

AMENDMENTS

TO ORCP 68

promulgated by

COUNCIL ON COURT PROCEDURES

1980 to 2024

ALLOWANCE AND TAXATION OF
ATTORNEY FEES, COSTS, AND DISBURSEMENTS

A. Definitions. As used in this rule:

A.(1) Costs and attorney fees. "Costs" are fixed sums provided by statute, intended to indemnify a party. "Attorney fees" are the reasonable and necessary value of legal services related to the prosecution or defense of an action.

A.(2) Disbursements. "Disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses, the necessary expenses of taking depositions, publication of summonses or notices, the postage where the same are served by mail, the compensation of referees, the copying of any public record, book, or document used as evidence on the trial, a sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation (not exceeding one percent per annum of the amount of the bond or other obligation), and any other expense specifically allowed by agreement, by these rules, or by other rule or statute.

B. Allowance of costs and disbursements. In any action, costs and disbursements shall be allowed to the prevailing party, unless these rules or other rule or statute direct that in the particular case costs and disbursements shall not be allowed to the prevailing party or shall be allowed to some other party, or unless the court otherwise directs.

If, under a special provision of these rules or any other rule or statute, a party has a right to recover costs, such party shall also have a right to recover disbursements. If a party is awarded attorney fees, such party shall not also recover the prevailing party costs authorized by ORS 20.070.

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

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

C.(1)(a) Subsection (2) of ORS 105.405 or paragraph (h) of subsection (1) of ORS 107.105 provide the substantive right to such items; or

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

C.(1)(c) Such items are granted by order, rather than entered as part of a judgment.

C.(2) Asserting claim for attorney fees. A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a

basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as substantially denied and no responsive pleading shall be necessary. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.

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

C.(4) Award of attorney fees, costs, and disbursements; entry and enforcement of judgment. Attorney fees, costs, and disbursements shall be entered as part of the judgment as follows:

C.(4)(a) Entry by clerk. Attorney fees, costs, and disbursements (whether the disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:

C.(4)(a)(i) Serves, in accordance with Rule 9 8., a verified and detailed statement of the amount of attorney fees, costs,

and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and

C.(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.

For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.

C.(4)(b) Objections. A party may object to the allowance of attorney fees, costs, and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Review by the court; hearing. Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.

C.(4)(d) Entry by court. After the hearing the court

shall make a statement of the attorney fees, costs, and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.

C.(5) Enforcement. Attorney fees, costs, and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees, costs, and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees, costs, and disbursements by the court pursuant to paragraph (4)(d) of this section.

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

C.(6)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims, pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same costs, attorney fees, and disbursements in more than one such judgment.

C.(6)(b) Separate judgments for the same claim. .When there are separate judgments entered for one claim (where separate actions are brought for the same claim against several parties who might have been joined as parties in the same action, or where pursuant to Rule 67 B. separate final judgments are entered against several parties for the same claim), costs, attorney fees, and

disbursements may be entered in each such judgment as provided in this rule, but satisfaction of one such judgment shall bar recovery of costs, attorney fees, or disbursements included in all other judgments.

COMMENT

This rule is designed to create a uniform procedure for determining the existence of a right to attorney fees. There has been substantial confusion in Oregon whether particular kinds of attorney fee claims must be pleaded and proved at trial, or could be submitted after trial. The Senate Judiciary Committee of the 1979 Legislative Assembly asked the Council to review the matter and to develop a uniform method of handling attorney fees.

This rule uses the bill of disbursements method for almost all attorney fee claims. The Council adopted the post-trial procedure because it is the simplest and separates a collateral controversy from the main trial. It also makes sense to deal with attorney fees after the case is tried.

The rule also develops a uniform provision for entitlement to costs and disbursements. This is necessary because of the procedural merger of law and equity. The rule is the prior rule in equity and for special proceedings. The rule does not deal with right to receive attorney fees. This was considered to be a substantive rather than a procedural matter. For the same reason, the rule does not cover the amount of costs or fees.

Section 68 A. of the rule retains the existing Oregon distinction between costs and disbursements. It also defines attorney fees. The disbursement definition combines ORS 20.020 and ORS 20.055. The Council did not change the items recoverable as disbursements. Discovery deposition costs remain non-recoverable because the rule refers to "necessary" deposition costs.

