party may allege them in the alternative. A party may also state as many separate claims or defenses as the party has, regardless of consistency and whether based upon legal or equitable grounds or upon both. All statements shall be made subject to the obligation set forth in Rule 17.

[*D*] E Adoption by reference. Statements in a pleading may be adopted by reference in a different part of the same pleading.

Shari Nilsson <nilsson@lclark.edu>

E-mail Conversation Between Norby & Hargreaves

1 message

Susie.L.Norby@ojd.state.or.us <Susie.L.Norby@ojd.state.or.us> Sat, Jun 9, 2018 at 3:45 PM
To: cocp-list <cocp-list@lclark.edu>
Cc: Shari Nilsson <nilsson@lclark.edu>

Council Members,

Ken asked that I circulate my e-mail exchange with retired Judge Hargreaves on the pseudonym / open courts issue. It appears below, in reverse chronological order. Begin to read at the bottom and work upward for the original sequence.

Susie Norby

-----Forwarded by Susie L Norby/CLA/OJD on 06/09/2018 03:36PM -----

To: Susie.L.Norby@ojd.state.or.us
From: jrhdks@gmail.com
Date: 05/24/2018 03:09PM
Subject: Re: Fictitious Party Pleading and OCCP

Thanks for the compliment. Wishing to cause a stir in the law is the reason I gave up my senior judgeship. Just things I couldn't say and do that I thought needed to be said and done.

_____
"I came into the world to live out loud" Emile Zola

Jim Hargreaves
Fulbright Specialist in Law
Legal Observer and Commentator
Amicus Curiae Consulting
2533 Lawrence Street
Eugene, Oregon USA 97405
1-541-913-6519

On May 24, 2018, at 2:55 PM, Susie.L.Norby@ojd.state.or.us wrote:

> More good stuff! Thanks!
>
> Yes, although all judges are human, and therefore imperfect, I have a baseline belief that the core principles of our constitutions are thoroughly understood and instinctively applied by our appellate judges and justices in all they do. It's possible that I am simply naive, but I question any logic that flows from a premise that the Chief Justice of the Supreme Court by-passed the open courts clause, negligently or purposefully, in performing his duties.
>
> For me, the McIntyre quote crystallizes the philosophical backdrop of the discussion. As responsible stewards of the law, mustn't we attempt to ascertain the reason that "open courts" are a constitutional requirement if we hope to accurately ascertain what the phrase means and properly apply it? In the current political climate, when efforts by the public to control the courts to align court conduct with the dictates of popular opinion, our discussion about the constitutional open courts construct seems to take on greater significance. But maybe not. A discrete analysis of rules, orders and case opinions is appealing, and arguably simpler to accomplish, but perhaps

incomplete.

The Reutter court and the Quail Hollow West court worked with ORCP 26A as they found it. It wasn't challenged by the parties, or dissected by the courts. They interpreted the Rule, in light of the constitution and common sense. Those courts did not opine that ORCP 26A is perfect, un-modifiable or perpetually immune to improvement. ORCP 26A was what it was, and its content guided the results of those cases as argued and interpreted. That said, the fact that the courts understood it, approved of it, and applied it does not make it immutable.

You and I are completely aligned on your wish for litigation on this topic. I believe such litigation is more likely if the Council takes some action on the question that it is if we take no action. I hope we will find out!

Thanks for batting this around with me. I feel privileged to engage with you on it. I am among the many who were gripped by your position papers. You sure know how to make a stir!

Susie Norby

<graycol.gif>Jim Hargreaves ---05/24/2018 01:30:47 PM---Thanks for your reply. Just three quick rejoinders. First, you certainly have a great deal more fait

From: Jim Hargreaves <jrhdks@gmail.com>
To: Susie.L.Norby@ojd.state.or.us
Date: 05/24/2018 01:30 PM
Subject: Re: Fictitious Party Pleading and OCCP

Thanks for your reply. Just three quick rejoinders. First, you certainly have a great deal more faith in the Court of Appeals and Supreme Court than I do when it comes to creating its own court rules and being certain of their validity. Second, I really see no relevance in your quote from the McIntyre case regarding anonymity and the right to free political speech. And third, I believe that the two Court of Appeals cases I cited in my paper, Reutter v. RWS Construction Inc. 128 Or. App. 365 ((1994) and Quail Hollow West v. Brownstone West 206 Or. App. 321 (2006) do a pretty good job pointing out why ORCP 26A regarding naming real parties in interest is important, which seems to me to negate any argument about the validity of fictitious party pleading.

I remain hopeful that with some publicity around this issue one of these days someone is going to raise this issue in litigation and take the issue up on appeal.

Again, thanks to all of you for your work on this issue.

On Thu, May 24, 2018 at 11:26 AM, <Susie.L.Norby@ojd.state.or.us> wrote:

Hello Judge Hargreaves,

Thank you for your letter. I reply in my personal capacity as an interested colleague in the law, not on behalf of the Committee, or the Council, and certainly not on behalf of the judiciary. I believe the combined orders of the Chief Justice and Chief Judge of our appellate courts create a compelling inference that there are circumstances under which use of pseudonyms in the captions of Oregon state court cases is constitutional. In other words, I am confident that our highest court justices and judges would not enter an order to formalize an inherently unconstitutional process. Therefore, the use of pseudonyms in Oregon state court case captions is not uniformly, categorically, and definitively constitutionally prohibited. There must be exceptions, however

limited, because the appellate order adopted by our highest court authorities identified at least one. I cannot think of a compelling argument for a contrary inference. The three points you make in your message below are predicated on a presumption that our highest court judges are cavalier with internal procedure, and may be presumed to disregard basic constitutional precepts when enacting such orders. If that is indeed a belief you hold, and not simply a "Devil's Advocate" suggestion, then I suppose we fundamentally disagree.

