

**MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES**

Saturday, September 8, 2018, 9:00 a.m.

Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Jay Beattie
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Jennifer Gates
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. Lynn R. Nakamoto
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling
Hon. Douglas L. Tookey*
Margurite Weeks
Hon. John A. Wolf

*Appeared by teleconference

Members Absent:

Hon. D. Charles Bailey, Jr.
Kelly L. Andersen
Travis Eiva
Hon. Timothy C. Gerking
Hon. David E. Leith
Hon. Susie L. Norby
Sharon A. Rudnick
Deanna L. Wray

Guests:

Amy Zubko, Oregon State Bar

Council Staff:

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

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 38 ORCP 44 ORCP 55 ORCP 65		ORCP 7 ORCP 15 ORCP 16 ORCP 22 ORCP 38 ORCP 43 ORCP 44 ORCP 55 ORCP 65	Discovery ORCP 7 ORCP 15

I. Call to Order

Mr. Keating called the meeting to order at 9:31 a.m.

II. Administrative Matters

A. Approval of June 9, 2018, Minutes

Mr. Keating asked Council members if they had any comments or changes to the draft minutes from the June 9, 2018, meeting (Appendix A). Hearing none, he asked for a motion to approve the minutes. Ms. Gates made a motion to approve the minutes. The motion was seconded by Judge Wolf and was approved unanimously without abstention.

B. Election of Officers

Judge Peterson explained that the Council's authorizing statutes require annual elections, but nothing says that a member cannot be re-elected for a second one-year term. He noted that, since the Council operates on a biennial schedule, most of the work is done in first year. During the second year, officers mostly deal with anything that comes up during the legislative session and then hand over the reigns to the new officers at the first Council meeting of the next biennium.

Judge Peterson asked for nominations for the three officer positions of chair, vice chair, and treasurer. He stated that each could be voted on individually or that it could be done as a slate. Mr. Crowley nominated Mr. Keating as chair, Ms. Gates as vice chair, and Ms. Weeks as treasurer. Ms. Payne seconded the nomination, which was approved unanimously without abstention.

III. Old Business

A. Committee Reports

1. ORCP 23 C/34 Committee

Judge Peterson noted that neither Ms. Wray nor Mr. Andersen were present to report on the committee's progress on suggested language for a legislative change. He observed that a recommendation to the Legislature is not something that the Council would publish in any case but, if the Council decides to recommend something in its transmittal letter, it would be necessary to round table the suggestion before making that recommendation.

B. Discussion of Draft Amendments

1. ORCP 7

Mr. Keating explained that neither Judge Norby nor Judge Gerking were present to give an overview of the suggested changes to Rule 7. He asked if any other committee member would like to make comments. Judge Wolf stated that he felt that both the committee and the Council had discussed fairly thoroughly the changes that dealt with electronic service issues and that there was no need to rehash all of that today.

Ms. Payne pointed out that Judge Roberts had a concern about alternative service and mailing but that it appears that the concern had been addressed in the proposed amendment before the Council today (Appendix B). Judge Peterson explained that Judge Roberts thought that mailing should be required for all forms of alternative service and that the committee attempted to address that. He stated that he hoped that it was resolved to Judge Roberts' satisfaction. Judge Roberts stated that she believed that it was.

Ms. Payne stated that she had one concern regarding ascertaining the address for mailing. In subsection D(6)(A) of the proposed amendment, it reads:

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.

Ms. Payne wondered whether it should read, "does know and can ascertain" because it then seems to repeat itself in stating, "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." Judge Wolf explained that the attempt was to clarify that, if a plaintiff does not know a current address, he or she must mail to the last known address but, if a plaintiff does not know any address for the defendant, then no mailing is required. Ms. Payne stated that this clarification makes sense to her.

Judge Peterson stated that the past minutes contain a pretty thorough recitation of all of the issues that the committee and Council had discussed. Judge Peterson noted that Judge Leith stated that he would not be able to attend this meeting, but Judge Peterson wanted to raise Judge Leith's ongoing concern about the micromanagement of electronic alternative service. Judge Leith's concerns

included whether, if a plaintiff does not get one aspect of the specific requirements of electronic alternative service exactly correct, would that defeat service? Judge Peterson stated that his own position is that, if it is a minor defect that does not affect a substantial right of a party, Rule 7 G will take care of it in the same way as for any other minor error in service. He reminded the Council that the initial suggestion came from a member of the bar to “do something about electronic service” and he believes that what the Council has crafted is more sweeping than anything the committee found anywhere else in the country.

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

Judge Wolf made a motion to publish the suggested amendment to Rule 7. Mr. Bundy seconded the motion, which was approved unanimously without abstention.

2. ORCP 15

Mr. Bundy explained that, after going through the issues that were raised about the language in section D, the committee decided it was not going to address section D. He stated that there are other changes in section A that the Council ultimately agreed would clear up some of the language with respect to the third-party complaint issue and other motion issues (Appendix C). Judge Peterson reminded the Council that the original suggestion for improvement to Rule 15 came from the Oregon State Bar's Procedure and Practice Committee. He pointed out that the current rule seems to tie the time in which to respond to pleadings to service of the summons; however, some pleadings are not served with a summons. He stated that the last sentence of section A, that is hard to understand, is a vestige of when the former language afforded only 10 days to respond to some pleadings, e.g., a counterclaim. The last sentence would appear to now apply only to replies in response to affirmative defenses that, when appropriate, are still required within 10 days. The amendment is an attempt to make the rule more uniform and avoid any traps. With the suggested revision, for any pleading entitled to a response, the responder gets 30 days.

Justice Nakamoto noted that the changes to language in section A require that the defendant appear within 30 days of the date of first publication. She wondered what would happen if a defendant finds out at some point after the last publication – has his or her time to respond already run? Judge Peterson stated that section A is consistent with Rule 7 in that the 30 days start on the first publication date [and that deadline is specified in the published summons]. Judge Wolf noted that a defendant would have a little time left in which to file a

response if that defendant received notice via the final publication, although it would be considerably limited. Mr. Beattie agreed that this has been the rule historically. Justice Nakamoto thanked them for the explanation.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 15

Ms. Payne made a motion to publish the suggested amendment to Rule 15. Mr. Beattie seconded the motion, which was approved unanimously without abstention.

3. ORCP 16

Mr. Crowley reminded the Council that the committee had put a lot of work into the concept of how to use pseudonyms in pleadings and how the Council should address that issue in the rules. He stated that the proposed amendment to Rule 16 (Appendix D), with the addition of one new section, was the result. Mr. Crowley pointed out that the Council had engaged in a lot of discussion about the proposed amendment at the June Council meeting. He guessed that the proposed amendment would probably get a lot of attention if it is published and that the Council can see what concerns the bench and bar may have. He proposed publishing the draft amendment.

Ms. Payne stated that she did not understand why the term “legal name” was removed from the prior draft of the amendment. Ms. Holley explained that there may be cases where a defendant is only known by a nickname but that his or her actual first name is different. She stated that the goal was to not have the entire pleading be wrong because the plaintiff was not aware of the correct legal name. Ms. Payne noted that a plaintiff would normally have to substitute for the correct legal name at some point. Judge Peterson stated that there was some discussion about whether the phrases “true name” and “legal name” could cause some mischief in that someone could challenge a pleading because “Bob” got sued as “Bob” as opposed to “Robert.” He stated that, by just using the word “name,” the rule is not loaded with any baggage. Ms. Holley explained that the plaintiff will seek to file under a pseudonym and, if the plaintiff misidentifies the defendant in the caption, he or she does not totally fall victim to the statute of limitations.

Mr. Bundy asked whether a plaintiff would file the motion to request filing under a pseudonym before filing the pleading, or file the motion and pleading simultaneously. Judge Conover stated that the consensus seems to be that there will be all kinds of issues and ramifications coming from this, but that the Council needs to get something started and will deal with any problems as they come

along. He pointed out that this is a serious issue that should not be put off because there are no current rules to deal with it. In Lane County, for instance, if an attorney files a case using a pseudonym it would not be seen by any judge until the day of trial. He stated that cases that are filed under a pseudonym usually involve issues of a very personal nature and are probably worth a lot of money, and judges are being faced on the morning of trial, with a jury panel seated, with the decision of whether to proceed or dismiss the case. Judge Hill agreed that this is an issue of concern that currently exists. Judge Roberts noted that an earlier time in the case where problems could well arise is under the statute of limitations. If there is a plaintiff who files under a pseudonym and the truly named defendant subsequently raises the question of the statute of limitations, does the complaint relate back if there was no permission to file under a pseudonym? She pointed out that, if people intend to ignore the rule, they take their chances.

Judge Peterson stated that, under *Worthington v. Estate of Milton E. Davis*, 250 Or App 755, 282 P3d 895 (2012), where there is a misnomer, but where the adverse party knows he or she has been sued, the case can probably be amended and would relate back if it is later determined that it was not appropriate to proceed using the pseudonym. He noted that ours is an adversarial system and that, frequently, unless it is a default, the case would be subject to motion practice or a responsive pleading.

Judge Conover stated that raising the issue of using a pseudonym early in the case is not currently happening in Lane County because there have been only a handful of cases filed under pseudonyms. He explained that he is only aware of one case where a Lane County judge raised the issue, and that case was eventually dismissed. There was one case where a defense attorney raised the issue himself or herself, but it was never litigated before the case settled. Judge Conover stated that most Lane County judges have taken the position that the court is not able to make that call unless the defense raises the issue so, to that extent, it does not happen. He stated that cases have proceeded with fictitious names in Lane County but, with this change, there would be a rule that specifically says what needs to happen, so the judge would be put into the position of making that call. He stated that he could envision some possibly significant issues coming up, particularly in the context of a very serious and significant complaint being filed.

Mr. Keating noted that the whole discussion regarding filing a case under a pseudonym developed as a result of concern that there is currently no provision in the Oregon rules to do so and a suggestion that the open court provision of Oregon's Constitution makes it inappropriate. Mr. Crowley stated that he is not certain that the proposed amendment answers all of these questions, but it is a start. He noted that a lot will have to be worked out through case history and that

local rules may need to be adopted. He suggested that perhaps the Uniform Trial Court Rules might need to be amended to come up with a way of addressing the issue. He also suggested that the Council may receive a lot of feedback and accordingly walk back the amendment, but he personally believes that it is a fairly simple statement that puts the issue clearly out there, which is the goal.

Judge Peterson again raised the issue of when the motion should be filed. Ms. Holley responded that the committee did not want to put a time period on it and that the amendment allows the motion to be filed at any time. However, she stated that, ideally, a plaintiff would appear *ex parte* before a judge before filing the case. She observed that there is not much point to obtaining a pseudonym if the party's real name has already been made public. She stated that it may be problematic if a party runs up against the statute of limitations in a county where there is no time scheduled for *ex parte* motions, but she anticipates that each court will have to set a procedure. She stated that another option is filing the motion with the complaint and, if the judge denies the motion, everything subsequently filed must be filed with the party's real name.

Ms. Payne observed that, every once in a while, there is a rule change that should be accompanied by education of the bar. She suggested that perhaps the Council should write an article if this amendment is eventually promulgated. Judge Peterson observed that he writes a summary of the changes to the ORCP for the Bar's Legislative Highlights publication each biennium. Ms. Payne stated that, depending on any feedback the Council receives, if the amendment is promulgated, the Council should pay particular attention to the education aspect.

Judge Hill pointed out that the ethical rules require that, before a lawyer has an *ex parte* contact, he or she must have express authority in a rule to do so. Because of this, he expressed concern that this amendment might be substantive. Judge Peterson noted that the procedure in Multnomah County is that the opposing party must be contacted before a party has *ex parte* contact with a judge. Judge Hill stated that, since the *ex parte* contact would occur before the case was filed, there would be no opposing party to contact. Ms. Payne stated that it would be similar to the procedure for appointing a guardian ad litem. Judge Hill noted that, in that context, there is a local rule that authorizes that *ex parte* contact under some circumstances. Judge Peterson stated that there must be an opposing party if you are suing someone. Judge Wolf stated that the opposing party may not have counsel yet, but they do exist. Mr. Beattie stated that, as a practical matter, pre-suit procedures are difficult in terms of getting notice on the other party and, in Multnomah County, it is now an *ex parte* matter. Judge Hill replied that, in that case, a lawyer would be all right ethically because there is a rule that authorizes the *ex parte* contact. However, it may be an ethical trap without specifically saying

that the motion can be done ex parte. Ms. Holley stated that her thought has always been that the motion would be filed simultaneously with the complaint and, if the motion was denied, all of the documents would then carry the real name. She stated that, if a county wanted parties to present the motion at ex parte, that county could write a local rule requiring it. Judge Hill agreed that this would solve the problem.

Judge Conover stated that there are a lot of significant issues, so he assumes that the intent of the Council with moving forward is to let each county and judge decide how it will be carried out. He noted that this will create a lot of problems with inconsistency between judges and counties. He observed that there has been a whole movement within the Oregon Judicial Department (OJD) to make things more uniform statewide, and this change may run afoul of that. Judge Roberts pointed out that this is the current situation.

Mr. Beattie asked whether it would be possible to use some sort of permission procedure that is already in place, such as a procedure for waiving a fee, without using the terms “seeking permission of the court” or “motion”? Judge Wolf stated that, with regard to a waiver of fee, there is a procedure that authorizes the ex parte procedure, which fits with Judge Hill's point. He noted that, in the 7th district, there is not a procedure and that district would need to come up with something if the amendment goes into effect. Judge Hill noted that Mr. Beattie's suggestion is just a motion by another name. Mr. Beattie wondered whether there may be a subtle way of putting it so it does not engage so much machinery. Ms. Holley stated that we do not want to have a procedure that is so informal that the other side does not have an opportunity to respond. Mr. Bundy stated that it would be something along the lines of a preliminary order to grant the ability to file subject to later objection by the defendant. Judge Roberts observed that the discussion was veering into the local rule level and that these changes are not within the Council's purview.

- a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 16

Ms. Payne made a motion to publish the suggested amendment to Rule 16. Ms. Holley seconded the motion, which was approved unanimously without abstention.

4. ORCP 22

Mr. Beattie explained that the proposed changes to Rule 22 (Appendix E) are primarily technical, with one procedural change in subsection C(1) that would eliminate the current requirement that, in order to add a third-party defendant more than 90 days after service on the defendant (who would be the third-party plaintiff), permission from every party that had appeared in the case as well as leave of court is required. He stated that permission of other parties has been eliminated and, like all other rules, only leave of court is required. He also explained that there is a change in subsection B(3), which is a technical change to make it more clear that a party must serve a cross-claim on a defendant who may or may not have appeared at that point. He stated that it differentiates the cross-claim defendant from other parties that may have appeared.

- a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 22

Ms. Gates made a motion to publish the suggested amendment to Rule 22. Judge Roberts seconded the motion, which was approved unanimously without abstention.

5. ORCP 43 - Legislature Recommendation

Judge Peterson reminded the Council that this draft amendment (Appendix F) was suggested by Legislative Counsel because the current version of the rule does not read very well. He stated that staff simplified the rule so that it now reads better. Section A is broken into subsections A(1) and A(2) with no intent to change any meaning. Staff also changed some instances of the word "shall" to "must" or "may" as appropriate.

- a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 43

Judge Roberts made a motion to publish the suggested amendment to Rule 43. Judge Wolf seconded the motion, which was approved unanimously without abstention.

6. ORCP 55

Ms. Nilsson explained that the draft amendment before the Council (Appendix G) includes multiple colors of highlighting that indicate as follows:

- yellow: Legislative Counsel suggestions - Judge Gerking and Judge Norby agree with these changes
- green: Judge Norby's and Judge Gerking's suggestions
- blue: Questions for the Council
- orange: Staff suggestions for discussion.

Ms. Nilsson suggested that she review each portion of the rule that required the discussion of the Council.

Page 11, line 18

A(1)(a)(i) originate in the court where the action is pending,
except as provided in Rule 38 C;

Judge Peterson explained that the reference to Rule 38 C was added to clarify that foreign depositions would not be in the court where the action is pending. The Council's consensus was to keep the reference.

Page 12, line 1

The reference "as described in Rule 43" was suggested by Legislative Counsel. Judge Gerking and Judge Norby disagree with the addition. Judge Norby's position is that electronically stored information is not exclusively described in Rule 43. Ms. Payne stated that it is defined in Rule 43 but that it is also used in other rules. Judge Wolf explained that Judge Gerking also had a concern that it might imply some need to comply with sections of Rule 43 that he did not think were appropriate. The Council's consensus was to remove the reference.

Page 12, line 15

There were questions about whether the two occurrences of the word "has" accurately describe the time frame of the procedure that has to be followed. The Council agreed that they are in the correct tense.

Judge Hill asked whether the rule currently requires as a basis for validity of the subpoena for a deposition that a notice of deposition be given. In other words, does the failure to give a notice of subpoena invalidate the subpoena? Several

Council members stated that they read the rule that way. Judge Roberts noted that this is a condition of the clerk issuing a subpoena. Judge Peterson stated that this would typically be for a self-represented litigant. Judge Hill agreed that, if this is a direction to the clerk, it makes sense. Justice Nakamoto suggested adding the words “by the clerk” on line 14 to make it very clear that this sentence applies only to subpoenas issued by the clerk, since there was confusion even among Council members. The sentence would read:

Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

Judge Hill made a motion to amend the sentence as proposed by Justice Nakamoto. Judge Wolf seconded the motion, which was passed unanimously by voice vote.

Page 13, line 4

An internal reference to Rule 7 F(2)(a) was suggested. Judge Peterson stated that he is not a huge fan of internal references, but he pointed out that the subpoena rule is often used by self-represented litigants and it may be useful to help direct them to the proper requirements for service. Mr. Keating asked whether Judge Gerking and Judge Norby agreed with this addition. Ms. Nilsson stated that they do, but that staff wanted to run it by the Council as well. Mr. Beattie noted that the overall language is cumbersome. Judge Wolf observed that it is dealing with the proof of service, not the actual service. He agreed that the language is awkward, but it is accurate.