Section 68 B. would supersede ORS 20.040, 20.060, and the last sentence of 20.100. The rule is the flexible standard formerly applied to equity cases. The language used was adapted from Michigan General Court Rule 526.1. The second sentence was drafted to avoid any problem with other statutes or rules which refer only to a right to costs in reliance upon ORS 20.020. The last sentence settles a question not answered under the prior ORS sections.

Subsection 68 C.(1) makes almost all claims for attorney fees subject to this rule. There are a large number of statutes governing right to attorney fees. Rather than attempt to change the language of all the statutes, the rule simply provides a

procedure for assessing such fees no matter what source is relied upon as providing the right to such fees. There are a few specific exceptions where the rule procedure would not be appropriate, specifically, dissolution and partition cases. 68 C.(1)(a).

Since the rule is designed to provide a procedure for claiming and proving attorney fees which are an incident of the action, pre-existing attorney fees which are actually claimed as damages are excluded. 68 C.(1)(b). The rule also applies only to costs and fees which are included in the judgment. Other fees and costs, such as discovery sanctions which are part of a court order and enforceable by contempt, would not be covered by the rule. 68 C.(1)(c).

The Council felt that a party should receive some warning of a potential claim for attorney fees prior to trial, even though the decision on amount and entitlement to these fees is postponed until a bill of disbursements is filed. Requiring a pleading allegation of a right to attorney fees in 68 C.(2) also allows the opponent to test the right to such fees by a pretrial motion.

Subsections 68 C.(4) and (5) are based upon the existing costs and disbursements procedure in ORS 20.210 through 20.230. Paragraph 68 C.(4)(a) changes the procedure and requires service of a statement claiming costs, as well as disbursements and attorney fees, prior to entry of such costs as part of a judgment. The specific claim for attorney fees is included in the bill of disbursements. Note that in cases involving a judgment against parties who are in default for failure to appear, service of the statement of costs, disbursements, and attorney fees is not required. However, a statement must be prepared and filed to provide a basis for assessment of these items. Also, no judgment for attorney fees can be entered in such default cases unless the court approves the amount of the fees. Such approval could be in the form of an approved fee schedule for default cases adopted by the court or approval for individual cases.

The Council increased the time for objection to the bill of disbursements from five days after expiration of the time to file the bill of disbursements to 15 days after service of the statement of costs, disbursements, and attorney fees. The last sentence of 68 C.(4)(c) requiring an opportunity to present evidence and affidavits was added. The provision for stay of enforcement upon objection in 68 C.(5) is new.

Subsection 68 C.(6) replaces ORS 20.050 and also covers the entry of multiple final judgments in one case. Paragraph 68 C.(6)(a) covers the situation where multiple judgments are entered on separate claims pursuant to ORCP 67 B. In such case, the court is required to avoid multiple taxation of the same costs, disbursements, or attorney fees. Paragraph 68 C.(6)(b) allows entry of the same costs, disbursements, and attorney fees when there are multiple judgments against different parties on the same claim (in the same case or in separate cases), but makes clear that satisfaction of the costs, attorney fees, and disbursements portion of one such judgment satisfies all of the judgments.

RULE 69

DEFAULT

A. Entry of default. When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to plead or otherwise defend as provided in these rules, and these facts are made to appear by affidavit or otherwise, the clerk or court shall enter the default of that party.

B. Entry of default judgment.

B.(1) By the clerk. The clerk upon written application of the party seeking judgment shall enter judgment when:

B.(1)(a) The action arises upon contract;

B.(1)(b) The claim of a party seeking judgment is for the recovery of a sum certain or for a sum which can by computation be made certain;

B.(1)(c) The party against whom judgment is sought has been defaulted for failure to appear;

B.(1)(d) The party against whom judgment is sought is not an infant or incompetent person and such fact is shown by affidavit;

B.(1)(e) The party seeking judgment submits an affidavit of the amount due;

B.(1)(f) An affidavit pursuant to subsection 8.(3) of this rule has been submitted; and

B.(1)(g) Summons was personally served within the State

ALLOWANCE AND TAXATION
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RULE 68

A.(2) Costs and disbursements. "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; [the necessary expenses of taking depositions;] the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the necessary expense of copying of any public record, book, or document used as evidence on the trial; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

COMMENT

The amendment to 68 A.(2) deletes "the necessary expenses of taking depositions" and, with the addition of the last sentence, explicitly states that the expense of taking depositions shall not be allowed as costs. The amendment does not affect other provisions of rule or statute where such expenses are allowed.