I agree that the precise parameters of any exceptions to use of actual names in Oregon state court case captions remain unclear. But the quote offered by Kelly Anderson in a recent Council meeting articulates an important point of view: The quote was taken from a decision by Supreme Court Justice John Paul Stevens in McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995):

"Anonymity is a shield from the tyranny of the majority. It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."

Of course, that decision is rooted in the US Constitution, not the Oregon Constitution, but its essence is the notion that access to justice is the driving force behind transparency, and also the driving force behind the occasional and limited need for opacity if meaningful justice is truly to be accessible to all.

It's a fascinating and complicated question, which I am grateful to you for placing squarely before us all through your well written and researched articles.

As you may have noted in the Council meeting minutes, one concern many of us have expressed is that the ORCP are not intended to create or over-ride substantive law, they are intended to provide procedures to organize the way we present legal questions to the courts. Although the legislature ultimately adopts the rules and amendments (usually passively, not actively), the Council is cautious not to interfere with the legislative or constitutional process -- where substantive issues are more publicly vetted. This is why your premise that the ORCP are laws that definitively preclude use of pseudonyms has captured my interest so much. If there are any circumstances under which use of pseudonyms in Oregon state case names IS constitutional, then the ORCP should make it clear that they do not over-ride those allowed uses.

I think part of your point in the message below is that the process of creation of internal appellate rules is not as transparent as the process of creation of the ORCP, and is not blessed by the legislature (passively or actively), therefore the ORCP should receive more weight. But if the root of this issue is really constitutionality, then no one is better equipped to craft a rule with a comprehensive eye toward state and federal constitutionality boundaries than our highest appellate court judges.

I hoped that you have followed the CCP minutes, so that you know we are valiantly struggling with these questions. I am very glad to hear that you see how earnest our efforts continue to be. I hope we reach a resolution that is agreeable to a large majority, although that aspiration seems lofty on this issue!

Very Respectfully,
Susie L. Norby

<graycol.gif>Jim Hargreaves ---05/24/2018 09:17:57 AM---Hello Judge Norby I was reading the minutes of the March meeting of the Council on Court

From: Jim Hargreaves <jrhdks@gmail.com>
To: susie.l.norby@ojd.state.or.us

Council on Court Procedures
June 9, 2018, Meeting
Appendix D-4

Date: 05/24/2018 09:17 AM
Subject: Fictitious Party Pleading and OCCP

Hello Judge Norby

I was reading the minutes of the March meeting of the Council on Court Procedure and came across a reference in the discussion about fictitious party pleading related to you wondering if I was aware of the combined orders of the Chief Justice and the Chief Judge regarding using initials in published opinions in certain cases in those court. I am very much aware of those orders and, in fact, refer to them in the only footnote in my paper, *Use of Fictitious Party Names in Litigation in Oregon*.

I would caution your group about putting much faith in those orders as some sort of indication of those courts' legal attitude toward the issue I have raised in my paper and with which your group is grappling. I say this for three reasons.

1. As I pointed out in the footnote, the appellate courts granted themselves these powers without providing any legal analysis, constitutional or otherwise, regarding the validity of the exercise of such powers under Oregon law.
2. As far as I can find, there have been no legal challenges to these appellate rules so their validity has never been tested in a case or controversy before either court.
3. The Oregon Rules of Civil Procedure do not apply in the appellate courts and thus they have different constraints upon their rule-making authority than do the trial courts, assuming the constitutional issue is surmounted.

It continues to be my belief that the Supplemental Local Rules of Multnomah and Clackamas Counties are clearly in conflict with various provisions of the Oregon Rules of Civil Procedure and, most probably violate the Oregon Constitution. It is my belief that your group, before taking any action, needs to clearly and definitively resolve each of these issues in responding to the issues I have raised.

I really appreciate the effort your group has made on this issue.

Jim

Jim Hargreaves
Fulbright Expert in Law
Legal Observer & Commentator
Amicus Curiae Consulting
2533 Lawrence Street
Eugene, Or 97405

541.913.6519

--

Jim

Jim Hargreaves
Fulbright Expert in Law
Legal Observer & Commentator
Amicus Curiae Consulting
2533 Lawrence Street
Eugene, Or 97405
541.913.6519

COUNTERCLAIMS, CROSS-CLAIMS,

AND THIRD-PARTY CLAIMS

RULE 22

A Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as that defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in that defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action, and shall be one arising out of the occurrence or transaction set forth in the complaint or related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim [*shall be served on the parties*] **must be served on any party against whom relief is sought in the cross-claim and on all other parties** who have appeared.

C Third-party practice.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or

may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain [*agreement of parties who have appeared and*] leave of court. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in this rule. The third-party defendant may assert against the plaintiff any defenses that the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. Any party may assert any claim against a third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert the third-party defendant's defenses as provided in Rule 21 and may assert the third-party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third-party defendant to be brought in under circumstances that would entitle a defendant to do so under subsection C(1) of this section.

D Joinder of additional parties.

D(1) 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 Rule 28 and Rule 29.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under

that contract, join as parties to that action all or any persons liable for attorney fees under ORS 20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E Separate trial. On the motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third-party claim so alleged if to do so would be more convenient, avoid prejudice, or be more economical and expedite the matter.