The Council’s consensus was to leave the internal reference in.

Page 13, line 10

Ms. Nilsson explained that the language in the existing rule, “unless sooner discharged” seemed ambiguous. Judge Roberts expressed concern that the proposed language “unless the court or party who served the subpoena discharges the witness sooner” implies that the party that subpoenaed the witness can discharge the witness at any time, i.e., after they have asked their questions.

Judge Hill pointed out that a lawyer should not need court approval to discharge a witness who he or she has subpoenaed but later decides is not needed to testify. Ms. Payne asked whether this section is not intended to cover deposition subpoenas because subsection 6(C) addresses deposition subpoenas. Judge Hill stated that it covers both. Ms. Nilsson stated that the language of the current rule also covers both. Judge Wolf noted that, theoretically, under the current rule a lawyer can also dismiss a witness at any time.

Judge Hill suggested changing the language back to the existing language, despite its ambiguity, because it can be dealt with the same way any other dispute about a deposition can be dealt with. Mr. Keating made a motion to change the sentence to read:

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 the witness is sooner discharged.

Judge Roberts seconded the motion, which was passed unanimously by voice vote.

Page 14, line 9

This is a question for the Council on a preferred lead line. The lead line from the prior version of the amendment was, "Written objection." Judge Norby initially suggested, "Timing," and also suggested, "Timeline" in a later e-mail to Ms. Nilsson. Staff suggested the combination of, "Written objection; timing."

Mr. Keating made a motion to use, "Written objection; timing." Judge Roberts seconded the motion, which was passed unanimously by voice vote.

Page 18, line 10

The suggestion was made to add the language "who are not in default" to modify "parties to the action." Judge Peterson stated that this was a staff suggestion because it is current practice and the existing language does not reflect it. Ms. Gates asked whether Judge Gerking and Judge Norby agree with the change. Ms. Nilsson stated that they do. Judge Wolf agreed that it accurately reflects practice. The consensus of the Council was to keep the suggested language.

Ms. Nilsson explained that there is an overarching question in section D that starts on page 18. The issue is the term "confidential health information." She stated

that Legislative Counsel had suggested the term “confidential health information records,” which staff felt was too long. Staff shortened it to “confidential health information” and also eliminated the use of the word “records” throughout the section because the word “records” seemed too nebulous. Judge Norby then expressed concern that repeating the term “confidential health information” throughout the section was onerous, so staff abbreviated it to “CHI” throughout the section, similar to “ESI” in Rule 43.

Mr. Bundy stated that the term personal health information (PHI) is used in healthcare settings as well as in the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and expressed concern that CHI is different from PHI. Mr. Keating and Mr. Beattie explained that it can be. Mr. Bundy stated that, as a health law lawyer, it is confusing to him. Mr. Beattie pointed out that the problem with this rule is trying to incorporate all of HIPAA into it. Judge Wolf noted that CHI in subsection D(1) includes both individually identifiable health information and protected health information, so CHI is really a third category that includes both.

Judge Roberts stated that she could see Legislative Counsel’s point, because Information and records are two different things. Information is something that people know and a record is a document or thing. A party cannot subpoena information; rather, the party must subpoena things that embody or record a thing. Judge Hill asked whether there is a distinction between a medical record and something that does not fall within the technical definition of a medical record, because he has concerns about inadvertently excluding something by using the term “record.”

Ms. Payne asked whether this would also apply to depositions or testimony that reveals CHI. Mr. Beattie stated that it would not unless one can put a deposition in an envelope. Judge Wolf stated that there is a section that deals with records that are introduced at a deposition. Judge Roberts stated that she would have thought the intention was to deal with documents or things. Judge Hill asked whether those with greater expertise in health care litigation know whether the term “records” is a term of art that may be narrower than information that we want to treat with sensitivity. Mr. Keating stated that Judge Hill’s premise is correct but, ever since HIPAA was adopted, it uses the phrase “the record” as the official record and various institutions define that differently. He stated that, if the Council undertakes to address and solve that problem here, it will never get done. What constitutes the official record is treated differently by people who go to different seminars on what constitutes the official record.

Judge Hill explained that his fear is that, by using the term “records,” the Council will be inserting itself into the middle of that controversy. Are we going to use the term record, which does create mischief as opposed to saying just information, where it is obvious there is some kind of document element to it. Mr. Keating stated that, if it is not a document or recording of some sort, what is it? Mr. Keating further questioned whether a record can be defined that broadly. Judge Hill stated that he does not see how adding the word “record” to “confidential health information” adds anything. He suggested that it creates a potential loop where a party gets to argue that they are subpoenaing something other than the official record as defined for HIPAA so that the party does not have to comply with Rule 55. He opined that the intent is just to say that, if it is this type of information sought, a party must go through this door to get it.

For further clarification, Judge Roberts suggested inserting the words, “documents containing” after the word “means” on page 18, line 21, to read:

For purposes of this section, CHI means **documents containing** information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

Judge Hill stated that the rule is already talking about subpoenas for physical things, so he did not know that inserting those words adds anything. Judge Roberts expressed concern that using the word “information” implies that you can subpoena knowledge. Judge Hill opined that adding the word “documents” would narrow the scope and exclude things that people can argue are not documents. Ms. Nilsson suggested solving the problem by paralleling the language in the lead line for section C, “ Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule.” She proposed that the new lead line for section D would read, “Subpoenas for documents and things containing confidential health information (“CHI”).”

Mr. Beattie made a motion to make this lead line change. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

Page 18, line 22

There is a question as to how to list the entities from which CHI may be collected. Judge Norby had a more narrow definition. Legislative Counsel suggested a more comprehensive list than the committee originally used. Staff then went to ORS

192.556(8), ORS 192.556(11), and HIPAA and pulled out all possible iterations of entities from which these records could be collected. Judge Peterson asked those who do a lot of healthcare practice whether anything seems to be missing. Ms. Payne stated that her concern is what happens if the statute changes, and she wondered if there a way to refer to these entities without individually listing them. She stated that HIPAA uses the particular statutory language, "covered entity." Ms. Nilsson explained that the term "covered entity" is used in the draft amendment and that a list of covered entities is also included. Ms. Payne suggested simply using the term "covered entity as defined in these statutes."

Mr. Beattie advised the Council to be careful in making any ad hoc changes without a careful analysis of HIPAA and stated that his objection to the rule all along has been trying to conform it to HIPAA. He stated that, prior to the mid-1980s, a party subpoenaed hospital records just like any other document, which was an easy way for defendants to get medical records, which was objectionable to plaintiffs' counsel. Then we trended to a rule that had a specific subsection that was headed hospital records and that used the same subpoena process but required the records to be produced at the time of trial or deposition, which essentially gave plaintiffs' counsel the first opportunity to look at the records and review them for privilege. That seemed to be a workable approach. Then, in the early 1990s, the Council tried to conform the rule to HIPAA, which he believes was a mistake because we end up trying to keep our rule compliant with state and federal law that is complicated and beyond the scope of most Council members. Mr. Beattie suggested that returning every cycle and trying to keep this rule in compliance is impossible. He did not think the Council should make any changes to the recommendations without either a serious review of what the federal and state laws are or without a more global discussion about whether the Council wishes to continue doing this.

Ms. Payne stated that she is simply suggesting changing to "covered entity," a phrase that is defined in the statutes. It would be easier to keep up because, if the statute changes to add more covered entities, they are still covered in the rule. She stated that she is not trying to make a substantive change here. Judge Peterson suggested changing the language to "covered entities, including" so that the language would not need to be changed every time the statute added a covered entity.

Judge Hill stated that he is not experienced in this area of law and he objects to referencing the covered entity because he does not want to know what that might mean. He would prefer to be given a list so that he and the opposing party can fight over that list. He agreed that Mr. Beattie makes a good point about whether we should or not, but he prefers that the rule be specific so that he doe not have

to search all through the law library to figure out how to serve a subpoena. Judge Wolf agreed, because a covered entity could be defined under HIPAA or Oregon state law. Mr. Keating stated that a subpoena is usually served on medical records clerks, who do not have to do legal research about covered entities.

The Council's consensus was to leave the language as it is in the draft rule.

Page 19 line 12

Judge Peterson noted that the language in the current rule is "issuing a subpoena." and the suggestion is to change to "serving a subpoena." He noted that attorneys issue subpoenas and self-represented litigants do not, but that the operative function in this instance is service.

Judge Hill asked why there is a distinction between "attorney or party" and suggested simply using the language "party." Ms. Nilsson explained that the current language is "attorney for the party issuing the subpoena." Judge Wolf noted that there is a reference later in the rule to just "party," so perhaps this reference should be changed as well. Ms. Gates made a motion to make this change. Judge Wolf seconded the motion, which was passed unanimously by voice vote.

Staff wondered whether the language "other record keeper," which exists in the current rule, is different from "custodian of records" and whether the language should be kept. Mr. Bundy stated that many clinics do not have a designated custodian of records. Judge Hill suggested keeping the language in to avoid semantic arguments over the definition of 'custodian of records.' The Council agreed.

Page 19, line 18

Staff wanted the Council's opinion on which lead line it prefers: "Sufficient context," or, "Sufficient information." Judge Roberts preferred the latter. Mr. Bundy pointed out that the rule requires more than sufficient information because it says that the written notice must include the subpoena and sufficient information, so "information" is not 100% accurate as to what the sentence requires. Mr. Crowley suggested, "Sufficiency." Ms. Gates made a motion for that change. Mr. Bundy seconded the motion, which was passed unanimously by voice vote.

Page 23, line 4

Staff did not know what the language, "or other charge," which is in the existing rule, meant and wanted the Council's input on whether it should remain. Judge Hill suggested that it might mean copy charges. Judge Peterson stated that Judge Norby had also suggested that. Mr. Bundy wondered if it might be a per page charge allowed by statute. Mr. Keating suggested leaving the language there and exploring it at another time.

Judge Wolf pointed out that the existing rule uses the language "payment of more than one witness fee" and the draft amendment says, "the legal witness fee," which could potentially be more than one fee. Judge Hill stated that he is confused by the way it is phrased. He was unsure about whether he can charge an "other charge." He pointed out that the "other charge" completely obliterates the limitation on the witness fee. He stated that this can be important because of the fees charged by parties producing records, which is a question that courts could hear on objection. He noted that he was not sure that the Council wanted to put itself in a position where it is telling a party serving a subpoena that they only need to give a witness fee and mileage, because the subpoenaed party may want to ask the court for additional compensation for their expenses and we do not want to cut the court off from allowing that. He suggested the language, "for one day or other charge as allowed by law."

Mr. Beattie noted that this is sort of a negative provision. Judge Wolf noted that he is not certain what the change to "legal witness fee" was intended to address and again expressed concern that it may open up the possibility of multiple witness fees. Judge Peterson noted that there may be several custodians of records. Judge Wolf stated that he liked Judge Hill's suggestion.

Mr. Keating suggested the language, "more than one witness fee and mileage for one day or other charge as allowed by law."

Mr. Bundy pointed out that this is just a condition on the service of the subpoena. He stated that a party can argue later that they need more fees. He noted that he sends subpoenas to medical providers all of the time and does not come up with the money up front because he does not know how many pages will be produced. Judge Peterson observed that, if there is a dispute, it is a matter for the parties to talk about and bring to the court. As a door opener, there is just the one fee and, if the other side complains and the parties cannot reach agreement, someone will be filing a motion. Judge Hill stated that, if that is where we want to go, we can strike the "or other charge" language.

Mr. Bundy made a motion to amend using the language, "Nothing in this section requires the tender or payment of more than one witness fee and mileage for one

day unless there has been agreement to the contrary.” Judge Wolf seconded the motion, which was passed by unanimous voice vote.

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

Judge Wolf made a motion to publish the suggested amendment to Rule 55, as amended by the Council. Judge Roberts seconded the motion, which was approved unanimously without abstention. Ms. Nilsson stated that she will include a copy of an updated cross-reference chart with the published amendment so that the bench and bar will be able to easily match sections of the current rule with the amendment.

7. Other Draft Amendments Contingent on Whether Draft Amendment of Rule 55 is Published

- a. ORCP 38

Judge Peterson explained that the proposed amendment to Rule 38 (Appendix H) is necessary because of the Council’s publication of the draft amendment of Rule 55. There is a change of a reference from Rule 55 A to Rule 55 A(1). There are also a few changes to clean up the rule for Council conventions since it was written over decades by different people.

- b. ORCP 44

Judge Peterson explained that the proposed amendment to Rule 44 (Appendix I) is necessary because of the Council’s publication of the draft amendment of Rule 55. In section E, references to Rule 55 H are now references to Rule 55 D. The phrase "confidential health information" is also used to be consistent with the language in the proposed amendment to Rule 55.

- c. ORCP 65

Judge Peterson explained that the proposed amendment to Rule 65 (Appendix J) is necessary because of the Council’s publication of the draft amendment of Rule 55. A reference to Rule 55 G is now a reference to Rule 55 A(6)(d).

(1) ACTION ITEM: Vote on Whether to Publish Draft Amendments of ORCP 38, 44, and 65

Judge Wolf made a motion to publish the suggested amendments to Rules 38, 44, and 65. Mr. Crowley seconded the motion, which was approved unanimously without abstention.

IV. New Business

A. Reviser's Bill Modifying Rule 69 C(1)(e)

Judge Peterson explained that the Legislature had made changes to Rule 69 relating to the Servicemembers Civil Relief Act through a Reviser's Bill (Appendix K) to reflect a changed citation and term used in the United States Code.

B. Rule 7

Judge Peterson reminded the Council that he had sent them a suggestion regarding Rule 7 (Appendix L) over the summer but had not received any comment. He noted that someone from the United States Marshals' Office is reading the Council's work and proposed that Rule 7 should allow service alternatives to the U.S. Postal Service. Judge Peterson pointed out that the statute (ORS 19.260) has changed to allow other forms of delivery for notices of appeal. However, it is a can of worms, since not all couriers are created equal: some are less reliable than others and some do not serve everywhere. He stated that the item can be placed on the agenda for next biennium for consideration by the new Council.

C. Deposition Costs by Agreement

Judge Peterson stated that Judge Leith had also raised an issue about whether deposition costs can be obtained by agreement (Appendix M). He suggested placing this issue on the agenda for next biennium.

D. Rule 57 G

Judge Peterson explained that a clerk to Judge Marilyn Litzenberger had raised an issue regarding jurors. The question was whether, under Rule 57 G(3), the same jurors who vote on multiple issues must concur on each vote necessary to a verdict (the "same nine rule"). He stated that he did not know the answer and wondered whether it is an issue for next biennium.

Mr. Beattie stated that it is an issue that the Supreme Court has been addressing recently. Judge Roberts stated that it is a substantive, constitutional issue that is not within the Council's purview. Judge Peterson asked whether it does have to be the same jurors. Judge Roberts stated that it depends on the specific issue. She noted that there has been some case law on variations on special damages versus general damages. There must be nine who agree on whether a party is at fault and that nine may agree on general damages, but a different configuration can agree on medical expenses. The Supreme Court has said that is acceptable but, on the other hand, if there are nine different jurors who concur on damages as a whole who are not the same nine who concurred on liability, that is not acceptable. She stated that it is a difficult issue.

E. Information Regarding Publication

Judge Peterson summarized the next steps for the Council. Each rule that has been approved for publication will be published on the Council's website as well as in the Advance Sheets. The Council will ask the Bar to again assist with an e-mail to all Oregon lawyers. He stated that Council staff will send Council members the changes made today to Rule 55 before the rule gets published.

The Council will meet on December 8, 2018, to consider any comments from the bench and bar. Mr. Beattie added that the Council will also vote on whether to promulgate the published rules on that day. Judge Peterson pointed out that votes to promulgate a rule require a super majority (15 votes) to pass and, if a Council member is not present or on the telephone, that is effectively a "no" vote.

Judge Peterson explained that any promulgated rule will be transmitted to the Legislature at the beginning of the legislative session. If the Legislature follows its typical practice, it will hold no hearings regarding the promulgations and take no action. If that is the case, the Council's promulgated rules become effective on January 1, 2020.

Ms. Payne asked when the public comment period begins and ends. Judge Peterson stated that the comment period will begin as soon as the draft amendments are released to the public, and we usually ask that people send their comments no later than a week before the promulgation meeting. He asked whether the Council would like staff to communicate comments as they are received or in the aggregate, once a week. The Council preferred weekly communications.

Judge Peterson noted that the Council is able to make minor changes based on comments at the December meeting, but no wholesale changes. If any minor changes are made, the Council would publish those changes again. He explained that the Council must also elect a Legislative Advisory Committee in December in case the Legislature has any questions about the promulgations or in case any other questions relating to civil procedure arise

during the legislative session. The Legislative Advisory Committee typically consists of the chair, the vice chair, and one or two judges.

V. Adjournment

Mr. Keating adjourned the meeting at 11:29 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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 C) 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 B) 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 C). It is a slight adjustment of the committee's proposed new section B from the last Council meeting, 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, 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 Attachment 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 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 as guidance 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

1 **SUMMONS**

2 **RULE 7**

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

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

11 **C Contents, time for response, and required notices**

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

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

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

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

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

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

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

6 NOTICE TO DEFENDANT:

7 READ THESE PAPERS

8 CAREFULLY!

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

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

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

23 NOTICE TO DEFENDANT:

24 READ THESE PAPERS

25 CAREFULLY!

26 You must "appear" to protect your rights in this matter. To "appear" you must file with

1 the court a legal document called a "motion," a "reply" to a counterclaim, or an "answer" to a
2 cross-claim. The "motion," "reply," or "answer" must be given to the court clerk or
3 administrator within 30 days along with the required filing fee. It must be in proper form and
4 have proof of service on the defendant's attorney or, if the defendant does not have an
5 attorney, proof of service on the defendant.