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

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C(2) **Asserting claim for attorney fees.** A party seeking attorney fees shall assert the right to recover such fees by alleging the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient. If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be asserted by a demand for attorney fees in such motion, in substantially similar form to the allegations required by this subsection. Such allegation shall be taken as [substantially] denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of the facts, statute, or rule which provides a basis for the award of fees shall be waived if not asserted prior to trial. Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fees is asserted as provided in this subsection.

COMMENT

The Council believed that in several cases the requirement in ORCP 68 C(2) that a party plead the statutory basis for attorney fees claimed has been too strictly interpreted by the appellate courts. The first sentence clarifies the original intent of the Council that all claims for attorney fees be subject to pretrial test for legal sufficiency by motion. This would surely be true under the prior rule for a pleading, but there might be some question whether a motion to strike or make more definite and certain could be used against an allegation of right to attorney fees contained in a motion. The second sentence of the amendment is totally new and would change the result in cases such as Dept. of Human Resources v. Strasser, 83 Or. App. 363, 732 P.2d 38, and AFSD v. Fulop, 72 Or. App. 424, 695 P.2d 979, rev'd on other grounds, 300 Or. 39, 706 P.2d 921 (1985). The waiver in the second sentence is only of objections to the form of allegation of the right to attorney fees. Any objection to the substantive validity of the opponent's claim for attorney fees is not waived by failure to assert such objection prior to the filing of objections to the cost bill.

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* * *

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

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

[C.(1)(a) ORS 105.405(2) or 107.105(1)(i) provide the substantive right to such items; or]

C.(1)[(b)](a) Such items are claimed as damages arising prior to the action; or

C.(1)[(c)](b) Such items are granted by order, rather than entered as part of a judgment.

C.(2) [Asserting] Alleging [claim for] right to attorney fees. A party seeking attorney fees shall [assert the right to recover such fees by alleging] allege the facts, statute, or rule which provides a basis for the award of such fees in a pleading filed by that party. [A party shall not be required to allege a right to a specific amount of attorney fees; an allegation that a party is entitled to "reasonable attorney fees" is sufficient.]
Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is alleged as provided in

this subsection.

C.(2)(b) If a party does not file a pleading and seeks judgment or dismissal by motion, a right to attorney fees shall be [asserted by a demand for attorney fees] alleged in such motion, in [substantially] similar form to the allegations required [by this subsection] in a pleading.

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

C.(2)(d) [Such allegation] Any allegation of a right to attorney fees in a pleading or motion shall be [taken as] deemed denied and no responsive pleading shall be necessary. The opposing party may make a motion to strike the allegation or to make the allegation more definite and certain. Any objections to the form or specificity of allegation of facts, statute, or rule which provides a basis for the award of fees shall be waived if not [asserted] alleged prior to trial or hearing. [Attorney fees may be sought before the substantive right to recover such fees accrues. No attorney fees shall be awarded unless a right to recover such fee is asserted as provided in this subsection.]

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

[C.(4) Award of attorney fees and costs and disbursements; entry and enforcement of judgment. Attorney fees and costs and

disbursements shall be entered as part of the judgment as follows:]

[C.(4)(a) **Entry by clerk.** Attorney fees and costs and disbursements (whether a cost of disbursement has been paid or not) shall be entered as part of a judgment if the party claiming them:]

[C.(4)(a)(i) Serves, in accordance with Rule 9 B., a verified and detailed statement of the amount of attorney fees and costs and disbursements upon all parties who are not in default for failure to appear, not later than 10 days after the entry of the judgment; and]

[C.(4)(a)(ii) Files the original statement and proof of service, if any, in accordance with Rule 9 C., with the court.]

[For any default judgment where attorney fees are included in the statement referred to in subparagraph (i) of this paragraph, such attorney fees shall not be entered as part of the judgment unless approved by the court before such entry.]