Council on Court Procedures
June 9, 2018, Meeting
Appendix E-3

SUBPOENA

RULE 55

[***A Defined; form.*** *A subpoena is a writ or order directed to a person and may require the attendance of the person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned or may require 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, 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 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*

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-1

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 quash or modify the subpoena if it is unreasonable and oppressive or 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 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 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). 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 7 days before*

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

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

D(2)(a) ***Designated individuals.*** *Every law enforcement agency shall designate an individual or individuals upon whom service of a subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of a subpoena pursuant to paragraph D(2)(b) of this 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 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 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.*** *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 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 3 days prior to trial.*

D(4) ***Service by mail 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 that person only upon leave of court and attendance of the witness may be compelled only upon the terms 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 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 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 the person resides, is employed, or transacts business in person, or at any other convenient place 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 the person is served with a subpoena, or at any other convenient place 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 any items are not included, why they are not.*

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-6

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

H(2) ***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 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;

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 that resolution; and

H(2)(a)(iv) the party issuing a subpoena 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 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 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 5 days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection 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 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 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 D(3) of this rule.

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

H(3)(a) ***Content.*** *The records described in subsection 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 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.*]

A Generally: form and contents, originating court, who may issue, who may serve, proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) Requirements: in general. Every subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number; and

A(1)(a)(iv) command each person to whom it is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(1) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(2) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in that person's possession,

custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(3) produce records of confidential health information for inspection and copying as provided in section D of this rule.

A(2) Originating court. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38C, a subpoena may be issued by the circuit court in the county in which the witness is to be examined.

A(3) Who may issue.

A(3)(a) Attorney of record. An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) Clerk of court. The clerk of the court in which the matter is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may only be issued if the requesting party has served a deposition notice as provided in Rule 39 C or Rule 40 A; served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that a notice will be served contemporaneously with service of the subpoena.

A(3)(c) Clerk of court for foreign depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the circuit court in the county in which the witness is to be examined.

A(3)(d) Judge, justice, or other authorized officer.

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, justice, or other authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) Who may serve. Any subpoena may be served by the party, the party's attorney,

or any other person who is at least 18 years of age.

A(5) Proof of service. Proving service of a subpoena is done in the same way as proving service of a summons, except that the server need not disavow being a party; an attorney for a party; or an officer, director, or employee of a party in the action.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless discharged sooner by the party who obtained the subpoena.

A(6)(b) Witness appearance contingent on fee payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. A witness may demand payment of legal witness fees and mileage for the next day at the end of each day's attendance. If the fees and mileage are not paid on demand, then the witness is not obligated to return.

A(6)(c) Deposition subpoena; place where witness can be required to attend or produce things.

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) Non-residents. A non-resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

A(6)(d) Obedience of subpoena. A witness is obligated to obey a subpoena. Disobedience or a refusal to be sworn or to answer as a witness may be punished as contempt by a court or judge who issued the subpoena, or before whom the action is pending. At a hearing or trial, if a witness who is a party disobeys a subpoena or refuses to be

sworn or to answer as a witness, then that party's complaint, answer, or reply may be stricken.

A(7) Recipient's option to object, move to quash or modify subpoena for production. A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of confidential health information, may object or move to quash or to modify the subpoena, as follows:

A(7)(a) Serve written objection before the production deadline but no later than 14 days after receiving subpoena. A written objection may be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

A(7)(a)(i) Objection may be partial or total. The written objection may be to all or to only part of the command to produce.

A(7)(a)(ii) Objection suspends obligation to produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

A(7)(b) Motion to quash or to modify. A motion to quash or to modify the command for production must be served and filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if it is unreasonable and oppressive, or may require that the party who served the subpoena pay the reasonable costs of production.

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, and prisoners.

B(1) Where attendance may be required. A subpoena may require appearance in court or out of court, including:

B(1)(a) Foreign depositions. Any foreign deposition under Rule 38 C presided over by any person authorized by Rule 38 C to take witness testimony, or any officer empowered by the laws of the United States to take testimony; or

B(1)(b) Administrative and other proceedings. Any administrative or other proceeding presided over by a judge, justice, or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

B(2) Service of subpoenas requiring the appearance or testimony of individuals or non-party organizations; tendering fees. Unless otherwise provided in this rule, a copy of the subpoena must be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place required.

B(2)(a) Service on an individual 14 years of age or older. The subpoena must be personally delivered to the witness, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declined payment, whether personal attendance is required or not.

B(2)(b) Service on an individual under 14 years of age. The subpoena must be personally delivered to the witness's parent, guardian, or guardian ad litem, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declined payment, whether personal attendance is required or not.

B(2)(c) Service on individuals waiving personal service. The subpoena may mailed to the witness, but mail service is only valid if all of the following circumstances exist:

B(2)(c)(i) Willingness communicated by witness. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that, during personal or telephonic contact, the witness communicated a willingness to appear and testify if subpoenaed;

B(2)(c)(ii) Satisfactory fee arrangements made. The party's attorney or attorney's agent made arrangements for the payment of fees and mileage satisfactory to the witness or the witness expressly declined payment; and

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-15

B(2)(c)(iii) Signed mail delivery receipt obtained. More than 10 days before the date to appear and testify, the subpoena was mailed in a manner that provided a signed receipt on delivery, and the attorney received the receipt signed by the witness (or witness's parent, guardian, or guardian ad litem) more than three days before the date to appear and testify.