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

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

15 NOTICE TO DEFENDANT:

16 READ THESE PAPERS

17 CAREFULLY!

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

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

26 If you have questions, you should see an attorney immediately. If you need help in finding

1 an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at
2 www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or
3 toll-free elsewhere in Oregon at (800) 452-7636.

4
5 **D Manner of service.**

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

18 **D(2) Service methods.**

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

21 **D(2)(b) Substituted service.** Substituted service may be made by delivering true copies of
22 the summons and the complaint at the dwelling house or usual place of abode of the person to
23 be served to any person 14 years of age or older residing in the dwelling house or usual place of
24 abode of the person to be served. Where substituted service is used, the plaintiff, as soon as
25 reasonably possible, shall cause to be mailed by first class mail true copies of the summons and
26 the complaint to the defendant at defendant's dwelling house or usual place of abode, together

1 with a statement of the date, time, and place at which substituted service was made. For the
2 purpose of computing any period of time prescribed or allowed by these rules or by statute,
3 substituted service shall be complete upon the mailing.

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

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

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

22 D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided
23 by these rules or by statute, service by mail, except as otherwise provided, shall be complete on
24 the day the defendant, or other person authorized by appointment or law, signs a receipt for
25 the mailing, or [three] 3 days after the mailing if mailed to an address within the state, or
26 [seven] 7 days after the mailing if mailed to an address outside the state, whichever first occurs.

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

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

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

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

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

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

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

1 D(3)(a)(iv)(B) the plaintiff, as soon as reasonably possible after delivery, causes true
2 copies of the summons and the complaint to be mailed by first class mail to the defendant at
3 the address at which the mail agent receives mail for the defendant and to any other mailing
4 address of the defendant then known to the plaintiff, together with a statement of the date,
5 time, and place at which the plaintiff delivered the copies of the summons and the complaint.

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

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

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

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

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

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

22 D(3)(b)(ii)(B) by personal service on any clerk or agent of the corporation who may be
23 found in the county where the action is filed;

24 D(3)(b)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true
25 copies of the summons and the complaint to: the office of the registered agent or to the last
26 registered office of the corporation, if any, as shown by the records on file in the office of the

1 Secretary of State; or, if the corporation is not authorized to transact business in this state at
2 the time of the transaction, event, or occurrence upon which the action is based occurred, to
3 the principal office or place of business of the corporation; and, in any case, to any address the
4 use of which the plaintiff knows or has reason to believe is most likely to result in actual notice;
5 or

6 D(3)(b)(ii)(D) upon the Secretary of State in the manner provided in ORS 60.121 or
7 60.731.

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

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

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

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

18 D(3)(c)(ii)(B) by personal service on any clerk or agent of the limited liability company
19 who may be found in the county where the action is filed;

20 D(3)(c)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true
21 copies of the summons and the complaint to: the office of the registered agent or to the last
22 registered office of the limited liability company, as shown by the records on file in the office of
23 the Secretary of State; or, if the limited liability company is not authorized to transact business
24 in this state at the time of the transaction, event, or occurrence upon which the action is based
25 occurred, to the principal office or place of business of the limited liability company; and, in any
26 case, to any address the use of which the plaintiff knows or has reason to believe is most likely

1 to result in actual notice; or

2 D(3)(c)(ii)(D) upon the Secretary of State in the manner provided in ORS 63.121.

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

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

7 D(3)(d)(ii) **Alternatives.** If a registered agent or a general partner of a limited partnership
8 cannot be found in the county where the action is filed, true copies of the summons and the
9 complaint may be served:

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

12 D(3)(d)(ii)(B) by personal service on any clerk or agent of the limited partnership who
13 may be found in the county where the action is filed;

14 D(3)(d)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true
15 copies of the summons and the complaint to: the office of the registered agent or to the last
16 registered office of the limited partnership, as shown by the records on file in the office of the
17 Secretary of State; or, if the limited partnership is not authorized to transact business in this
18 state at the time of the transaction, event, or occurrence upon which the action is based
19 occurred, to the principal office or place of business of the limited partnership; and, in any case,
20 to any address the use of which the plaintiff knows or has reason to believe is most likely to
21 result in actual notice; or

22 D(3)(d)(ii)(D) upon the Secretary of State in the manner provided in ORS 70.040 or
23 70.045.

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

1 liability partnership.

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

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

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

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

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

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

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

1 accordance with paragraph D(2)(d) of this rule addressed to that defendant at:

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

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

6 D(4)(a)(i)(C) any other address of that defendant known to the plaintiff at the time of
7 making the mailings required by parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule that reasonably
8 might result in actual notice to that defendant. **Sufficient service pursuant to this**

9 **subparagraph may be shown if the proof of service includes a true copy of the envelope in**
10 **which each of the certified, registered, or express mailings required by parts D(4)(a)(i)(A),**
11 **D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as**
12 **undeliverable or that the defendant did not sign the receipt. For the purpose of computing**
13 **any period of time prescribed or allowed by these rules or by statute, service under this**
14 **subparagraph shall be complete on the latest date on which any of the mailings required by**
15 **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**
16 **by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not know of any address**
17 **other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of**
18 **service shall so certify.**

19 *[Sufficient service pursuant to this subparagraph may be shown if the proof of service*
20 *includes a true copy of the envelope in which each of the certified, registered, or express*
21 *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*
22 *showing that it was returned to sender as undeliverable or that the defendant did not sign the*
23 *receipt. For the purpose of computing any period of time prescribed or allowed by these rules or*
24 *by statute, service under this subparagraph shall be complete on the latest date on which any of*
25 *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*
26 *the mailing required by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not*

1 | *know of any address other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this*
2 | *rule, the proof of service shall so certify.]*

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

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

8 | D(4)(b) **Notification of change of address.** Any person who; while operating a motor
9 | vehicle upon the roads, highways, streets, or premises open to the public as defined by law of
10 | this state; is involved in any accident, collision, or other event giving rise to liability shall
11 | forthwith notify the Department of Transportation of any change of the person's address
12 | occurring within [*three*] **3** years after the accident, collision, or event.

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

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

20 | D(6)(a) **Court order for service by other method.** *On motion upon a showing by affidavit*
21 | *or declaration that service cannot be made by any method otherwise specified in these rules or*
22 | *other rule or statute, the court, at its discretion, may order service by any method or*
23 | *combination of methods that under the circumstances is most reasonably calculated to apprise*
24 | *the defendant of the existence and pendency of the action, including but not limited to:*
25 | *publication of summons; mailing without publication to a specified post office address of the*
26 | *defendant by first class mail and any of the following: certified, registered, or express mail,*

1 | *return receipt requested; or posting at specified locations. If service is ordered by any manner*
2 | *other than publication, the court may order a time for response.*

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

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

19 | **D(6)(d) Mailing summons and complaint.** *If the court orders service by publication and*
20 | *the plaintiff knows or with reasonable diligence can ascertain the defendant's current address,*
21 | *the plaintiff shall mail true copies of the summons and the complaint to the defendant at that*
22 | *address by first class mail and any of the following: certified, registered, or express mail, return*
23 | *receipt requested. If the plaintiff does not know and cannot ascertain upon diligent inquiry the*
24 | *current address of any defendant, true copies of the summons and the complaint shall be*
25 | *mailed by the methods specified above to the defendant at the defendant's last known address.*
26 | *If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's*

1 *current and last known addresses, a mailing of copies of the summons and the complaint is not*
2 *required.]*

3 **D(6) Court order for service by other method. When it appears that service is not**
4 **possible under any method otherwise specified in these rules or other rule or statute, then a**
5 **motion supported by affidavit or declaration may be filed to request a discretionary court**
6 **order to allow alternative service by any method or combination of methods that, under the**
7 **circumstances, is most reasonably calculated to apprise the defendant of the existence and**
8 **pendency of the action. If the court orders alternative service and the plaintiff knows or with**
9 **reasonable diligence can ascertain the defendant's current address, the plaintiff must mail**
10 **true copies of the summons and the complaint to the defendant at that address by first class**
11 **mail and any of the following: certified, registered, or express mail, return receipt requested.**
12 **If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the current address**
13 **of any defendant, true copies of the summons and the complaint must be mailed by the**
14 **methods specified above to the defendant at the defendant's last known address. If the**
15 **plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's current**
16 **and last known addresses, a mailing of copies of the summons and the complaint is not**
17 **required.**

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

23 **D(6)(a)(i) Alternative service by publication. In addition to the contents of a summons**
24 **as described in section C of this rule, a published summons must also contain a summary**
25 **statement of the object of the complaint and the demand for relief, and the notice required**
26 **in subsection C(3) of this rule must state: "The motion or answer or reply must be given to the**

1 court clerk or administrator within 30 days of the date of first publication specified herein
2 along with the required filing fee." The published summons must also contain the date of the
3 first publication of the summons.

4 D(6)(a)(i)(A) Where published. An order for publication must direct publication to be
5 made in a newspaper of general circulation in the county where the action is commenced or,
6 if there is no such newspaper, then in a newspaper to be designated as most likely to give
7 notice to the person to be served. The summons must be published four times in successive
8 calendar weeks. If the plaintiff knows of a specific location other than the county in which the
9 action is commenced where publication might reasonably result in actual notice to the
10 defendant, the plaintiff must so state in the affidavit or declaration required by paragraph
11 D(6) of this rule, and the court may order publication in a comparable manner at that location
12 in addition to, or in lieu of, publication in the county in which the action is commenced.

13 D(6)(a)(ii) Alternative service by posting. The court may order service by posting true
14 copies of the summons and complaint at a designated location in the courthouse where the
15 action is commenced and at any other location that the affidavit or declaration required by
16 subsection D(6) of this rule indicates that the posting might reasonably result in actual notice
17 to the defendant.

18 D(6)(b) Electronic alternative service. Electronic forms of alternative service may
19 include, but are not limited to: e-mail; text message; facsimile transmission as defined in Rule
20 9 F; or posting to a social media account. The affidavit or declaration filed with a motion for
21 electronic alternative service must include: verification that diligent inquiry revealed that the
22 defendant's residence address, mailing address, and place of employment are unlikely to
23 accomplish service; the reason that plaintiff believes the defendant has recently sent and
24 received transmissions from the specific e-mail address or telephone or facsimile number, or
25 maintains an active social media account on the specific platform the plaintiff asks to use;
26 and facts that indicate the intended recipient is likely to personally receive the electronic

1 transmission. The certificate of service must verify compliance with subparagraph D(6)(b)(i)
2 and subparagraph D(6)(b)(ii) of this rule. An amended certificate of service must be filed if it
3 later becomes evident that the intended recipient did not personally receive the electronic
4 transmission.

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

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

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

1 against those defendants by name.

2 [D(6)(f) *Defending before or after judgment.*] D(6)(d) Defending before or after
3 judgment. A defendant against whom [*publication*] service pursuant to this subsection is
4 ordered or that defendant's representatives, on application and sufficient cause shown, at any
5 time before judgment [*shall*] will be allowed to defend the action. A defendant against whom
6 [*publication*] service pursuant to this subsection is ordered or that defendant's representatives
7 may, upon good cause shown and upon any terms that may be proper, be allowed to defend
8 after judgment and within one year after entry of judgment. If the defense is successful, and
9 the judgment or any part thereof has been collected or otherwise enforced, restitution may be
10 ordered by the court, but the title to property sold upon execution issued on that judgment, to
11 a purchaser in good faith, [*shall not be*] will not be affected thereby.

12 [D(6)(g) *Defendant who cannot be served.*] D(6)(e) Defendant who cannot be served.
13 Within the meaning of this subsection, a defendant cannot be served with summons by any
14 method authorized by subsection D(3) of this rule if[:] service pursuant to subparagraph
15 D(4)(a)(i) of this rule is not [*authorized*] applicable, [*and*] the plaintiff attempted service of
16 summons by all of the methods authorized by subsection D(3) of this rule, and the plaintiff was
17 unable to complete service; or if the plaintiff knew that service by these methods could not be
18 accomplished.

19 **E By whom served; compensation.** A summons may be served by any competent person
20 18 years of age or older who is a resident of the state where service is made or of this state and
21 [*is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or*
22 *employee of, nor attorney for, any party, corporate or otherwise.*] is neither a party to the
23 action, corporate or otherwise, nor any party's officer, director, employee, or attorney,
24 except as provided in ORS 180.260. However, service pursuant to subparagraph D(2)(d)(i), as
25 well as the mailings specified in paragraphs D(2)(b), D(2)(c), and part D(3)(a)(iv)(B) of this rule,
26 may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in

1 | this state who serves a summons shall be prescribed by statute or rule. If any other person
2 | serves the summons, a reasonable fee may be paid for service. This compensation shall be part
3 | of disbursements and shall be recovered as provided in Rule 68.

4 | **F Return; proof of service.**

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

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

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

10 | F(2)(a)(i) **Certificate of service when summons not served by sheriff or deputy.** If the
11 | summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating:
12 | the specific documents that were served; the time, place, and manner of service; that the
13 | server is a competent person 18 years of age or older and a resident of the state of service or
14 | this state and is not a party to nor an officer, director, or employee of, nor attorney for any
15 | party, corporate or otherwise; and that the server knew that the person, firm, or corporation
16 | served is the identical one named in the action. If the defendant is not personally served, the
17 | server shall state in the certificate when, where, and with whom true copies of the summons
18 | and the complaint were left or describe in detail the manner and circumstances of service. If
19 | true copies of the summons and the complaint were mailed, the certificate may be made by the
20 | person completing the mailing or the attorney for any party and shall state the circumstances
21 | of mailing and the return receipt, if any, shall be attached.

22 | F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff
23 | or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating: the specific
24 | documents that were served; the time, place, and manner of service; and, if defendant is not
25 | personally served, when, where, and with whom true copies of the summons and the complaint
26 | were left or describing in detail the manner and circumstances of service. If true copies of the

1 summons and the complaint were mailed, the certificate shall state the circumstances of
2 mailing and the return receipt, if any, shall be attached.

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

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

6 _____

7 Affidavit of Publication

8

9 State of Oregon)
10 County of) ss.

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

17

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

19

20 _____

21 Notary Public for Oregon
22 My commission expires
_____ day of _____, 2____

23

24 _____

25

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

27

28 _____

1 Declaration of Publication

2 State of Oregon)
3 County of) ss.

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

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

13 _____
14 _____
15 ____ day of _____, 2____
16 _____
17 _____

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

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

1 attached to the summons.

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

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

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

1 **TIME FOR FILING PLEADINGS OR MOTIONS**

2 **RULE 15**

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

15 **B Pleading after motion.**

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

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

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

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

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

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1 **FORM OF PLEADINGS**

2 **RULE 16**

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

8 **B Pseudonyms. Each party must be identified by the party's name except that a party may**
9 **seek a court order permitting use of a pseudonym when otherwise permitted by law.**

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

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

23 **[D] E Adoption by reference.** Statements in a pleading may be adopted by reference in a
24 different part of the same pleading.
25
26

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

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

23 | **D Joinder of additional parties.**

24 | D(1) Persons other than those made parties to the original action may be made parties to
25 | a counterclaim or cross-claim in accordance with the provisions of Rule 28 and Rule 29.

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

1 | that contract, join as parties to that action all or any persons liable for attorney fees under ORS
2 | 20.097. As used in this subsection “contract” includes any instrument or document evidencing a
3 | debt.

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

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

1 **PRODUCTION OF DOCUMENTS AND THINGS AND ENTERING PROPERTY**
2 **FOR INSPECTION AND OTHER PURPOSES**

3 **RULE 43**

4 **A Scope.** *[Any party may serve on any other party any of the following requests:]*

5 A(1) **Documents or things.** Any party may serve on any other party a [A] request to
6 produce and permit the party making the request, or someone acting on behalf of the party
7 making the request, to inspect and copy any designated documents (including electronically
8 stored information, writings, drawings, graphs, charts, photographs, sound recordings, images,
9 and other data or data compilations from which information can be obtained and translated, if
10 necessary, by the respondent through detection devices or software into reasonably usable
11 form) or to inspect and copy, test, or sample any tangible things that constitute or contain
12 matters within the scope of Rule 36 B and that are in the possession, custody, or control of the
13 party on whom the request is served[;].

14 A(2) **Entering property.** Any party may serve on any other party a [A] request to enter
15 land or other property in the possession or control of the party on whom the request is served
16 for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the
17 property or any designated object or operation thereon, within the scope of Rule 36 B.

18 **B Procedure.**

19 B(1) **Generally.** A party may serve a request on the plaintiff after commencement of the
20 action and on any other party with or after service of the summons on that party. The request
21 *[shall]* **must** identify any items requested for inspection, copying, or related acts by individual
22 item or by category described with reasonable particularity, designate any land or other
23 property on which entry is requested, and *[shall]* **must** specify a reasonable place and manner
24 for the inspection, copying, entry, and related acts.

25 B(2) **Time for response.** A request *[shall]* **may** not require a defendant to produce or
26 allow inspection, copying, entry, or other related acts before the expiration of 45 days after

1 service of summons, unless the court specifies a shorter time. Otherwise, within 30 days after
2 service of a request in accordance with subsection B(1) of this rule, or such other time as the
3 court may order or to which the parties may agree in writing, a party [*shall*] **must** serve a
4 response that includes the following:

5 B(2)(a) a statement that, except as specifically objected to, any requested item within the
6 party's possession or custody is provided, or will be provided or made available within the time
7 allowed and at the place and in the manner specified in the request, and that the items are or
8 [*shall*] **must** be organized and labeled to correspond with the categories in the request;

9 B(2)(b) a statement that, except as specifically objected to, a reasonable effort has been
10 made to obtain any requested item not in the party's possession or custody, or that no such
11 item is within the party's control;

12 B(2)(c) a statement that, except as specifically objected to, entry will be permitted as
13 requested to any land or other property; and

14 B(2)(d) any objection to a request or a part thereof and the reason for each objection.

15 B(3) **Objections.** Any objection not stated in accordance with subsection B(2) of this rule
16 is waived. Any objection to only a part of a request [*shall*] **must** clearly state the part objected
17 to. An objection does not relieve the requested party of the duty to comply with any request or
18 part thereof not specifically objected to.