[C.(4)(b) **Objections.** A party may object to the allowance of attorney fees and costs and disbursements or any part thereof as part of a judgment by filing and serving written objections to such statement, signed in accordance with Rule 17, not later than 15 days after the service of the statement of the amount of such items upon such party under paragraph (a) of this subsection. Objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule

23.]

[C.(4)(c) **Review by the court; hearing.** Upon service and filing of timely objections, the court, without a jury, shall hear and determine all issues of law or fact raised by the statement and objections. Parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issues.]

[C.(4)(d) **Entry by court.** After the hearing the court shall make a statement of the attorney fees and costs and disbursements allowed, which shall be entered as a part of the judgment. No other findings of fact or conclusions of law shall be necessary.]

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

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

C.(4)(a)(i) File with the court a signed and detailed statement of the amount of attorney fees or costs and disbursements, together with proof of service, if any, in accordance with Rule 9 C.; and

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

C.(4)(b) Objections. A party may object to a statement seeking attorney fees or costs and disbursements or any part thereof by written objections to the statement. The objections shall be served within 14 days after service on the objecting party of a copy of the statement. The objections shall be specific and may be founded in law or in fact and shall be deemed controverted without further pleading. Statements and objections may be amended in accordance with Rule 23.

C.(4)(c) Hearing on objections.

C.(4)(c)(i) If objections are filed in accordance with paragraph C.(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue.

C.(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. No findings of fact or conclusions of law shall be necessary.

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

[C.(5) Enforcement. Attorney fees and costs and disbursements entered as part of a judgment pursuant to this section may be enforced as part of that judgment. Upon service and filing of objections to the entry of attorney fees and costs

and disbursements as part of a judgment, pursuant to paragraph (4)(b) of this section, enforcement of that portion of the judgment shall be stayed until the entry of a statement of attorney fees and costs and disbursements by the court pursuant to (4)(d) of this section.]

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

C.(5)(a) As part of judgment. When all issues regarding attorney fees or costs and disbursements have been determined before a judgment pursuant to Rule 67 is entered, the court shall include any award or denial of attorney fees or costs and disbursements in that judgment.

C.(5)(b) By supplemental judgment; notice. When any issue regarding attorney fees or costs and disbursements has not been determined before a judgment pursuant to Rule 67 is entered, any award or denial of attorney fees or costs and disbursements shall be made by a separate supplemental judgment. The supplemental judgment shall be filed and entered and notice shall be given to the parties in the same manner as provided in Rule 70 B.(1).

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

C.(6)(a) Separate judgments for separate claims. Where separate final judgments are granted in one action for separate claims pursuant to Rule 67 B., the court shall take such steps as necessary to avoid the multiple taxation of the same attorney

fees and costs and disbursements in more than one such judgment.

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

COMMENT

The Council changed ORCP 68 C(1) to make the procedure for recovery of attorney fees and costs and disbursements in ORCP 68 applicable to dissolution cases.

The Council made minor changes in ORCP 68 C(2). It changed several references to "assert" attorney fees and costs and disbursements in a pleading or motion to "allege" such fees or costs and disbursements. It made clear that no response is required to such an allegation, whether the allegation is made in a responsive pleading or a motion. It also divided the section into subsections and changed the order of the sentences in the subsections for purposes of clarity.

The Council changed the procedure for award of attorney fees or costs and disbursements in ORCP 68 C(4). The existing language refers to entry of an award of attorney fees or costs and disbursements "as part of the judgment" in the case. The new language attempts to conform the rule to the language in ORS 20.220 which treats any award of attorney fees or costs and disbursements, subsequent to the judgment on the main claim, as a separate judgment. ORCP 68 C(5)(a) provides that, if the attorney fees and costs and disbursements award is finally determined prior to entry of judgment on the principal claim, the award is included in the principal judgment. In the more usual case, where the attorney fees or costs and disbursements award is not determined before the entry of judgment on the principal claim, ORCP 68 C(5)(b) provides for entry of an entirely separate

supplemental judgment.