B(2)(d) Service of a deposition subpoena to a non-party organization pursuant to Rule 39 C(6). The subpoena must be delivered in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

B(3) Service of a subpoena requiring appearance or testimony to law enforcement agency or officer. If a peace officer's appearance is required in a professional capacity, then a subpoena may be served by:

B(3)(a) Personal service. Service of a copy, along with one day's attendance fee and mileage as allowed by law, unless payment was expressly declined, to the officer personally; or

B(3)(b) Substitute service. Service of a copy, along with one day's attendance fee and mileage as allowed by law, to an individual designated by the law enforcement agency that employs the officer or, if there is no designated individual available, then to the person in charge, at least 10 days before the date the officer is required to attend, provided that the officer is currently employed by the agency and is present in the state at the time the agency is served.

B(3)(c) Law enforcement agency obligations. "Law Enforcement Agency" is defined for purposes of this paragraph as the Oregon State Police, a county sheriff's department, or a municipal police department.

B(3)(c)(i) Designate a representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

B(3)(c)(ii) Ensure actual notice or report otherwise. When a law enforcement officer is subpoenaed by substitute service under this subparagraph, the agency must make a good faith effort to give the officer actual notice of the time, date, and location identified in the subpoena for the appearance. If the agency is unable to notify the officer, then the agency will promptly report this inability to the court. The court may postpone the matter to allow the officer to be personally served.

B(4) Service of subpoena requiring the appearance and testimony of a prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena to a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

C Subpoenas requiring production of documents or things other than confidential health information.

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify, or may be issued separately.

C(2) When mail service allowed. A copy of a subpoena commanding production that does not contain a command to appear and testify may be served by mail.

C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of a subpoena issued solely to command production for inspection prior to a deposition, hearing, or trial must:

C(3)(a) Provide advance notice to parties. The subpoena must be served on all parties to the action at least seven days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the court orders less time;

C(3)(b) Allow time for production. The subpoena must allow at least 14 days for production of the required items, unless the court orders less time; and

C(3)(c) Specify originals or true copies. The subpoena must specify whether originals or true copies will satisfy the subpoena.

D Subpoenas for records of confidential heath information.

D(1) Confidential health information to which this section applies. This section creates protections for production of confidential health information, which includes both "individually identifiable health information" as described in ORS 192.556(8) and "protected health information" as described in ORS 192.556(11)(a). "Confidential health information" is defined as information collected from a person by a health care entity, employer, or insurance provider that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) Qualified protective order limits use of confidential health information. A "qualified protective order" is defined as a court order that prohibits the parties from using or disclosing confidential health information for any purpose other than the litigation for which it is produced, and that requires the return of all confidential health information records to the original custodian, or the destruction of all confidential health information records, including all copies made, at the end of the litigation.

D(3) Subpoena must also comply with state and federal law. A subpoena to command

production of confidential health information must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not fully comply, then the recipient is entitled to disregard it and withhold the confidential records it seeks.

D(4) Service of subpoena is subject to the following conditions.

D(4)(a) Qualified protective order; declaration or affidavit; contents. The attorney or party issuing a subpoena for confidential health information must serve the custodian or other record keeper with either a qualified protective order, or with a declaration or affidavit together with supporting documentation that demonstrates that:

D(4)(a)(i) Written notice was given with 14 days to object. The party made a good faith attempt to provide written notice to the patient or to the patient's attorney that allowed for 14 days after the date of the notice to object;

D(4)(a)(ii) Sufficient context was given to enable meaningful objection. The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the patient or attorney to meaningfully object;

D(4)(a)(iii) No timely objections were made, or objections were resolved. Either no written objection was made within the 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

D(4)(a)(iv) Requests to inspect and copy will be promptly allowed. The party must certify that the patient or the patient's representative will be permitted, promptly on request, to inspect and copy any records received.

D(4)(b) Objections. Within 14 days from the date of a notice requesting confidential health information, the individual or individual's attorney objecting to the subpoena must respond in writing to the party issuing the notice, stating the reasons for each objection.

D(4)(c) Statement required to secure personal attendance of records custodian and original records. The personal attendance of a custodian of records and the production of

original records is required if the subpoena contains the following statement:

_____

This subpoena requires a custodian of records to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D(7) is insufficient for this subpoena.

_____

D(5) Mandatory privacy procedures for all records produced.

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) Enclosure in a sealed outer envelope; properly addressed. The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) Court. If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a deposition or similar 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;

D(5)(b)(iii) Other hearing or miscellaneous proceeding. In other cases involving a hearing or other miscellaneous proceedings, to the officer or body conducting the hearing at the official place of business; or

D(5)(b)(iv) If no hearing is scheduled. If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) Additional responsibilities of attorney or party receiving delivery of confidential

health information.

D(6)(a) Service of a copy of subpoena to patient and all parties to the litigation. If the subpoena directs delivery of confidential health records to the attorney or party who issued the subpoena, then a copy of the subpoena must be served on the patient 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 custodian or keeper of the records.

D(6)(b) Parties' right to inspect or obtain a copy of the records at own expense. Any party to the proceeding may inspect the records provided and may request a complete copy of the records. On request, the records must be promptly provided by the party who issued the subpoena at the expense of the party who requested the inspection or copies.

D(7) Inspection of records delivered to court or other proceeding. 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 must remain sealed and must 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 must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are not introduced in evidence or required as part of the record must be returned to the custodian who produced them.

D(8) Compliance by delivery only when no personal attendance is required.

D(8)(a) Mail or delivery by a non-party, along with declaration. A custodian of confidential health information who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all records subpoenaed within five days after the subpoena is received, along with a declaration that complies with this paragraph.