19 B(4) **Continuing duty.** A party served in accordance with subsection B(1) of this rule is
20 under a continuing duty during the pendency of the action to produce promptly any item
21 responsive to the request and not objected to that comes into the party's possession, custody,
22 or control.

23 B(5) **Seeking relief under Rule 46 A(2).** A party who moves for an order under Rule 46
24 A(2) regarding any objection or other failure to respond or to permit inspection, copying, entry,
25 or related acts as requested, [*shall*] **must** do so within a reasonable time.

26 **C Writing called for need not be offered.** Though a writing called for by one party is

1 produced by the other, and is inspected by the party calling for it, the party requesting
2 production is not obliged to offer it in evidence.

3 **D Persons not parties.** A person not a party to the action may be compelled to produce
4 books, papers, documents, or tangible things and to submit to an inspection thereof as
5 provided in Rule 55. This rule does not preclude an independent action against a person not a
6 party for permission to enter land.

7 **E Electronically stored information (“ESI”).**

8 **E(1) Form in which ESI is to be produced.** A request for ESI may specify the form in which
9 the information is to be produced by the responding party but, if no such specification is made,
10 the responding party must produce the information in either the form in which it is ordinarily
11 maintained or in a reasonably useful form.

12 **E(2) Meetings to resolve issues regarding ESI production; relevance to discovery**
13 **motions.** In any action in which a request for production of ESI is anticipated, any party may
14 request one or more meetings to confer about ESI production in that action. No meeting may
15 be requested until all of the parties have appeared or have provided written notice of intent to
16 file an appearance pursuant to Rule 69 B(1). The court may also require that the parties meet to
17 confer about ESI production. Within 21 days of the request for a meeting, the parties must
18 meet and confer about the scope of the production of ESI; data sources of the requested ESI;
19 form of the production of ESI; cost of producing ESI; search terms relevant to identifying
20 responsive ESI; preservation of ESI; issues of privilege pertaining to ESI; issues pertaining to
21 metadata; and any other issue a requesting or producing party deems relevant to the request
22 for ESI. Failure to comply in good faith with this subsection [*shall*] **will** be considered by a court
23 when ruling on any motion to compel or motion for a protective order related to ESI. The
24 requirements in this subsection are in addition to any other duty to confer created by any other
25 rule.
26

1 | order at any time to compel production. In any case, where a subpoena commands production
2 | of books, papers, documents, or tangible things the court, upon motion made promptly and, in
3 | any event, at or before the time specified in the subpoena for compliance therewith, may quash
4 | or modify the subpoena if it is unreasonable and oppressive or condition denial of the motion
5 | upon the advancement by the person in whose behalf the subpoena is issued of the reasonable
6 | cost of producing the books, papers, documents, or tangible things.

7 | **C Purpose; issuance.**

8 | **C(1) Purpose.**

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

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

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

20 | **C(2) By whom issued.**

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

24 | **C(2)(a)(i) Requirements for subpoenas issued in blank.** Upon request of a party or
25 | attorney, any subpoena issued by a clerk of the court may be issued in blank and delivered to
26 | the party or attorney requesting it, who shall before service include on the subpoena the name

1 of the person commanded to appear; or the books, papers, documents, or tangible things to be
2 produced or inspected; and the particular time and location for the attendance of the person or
3 the production or the inspection, as applicable.

4 **C(2)(b) By the clerk of the court for foreign depositions.** A subpoena for a foreign
5 deposition may be issued as specified in Rule 38 C(2) by the clerk of a circuit court in the county
6 in which the witness is to be examined.

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

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

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

13 **D(1) Service.** Except as provided in subsection D(2) of this rule, a subpoena may be served
14 by the party or any other person 18 years of age or older. The service shall be made by
15 delivering a copy to the witness personally and giving or offering to the witness at the same
16 time the fees to which the witness is entitled for travel to and from the place designated and,
17 whether or not personal attendance is required, one day's attendance fees. If the witness is
18 under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the
19 witness's parent, guardian, or guardian ad litem. The service must be made so as to allow the
20 witness a reasonable time for preparation and travel to the place of attendance. A subpoena for
21 the taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be
22 served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i),
23 D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h). A copy of each subpoena commanding production of
24 books, papers, documents, or tangible things and inspection thereof before trial that is not
25 accompanied by a command to appear at trial or hearing or at deposition, whether the
26 subpoena is served personally or by mail, shall be served on each party at least 7 days before

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

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

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

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

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

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

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

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

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

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

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

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

23 **E Subpoena for hearing or trial; prisoners.** If the witness is confined in a prison or jail in
24 this state, a subpoena may be served on that person only upon leave of court and attendance of
25 the witness may be compelled only upon the terms that the court prescribes. The court may
26 order temporary removal and production of the prisoner for the purpose of giving testimony or

1 | may order that testimony only be taken upon deposition at the place of confinement. The
2 | subpoena and court order shall be served upon the custodian of the prisoner.

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

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

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

19 | **F(3) Production without examination or deposition.** A party who issues a subpoena may
20 | command the person to whom it is issued to produce books, papers, documents, or tangible
21 | things, other than individually identifiable health information as described in section H of this
22 | rule, by mail or otherwise, at a time and place specified in the subpoena, without commanding
23 | inspection of the originals or a deposition. In such instances, the person to whom the subpoena
24 | is directed complies if the person produces copies of the specified items in the specified manner
25 | and certifies that the copies are true copies of all of the items responsive to the subpoena or, if
26 | any items are not included, why they are not.

1 **G Disobedience of subpoena; refusal to be sworn or to answer as a witness.**

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

6 **H Individually identifiable health information.**

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

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

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

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

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

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

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

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

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

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

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

19 | *H(2)(c) **Time for compliance.** Except as provided in subsection H(4) of this rule, when a*
20 | *subpoena is served upon a custodian of individually identifiable health information in an action*
21 | *in which the entity or person is not a party, and the subpoena requires the production of all or*
22 | *part of the records of the entity or person relating to the care or treatment of an individual, it is*
23 | *sufficient compliance with the subpoena if a custodian delivers by mail or otherwise a true and*
24 | *correct copy of all of the records responsive to the subpoena within 5 days after receipt thereof.*
25 | *Delivery shall be accompanied by an affidavit or a declaration as described in subsection H(3) of*
26 | *this rule.*

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

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

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

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

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

4 | *H(3)(a) Content. The records described in subsection H(2) of this rule shall be*
5 | *accompanied by the affidavit or declaration of a custodian of the records, stating in substance*
6 | *each of the following:*

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

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

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

14 | *H(3)(b) When custodian has no records or fewer records than requested. If the entity or*
15 | *person has none of the records described in the subpoena, or only a part thereof, the affiant or*
16 | *declarant shall so state in the affidavit or declaration and shall send only those records of which*
17 | *the affiant or declarant has custody.*

18 | *H(3)(c) Multiple affidavits or declarations. When more than one person has knowledge of*
19 | *the facts required to be stated in the affidavit or declaration, more than one affidavit or*
20 | *declaration may be used.*

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

22 | *H(4)(a) Required statement. The personal attendance of a custodian of records and the*
23 | *production of original records is required if the subpoena duces tecum contains the following*
24 | *statement:*

25 | _____
26 | *The personal attendance of a custodian of records and the production of original records*

1 is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil
2 Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

3
4 **H(4)(b) Multiple subpoenas.** *If more than one subpoena duces tecum is served on a*
5 *custodian of records and personal attendance is required under each pursuant to paragraph*
6 *H(4)(a) of this rule, the custodian shall be deemed to be the witness of the party serving the first*
7 *such subpoena.*

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

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

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

16 **A(1) Form and contents.**

17 **A(1)(a) General requirements. A subpoena is a writ or order that must:**

18 **A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule**
19 **38 C;**

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

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

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

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

26 **A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books,**

1 documents, electronically stored information (as described in Rule 43), or tangible things in
2 the person's possession, custody, or control as provided in section C of this rule, except
3 confidential health information as defined in subsection D(1) of this rule; or

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

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

9 A(3) Who may issue.

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

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

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

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

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

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

1 A(4) Who may serve. A subpoena may be served by a party, the party's attorney, or any
2 other person who is 18 years of age or older.

3 A(5) Proof of service. Proving service of a subpoena is done in the same way as
4 provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not
5 disavow being a party in the action; an attorney for a party; or an officer, director, or
6 employee of a party.

7 A(6) Recipient obligations.

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

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

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

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

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

25 A(6)(d) Obedience to subpoena. A witness must obey a subpoena. Disobedience or a
26 refusal to be sworn or to answer as a witness may be punished as contempt by the court or

1 by the judge who issued the subpoena or before whom the action is pending. At a hearing or
2 trial, if a witness who is a party disobeys a subpoena, or refuses to be sworn or to answer as a
3 witness, that party's complaint, answer, or other pleading may be stricken.

4 A(7) Recipient's option to object, to move to quash, or to move to modify subpoena for
5 production. A person who is not subpoenaed to appear, but who is commanded to produce
6 and permit inspection and copying of documents or things, including records of confidential
7 health information as defined in subsection D(1) of this rule, may object, or move to quash or
8 move to modify the subpoena, as provided as follows.

9 A(7)(a) Written objection. Timing? Written objection; timing? A written objection may
10 be served on the party who issued the subpoena before the deadline set for production, but
11 not later than 14 days after service on the objecting person.

12 A(7)(a)(i) Scope. The written objection may be to all or to only part of the command to
13 produce.

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

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

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

26 B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or

1 out of court, including:

2 B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or
3 at the trial of an issue therein, or upon the taking of a deposition in an action pending
4 therein.

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

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

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

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

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

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

1 B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's
2 attorney or attorney's agent certifies that the witness **agreed** to appear and testify if
3 subpoenaed;

4 B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent **made** satisfactory
5 arrangements with the witness to ensure the payment of fees and mileage. or the witness
6 expressly **declined** payment; and

7 B(2)(c)(iii) Signed mail receipt. **The subpoena was mailed more than 10 days before the**
8 date to appear and testify in a manner that **provided** a signed receipt on delivery, **and the**
9 witness or, if applicable, the witness's parent, guardian, or guardian ad litem, **signed the**
10 receipt more than 3 days before the date to appear and testify.

11 B(2)(d) Service of a deposition subpoena on a **nonparty** organization pursuant to Rule
12 39 C(6). **A subpoena naming a nonparty organization as a deponent** must be delivered in the
13 same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7
14 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

15 **B(3) Service of a subpoena requiring appearance of a peace officer in a professional**
16 **capacity.**

17 **B(3)(a) Personal service on a peace officer. A subpoena directed to a peace officer in a**
18 **professional capacity may be served by personal service of a copy, along with one day's**
19 **attendance fee and mileage as allowed by law, unless the peace officer expressly declines**
20 **payment.**

21 **B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a**
22 **peace officer in a professional capacity may be served by substitute service of a copy, along**
23 **with one day's attendance fee and mileage as allowed by law, on an individual designated by**
24 **the law enforcement agency that employs the peace officer or, if a designated individual is**
25 **not available, then on the person in charge at least 10 days before the date the peace officer**
26 **is required to attend, provided that the peace officer is currently employed by the law**

1 enforcement agency and is present in this state at the time the agency is served.

2 B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law
3 enforcement agency means the Oregon State Police, a county sheriff's department, a city
4 police department, or a municipal police department.

5 B(3)(b)(ii) Law enforcement agency obligations.

6 B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate
7 one or more individuals to be available during normal business hours to receive service of
8 subpoenas.

9 B(3)(b)(ii)(B) Ensuring actual notice or reporting otherwise. When a peace officer is
10 subpoenaed by substitute service under paragraph B(3)(b) of this rule, the agency must make
11 a good faith effort to give the peace officer actual notice of the time, date, and location
12 identified in the subpoena for the appearance. If the law enforcement agency is unable to
13 notify the peace officer, then the agency must promptly report this inability to the court. The
14 court may postpone the matter to allow the peace officer to be personally served.

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

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

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

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

25 C Subpoenas requiring production of documents or things other than confidential
26 health information as defined in subsection D(1) of this rule.

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

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

6 C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of
7 a subpoena issued solely to command production or inspection prior to a deposition, hearing,
8 or trial must do the following:

9 C(3)(a) Advance notice to parties. The subpoena must be served on all parties to the
10 action who are not in default at least 7 days before service of the subpoena on the person or
11 organization's representative who is commanded to produce and permit inspection, unless
12 the court orders less time;

13 C(3)(b) Time for production. The subpoena must allow at least 14 days for production
14 of the required documents or things, unless the court orders less time; and

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

17 D Subpoenas for confidential health information ("CHI").

18 D(1) Application of this section; "confidential health information" defined. This section
19 creates protections for production of CHI, which includes both individually identifiable health
20 information as defined in ORS 192.556 (8) and protected health information as defined in ORS
21 192.556 (11)(a). For purposes of this section, CHI means information collected from a person
22 by a health care provider, health care facility, state health plan, health care clearinghouse,
23 health insurer, employer, or school or university that identifies the person or could be used to
24 identify the person and that includes records that:

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

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

1 person.

2 D(2) Qualified protective orders. A qualified protective order means a court order that
3 prohibits the parties from using or disclosing CHI for any purpose other than the litigation for
4 which the information is produced, and that, at the end of the litigation, requires the return
5 of all CHI to the original custodian, including all copies made, or the destruction of all CHI.

6 D(3) Compliance with state and federal law. A subpoena to command production of
7 CHI must comply with the requirements of this section, as well as with all other restrictions or
8 limitations imposed by state or federal law. If a subpoena does not fully comply, then the
9 recipient is entitled to disregard the subpoena and withhold the CHI it seeks.

10 D(4) Conditions on service of subpoena.

11 D(4)(a) Qualified protective order; declaration or affidavit; contents. The attorney or
12 party serving a subpoena for CHI must serve the custodian or other record keeper with either
13 a qualified protective order or a declaration or affidavit together with supporting
14 documentation that demonstrates:

15 D(4)(a)(i) Written notice. The party made a good faith attempt to provide the person
16 whose CHI is sought, or the person's attorney, written notice that allowed 14 days after the
17 date of the notice to object;

18 D(4)(a)(ii) Sufficient context. Sufficient information? The written notice included the
19 subpoena and sufficient information about the litigation underlying the subpoena to enable
20 the person or the person's attorney to meaningfully object;

21 D(4)(a)(iii) Information regarding objections. The party must certify that either no
22 written objection was made within the 14 days, or objections made were resolved and the
23 command in the subpoena is consistent with that resolution; and

24 D(4)(a)(iv) Inspection requests. The party must certify that the person or the person's
25 representative was or will be permitted, promptly on request, to inspect and copy any CHI
26 received.

1 D(4)(b) Objections. Within 14 days from the date of a notice requesting CHI, the
2 person whose CHI is being sought, or the person's attorney objecting to the subpoena, must
3 respond in writing to the party issuing the notice, and state the reasons for each objection.

4 D(4)(c) Statement to secure personal attendance and production. The personal
5 attendance of a custodian of records and the production of original CHI is required if the
6 subpoena contains the following statement:

8 This subpoena requires a custodian of confidential health information to personally
9 attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of
10 Civil Procedure 55 D(8) is insufficient for this subpoena.

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

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

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

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

22 D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a
23 deposition or similar hearing, to the officer administering the oath for the deposition at the
24 place designated in the subpoena for the taking of the deposition or at the officer's place of
25 business;

26 D(5)(b)(iii) Other hearings or miscellaneous proceedings. If the subpoena directs

1 attendance at another hearing or another miscellaneous proceeding, to the officer or body
2 conducting the hearing or proceeding at the officer's or body's official place of business; or

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

5 D(6) Additional responsibilities of attorney or party receiving delivery of CHI.

6 D(6)(a) Service of a copy of subpoena on patient and all parties to the litigation. If the
7 subpoena directs delivery of CHI to the attorney or party who issued the subpoena, then a
8 copy of the subpoena must be served on the person whose CHI is sought, and on all other
9 parties to the litigation who are not in default, not less than 14 days prior to service of the
10 subpoena on the custodian or keeper of the records.

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

15 D(7) Inspection of CHI delivered to court or other proceeding. After filing and after
16 giving reasonable notice in writing to all parties who have appeared of the time and place of
17 inspection, the copy of the CHI may be inspected by any party or by the attorney of record of
18 a party in the presence of the custodian of the court files, but otherwise the copy must
19 remain sealed and must be opened only at the time of trial, deposition, or other hearing at
20 the direction of the judge, officer, or body conducting the proceeding. The CHI must be
21 opened in the presence of all parties who have appeared in person or by counsel at the trial,
22 deposition, or hearing. CHI that is not introduced in evidence or required as part of the record
23 must be returned to the custodian who produced it.

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

25 D(8)(a) Mail or delivery by a nonparty, along with declaration. A custodian of CHI who
26 is not a party to the litigation connected to the subpoena, and who is not required to attend

1 and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI
2 subpoenaed within five days after the subpoena is received, along with a declaration that
3 complies with paragraph D(8)(b) of this rule.

4 D(8)(b) Declaration of custodian of records when CHI produced. CHI that is produced
5 when personal attendance of the custodian is not required must be accompanied by a
6 declaration of the custodian that certifies all of the following:

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

9 D(8)(b)(ii) True and complete copy. The copy produced is a true copy of all of the CHI
10 responsive to the subpoena; and

11 D(8)(b)(iii) Proper preparation practices. Preparation of the copy of the CHI being
12 produced was done:

13 D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of
14 the entity subpoenaed or the declarant;

15 D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

16 D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred
17 to in the CHI.

18 D(8)(c) Declaration of custodian of records when not all CHI produced. When the
19 custodian of records produces no CHI, or less information than requested, the custodian of
20 records must specify this in the declaration. The custodian may only send CHI within the
21 custodian's custody.