The new language changes the procedure for entry of judgments for attorney fees or costs and disbursements in several other respects. Under the existing rule, the clerk enters judgment for the amount claimed in the attorney fees or costs and disbursements statements. If objections are filed, the enforceability of that judgment is suspended until the court rules on the objections. Under the new rule, no judgment is entered for attorney fees or costs and disbursements until after the time for objections expires. If no objections are filed, the court enters judgment for the attorney fees or costs and disbursements. If objections are filed, the court enters judgment for attorney fees or costs and disbursements after hearing and determining such objections. Under the existing procedure, the clerk automatically entered the amount claimed in the statement of attorney fees or costs and disbursements. Under the new ORCP 68 C(4)(d), the court may enter the amount claimed in the absence of objection, but is not required to do so. The court would thus have discretion to pass on the reasonableness of the amounts claimed even if there is no objection. This eliminated the necessity of requiring court approval of attorney fees in default judgment situations.

ALLOWANCE AND TAXATION OF
ATTORNEY FEES AND COSTS AND DISBURSEMENTS
RULE 68

A. Definitions. As used in this rule:

* * * * *

A.(2) **Costs and disbursements.** "Costs and disbursements" are reasonable and necessary expenses incurred in the prosecution or defense of an action other than for legal services, and include the fees of officers and witnesses; the expense of publication of summonses or notices, and the postage where the same are served by mail; the compensation of referees; the necessary expense of copying of any public record, book, or document ~~used as evidence on the trial~~ admitted into evidence at trial; recordation of any document where recordation is required to give notice of the creation, modification or termination of an interest in real property; a reasonable sum paid a person for executing any bond, recognizance, undertaking, stipulation, or other obligation therein; and any other expense specifically allowed by agreement, by these rules, or by other rule or statute. The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwise provided by rule or statute.

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COMMENT

68 A.(2). The purpose of this amendment is to make clear that the costs of copying public records and the like for use at

trial are allowable and taxable only if such records are admitted, as opposed to being merely offered in evidence or obtained in preparation for trial. Admissibility of public records, documents, and data collections is provided for in Rules 803(8) [ORS 40.460], 902(4) [ORS 40.510], and 1005 [ORS 40.570] of the Oregon Evidence Code.

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RULE 68

A. Definitions. As used in this rule:

* * * * *

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

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COMMENT TO RULE 68

Subsection A(2) is amended to transfer to it the provision formerly contained in subparagraph 7 D(4)(a)(ii) for taxation as costs any fee charged by the ODOT for providing to the plaintiff address information pertinent to a defendant served pursuant to subparagraph 7 D(4)(a)(i).

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RULE 68

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C(4)(c) Hearing on objections.

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C(4)(c)(ii) The court shall deny or award in whole or in part the amounts sought as attorney fees or costs and disbursements. *[No findings of fact or conclusions of law shall be necessary.]*

* * *

C(4)(e) Findings and conclusions. On the request of a party, the court shall make special findings of fact and state its conclusions of law on the record regarding the issues material to the award or denial of attorney fees. A party shall make a request pursuant to this paragraph by including a request for findings and conclusions in the title of the statement of attorney fees or costs and disbursements or objections filed pursuant to paragraph (a) or (b) of this subsection. In the absence of a request under this paragraph, the court may make either general or special findings of fact and may state its conclusions of law regarding attorney fees.

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Council on Court Procedures, Staff Comment, 1998

The rule previously provided that: "No findings of fact or conclusions of law shall be necessary." In recent years appellate courts have increasingly experienced the need to remand rulings on attorney fee awards to the trial court for supplementation of the record by inclusion of findings and conclusions material to

such rulings because of the difficulty or impossibility of conducting meaningful review in their absence. *See, e.g., Mattiza v. Foster*, 311 Or 1, 10, 803 P2d 723 (1990).

A new paragraph C(4)(e) is added requiring the trial court to make special findings of fact and state its conclusions of law regarding issues material to any ruling on a statement of attorney fees or objections thereto, which make clear the factual and legal basis for the denial of requested fees or the amount in which they are awarded. However, this requirement is conditional upon a request for special findings of fact and conclusions of law being timely made. In the absence of a timely request the court may make only a general finding of fact and need not state its conclusions of law separately. A request under this paragraph is timely only if included in the title of the statement filed pursuant to paragraph C(4)(a) of this rule or in the title of any objections filed pursuant to paragraph C(4)(b) of this rule.