D(8)(b) Declaration of custodian of records when records produced. Confidential

health information records produced when no personal attendance of the custodian is required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) Authority of declarant. That the declarant is a duly authorized custodian of the records and has authority to certify records;

D(8)(b)(ii) True and complete copy. That the copy produced is a true copy of all of the records responsive to the subpoena; and

D(8)(b)(iii) Proper preparation practices. That preparation of the copy of the records being produced was done:

D(8)(b)(iii)(1) Responsible preparer. By the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the declarant;

D(8)(b)(iii)(2) Ordinary course of business. In the ordinary course of the entity's or the person's business; and

D(8)(b)(iii)(3) Contemporaneously with information described. At or near the time of the act, condition, or event described or referred to in the records.

D(8)(c) Declaration of custodian of records when not all records produced. When no records, or fewer records than requested, are produced by the custodian, this circumstance must be specified in the declaration. The custodian may only send records within the custodian's custody.

D(8)(d) Multiple declarations allowed when necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) Designation of responsible party when multiple parties subpoena records. If more than one party subpoenas a custodian of records to personally attend under paragraph D 4(b) of this rule, the custodian will be deemed to be the witness of the party who first served such a subpoena.

D(10) 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.

D(11) 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.

ORCP 55
Cross-Reference Chart

Draft Amendment 6/1/18	Existing Rule 55 (as Shown in 6/1/18 Draft) Page Reference	Existing Rule 55 Section Reference
A(1)(a)	page 1, line 3	A
A(1)(a)(i)	page 2, lines 21-23	C(2)(a)
A(1)(a)(ii)	page 1, line 11	A
A(1)(a)(iv)(1)	page 1, lines 4-5	A
A(1)(a)(iv)(2)	page 1, lines 5-6	A
A(1)(a)(iv)(3)	page 7, line 22	H(2)
A(2)	page 21, lines 22-23 page 3, lines 4-6	C(2)(a) C(2)(b)
A(3)(a)	page 3, lines 10-11	C(2)(d)
A(3)(b)	page 2, line 21-23 through page 3, line 3 page 6, lines 5-10	C(2)(a) and C(2)(a)(i) F(1)
A(3)(c)	page 3, lines 4-6	C(2)(b)
A(3)(d)	page 3, lines 7-9	C(2)(c)
A(3)(d)(i)	page 2, line 23	C(2)(a)
A(3)(d)(ii)	page 3, lines 7-9	C(2)(c)
A(4)	page 3, lines 13-14	D(1)
A(5)	page 5, lines 19-21	D(5)
A(6)(a)	page 1, lines 7-8	A
A(6)(b)	page 1, lines 8-10	A
A(6)(c)(i)	page 6, lines 11-14	F(2)
A(6)(c)(ii)	page 6, lines 15-18	F(2)
A(6)(d)	page 7, lines 1-5	G
A(7)(a) through A(7)(b)	page 1, line 18 through page 2, line 6	B
B(1)	page 2, lines 9-12 page 2, lines 16-19	C(1)(a) C(1)(c)
B(1)(b)	page 2, lines 16-18	C(1)(c)
B2	page 3, lines 19-20	D(1)
B(2)(a)	page 3, lines 14-17	D(1)
B(2)(b)	page 3, lines 17-19	D(1)
B(2)(c)	page 5, lines 1-3	D(3)
B(2)(c)(i)	page 5, lines 4-7	D(3)(a)
B(2)(c)(ii)	page 5, lines 8-9	D(3)(b)
B(2)(c)(iii)	pgae 5, lines 11-14	D(3)(c)
B(2)(d)	page 3, lines 20-22	D(1)
B(3)	page 4, line 5	D(1)
B(3)(a)	page 4, lines 11-13	D(2)(b)
B(3)(b)	page 4, lines 8-10 page 4, lines 14-17	D(2)(a) D(2)(b)
B(3)(c)	page 4, line 24-26	D(2)(d)
B(3)(c)(i)	page 4, lines 6-10	D(2)(a)
B(3)(c)(ii)	page 4, lines 18-23	D(2)(c)
B(4)(a) through B(4)(c)	page 5, line 23 through page 6, line 12	E

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-24

ORCP 55
Cross-Reference Chart

Draft Amendment 6/1/18	Existing Rule 55 (as Shown in 6/1/18 Draft) Page Reference	Existing Rule 55 Section Reference
C	page 1, lines 12-15 page 7, lines 22-23	B H(2)
C(1)	page 1, lines 5-8	B
C(2)	page 5, line 15-18	D(4)
C(3) through C(3)(b)	page 3, line 23 through page 4, line 4	D(1)
C(3)(c)	page 6, lines 23-26	F(3)
D through D(2)	page 7, lines 7-25	H through H(1)
D(3)	page 7, lines 22-25	H(2)
D4(a)	page 7, line 26 through page 8, line 3	H(2)(a)
D(4)(a)(i)	page 8, lines 4-6	H(2)(a)(i)
D(4)(a)(ii)	page 8, lines 7-9	H(2)(a)(ii)
D(4)(a)(iii)	page 8, lines 10-11	H(2)(a)(iii)
D(4)(a)(iv)	page 8, lines 12-14	H(2)(a)(iv)
D(4)(b)	page 8, lines 15-18	H(2)(b)
D(4)(c)	page 10, line 12 through page 11, line 2	H(4) through H(4)(a)
D(5)(a)	page 9, lines 11-13	H(2)(d)
D(5)(b) through D(5)(b)(iv)	page 9, lines 3-10	H(2)(d)
D(6)(a) through D(7)	page 9, lines 10-25	H(2)(d)
D(8) through D(8)(a)	page 8, lines 19-26 page 9, line 26 through page 10, line 2	H(2)(c) H(2)(f)
D(8)(b) through D(8)d)	page 10, lines 3-20	H(3)
D(9)	page 11, lines 4-7	H(4)(b)
D(10)	page 11, lines 8-10	H(5)
D(11)	page 11, lines 11-12	H(6)