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

25 D(9) Designation of responsible party when multiple parties subpoena CHI. If more
26 than one party subpoenas a custodian of records to personally attend under paragraph

1 D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party
2 who first served such a subpoena.

3 D(10) Tender and payment of fees. Nothing in this section requires the tender or
4 payment of more than the legal witness fee and mileage for one day or other charge unless
5 there has been agreement to the contrary.

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

August 26, 2018
Council Staff Response to Judge Norby Feedback
on ORCP 55, Draft 3 (Legislative Counsel Suggestions)

p. 11, line 18 – A(1)(a)(i)

I recommend placing the blue highlighted language at the end instead of beginning: “A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule 38C.” This is the very 1st item on the very 1st list that describes “subpoena” in the Rule. When the very 1st note about what a subpoena is begins with what it is not, that undermines the strength of the definition overall.

Agreed. Thank you.

p. 12, line 1 – A(1)(a)(iv)(B)

I disagree that the blue highlighted language “as described in Rule 43” should be added. Rule 43E does not define or describe what “electronically stored information” means. Both ORCP 43E(1) and (2) are permissive, not mandatory. Also, a “request” for ESI can be made in the form of a subpoena, or it can be made by Rule 43 Motion or more informal means. If a person who receives an ESI subpoena wishes to challenge / move to quash based on non-compliance with the permissive Rule 43 process, they can do so. But inserting this language converts a permissive Rule (43) into a mandatory Rule (55) by combining them. It adds nothing, and creates unnecessary potential issues.

Judge Gerking agreed with you. Just in case there are other views, we are leaving this internal reference in the next version, highlighted, for discussion by the Council.

p. 12, line 15 – A(3)(b)

I disagree that the change from the past tense to the present tense is correct here (and in one other location on p. 16 below). The present tense “serves” implies that it can happen contemporaneously with the service of the subpoena to attend the deposition. It can’t – it must have happened prior to that service. I recommend restoring the past tenses here.

Thank you for your careful reading. Sometimes the rules of grammar interfere with what a rule is actually meant to convey. This was certainly the case here.

p. 12, line 25 – A(3)(d)(ii)

I don’t understand how the replacement of the comma between “judge” and “justice” with “or” improves the clarity here. The comma correctly indicated that judges are qualitatively distinct from justices. The “or” suggests that the two are alternative titles for the same position. I think the comma is more correct.

I think the intention was to separate judicial use of subpoenas from administrative. It appears we created less, rather than more, clarity. Our compromise was to change to “a judge, a justice, or an authorized...” Does this work better?

p. 14, line 10 – A(7)

I disagree that it is better to replace “as follows” with “as provided in paragraph A(7)(a) or A(7)(b) of this rule.” Referring to the very next sentences with numbers and letters overcomplicates a simple preface. Lengthening the language is unnecessary and diminishes clarity.

We were attempting to avoid a punctuation problem and inadvertently caused an overcomplication problem. I think ending the sentence with a period instead of a colon solved everything.

p. 14, line 11 – A(7)(a) & (a)(i)

I suggest that the newly truncated headings be further truncated & improved like this: **A(7)(a) Timing.** (Not “Written objection.”) **A(7)(a)(i) Scope.** (Not “Partial or total objection.”)

We included your suggestions for the Council to discuss at the meeting.

p. 16, lines 6, 8, 10 & 11 – B(2)(c)(ii) & (iii)

This is the other location where I disagree with the change from the past tense to the present tense. Again, I believe the past tenses here have meaning. The verbs I would change back are: (line 6) “makes” should be “made”, (line 8) “declines” should be “declined”, (line 10) “provides” should be “provided”, (line 11) “signs” should be “signed.”

Agreed.

p. 16, lines 19 & 20, 23 & 24 – B(3)(a) & B(3)(b)

I understand Legislative Counsel’s emphasis on the need to ensure that headings do not strip necessary language from the actual text of the Rule. But here, the correction of parts (a) & (b) lost their parallel structure. I recommend restoring the parallelism and altering the language this way:

- (a) **Personal service. A subpoena directed to a peace officer in a professional capacity may be served by personal service of a copy, along with...**
- (b) **Substitute service. A subpoena directed to a peace officer in a professional capacity may be served by substitute service of a copy, along with...**

(Note: If you disagree with this suggestion overall, please still consider changing “service of a copy” in line 20 with “personal service of a copy.”)

Thanks for this suggestion. I think the slight reorganization of this area makes it a little more clear, but you are correct that some parallelism was lost. We used your suggestions for text but instead changed the lead lines in a different way to make them parallel. Hopefully this worked.

p. 18, line 7 – C(2)

Here the word “command” has been changed to “requirement.” I prefer the word “command” because it is consistent ORCP 55A(1)(a)(iv), it is what a subpoena does, and it is more correct.

LC was trying to avoid using the word “command” twice. I think changing the initial reference to “subpoena for production” and restoring the word “command” addresses your concern.

p. 18, line 12 – C(3)(a)

I am very enamored of the blue highlighted language (“who are not in default”), but it is arguably a substantive change from the current Rule. We endeavored to avoid substantive changes. One can argue that this language clarifies something that was previously implicit, and I favor that argument myself. I would vote to include this language, but not to open the floodgates to more arguably substantive changes.

That’s exactly why we highlighted it in blue for the Council to discuss. We’re definitely sensitive to the concern to not substantively change the rule, but thought that this might be a helpful clarification.

p. 19, lines 5-6 – D(2)

I disagree that the original language “means a court order that prohibits” is improved or clarified by the replacement language “means an order issued by the court that prohibits.” I would restore the original language here.’

Agreed – done.

p. 19, line 19 – D(4)(a)

I don’t see a change to the phrase “other record keeper.” I’m unsure why that has blue highlights.

This is a question for the Council. We are not sure whether any other type of “record keeper” other than a custodian of records exists, but are reluctant to remove language from the original rule if we are uncertain.

p. 19, lines 21- 23 – D(4)(a)(i)

This is an excellent improvement. Just wanted to tell you I think so!

Thanks.

p. 21, line 17-18 – D(6)(a)

I am again very enamored of the blue highlighted language (“who are not in default”) and vote for it. But, see prior note above for my concerns. If the Council rejects it, I understand.

See above.

p. 23, line 18 – D(10)

I surmise from the blue highlights that you wonder what “other charge” may apply. I think it is likely copying costs would be an “other charge,” and there could also be a fee for staff time in locating and collating subpoenaed records. I would retain these two words.

Again, we were uncertain to what these words might refer and were unsure about removing them.

Throughout Section D

I don’t believe it is necessary to repeat the phrase “confidential health information” **over** and **over** and **over** in Section D, as the changes now do. Section D only applies to CHI, a fact that is already very clear. I think that repetition is excessive. I would change most of these revisions back to “records”.

We felt that “records” was a vague term as opposed to the specificity of “confidential health information.” Legislative Counsel’s suggestion was to change most instances to “confidential health information records,” which was even more wordy. In our new draft, we have taken the approach of using the abbreviation “CHI” (similar to what we did in our last revision of Rule 43 with “ESI”). Another solution might be to simply use the word “information.” We’ll check in with the Council to get their thoughts on the 8th.

1 | order at any time to compel production. In any case, where a subpoena commands production
2 | of books, papers, documents, or tangible things the court, upon motion made promptly and, in
3 | any event, at or before the time specified in the subpoena for compliance therewith, may quash
4 | or modify the subpoena if it is unreasonable and oppressive or condition denial of the motion
5 | upon the advancement by the person in whose behalf the subpoena is issued of the reasonable
6 | cost of producing the books, papers, documents, or tangible things.

7 | **C Purpose; issuance.**

8 | **C(1) Purpose.**

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

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

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

20 | **C(2) By whom issued.**

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

24 | **C(2)(a)(i) Requirements for subpoenas issued in blank.** Upon request of a party or
25 | attorney, any subpoena issued by a clerk of the court may be issued in blank and delivered to
26 | the party or attorney requesting it, who shall before service include on the subpoena the name

1 of the person commanded to appear; or the books, papers, documents, or tangible things to be
2 produced or inspected; and the particular time and location for the attendance of the person or
3 the production or the inspection, as applicable.

4 **C(2)(b) By the clerk of the court for foreign depositions.** A subpoena for a foreign
5 deposition may be issued as specified in Rule 38 C(2) by the clerk of a circuit court in the county
6 in which the witness is to be examined.

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

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

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

13 **D(1) Service.** Except as provided in subsection D(2) of this rule, a subpoena may be served
14 by the party or any other person 18 years of age or older. The service shall be made by
15 delivering a copy to the witness personally and giving or offering to the witness at the same
16 time the fees to which the witness is entitled for travel to and from the place designated and,
17 whether or not personal attendance is required, one day's attendance fees. If the witness is
18 under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the
19 witness's parent, guardian, or guardian ad litem. The service must be made so as to allow the
20 witness a reasonable time for preparation and travel to the place of attendance. A subpoena for
21 the taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be
22 served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i),
23 D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h). A copy of each subpoena commanding production of
24 books, papers, documents, or tangible things and inspection thereof before trial that is not
25 accompanied by a command to appear at trial or hearing or at deposition, whether the
26 subpoena is served personally or by mail, shall be served on each party at least 7 days before

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

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

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

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

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

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

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

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

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

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

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

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

23 **E Subpoena for hearing or trial; prisoners.** If the witness is confined in a prison or jail in
24 this state, a subpoena may be served on that person only upon leave of court and attendance of
25 the witness may be compelled only upon the terms that the court prescribes. The court may
26 order temporary removal and production of the prisoner for the purpose of giving testimony or

1 | *may order that testimony only be taken upon deposition at the place of confinement. The*
2 | *subpoena and court order shall be served upon the custodian of the prisoner.*

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

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

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

19 | ***F(3) Production without examination or deposition.*** *A party who issues a subpoena may*
20 | *command the person to whom it is issued to produce books, papers, documents, or tangible*
21 | *things, other than individually identifiable health information as described in section H of this*
22 | *rule, by mail or otherwise, at a time and place specified in the subpoena, without commanding*
23 | *inspection of the originals or a deposition. In such instances, the person to whom the subpoena*
24 | *is directed complies if the person produces copies of the specified items in the specified manner*
25 | *and certifies that the copies are true copies of all of the items responsive to the subpoena or, if*
26 | *any items are not included, why they are not.*

1 **G Disobedience of subpoena; refusal to be sworn or to answer as a witness.**

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

6 **H Individually identifiable health information.**

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

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

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

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

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

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

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

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

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

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

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

19 | *H(2)(c) **Time for compliance.** Except as provided in subsection H(4) of this rule, when a*
20 | *subpoena is served upon a custodian of individually identifiable health information in an action*
21 | *in which the entity or person is not a party, and the subpoena requires the production of all or*
22 | *part of the records of the entity or person relating to the care or treatment of an individual, it is*
23 | *sufficient compliance with the subpoena if a custodian delivers by mail or otherwise a true and*
24 | *correct copy of all of the records responsive to the subpoena within 5 days after receipt thereof.*
25 | *Delivery shall be accompanied by an affidavit or a declaration as described in subsection H(3) of*
26 | *this rule.*

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

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

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

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

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

4 | *H(3)(a) Content. The records described in subsection H(2) of this rule shall be*
5 | *accompanied by the affidavit or declaration of a custodian of the records, stating in substance*
6 | *each of the following:*

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

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

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

14 | *H(3)(b) When custodian has no records or fewer records than requested. If the entity or*
15 | *person has none of the records described in the subpoena, or only a part thereof, the affiant or*
16 | *declarant shall so state in the affidavit or declaration and shall send only those records of which*
17 | *the affiant or declarant has custody.*

18 | *H(3)(c) Multiple affidavits or declarations. When more than one person has knowledge of*
19 | *the facts required to be stated in the affidavit or declaration, more than one affidavit or*
20 | *declaration may be used.*

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

22 | *H(4)(a) Required statement. The personal attendance of a custodian of records and the*
23 | *production of original records is required if the subpoena duces tecum contains the following*
24 | *statement:*

25 | _____
26 | *The personal attendance of a custodian of records and the production of original records*

1 is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil
2 Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

3
4 **H(4)(b) Multiple subpoenas.** *If more than one subpoena duces tecum is served on a*
5 *custodian of records and personal attendance is required under each pursuant to paragraph*
6 *H(4)(a) of this rule, the custodian shall be deemed to be the witness of the party serving the first*
7 *such subpoena.*

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

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

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

16 **A(1) Form and contents.**

17 **A(1)(a) General requirements. A subpoena is a writ or order that must:**

18 **A(1)(a)(i) except as provided in Rule 38 C, originate in the court where the action is**
19 **pending;**

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

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

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

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

26 **A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books,**

1 documents, electronically stored information (as described in Rule 43), or tangible things in
2 the person's possession, custody, or control as provided in section C of this rule, except
3 confidential health information as defined in subsection D(1) of this rule; or

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

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

9 A(3) Who may issue.

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

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

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

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

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

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

1 proceeding.

2 A(4) Who may serve. A subpoena may be served by a party, the party's attorney, or any
3 other person who is 18 years of age or older.

4 A(5) Proof of service. Proving service of a subpoena is done in the same way as
5 provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not
6 disavow being a party in the action; an attorney for a party; or an officer, director, or
7 employee of a party.

8 A(6) Recipient obligations.

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

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

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

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

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

1 A(6)(d) Obedience to subpoena. A witness must obey a subpoena. Disobedience or a
2 refusal to be sworn or to answer as a witness may be punished as contempt by the court or
3 by the judge who issued the subpoena or before whom the action is pending. At a hearing or
4 trial, if a witness who is a party disobeys a subpoena, or refuses to be sworn or to answer as a
5 witness, that party's complaint, answer, or other pleading may be stricken.

6 A(7) Recipient's option to object, to move to quash, or to move to modify subpoena for
7 production. A person who is not subpoenaed to appear, but who is commanded to produce
8 and permit inspection and copying of documents or things, including records of confidential
9 health information as defined in subsection D(1) of this rule, may object, or move to quash or
10 move to modify the subpoena, as provided in paragraph A(7)(a) or A(7)(b) of this rule.

11 A(7)(a) Written objection. A written objection may be served on the party who issued
12 the subpoena before the deadline set for production, but not later than 14 days after service
13 on the objecting person.

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

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

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

26 B Subpoenas requiring appearance and testimony by individuals, organizations, law

1 enforcement agencies or officers, and prisoners.

2 B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or
3 out of court, including:

4 B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or
5 at the trial of an issue therein, or upon the taking of a deposition in an action pending
6 therein.

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

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

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

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

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

26 B(2)(c) Service on individuals waiving personal service. If the witness waives personal

1 service, the subpoena may be mailed to the witness, but mail service is valid only if all of the
2 following circumstances exist:

3 B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's
4 attorney or attorney's agent certifies that the witness agrees to appear and testify if
5 subpoenaed;

6 B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent makes
7 satisfactory arrangements with the witness to ensure the payment of fees and mileage. or
8 the witness expressly declines payment; and

9 B(2)(c)(iii) Signed mail receipt. The subpoena is mailed more than 10 days before the
10 date to appear and testify in a manner that provides a signed receipt on delivery, and the
11 witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signs the
12 receipt more than 3 days before the date to appear and testify.

13 B(2)(d) Service of a deposition subpoena on a nonparty organization pursuant to Rule
14 39 C(6). A subpoena naming a nonparty organization as a deponent must be delivered in the
15 same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7
16 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

17 B(3) Service of a subpoena requiring appearance of a peace officer in a professional
18 capacity.

19 B(3)(a) Personal service. If a peace officer's appearance or testimony is required in a
20 professional capacity, then a subpoena may be served by service of a copy, along with one
21 day's attendance fee and mileage as allowed by law, unless the peace officer expressly
22 declines payment.

23 B(3)(b) Substitute service on a law enforcement agency. A subpoena may be served by
24 service of a copy, along with one day's attendance fee and mileage as allowed by law, on an
25 individual designated by the law enforcement agency that employs the peace officer or, if a
26 designated individual is not available, then on the person in charge at least 10 days before

1 the date the peace officer is required to attend, provided that the peace officer is currently
2 employed by the law enforcement agency and is present in this state at the time the agency is
3 served.

4 B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law
5 enforcement agency means the Oregon State Police, a county sheriff's department, a city
6 police department, or a municipal police department.

7 B(3)(b)(ii) Law enforcement agency obligations.

8 B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate
9 one or more individuals to be available during normal business hours to receive service of
10 subpoenas.

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

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

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

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

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

1 C Subpoenas requiring production of documents or things other than confidential
2 health information as defined in subsection D(1) of this rule.

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

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

8 C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of
9 a subpoena issued solely to command production or inspection prior to a deposition, hearing,
10 or trial must do the following:

11 C(3)(a) Advance notice to parties. The subpoena must be served on all parties to the
12 action who are not in default at least 7 days before service of the subpoena on the person or
13 organization's representative who is commanded to produce and permit inspection, unless
14 the court orders less time;

15 C(3)(b) Time for production. The subpoena must allow at least 14 days for production
16 of the required documents or things, unless the court orders less time; and

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

19 D Subpoenas for confidential health information.

20 D(1) Application of this section; "confidential health information" defined. This section
21 creates protections for production of confidential health information, which includes both
22 individually identifiable health information as defined in ORS 192.556 (8) and protected
23 health information as defined in ORS 192.556 (11)(a). For purposes of this section,
24 confidential health information means information collected from a person by a health care
25 provider, health care facility, state health plan, health care clearinghouse, health insurer,
26 employer, or school or university that identifies the person or could be used to identify the

1 person and that includes records that:

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

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

5 D(2) Qualified protective orders. A qualified protective order means an order issued
6 by the court that prohibits the parties from using or disclosing confidential health information
7 for any purpose other than the litigation for which the information is produced, and that, at
8 the end of the litigation, requires the return of all confidential health information to the
9 original custodian, including all copies made, or the destruction of all confidential health
10 information.