SUBPOENA

RULE 55

A(1)(a)

[***A Defined; form.*** *A subpoena is a writ or order directed to a person and may require the attendance of the person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned* A(1)(a)(iv)(i) *or may require 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,* A(6)(a) *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.* A(6)(b) *Every subpoena shall state the name of the court,* A(1)(a)(ii) *the case name, and the case number.* A(1)(a)(iii)

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.* C C(1) *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 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* A(7)

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-26

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 quash or modify the subpoena if it is unreasonable and oppressive or 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 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*

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-27

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.

A(3)(b)

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.*

A(2)
A(3)(c)

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.*

A(3)(d)

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.*

A(3)(a)

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

D(1) ***Service.*** *Except as provided in subsection D(2) of this rule, a subpoena may be served by the party or any other person 18 years of age or older.*

A(4)

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.

B(2)(a)

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.

B(2)(b)

The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

B(2)

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).

B(2)(d)

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 7 days before

C(3) and C(3)(a)

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-28

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.

C(3) and C(3)(a)

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

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

B(3)(c)(i)

B(3)(b)

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 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.*

B(3)(a)

B(3)(b)

D(2)(c) ***Notice to officer.*** *When a subpoena has been served as provided in 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.*

B(3)(c)(ii)

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.*

B(3)(c)

*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:*

B(2)(c)

*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;*

B(2)(c)(i)

*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*

B(2)(c)(ii)

*D(3)(c) **Time limitations.** The subpoena was mailed to the witness more than 10 days before trial by certified mail or some other 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 3 days prior to trial.*

B(2)(c)(iii)

*D(4) **Service by mail 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.*

C(2)

*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.*

A(5)

***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 that person only upon leave of court and attendance of the witness may be compelled only upon the terms that the court prescribes. The court may order temporary removal and production of the prisoner for the purpose of giving testimony or*

B(4)

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-30

B(4)

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 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 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.*

A(3)(b)

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 the person resides, is employed, or transacts business in person, or at any other convenient place 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 the person is served with a subpoena, or at any other convenient place that is fixed by an order of the court.*

A(6)(c)(i)

A(6)(c)(ii)

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 any items are not included, why they are not.*

C(1)

C(3)(c)

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-31

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, that party's complaint, answer, or reply may be stricken.*

A(6)(d)

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:*

D(1)

H(1)(a) ***"Individually identifiable health information."*** *"Individually identifiable health information" means information that identifies an individual or that could be used to identify an individual; that has been collected from an individual and created or received by a health care provider, health plan, employer, or health care clearinghouse; and 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.*

D(1)

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 the information was requested and that requires the return to the original custodian of the information or the destruction of the individually identifiable health information (including all copies made) at the end of the litigation.*

D(1)

H(2) ***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.*

A(1)(a)(iv)(3)(C) and D(3)

H(2)(a) ***Supporting documentation.*** *The attorney for the party issuing a subpoena*

D(4)(a)

requesting production of individually identifiable health information must serve the custodian or other keeper of that information either with a qualified protective order or with an affidavit or declaration together with attached supporting documentation demonstrating that:

D(4)(a)

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;

D(4)(a)(i)

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;

D(4)(a)(ii)

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 that resolution; and

D(4)(a)(iii)

H(2)(a)(iv) the party issuing a subpoena certifies that he or she will, promptly upon request, permit the patient or the patient's representative to inspect and copy the records received.

D(4)(a)(iv)

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.*

D(4)(b)

H(2)(c) ***Time for compliance.*** *Except as provided in subsection 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 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 5 days after receipt thereof. Delivery shall be accompanied by an affidavit or a declaration as described in subsection H(3) of this rule.*

D(8)(a)

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-33

H(2)(d) **Method of compliance.** The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the 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.

D(5)(a)

D(5)(b)(i) through D(5)(b)(iv)

D(6) and D(7)

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

D(8)(a)

H(2)(f) **Service of subpoena.** For purposes of this section, the subpoena duces tecum to

D(8)(a)

the custodian of the records may be served by first class mail. Service of subpoena by mail under this section shall not be subject to the requirements of subsection D(3) of this rule.

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

H(3)(a) ***Content.*** *The records described in subsection 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.

D(8)(b) through D(8)(d)

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.***

D(4)(c)

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 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.*]

A Generally: form and contents, originating court, who may issue, who may serve, proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) Requirements: in general. Every subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number; and

A(1)(a)(iv) command each person to whom it is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(1) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(2) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in that person's possession,

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-36

custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(3) produce records of confidential health information for inspection and copying as provided in section D of this rule.

A(2) Originating court. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38C, a subpoena may be issued by the circuit court in the county in which the witness is to be examined.

A(3) Who may issue.

A(3)(a) Attorney of record. An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) Clerk of court. The clerk of the court in which the matter is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may only be issued if the requesting party has served a deposition notice as provided in Rule 39 C or Rule 40 A; served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that a notice will be served contemporaneously with service of the subpoena.

A(3)(c) Clerk of court for foreign depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the circuit court in the county in which the witness is to be examined.

A(3)(d) Judge, justice, or other authorized officer.