11 D(3) Compliance with state and federal law. A subpoena to command production of
12 confidential health information must comply with the requirements of this section, as well as
13 with all other restrictions or limitations imposed by state or federal law. If a subpoena does
14 not fully comply, then the recipient is entitled to disregard the subpoena and withhold the
15 confidential health information it seeks.

16 D(4) Conditions on service of subpoena.

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

21 D(4)(a)(i) Written notice. The party made a good faith attempt to provide the person
22 whose confidential health information is sought, or the person's attorney, written notice that
23 allowed 14 days after the date of the notice to object;

24 D(4)(a)(ii) Sufficient context. The written notice included the subpoena and sufficient
25 information about the litigation underlying the subpoena to enable the person or the
26 person's attorney to meaningfully object;

1 D(4)(a)(iii) Information regarding objections. The party must certify that either no
2 written objection was made within the 14 days, or objections made were resolved and the
3 command in the subpoena is consistent with that resolution; and

4 D(4)(a)(iv) Inspection requests. The party must certify that the person or the person's
5 representative was or will be permitted, promptly on request, to inspect and copy any
6 confidential health information received.

7 D(4)(b) Objections. Within 14 days from the date of a notice requesting confidential
8 health information, the person whose confidential health information is being sought, or the
9 person's attorney objecting to the subpoena, must respond in writing to the party issuing the
10 notice, and state the reasons for each objection.

11 D(4)(c) Statement to secure personal attendance and production. The personal
12 attendance of a custodian of records and the production of original confidential health
13 information is required if the subpoena contains the following statement:

14
15 This subpoena requires a custodian of confidential health information to personally
16 attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of
17 Civil Procedure 55 D(8) is insufficient for this subpoena.

18
19 D(5) Mandatory privacy procedures for all records produced.

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

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

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

3 D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a
4 deposition or similar hearing, to the officer administering the oath for the deposition at the
5 place designated in the subpoena for the taking of the deposition or at the officer's place of
6 business;

7 D(5)(b)(iii) Other hearings or miscellaneous proceedings. If the subpoena directs
8 attendance at another hearing or another miscellaneous proceeding, to the officer or body
9 conducting the hearing or proceeding at the officer's or body's official place of business; or

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

12 D(6) Additional responsibilities of attorney or party receiving delivery of confidential
13 health information.

14 D(6)(a) Service of a copy of subpoena on patient and all parties to the litigation. If the
15 subpoena directs delivery of confidential health information to the attorney or party who
16 issued the subpoena, then a copy of the subpoena must be served on the person whose
17 confidential health information is sought, and on all other parties to the litigation who are
18 not in default, not less than 14 days prior to service of the subpoena on the custodian or
19 keeper of the records.

20 D(6)(b) Parties' right to inspect or obtain a copy of the confidential health information
21 at own expense. Any party to the proceeding may inspect the confidential health information
22 provided and may request a complete copy of the information. On request, the confidential
23 health information must be promptly provided by the party who served the subpoena at the
24 expense of the party who requested the inspection or copies.

25 D(7) Inspection of confidential health information delivered to court or other
26 proceeding. After filing and after giving reasonable notice in writing to all parties who have

1 appeared of the time and place of inspection, the copy of the confidential health information
2 may be inspected by any party or by the attorney of record of a party in the presence of the
3 custodian of the court files, but otherwise the copy must remain sealed and must be opened
4 only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or
5 body conducting the proceeding. The confidential health information must be opened in the
6 presence of all parties who have appeared in person or by counsel at the trial, deposition, or
7 hearing. Confidential health information that is not introduced in evidence or required as part
8 of the record must be returned to the custodian who produced it.

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

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

16 D(8)(b) Declaration of custodian of records when confidential health information
17 produced. Confidential health information that is produced when personal attendance of the
18 custodian is not required must be accompanied by a declaration of the custodian that
19 certifies all of the following:

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

22 D(8)(b)(ii) True and complete copy. The copy produced is a true copy of all of the
23 confidential health information responsive to the subpoena; and

24 D(8)(b)(iii) Proper preparation practices. Preparation of the copy of the confidential
25 health information being produced was done:

26 D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of

1 the entity subpoenaed or the declarant;

2 D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

3 D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred
4 to in the confidential health information.

5 D(8)(c) Declaration of custodian of records when not all confidential health
6 information produced. When the custodian of records produces no confidential health
7 information, or less information than requested, the custodian of records must specify this in
8 the declaration. The custodian may only send confidential health information within the
9 custodian's custody.

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

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

17 D(10) Tender and payment of fees. Nothing in this section requires the tender or
18 payment of more than the legal witness fee and mileage for one day or other charge unless
19 there has been agreement to the contrary.

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



STATE OF OREGON
Legislative Counsel Committee

August 2, 2018

To: Mark A. Peterson, Executive Director
Shari C. Nilsson, Executive Assistant
Council on Court Procedures

From: Martha S. Anderson, Senior Editor
Cecilia (CeCe) Seiter, Editor

Subject: Corrections and Suggestions for Rule 55 Rewrite

Attached are three color PDFs:

- **Rule 55 red-marked copy.pdf.** This is the red-marked copy of the Rule 55 rewrite with changes that both CeCe and I would make as corrections to a draft bill.
- **Rule 55 lead-marked copy.pdf.** This is the lead-marked copy of the Rule 55 rewrite (some of the red included to keep context intact) with lots of suggestions and several questions. These are the types of things we routinely suggest and discuss with our drafting attorneys who make the ultimate decisions about the final corrections.
- **Rule 55 numbering scheme.pdf.** This is a color copy of chart tracing the beginnings and endings of each component of the Rule 55 rewrite. If the numbering gets complicated, we'll make a chart like this to give us a drone's eye view of an amended or newly created ORS section.

Observations/Suggestions:

- Some leadlines can be simplified. Suggestions appear on the lead markup.
- Some "leadlines" are not functioning as leadlines and are text. See [page 18](#), lines 3, 7 and 9, of the red markup. And see [page 16](#), lines 14 and 17. Also see [page 22](#), lines 6, 8, 10, 12, 14 and 16, of the lead markup.
- Some leadlines seem unnecessary; suggestions for deletion appear on the lead markup.
- Overreliance on leadlines sometimes leaves gaps for the reader. Small suggestions on [page 15](#), lines 13, 17 and 20, of the lead markup could fill these gaps.
- We looked at ORS to compare ORS definitions to the Rule 55 definition for "law enforcement agency" and made one suggestion that appears in the text of some statutes. We also examined statutory definitions for "health care provider" and "health care facility" for the suggested replacements/adjustments for "health care entity" on [page 18](#), line 16, of the lead markup. In ORS, only three statutes refer to "health care entities" and none define the term. Some statutes define "health care facility" and then define "health care providers" to mean licensed practitioners and indicate that the term "health care provider" also includes a "health care facility."
- We briefly looked at descriptions of the HIPAA law and compared these with the definition of "confidential health information." Neither of us raised red flags.

1 | order at any time to compel production. In any case, where a subpoena commands production
2 | of books, papers, documents, or tangible things the court, upon motion made promptly and, in
3 | any event, at or before the time specified in the subpoena for compliance therewith, may quash
4 | or modify the subpoena if it is unreasonable and oppressive or condition denial of the motion
5 | upon the advancement by the person in whose behalf the subpoena is issued of the reasonable
6 | cost of producing the books, papers, documents, or tangible things.

7 | **C Purpose; issuance.**

8 | **C(1) Purpose.**

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

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

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

20 | **C(2) By whom issued.**

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

24 | **C(2)(a)(i) Requirements for subpoenas issued in blank.** Upon request of a party or
25 | attorney, any subpoena issued by a clerk of the court may be issued in blank and delivered to
26 | the party or attorney requesting it, who shall before service include on the subpoena the name

1 of the person commanded to appear; or the books, papers, documents, or tangible things to be
2 produced or inspected; and the particular time and location for the attendance of the person or
3 the production or the inspection, as applicable.

4 **C(2)(b) By the clerk of the court for foreign depositions.** A subpoena for a foreign
5 deposition may be issued as specified in Rule 38 C(2) by the clerk of a circuit court in the county
6 in which the witness is to be examined.

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

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

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

13 **D(1) Service.** Except as provided in subsection D(2) of this rule, a subpoena may be served
14 by the party or any other person 18 years of age or older. The service shall be made by
15 delivering a copy to the witness personally and giving or offering to the witness at the same
16 time the fees to which the witness is entitled for travel to and from the place designated and,
17 whether or not personal attendance is required, one day's attendance fees. If the witness is
18 under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the
19 witness's parent, guardian, or guardian ad litem. The service must be made so as to allow the
20 witness a reasonable time for preparation and travel to the place of attendance. A subpoena for
21 the taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be
22 served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i),
23 D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h). A copy of each subpoena commanding production of
24 books, papers, documents, or tangible things and inspection thereof before trial that is not
25 accompanied by a command to appear at trial or hearing or at deposition, whether the
26 subpoena is served personally or by mail, shall be served on each party at least 7 days before

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

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

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

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

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

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

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

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

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

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

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

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

23 **E Subpoena for hearing or trial; prisoners.** If the witness is confined in a prison or jail in
24 this state, a subpoena may be served on that person only upon leave of court and attendance of
25 the witness may be compelled only upon the terms that the court prescribes. The court may
26 order temporary removal and production of the prisoner for the purpose of giving testimony or

1 | may order that testimony only be taken upon deposition at the place of confinement. The
2 | subpoena and court order shall be served upon the custodian of the prisoner.

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

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

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

19 | **F(3) Production without examination or deposition.** A party who issues a subpoena may
20 | command the person to whom it is issued to produce books, papers, documents, or tangible
21 | things, other than individually identifiable health information as described in section H of this
22 | rule, by mail or otherwise, at a time and place specified in the subpoena, without commanding
23 | inspection of the originals or a deposition. In such instances, the person to whom the subpoena
24 | is directed complies if the person produces copies of the specified items in the specified manner
25 | and certifies that the copies are true copies of all of the items responsive to the subpoena or, if
26 | any items are not included, why they are not.

1 **G Disobedience of subpoena; refusal to be sworn or to answer as a witness.**

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

6 **H Individually identifiable health information.**

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

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

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

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

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

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

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

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

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

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

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

19 | *H(2)(c) **Time for compliance.** Except as provided in subsection H(4) of this rule, when a*
20 | *subpoena is served upon a custodian of individually identifiable health information in an action*
21 | *in which the entity or person is not a party, and the subpoena requires the production of all or*
22 | *part of the records of the entity or person relating to the care or treatment of an individual, it is*
23 | *sufficient compliance with the subpoena if a custodian delivers by mail or otherwise a true and*
24 | *correct copy of all of the records responsive to the subpoena within 5 days after receipt thereof.*
25 | *Delivery shall be accompanied by an affidavit or a declaration as described in subsection H(3) of*
26 | *this rule.*

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

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

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

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

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

4 | **H(3)(a) Content.** The records described in subsection H(2) of this rule shall be
5 | accompanied by the affidavit or declaration of a custodian of the records, stating in substance
6 | each of the following:

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

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

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

14 | **H(3)(b) When custodian has no records or fewer records than requested.** If the entity or
15 | person has none of the records described in the subpoena, or only a part thereof, the affiant or
16 | declarant shall so state in the affidavit or declaration and shall send only those records of which
17 | the affiant or declarant has custody.

18 | **H(3)(c) Multiple affidavits or declarations.** When more than one person has knowledge of
19 | the facts required to be stated in the affidavit or declaration, more than one affidavit or
20 | declaration may be used.

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

22 | **H(4)(a) Required statement.** The personal attendance of a custodian of records and the
23 | production of original records is required if the subpoena duces tecum contains the following
24 | statement:

25 | _____
26 | The personal attendance of a custodian of records and the production of original records

1 is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil
2 Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

3
4 **H(4)(b) Multiple subpoenas.** If more than one subpoena duces tecum is served on a
5 custodian of records and personal attendance is required under each pursuant to paragraph
6 H(4)(a) of this rule, the custodian shall be deemed to be the witness of the party serving the first
7 such subpoena.

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

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

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

16 **A(1) Form and contents.**

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

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

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

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

21 **A(1)(a)(iv) command each person to whom ^{the subpoena} it is directed to do one or more of the** X

22 **following things at a specified time and place:**

23 **A(1)(a)(iv)(1) appear and testify in a deposition, hearing, trial, or administrative or** X

24 **other out-of-court proceeding as provided in section B of this rule;**

25 **A(1)(a)(iv)(2) produce items for inspection and copying, such as specified books,** X

26 **documents, electronically stored information, or tangible things in that person's possession,**

per Rule 1 G
L → (23)
(25)

per Rule 4 G

1 custody, or control as provided in section C of this rule, except confidential health

2 information as defined in subsection D(1) of this rule; or

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

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

8 A(3) Who may issue.

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

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

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

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

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

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

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

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

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

5 A(6) Recipient obligations.

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

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

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

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

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

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

Court or judge who . . . or before whom

1 witness, ~~then~~ that party's complaint, answer, or other pleading may be stricken.

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

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

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

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

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

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

24 B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or
25 out of court, including:

26 B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or

1 at the trial of an issue therein, or upon the taking of a deposition in an action pending
2 therein.

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

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

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

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

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

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

23 B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's
24 attorney or attorney's agent certifies that the witness agrees to appear and testify if
25 subpoenaed;

26 B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory

1 arrangements with the witness to ensure the payment of fees and mileage, or the witness
2 expressly declined payment; and

3 B(2)(c)(iii) Signed mail receipt. More than 10 days before the date to appear and testify,
4 the subpoena was mailed in a manner that provided a signed receipt on delivery, and the
5 receipt is signed by the witness (or witness's parent, guardian, or guardian ad litem) more
6 than 3 days before the date to appear and testify.

7 B(2)(d) Service of a deposition subpoena on a non-party organization pursuant to Rule
8 39 C(6). The subpoena must be delivered in the same manner as provided for service of
9 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),
10 or Rule 7 D(3)(h).

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

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

16 or ← *only works if B(3) stops @ cl. 22 below*

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

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

26 B(3)(c)(i) Designate a representative. All law enforcement agencies must designate one

SEE LEAD PENCIL SUGGESTION FOR RENUMBERING B(3)(c) & B(4)

1 or more individuals to be available during normal business hours to receive service of
2 subpoenas.

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

paragraph B(3)(b) of this subsection
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9 B(4) Service of subpoena requiring the appearance and testimony of a prisoner. All of
10 the following are required to secure a prisoner's appearance and testimony:

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

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

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

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

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

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

26 C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of

1 a subpoena issued solely to command production for inspection prior to a deposition,
2 hearing, or trial must: *not functioning as leadlines*

3 C(3)(a) Provide advance notice to parties. The subpoena must be served on all parties
4 to the action at least 7 days before service of the subpoena on the person or organization's
5 representative who is commanded to produce and permit inspection, unless the court orders
6 less time; *X lc*

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

9 C(3)(c) Specify originals or true copies. The subpoena must specify whether originals
10 or true copies will satisfy the subpoena. *X lc*

11 D Subpoenas for records of confidential *health* information.

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

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

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

22 D(2) Qualified protective order limits use of confidential health information. A

23 "qualified protective order" is defined as a court order that prohibits the parties from using or
24 disclosing confidential health information for any purpose other than the litigation for which
25 it is produced, and that requires the return of all confidential health information records to
26 the original custodian, or the destruction of all confidential health information records,

*Legislative
style*

1 including all copies made, at the end of the litigation.

2 D(3) Subpoena must also comply with state and federal law. A subpoena to command
3 production of confidential health information must comply with the requirements of this
4 section, ^{and} as well as with all other restrictions or limitations imposed by state or federal law. If
5 a subpoena does not fully comply, then the recipient is entitled to disregard it and withhold
6 the confidential records it seeks. ^{records of health information the subpoena} ^{the subpoena}

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

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

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

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

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

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

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

1 D(4)(c) Statement required to secure personal attendance of records custodian and
2 original records. The personal attendance of a custodian of records and the production of
3 original records is required if the subpoena contains the following statement:

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

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

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

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

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

19 D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a
20 deposition or similar hearing, to the officer administering the oath for the deposition at the
21 place designated in the subpoena for the taking of the deposition or at the officer's place of
22 business;

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

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

1 party issuing the subpoena.

2 D(6) Additional responsibilities of attorney or party receiving delivery of confidential
3 health information.

4 D(6)(a) Service of a copy of subpoena to patient and all parties to the litigation. If the
5 subpoena directs delivery of confidential health records to the attorney or party who issued
6 the subpoena, then a copy of the subpoena must be served on the patient whose records are
7 sought, and on all other parties to the litigation, not less than 14 days prior to service of the
8 subpoena on the custodian or keeper of the records.

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

13 D(7) Inspection of records delivered to court or other proceeding. After filing and after
14 giving reasonable notice in writing to all parties who have appeared of the time and place of
15 inspection, the copy of the records may be inspected by any party or by the attorney of
16 record of a party in the presence of the custodian of the court files, but otherwise must
17 remain sealed and must be opened only at the time of trial, deposition, or other hearing at
18 the direction of the judge, officer, or body conducting the proceeding. The records must be
19 opened in the presence of all parties who have appeared in person or by counsel at the trial,
20 deposition, or hearing. Records that are not introduced in evidence or required as part of the
21 record must be returned to the custodian who produced them.

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

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

1 subpoena is received, along with a declaration that complies with this paragraph.

2 D(8)(b) Declaration of custodian of records when records produced. Confidential
3 health information records produced when no personal attendance of the custodian is
4 required must be accompanied by a declaration of the custodian that certifies all of the
5 following:

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

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

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

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

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

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

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

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

25 D(9) Designation of responsible party when multiple parties subpoena records. If more
26 than one party subpoenas a custodian of records to personally attend under paragraph D 4(b)

D (4) (c)

within section D

Section

1 of this rule, the custodian will be deemed to be the witness of the party who first served such
2 a subpoena.