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, justice, or other authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) Who may serve. Any subpoena may be served by the party, the party's attorney,

or any other person who is at least 18 years of age.

A(5) Proof of service. Proving service of a subpoena is done in the same way as proving service of a summons, except that the server need not disavow being a party; an attorney for a party; or an officer, director, or employee of a party in the action.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless discharged sooner by the party who obtained the subpoena.

A(6)(b) Witness appearance contingent on fee payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. A witness may demand payment of legal witness fees and mileage for the next day at the end of each day's attendance. If the fees and mileage are not paid on demand, then the witness is not obligated to return.

A(6)(c) Deposition subpoena; place where witness can be required to attend or produce things.

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) Non-residents. A non-resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

A(6)(d) Obedience of subpoena. A witness is obligated to obey a subpoena. Disobedience or a refusal to be sworn or to answer as a witness may be punished as contempt by a court or judge who issued the subpoena, or before whom the action is pending. At a hearing or trial, if a witness who is a party disobeys a subpoena or refuses to be

G

sworn or to answer as a witness, then that party's complaint, answer, or reply may be stricken.

A(7) Recipient's option to object, move to quash or modify subpoena for production. A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of confidential health information, may object or move to quash or to modify the subpoena, as follows:

A(7)(a) Serve written objection before the production deadline but no later than 14 days after receiving subpoena. A written objection may be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

A(7)(a)(i) Objection may be partial or total. The written objection may be to all or to only part of the command to produce.

A(7)(a)(ii) Objection suspends obligation to produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied.

B

However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

A(7)(b) Motion to quash or to modify. A motion to quash or to modify the command for production must be served and filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if it is unreasonable and oppressive, or may require that the party who served the subpoena pay the reasonable costs of production.

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, and prisoners.

C(1)(a) and C(1)(c)

B(1) Where attendance may be required. A subpoena may require appearance in court or out of court, including:

C(1)(b) B(1)(a) Foreign depositions. Any foreign deposition under Rule 38 C presided over by any person authorized by Rule 38 C to take witness testimony, or any officer empowered by the laws of the United States to take testimony; or

C(1)(c) B(1)(b) Administrative and other proceedings. Any administrative or other proceeding presided over by a judge, justice, or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

B(2) Service of subpoenas requiring the appearance or testimony of individuals or non-party organizations; tendering fees. Unless otherwise provided in this rule, a copy of the subpoena must be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place required.

D(1) B(2)(a) Service on an individual 14 years of age or older. The subpoena must be personally delivered to the witness, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declined payment, whether personal attendance is required or not.

B(2)(b) Service on an individual under 14 years of age. The subpoena must be personally delivered to the witness's parent, guardian, or guardian ad litem, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declined payment, whether personal attendance is required or not.

D(3) B(2)(c) Service on individuals waiving personal service. The subpoena may mailed to the witness, but mail service is only valid if all of the following circumstances exist:

D(3)(a) B(2)(c)(i) Willingness communicated by witness. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that, during personal or telephonic contact, the witness communicated a willingness to appear and testify if subpoenaed;

D(3)(b) B(2)(c)(ii) Satisfactory fee arrangements made. The party's attorney or attorney's agent made arrangements for the payment of fees and mileage satisfactory to the witness or the witness expressly declined payment; and

B(2)(c)(iii) Signed mail delivery receipt obtained. More than 10 days before the date to appear and testify, the subpoena was mailed in a manner that provided a signed receipt on delivery, and the attorney received the receipt signed by the witness (or witness's parent, guardian, or guardian ad litem) more than three days before the date to appear and testify.

D(3)(c)

B(2)(d) Service of a deposition subpoena to a non-party organization pursuant to Rule 39 C(6). The subpoena must be delivered in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

D(1)

B(3) Service of a subpoena requiring appearance or testimony to law enforcement agency or officer. If a peace officer's appearance is required in a professional capacity, then a subpoena may be served by:

B(3)(a) Personal service. Service of a copy, along with one day's attendance fee and mileage as allowed by law, unless payment was expressly declined, to the officer personally; or

B(3)(b) Substitute service. Service of a copy, along with one day's attendance fee and mileage as allowed by law, to an individual designated by the law enforcement agency that employs the officer or, if there is no designated individual available, then to the person in charge, at least 10 days before the date the officer is required to attend, provided that the officer is currently employed by the agency and is present in the state at the time the agency is served.

D(2)(b)

B(3)(c) Law enforcement agency obligations. "Law Enforcement Agency" is defined for purposes of this paragraph as the Oregon State Police, a county sheriff's department, or a municipal police department.

D(2)(d)

B(3)(c)(i) Designate a representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

D(2)(a)

Council on Court Procedures
June 9, 2018, Meeting
Appendix F-41

B(3)(c)(ii) Ensure actual notice or report otherwise. When a law enforcement officer is subpoenaed by substitute service under this subparagraph, the agency must make a good faith effort to give the officer actual notice of the time, date, and location identified in the subpoena for the appearance. If the agency is unable to notify the officer, then the agency will promptly report this inability to the court. The court may postpone the matter to allow the officer to be personally served.

D(2)(c)

B(4) Service of subpoena requiring the appearance and testimony of a prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena to a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

E

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

C Subpoenas requiring production of documents or things other than confidential health information.

B and H(2)

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify, or may be issued separately.

B

C(2) When mail service allowed. A copy of a subpoena commanding production that does not contain a command to appear and testify may be served by mail.