3 D(10) Tender and payment of fees. Nothing in this section requires the tender or
4 payment of more than one witness and mileage fee or other charge unless there has been
5 agreement to the contrary.

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

section

after examining these rules

① If D(11) is referring only to Rule 55 D, cite "this section",

② If D(11) is referring to all of Rule 55, D(11) should be redesignated* to E and the "this rule" retained,

* [D(11)] E
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SUBPOENA

RULE 55

1
2
3 [A **Defined; form.** A subpoena is a writ or order directed to a person and may require the
4 attendance of the person at a particular time and place to testify as a witness on behalf of a
5 particular party therein mentioned or may require the person to produce books, papers,
6 documents, or tangible things and permit inspection thereof at a particular time and place. A
7 subpoena requiring attendance to testify as a witness requires that the witness remain until the
8 testimony is closed unless sooner discharged but, at the end of each day's attendance, a witness
9 may demand of the party, or the party's attorney, the payment of legal witness fees for the next
10 following day and, if not then paid, the witness is not obliged to remain longer in attendance.
11 Every subpoena shall state the name of the court, the case name, and the case number.

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

1 | order at any time to compel production. In any case, where a subpoena commands production
2 | of books, papers, documents, or tangible things the court, upon motion made promptly and, in
3 | any event, at or before the time specified in the subpoena for compliance therewith, may quash
4 | or modify the subpoena if it is unreasonable and oppressive or condition denial of the motion
5 | upon the advancement by the person in whose behalf the subpoena is issued of the reasonable
6 | cost of producing the books, papers, documents, or tangible things.

7 | **C Purpose; issuance.**

8 | **C(1) Purpose.**

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

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

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

20 | **C(2) By whom issued.**

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

24 | **C(2)(a)(i) Requirements for subpoenas issued in blank.** Upon request of a party or
25 | attorney, any subpoena issued by a clerk of the court may be issued in blank and delivered to
26 | the party or attorney requesting it, who shall before service include on the subpoena the name

1 of the person commanded to appear; or the books, papers, documents, or tangible things to be
2 produced or inspected; and the particular time and location for the attendance of the person or
3 the production or the inspection, as applicable.

4 **C(2)(b) By the clerk of the court for foreign depositions.** A subpoena for a foreign
5 deposition may be issued as specified in Rule 38 C(2) by the clerk of a circuit court in the county
6 in which the witness is to be examined.

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

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

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

13 **D(1) Service.** Except as provided in subsection D(2) of this rule, a subpoena may be served
14 by the party or any other person 18 years of age or older. The service shall be made by
15 delivering a copy to the witness personally and giving or offering to the witness at the same
16 time the fees to which the witness is entitled for travel to and from the place designated and,
17 whether or not personal attendance is required, one day's attendance fees. If the witness is
18 under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the
19 witness's parent, guardian, or guardian ad litem. The service must be made so as to allow the
20 witness a reasonable time for preparation and travel to the place of attendance. A subpoena for
21 the taking of a deposition, served upon an organization as provided in Rule 39 C(6), shall be
22 served in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i),
23 D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h). A copy of each subpoena commanding production of
24 books, papers, documents, or tangible things and inspection thereof before trial that is not
25 accompanied by a command to appear at trial or hearing or at deposition, whether the
26 subpoena is served personally or by mail, shall be served on each party at least 7 days before

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

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

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

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

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

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

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

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

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

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

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

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

23 **E Subpoena for hearing or trial; prisoners.** If the witness is confined in a prison or jail in
24 this state, a subpoena may be served on that person only upon leave of court and attendance of
25 the witness may be compelled only upon the terms that the court prescribes. The court may
26 order temporary removal and production of the prisoner for the purpose of giving testimony or

1 | *may order that testimony only be taken upon deposition at the place of confinement. The*
2 | *subpoena and court order shall be served upon the custodian of the prisoner.*

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

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

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

19 | ***F(3) Production without examination or deposition.*** *A party who issues a subpoena may*
20 | *command the person to whom it is issued to produce books, papers, documents, or tangible*
21 | *things, other than individually identifiable health information as described in section H of this*
22 | *rule, by mail or otherwise, at a time and place specified in the subpoena, without commanding*
23 | *inspection of the originals or a deposition. In such instances, the person to whom the subpoena*
24 | *is directed complies if the person produces copies of the specified items in the specified manner*
25 | *and certifies that the copies are true copies of all of the items responsive to the subpoena or, if*
26 | *any items are not included, why they are not.*

1 **G Disobedience of subpoena; refusal to be sworn or to answer as a witness.**

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

6 **H Individually identifiable health information.**

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

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

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

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

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

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

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

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

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

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

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

19 | H(2)(c) **Time for compliance.** Except as provided in subsection H(4) of this rule, when a
20 | subpoena is served upon a custodian of individually identifiable health information in an action
21 | in which the entity or person is not a party, and the subpoena requires the production of all or
22 | part of the records of the entity or person relating to the care or treatment of an individual, it is
23 | sufficient compliance with the subpoena if a custodian delivers by mail or otherwise a true and
24 | correct copy of all of the records responsive to the subpoena within 5 days after receipt thereof.
25 | Delivery shall be accompanied by an affidavit or a declaration as described in subsection H(3) of
26 | this rule.

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

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

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

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

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

4 | H(3)(a) **Content.** The records described in subsection H(2) of this rule shall be
5 | accompanied by the affidavit or declaration of a custodian of the records, stating in substance
6 | each of the following:

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

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

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

14 | H(3)(b) **When custodian has no records or fewer records than requested.** If the entity or
15 | person has none of the records described in the subpoena, or only a part thereof, the affiant or
16 | declarant shall so state in the affidavit or declaration and shall send only those records of which
17 | the affiant or declarant has custody.

18 | H(3)(c) **Multiple affidavits or declarations.** When more than one person has knowledge of
19 | the facts required to be stated in the affidavit or declaration, more than one affidavit or
20 | declaration may be used.

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

22 | H(4)(a) **Required statement.** The personal attendance of a custodian of records and the
23 | production of original records is required if the subpoena duces tecum contains the following
24 | statement:

25 | _____
26 | The personal attendance of a custodian of records and the production of original records

1 is required by this subpoena. The procedure authorized pursuant to Oregon Rule of Civil
2 Procedure 55 H(2) shall not be deemed sufficient compliance with this subpoena.

3
4 **H(4)(b) Multiple subpoenas.** If more than one subpoena duces tecum is served on a
5 custodian of records and personal attendance is required under each pursuant to paragraph
6 H(4)(a) of this rule, the custodian shall be deemed to be the witness of the party serving the first
7 such subpoena.

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

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

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

16 **A(1) Form and contents.**

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

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

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

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

21 **A(1)(a)(iv) command ^{the} each person to whom it is directed to do one or more of the** ?

22 **following things at a specified time and place:**

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

25 **A(1)(a)(iv)(2) produce items for inspection and copying, such as specified books,**
26 **documents, electronically stored information, or tangible things in ^{the} that person's possession,** ??

As described
in Rule 43

Draft 2 - 6/21/18

We're in A pointing to D

finds only 16 references to "circuit court" in documents

as defined in section D(1) of this rule

1 custody, or control as provided in section C of this rule, except confidential health
2 information as defined in subsection D(1) of this rule; or
3 A(1)(a)(iv)(3) produce records of confidential health information for inspection and
4 copying as provided in section D of this rule.

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

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

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

16 things; or certifies that a notice will be served contemporaneously with service of the
17 subpoena.

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

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

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

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

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

or
→ has served
→ has served
→ has certified

? see u. 6

- or -

unless the party who obtained the subpoena discharges the witness sooner

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

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

5 A(6) Recipient obligations.

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

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

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

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

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

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

at a hearing or trial

?

1 witness, then that party's complaint, answer, or other pleading may be stricken.

2 A(7) Recipient's option to object, move to quash or modify subpoena for production. A

3 person who is not subpoenaed to appear, but who is commanded to produce and permit

4 inspection and copying of documents or things, including records of confidential health

5 information, may object or move to quash or to modify the subpoena, as follows:

as defined in section D of this rule

6 A(7)(a) Serve written objection before the production deadline but no later than 14

7 days after receiving subpoena. A written objection may be served on the party who issued

8 the subpoena before the deadline set for production, but not later than 14 days after service

9 on the objecting person.

10 A(7)(a)(i) Objection may be partial or total. The written objection may be to all or to

11 only part of the command to produce.

12 A(7)(a)(ii) Objection suspends obligation to produce. Serving a written objection

13 suspends the time to produce the documents or things sought to be inspected and copied.

14 However, the party who served the subpoena may move for a court order to compel

15 production at any time. A copy of the motion to compel must be served on the objecting

16 person.

party

17 A(7)(b) Motion to quash or to modify. A motion to quash or to modify the command for

18 production must be served and filed with the court no later than the deadline set for

19 production. The court may quash or modify the subpoena if it is unreasonable and

20 oppressive, or may require that the party who served the subpoena pay the reasonable costs

21 of production.

22 B Subpoenas requiring appearance and testimony by individuals, organizations, law

23 enforcement agencies or officers, and prisoners.

24 B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or

25 out of court, including:

26 B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or

Service of written objection after receipt of subpoena.

Also...

?

Simplify leadline

1 at the trial of an issue therein, or upon the taking of a deposition in an action pending
2 therein.

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

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

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

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

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

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

23 B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's
24 attorney or attorney's agent certifies that the witness agrees to appear and testify if
25 subpoenaed;

26 B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent ^{makes} satisfactory

1 arrangements with the witness to ensure the payment of fees and mileage. or the witness
2 expressly ^{declines} declined payment; and ^{The subpoena is mailed,}

3 B(2)(c)(iii) Signed mail receipt. More than 10 days before the date to appear and testify,
4 the subpoena was mailed in a manner that ^{provides} provided a signed receipt on delivery, and the
5 receipt is signed by the witness ^{or, if applicable, the} (or witness's parent, guardian, or guardian ad litem) more
6 than ^{three} 3 days before the date to appear and testify. ^{signs the receipt}

7 B(2)(d) Service of a deposition subpoena on a non-party organization pursuant to Rule
8 39 C(6). The subpoena ^A must be delivered in the same manner as provided for service of
9 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),
10 or Rule 7 D(3)(h). ^(naming an organization as a deponent)

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

14 B(3)(a) Personal service. Service of a copy, along with one day's attendance fee and
15 mileage as allowed by law, unless ^{on the peace officer personally} payment was expressly declined, ^{the peace officer expressly declines payment} on the officer personally;
16 or ^{these don't seem to function as leadlines}

17 B(3)(b) Substitute service. Service of a copy, along with one day's attendance fee and
18 mileage as allowed by law, on an individual designated by the law enforcement agency that
19 employs the ^{peace} officer or, if there is ^a no designated individual ^{is not} available, then on the person in
20 charge, at least 10 days before the date the officer is required to attend, provided that the
21 officer is currently employed by the agency and is present in the state at the time the agency
22 is served. ^{peace} ^{law enforcement} ^{this} ^{is not}

23 B(3)(c) Law enforcement agency obligations. "Law Enforcement Agency" is defined for
24 purposes of this paragraph as the Oregon State Police, a county sheriff's department, or a
25 municipal police department. ^{For section "law enforcement agency" means city or}

26 B(3)(c)(i) Designate a representative. All law enforcement agencies must designate one

1 or more individuals to be available during normal business hours to receive service of

2 subpoenas.

3 B(3)(c)(ii) Ensure actual notice or report otherwise. When a law enforcement officer is

4 subpoenaed by substitute service under this subparagraph, the agency must make a good

5 faith effort to give the officer actual notice of the time, date, and location identified in the

6 subpoena for the appearance. If the agency is unable to notify the officer, then the agency

7 will promptly report this inability to the court. The court may postpone the matter to allow

8 the officer to be personally served.

9 B(4) Service of subpoena requiring the appearance and testimony of a prisoner. All of

10 the following are required to secure a prisoner's appearance and testimony:

11 B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a

12 subpoena on a prisoner, and the court may prescribe terms and conditions when compelling

13 a prisoner's attendance;

14 B(4)(b) Court determines location. The court may order temporary removal and

15 production of the prisoner to a requested location, or may require that testimony be taken by

16 deposition at, or by remote location testimony from, the place of confinement; and

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

18 custodian of the prisoner.

19 C Subpoenas requiring production of documents or things other than confidential

20 health information.

21 C(1) Combining subpoena for production with subpoena to appear and testify. A

22 subpoena for production may be joined with a subpoena to appear and testify, or may be

23 issued separately.

24 C(2) When mail service allowed. A copy of a subpoena ^{for} commanding production that

25 does not contain a command to appear and testify may be served by mail.

26 C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of

1 a subpoena issued solely to command production for inspection prior to a deposition,
2 hearing, or trial must:

3 C(3)(a) Provide advance notice to parties. The subpoena must be served on all parties
4 to the action at least 7 days before service of the subpoena on the person or organization's
5 representative who is commanded to produce and permit inspection, unless the court orders
6 less time;

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

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

11 D Subpoenas for records of confidential ^{health} information.

12 D(1) Confidential health information to which this section applies. This section creates

13 protections for production of confidential health information, which includes both

14 "individually identifiable health information" as described in ORS 192.556(8) and "protected

15 health information" as described in ORS 192.556(11)(a). "Confidential health information" is

16 defined as information collected from a person by a health care entity, employer, or

17 insurance provider that identifies the person or could be used to identify the person and that

18 includes records that:

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

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

21 person.

22 D(2) Qualified protective order ^Slimits use of confidential health information. A

23 "qualified protective order" is defined as a court order that prohibits the parties from using or

24 disclosing confidential health information for any purpose other than the litigation for which

25 it is produced, and that requires the return of all confidential health information records to

26 the original custodian, or the destruction of all confidential health information records.

... collected from a person by an employer, a health care provider, a health care facility, or other entity providing medical service, or an insurance provider that identifies ...

1 including all copies made, at the end of the litigation.

2 ^{Compliance}
D(3) Subpoena must also comply with state and federal law. A subpoena to command
3 production of confidential health information must comply with the requirements of this
4 section, ^{and} as well as with all other restrictions or limitations imposed by state or federal law. If
5 a subpoena does not fully comply, then the recipient is entitled to disregard ^{the subpoena} it and withhold
6 the confidential ^{of confidential health information} records it seeks. ^{the subpoena}

7 ^{Conditions on}
D(4) Service of subpoena is subject to the following conditions.

8 ^{not used in ORS; m-w indicates two words ST OK}
D(4)(a) Qualified protective order; declaration or affidavit; contents. The attorney or
9 party issuing a subpoena for confidential health information must serve the custodian or
10 other record keeper with either a qualified protective order, or with a declaration or affidavit
11 together with supporting documentation that demonstrates that:

12 ^{Will make}
D(4)(a)(i) ~~Written notice was given with 14 days to object.~~ The party made a good faith
13 attempt to provide ^{person whose confidential health information is sought} written notice to the patient or to the patient's attorney that allowed for
14 14 days after the date of the notice to object; ^{person's}

15 ^{patient suddenly appears}
D(4)(a)(ii) ~~Sufficient context was given to enable meaningful objection.~~ The written
16 notice included the subpoena and sufficient information about the litigation underlying the
17 subpoena to enable the ^{person or the person's} patient or attorney to meaningfully object;

18 ^{written notice that allowed for}
D(4)(a)(iii) ~~No timely objections were made, or objections were resolved.~~ Either no
19 written objection was made within the 14 days, or ^{that} objections made were resolved and the
20 command in the subpoena is consistent with that resolution; and

21 ^{certified}
D(4)(a)(iv) ~~Requests to inspect and copy will be promptly allowed.~~ The party must
22 ^{person or the person's} certify that the patient or the patient's representative will be permitted, promptly on
23 ^{representative or attorney} request, to inspect and copy any records received. ^{of confidential health information}

24 ^{not sure who}
D(4)(b) Objections. Within 14 days from the date of a notice requesting confidential
25 ^{person whose confidential health information is sought or person's} health information, the individual or individual's attorney objecting to the subpoena must
26 ^{and state} respond in writing to the party issuing the notice, stating the reasons for each objection.

NOT SURE ON VERB TENSES

11 12 - 23

1 D(4)(c) Statement required to secure personal attendance of records custodian and
2 original records. The personal attendance of a custodian of records and the production of
3 original records is required if the subpoena contains the following statement:

4 _____
5 This subpoena requires a custodian of records to personally attend and produce
6 original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55

7 D(7) is insufficient for this subpoena.

8 Just this? or is it "D(7) or D(8)"?

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

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

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

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

19 D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a
20 deposition or similar hearing, to the officer administering the oath for the deposition at the
21 place designated in the subpoena for the taking of the deposition or at the officer's place of
22 business;

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

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

unclear to us

unclear to us

securing required

of records

production of original records

OK OK

Also? your answer depends on how ultimately numbered

If the subpoena directs attendance at other hearings

other

other

or proceedings

1 party issuing the subpoena.

2 D(6) Additional responsibilities of attorney or party receiving delivery of confidential
3 health information. *records of*

4 D(6)(a) Service of a copy of subpoena to patient and all parties to the litigation. If the
5 subpoena directs delivery of confidential health records to the attorney or party who issued
6 the subpoena, then a copy of the subpoena must be served on the patient whose records are
7 sought, and on all other parties to the litigation, not less than 14 days prior to service of the
8 subpoena on the custodian or keeper of the records. *person whose records are sought*
records of information
person
OK *but -*

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

13 D(7) Inspection of records delivered to court or other proceeding. After filing and after
14 giving reasonable notice in writing to all parties who have appeared of the time and place of
15 inspection, the copy of the records may be inspected by any party or by the attorney of
16 record of a party in the presence of the custodian of the court files, but otherwise must
17 remain sealed and must be opened only at the time of trial, deposition, or other hearing at
18 the direction of the judge, officer, or body conducting the proceeding. The records must be
19 opened in the presence of all parties who have appeared in person or by counsel at the trial,
20 deposition, or hearing. Records that are not introduced in evidence or required as part of the
21 record must be returned to the custodian who produced them. *the copy*
of confidential health information

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

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

D(4)(c) Declaration of custodian of records.
D(4)(c)(i) The custodian must specify what the
custodian sent only records...

D(8)(b)
of this subsection

of records is not

see ll 20-21
Q3 - Does the concept of sending only records within custodian's custody fit here, instead?

the custodian of records produces

Q1 - does this fit better elsewhere?
Q2 - or, does the custodian declare that the custodian sent only records in the custodian's custody??

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)

Q5

D(4)(c)

see p. 20 ll 1-3

1 of this rule, the custodian will be deemed to be the witness of the party who first served such
2 a subpoena.

3 D(10) Tender and payment of fees. Nothing in this section requires the tender or
4 payment of more than one witness and mileage fee or other charge unless there has been
5 agreement to the contrary.

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

section of records is
of this section
section

*one day of legal
witness fees and mileage
or other charges*

*see red-marked
copy if this rule, this is likely E
if this section, this remains D(11)*

Q

Q

1 **PERSONS WHO MAY ADMINISTER OATHS FOR DEPOSITIONS;**

2 **FOREIGN DEPOSITIONS**

3 **RULE 38**

4 **A Within Oregon.**

5 A(1) Within this state, depositions shall be preceded by an oath or affirmation
6 administered to the deponent by an officer authorized to administer oaths by the laws of this
7 state or by a person specially appointed by the court in which the action is pending. A person so
8 appointed has the power to administer oaths for the purpose of the deposition. A(2) For
9 purposes of this rule, a deposition taken pursuant to Rule 39 C(7) is taken within this state if
10 either the deponent or the person administering the oath is located in this state.

11 **B Outside the state.** Within another state, or within a territory or insular possession
12 subject to the dominion of the United States, or in a foreign country, depositions may be taken:
13 [(1)]

14 **B(1)** on notice before a person authorized to administer oaths in the place in which the
15 examination is held, either by the law thereof or by the law of the United States; [(2)]

16 **B(2)** before a person appointed or commissioned by the court in which the action is
17 pending, and such a person shall have the power by virtue of such person’s appointment or
18 commission to administer any necessary oath and take testimony; or [(3)]

19 **B(3)** pursuant to a letter rogatory. A commission or letter rogatory shall be issued on
20 application and notice and on terms that are just and appropriate. It is not requisite to the
21 issuance of a commission or a letter rogatory that the taking of the deposition in any other
22 manner is impracticable or inconvenient; and both a commission and a letter rogatory may be
23 issued in proper cases. A notice or commission may designate the person before whom the
24 deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed
25 “To the Appropriate Authority in (here name the state, territory, or country).” Evidence
26 obtained in a foreign country in response to a letter rogatory need not be excluded merely for

1 the reason that it is not a verbatim transcript or that the testimony was not taken under oath or
2 for any similar departure from the requirements for depositions taken within the United States
3 under these rules.

4 **C Foreign depositions and subpoenas.**

5 **C(1) Definitions.** For the purpose of this section:

6 C(1)(a) “Foreign subpoena” means a subpoena issued under authority of a court of record
7 of any state other than Oregon.

8 C(1)(b) “State” means a state of the United States, the District of Columbia, Puerto Rico,
9 the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular
10 possession subject to the jurisdiction of the United States.

11 **C(2) Issuance of subpoena.**

12 C(2)(a) To request issuance of a subpoena under this section, a party or attorney shall
13 submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be
14 conducted in this state.

15 C(2)(b) When a party or attorney submits a foreign subpoena to a clerk of court in this
16 state, the clerk, in accordance with that court’s procedure and requirements, shall assign a case
17 number and promptly issue a subpoena for service upon the person to whom the foreign
18 subpoena is directed. If a party to an out-of-state proceeding retains an attorney licensed to
19 practice in this state, that attorney may assist the clerk in drafting the subpoena.

20 C(2)(c) A subpoena under this subsection shall:

21 [(i)] **C(2)(c)(i)** Conform to the requirements of these Oregon Rules of Civil Procedure,
22 including Rule 55, and conform substantially to the form provided in [Rule 55 A] **Rule 55 A(1)**
23 but may otherwise incorporate the terms used in the foreign subpoena as long as those terms
24 conform to these rules; and

25 [(ii)] **C(2)(c)(ii)** Contain or be accompanied by the names, addresses, and telephone
26 numbers of all counsel of record in the proceeding to which the subpoena relates and of any

1 party not represented by counsel.

2 **C(3) Service of subpoena.** A subpoena issued by a clerk of court under subsection (2) of
3 this section shall be served in compliance with Rule 55.

4 **C(4) Effects of request for subpoena.** A request for issuance of a subpoena under this
5 section does not constitute an appearance in the court. A request does allow the court to
6 impose sanctions for any action in connection with the subpoena that is a violation of
7 applicable law.

8 **C(5) Motions.** A motion to the court, or a response thereto, for a protective order or
9 to enforce, quash, or modify a subpoena issued by a clerk of court pursuant to this section is an
10 appearance before the court and shall comply with the rules and statutes of this state. The
11 motion shall be submitted to the court in the county in which discovery is to be conducted.

12 **C(6) Uniformity of application and construction.** In applying and construing this section,
13 consideration shall be given to the need to promote the uniformity of the law with respect to
14 its subject matter among states that enact it.

1 claimant shall deliver to the requesting party a copy of all written reports and existing notations
2 of any examinations relating to injuries for which recovery is sought unless the claimant shows
3 inability to comply.

4 **D Report; effect of failure to comply.**

5 **D(1) Preparation of written report.** If an obligation to furnish a report arises under
6 sections B or C of this rule and the examining physician or psychologist has not made a written
7 report, the party who is obliged to furnish the report shall request that the examining physician
8 or psychologist prepare a written report of the examination, and the party requesting such
9 report shall pay the reasonable costs and expenses, including the examiner's fee, necessary to
10 prepare such a report.

11 **D(2) Failure to comply or make report or request report.** If a party fails to comply with
12 sections B and C of this rule, or if a physician or psychologist fails or refuses to make a detailed
13 report within a reasonable time, or if a party fails to request that the examining physician or
14 psychologist prepare a written report within a reasonable time, the court may require the
15 physician or psychologist to appear for a deposition or may exclude the physician's or
16 psychologist's testimony if offered at the trial.

17 **E Access to *[individually identifiable]* confidential health information.** Any party against
18 whom a civil action is filed for compensation or damages for injuries may obtain copies of
19 *[individually identifiable]* confidential health information as defined in *[Rule 55 H]* **Rule 55 D**
20 within the scope of discovery under Rule 36 B. *[Individually identifiable]* **Confidential** health
21 information may be obtained by written patient authorization, by an order of the court, or by
22 subpoena in accordance with *[Rule 55 H]* **Rule 55 D**.

1 production of evidence upon all matters embraced in the reference, including the production of
2 all books, papers, vouchers, documents, and writings applicable thereto. Unless otherwise
3 directed by the order of reference, the referee may rule upon the admissibility of evidence. The
4 referee has the authority to put witnesses on oath and may personally examine such witnesses
5 upon oath.

6 **C(3) Record.** When a party so requests, the referee shall make a record of the evidence
7 offered and excluded in the same manner and subject to the same limitations as a court sitting
8 without a jury.

9 **D Proceedings.**

10 **D(1) Meetings.**

11 D(1)(a) When a reference is made, the clerk or person performing the duties of that
12 office shall forthwith furnish the referee with a copy of the order of reference. Upon receipt
13 thereof, unless the order of reference otherwise provides, the referee shall forthwith set a time
14 and place for the first meeting of the parties or their attorneys to be held within 20 days after
15 the date of the order of reference and shall notify the parties or their attorneys of the meeting
16 date.

17 D(1)(b) It is the duty of the referee to proceed with all reasonable diligence. Any party,
18 after notice to the parties and the referee, may apply to the court for an order requiring the
19 referee to speed the proceedings and to make the report.

20 D(1)(c) If a party fails to appear at the time and place appointed, the referee may
21 proceed ex parte or may adjourn the proceedings to a future day, giving notice to the absent
22 party of the adjournment.

23 **D(2) Witnesses.** The parties may procure the attendance of witnesses before the
24 referee by the issuance and service of subpoenas as provided in Rule 55. If, without adequate
25 excuse, a witness fails to appear or give evidence, that witness may be punished as for a
26 contempt by the court and be subjected to the consequences, penalties, and remedies

1 provided in [Rule 55 G] **Rule 55 A(6)(d)**.

2 **D(3) Accounts.** When matters of accounting are in issue, the referee may prescribe the
3 form in which the accounts shall be submitted and in any proper case may require or receive in
4 evidence a statement by a certified public accountant who is called as a witness. Upon
5 objection of a party to any of the items thus submitted or upon a showing that the form of
6 statement is insufficient, the referee may require a different form of statement to be furnished
7 or the accounts or specific items thereof to be proved by oral examination of the accounting
8 parties or in such other manner as the referee directs.

9 **E Report.**

10 **E(1) Contents.** The referee shall without delay prepare a report upon the matters
11 submitted by the order of reference and, if required to make findings of fact and conclusions of
12 law, the referee shall set them forth in the report.

13 **E(2) Filing.** Unless otherwise directed by the order of reference, the referee shall file the
14 report with the clerk of the court or person performing the duties of that office and shall file a
15 transcript of the proceedings and of the evidence and the original exhibits with the report. The
16 referee shall forthwith mail a copy of the report to all parties.

17 **E(3) Effect.**

18 E(3)(a) Unless the parties stipulate to the contrary, the referee's findings of fact shall
19 have the same effect as a jury verdict. Within 10 days after being served with notice of the filing
20 of the report, any party may serve written objections thereto upon the other parties.

21 Application to the court for action upon the report and upon objections to the report shall be
22 by motion. The court after hearing may affirm or set aside the report, in whole or in part.

23 E(3)(b) In any case, the parties may stipulate that a referee's findings of fact shall be binding or
24 shall be binding unless clearly erroneous.

FROM LC 205 (2019), Draft Reviser's Bill

Effective date would be January 1, 2020

SECTION 2. ORCP 69 C is amended to read:

C Motion for order of default.

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

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

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

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

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

C(1)(e) whether the party against whom the order is sought is or is not a person in the military service, or stating that the movant is unable to determine whether or not the party against whom the order is sought is in the military service as required by section 201(b)(1) of the Servicemembers Civil Relief Act, 50 U.S.C. [App. 521] **3931**, as amended.

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

C(2)(a) is incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005, an order of default may be entered against the party against whom the order is sought only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27; or

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

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

NOTE: Adjusts reference in C(1)(e) to reflect federal code reorganization.¹

¹ "CODIFICATION[:]Section was formerly classified to section 521 of the former Appendix to this title prior to editorial reclassification and renumbering as this section." First note after 50 U.S.C. 3931 (accessed August 16, 2018, via citation search at <https://www.govinfo.gov/#citation>).



Shari Nilsson <nilsson@lclark.edu>

Fwd: Oregon Civil Procedure rule 7D(2)

Mark Peterson <mpeterso@lclark.edu>

Tue, Jul 10, 2018 at 1:57 PM

To: Oregon Council on Court Procedures <ccp@lclark.edu>

Hello all,

How is your summer reading (of our potential amendments) going? I have not heard any observations of errors or needed changes to date.

On a slightly related note, I am forwarding an e mail from the U.S. Marshalls Service suggesting yet another tweak in Rule 7. (It is interesting to note who is keeping up with our work.) There is a suggestion to expand service by mail to include Federal Express for the reasons outlined in the e mail. I do not think that the Rules can name a privately owned vendor but a change could be made to read like the fairly recent amendments to ORS 19.260(1)(a)(B) and (b) relating to filing of notices of appeal. That statute allows for service by "the United States Postal Service or the commercial delivery service." Two concerns: 1) are all commercial delivery services up to the task? and 2) the impact would likely go beyond ORCP 7 D(2). See, e.g., the current 7 D(6)(d). How is the change in the statute working with regard to filing notices of appeal? Any thoughts? If there is a good deal of support, your staff could attempt to create a version using ORS 19.260's language at the appropriate places in the rule. Or we can decide that it is a bad idea. Or, we can revisit it next biennium.

Mark

--

Mark A. Peterson
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----- Forwarded message -----

From: **Shari Nilsson** <nilsson@lclark.edu>
Date: Thu, Jun 21, 2018 at 11:27 PM
Subject: Re: Oregon Civil Procedure rule 7D(2)
To: "Caillier, Brett (USMS)" <Brett.Caillier@usdoj.gov>
Cc: Mark Peterson <mpeterso@lclark.edu>

Mr. Caillier,

Thank you for contacting the Council regarding this issue. It is always helpful to receive input, particularly from agencies like yours that are "on the ground" doing the work that the rules govern. The Council works on a biennial schedule and we are currently at the point in our biennium where Council members have completed the bulk of their committee work and are preparing to vote on which draft rules to publish for public comment in September. We do have a committee that is looking at Rule 7 this biennium, but it is likely too late for them to give your suggestion due consideration. I will certainly pass your e-mail along to the full Council and, if they are unable to consider the issue this biennium, we will put it on the agenda for next biennium.

Please do not hesitate to contact me or our Executive Director, Mark Peterson (copied here) if you have any questions or if you'd like to add anything further.

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Best regards,
Shari

Shari Nilsson
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On Wed, Jun 13, 2018 at 10:13 AM, Caillier, Brett (USMS) <Brett.Caillier@usdoj.gov> wrote:

Good morning,

I am contacting you regarding civil process rule D(2)d printed below for reference. This rule is in regards to the requirements for process by mail. I understand this rule was developed in 1979 and put in place in 1980 before Federal Express was the company it is today. I would like to make some arguments for the inclusion of language to allow Federal Express mail with an adult signature to be included in this rule. I am not a legal scholar so the benefits provided only relate to process. Benefits we have noted based on our experience are outlined below. If possible, we would like Federal Express's inclusion in this rule to be considered.

Benefits of using Fedex

Federal express delivers mail faster than 1st class mail

It is more reliable getting to where it is supposed to go (we have had issues never receiving the green certificate back and when service is denied ever getting the envelope with contents back with USPS)

We can get instant email notifications when the envelope is delivered (to receive notification that includes a signature with USPS we have to wait for the return of the green certificate which we have had issues ever getting back)

Envelope tracking is more detailed with locations and times.

Proof of service includes the computer typed name as well as signature. (USPS certified mail has the person print their name and sign the green certificate, but many times both are illegible)

Mail generally cost \$1 to \$1.50 less per envelope

Essentially we have found the reliability, speed, data provided for proof of service, and cost all advantage federal express at this point in time.

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

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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.

Thank you

Brett Caillier

Administrative Officer
District of Oregon
U.S. Marshals Service

(503)326-4184 Work

(202)503-6587 Cell

Brett.Caillier@usdoj.gov





Shari Nilsson <nilsson@lclark.edu>

Re: ORCP 68 question

Mark Peterson <mpeterso@lclark.edu>

Wed, May 23, 2018 at 7:51 PM

To: David.E.Leith@ojd.state.or.us

Cc: Shari Nilsson <nilsson@lclark.edu>

David,

One of the reasons that I love the law is that, even when I think that I know something, I learn that I have to think about it when we apply the law to a set of facts. I assumed that deposition costs (not the attorney fees for legal services in conducting and defending depositions) were not recoverable. Rule 68 A(2). However, that subsection does allow the parties to recover other "expenses" by agreement. I must say that I have not attempted to add or shift expenses and I have not encountered such an attempt as you describe. Maybe the operative word is "other." The last sentence in the subsection seems to be saying that the expenses associated with taking depositions cannot be recovered so is that removing deposition expenses from the list of all other possible expenses that the parties can agree are recoverable? If so, is that exclusion of deposition expenses substantive or is it a codification of previous statutory or otherwise established law? That would require a little research. In any case, there is a lack of parallelism in the two sentences where "other" expenses can be shifted by agreement and deposition expenses can only be shifted by law. Is that the result that we want? I suggest that we give it a brief round table airing at our June Council meeting to see if anyone has a satisfactory answer. Although adding a fix such as you suggest usually would not be attempted late in the biennium (but see, Judge Robert's proposal for Rule 22 B), it could be done.

It is the experience and experiences of Council members that make the Council as effective as it is in evaluating whether the rules are working reasonably well to effect the just, speedy, and inexpensive resolution of civil claims and defenses.

Like a good lawyer and new judge, I think that I answered your question with yet more questions. nevertheless, thanks for asking.

Mark

--

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On Wed, May 23, 2018 at 2:10 PM, <David.E.Leith@ojd.state.or.us> wrote:

Mark,

I encountered the following argument in a recent Rule 68 hearing. The plaintiff prevailed in its suit on a note. The note provided that the prevailing party was entitled to any expenses incurred to recover on the note. The plaintiff contended that costs of deposition should be included as an expense. The defense argued that deposition costs were precluded under Rule 68.

Defendant acknowledged that ORCP 68A(2) includes as costs and disbursements "any * * * expense specifically allowed by agreement, by these rules, or by any other rule or statute." But the rule goes on to provide in the last

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sentence, "The expense of taking depositions shall not be allowed, * * * except as otherwise provided by rule or statute." That last sentence does not explicitly allow for recovery of deposition expenses where allowed by agreement,

I rejected the defense argument in part because I do not think the last sentence of ORCP 68A(2) was intended to have that effect. In the alternative, I explained on the record that if the last sentence did intend to prohibit enforcement of agreements to shift deposition costs, that would be a substantive rule beyond the Council's charge.

If I am correct that ORCP 68A(2) is not intended to preclude enforcement of such agreements, that intent could be clarified by adding agreements to the list of exceptions in the last sentence. We are late for this session, but maybe we could add that to the list for next time?

I'd be interested in your thoughts. Thanks, -- Dave