D(4)

C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of a subpoena issued solely to command production for inspection prior to a deposition, hearing, or trial must:

D(1)

C(3)(a) Provide advance notice to parties. The subpoena must be served on all parties to the action at least seven days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the court orders less time;

C(3)(b) Allow time for production. The subpoena must allow at least 14 days for production of the required items, unless the court orders less time; and

C(3)(c) Specify originals or true copies. The subpoena must specify whether originals or true copies will satisfy the subpoena.

D Subpoenas for records of confidential heath information.

D(1) Confidential health information to which this section applies. This section creates protections for production of confidential health information, which includes both "individually identifiable health information" as described in ORS 192.556(8) and "protected health information" as described in ORS 192.556(11)(a). "Confidential health information" is defined as information collected from a person by a health care entity, employer, or insurance provider that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) Qualified protective order limits use of confidential health information. A "qualified protective order" is defined as a court order that prohibits the parties from using or disclosing confidential health information for any purpose other than the litigation for which it is produced, and that requires the return of all confidential health information records to the original custodian, or the destruction of all confidential health information records, including all copies made, at the end of the litigation.

D(3) Subpoena must also comply with state and federal law. A subpoena to command

production of confidential health information must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not fully comply, then the recipient is entitled to disregard it and withhold the confidential records it seeks.

H(2)

D(4) Service of subpoena is subject to the following conditions.

D(4)(a) Qualified protective order; declaration or affidavit; contents. The attorney or party issuing a subpoena for confidential health information must serve the custodian or other record keeper with either a qualified protective order, or with a declaration or affidavit together with supporting documentation that demonstrates that:

H(2)(a)

D(4)(a)(i) Written notice was given with 14 days to object. The party made a good faith attempt to provide written notice to the patient or to the patient's attorney that allowed for 14 days after the date of the notice to object;

H(2)(a)(i)

D(4)(a)(ii) Sufficient context was given to enable meaningful objection. The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the patient or attorney to meaningfully object;

H(2)(a(ii)

D(4)(a)(iii) No timely objections were made, or objections were resolved. Either no written objection was made within the 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

H(2)(a)(iii)

D(4)(a)(iv) Requests to inspect and copy will be promptly allowed. The party must certify that the patient or the patient's representative will be permitted, promptly on request, to inspect and copy any records received.

H(2)(a)(iv)

D(4)(b) Objections. Within 14 days from the date of a notice requesting confidential health information, the individual or individual's attorney objecting to the subpoena must respond in writing to the party issuing the notice, stating the reasons for each objection.

H(2)(b)

D(4)(c) Statement required to secure personal attendance of records custodian and original records. The personal attendance of a custodian of records and the production of

H(4) through H(4)(a)

original records is required if the subpoena contains the following statement:

_____

This subpoena requires a custodian of records to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D(7) is insufficient for this subpoena.

_____

D(5) Mandatory privacy procedures for all records produced.

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) Enclosure in a sealed outer envelope; properly addressed. The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) Court. If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a deposition or similar 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;

D(5)(b)(iii) Other hearing or miscellaneous proceeding. In other cases involving a hearing or other miscellaneous proceedings, to the officer or body conducting the hearing at the official place of business; or

D(5)(b)(iv) If no hearing is scheduled. If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) Additional responsibilities of attorney or party receiving delivery of confidential

H(4) through H(4)(a)

H(2)(d)

health information.

D(6)(a) Service of a copy of subpoena to patient and all parties to the litigation. If the subpoena directs delivery of confidential health records to the attorney or party who issued the subpoena, then a copy of the subpoena must be served on the patient 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 custodian or keeper of the records.

D(6)(b) Parties' right to inspect or obtain a copy of the records at own expense. Any party to the proceeding may inspect the records provided and may request a complete copy of the records. On request, the records must be promptly provided by the party who issued the subpoena at the expense of the party who requested the inspection or copies.

H(2)(d)

D(7) Inspection of records delivered to court or other proceeding. 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 must remain sealed and must 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 must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are not introduced in evidence or required as part of the record must be returned to the custodian who produced them.

D(8) Compliance by delivery only when no personal attendance is required.

D(8)(a) Mail or delivery by a non-party, along with declaration. A custodian of confidential health information who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all records subpoenaed within five days after the subpoena is received, along with a declaration that complies with this paragraph.

H(2)(c)

H(3)

D(8)(b) Declaration of custodian of records when records produced. Confidential

health information records produced when no personal attendance of the custodian is required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) Authority of declarant. That the declarant is a duly authorized custodian of the records and has authority to certify records;

D(8)(b)(ii) True and complete copy. That the copy produced is a true copy of all of the records responsive to the subpoena; and

D(8)(b)(iii) Proper preparation practices. That preparation of the copy of the records being produced was done:

D(8)(b)(iii)(1) Responsible preparer. By the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the declarant;

D(8)(b)(iii)(2) Ordinary course of business. In the ordinary course of the entity's or the person's business; and

H(3) D(8)(b)(iii)(3) Contemporaneously with information described. At or near the time of the act, condition, or event described or referred to in the records.

D(8)(c) Declaration of custodian of records when not all records produced. When no records, or fewer records than requested, are produced by the custodian, this circumstance must be specified in the declaration. The custodian may only send records within the custodian's custody.

D(8)(d) Multiple declarations allowed when necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) Designation of responsible party when multiple parties subpoena records. If

H(4)(b) more than one party subpoenas a custodian of records to personally attend under paragraph D 4(b) of this rule, the custodian will be deemed to be the witness of the party who first served such a subpoena.

D(10) 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(5)

D(11) Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44. H(6)