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AND DISBURSEMENTS
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* * * * *

C(4)(c) Hearing on objections.

C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule, the court, without a jury, shall hear and determine all issues of law and fact raised by the statement of attorney fees or costs and disbursements and by the objections. The parties shall be given a reasonable opportunity to present evidence and affidavits relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying attorney fees or costs and disbursements.

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

* * * * *

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

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

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

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

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

14 C(2)(b) If a party does not file a pleading [*and seeks judgment or dismissal by motion*]
15 **but instead files a motion or a response to a motion,** a right to attorney fees shall be alleged in
16 such motion **or response,** in similar form to the allegations required in a pleading.

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

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

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

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

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

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

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

13 **C(4)(b) Objections.** A party may object to a statement seeking attorney fees or costs and
14 disbursements or any part thereof by **a** written objection[s] to the statement. The objection[s]
15 **and supporting documents, if any**, shall be served within 14 days after service on the objecting
16 party of a copy of the statement. The objection[s] shall be specific and may be founded in law
17 or in fact and shall be deemed controverted without further pleading. [*Statements and*
18 *objections may be amended in accordance with Rule 23.*] **The objecting party may present**
19 **affidavits, declarations, and other evidence relevant to any factual issue, including any factors**
20 **that ORS 20.075 or any other statute or rule requires or permits the court to consider in**
21 **awarding or denying attorney fees or costs and disbursements.**

22 **C(4)(c) Response to objections.** **The party seeking an award of attorney fees may file a**
23 **response to an objection filed pursuant to paragraph C(4)(b) of this rule. The response and**
24 **supporting documents, if any, shall be served within seven days after service of the objection.**
25 **The response shall be specific and may address issues of law or fact. The party seeking**
26 **attorney fees may present affidavits, declarations, and other evidence relevant to any factual**

1 issue, including any factors that ORS 20.075 or any other statute or rule requires or permits
2 the court to consider in awarding or denying attorney fees or costs and disbursements.

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

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

9 *[C(4)(c)(i) If objections are filed in accordance with paragraph C(4)(b) of this rule],*

10 C(4)(e)(i) If a hearing is requested the court, without a jury, shall hear and determine
11 all issues of law and fact raised by *[the statement of attorney fees or costs and disbursements*
12 *and by] the objection[s]. [The parties shall be given a reasonable opportunity to present*
13 *affidavits, declarations and other evidence relevant to any factual issue, including any factors*
14 *that ORS 20.075 or any other statute or rule requires or permits the court to consider in*
15 *awarding or denying attorney fees or costs and disbursements.]*

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

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

20 C(4)[(e)](g) Findings and conclusions. On the request of a party, the court shall make
21 special findings of fact and state its conclusions of law on the record regarding the issues
22 material to the award or denial of attorney fees. A party **must** *[shall]* make a request pursuant
23 to this paragraph by including a request for findings and conclusions in the title of the
24 statement of attorney fees or costs and disbursements, *[or] objection[s], or response* filed
25 pursuant to paragraph (a), *[or] (b), or (c)* of this subsection. In the absence of a request under
26 this paragraph, the court may make either general or special findings of fact and may state its

1 conclusions of law regarding attorney fees.

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

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

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

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

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

13 **C(6)(b) Separate judgments for the same claim.** If more than one judgment is entered
14 for the same claim (when separate actions are brought for the same claim against several
15 parties who might have been joined as parties in the same action[,] or₂ when pursuant to Rule
16 67 B₂ separate limited judgments are entered against several parties for the same claim),
17 attorney fees and costs and disbursements may be entered in each judgment as provided in
18 this rule, but satisfaction of one judgment bars recovery of attorney fees or costs and
19 disbursements included in all other judgments.

1 **PLEADING, ALLOWANCE, AND TAXATION OF ATTORNEY FEES**

2 **AND COSTS AND DISBURSEMENTS**

3 **RULE 68**

4 **A Definitions.** As used in this rule:

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

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

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

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

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

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

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

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

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

16 C(2)(b) **Alternatives.** If a party does not file a pleading but instead files a motion or a
17 response to a motion, a right to attorney fees shall be alleged in [*such*] **the party's** motion or
18 response, in similar form to the allegations required in a pleading.

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

22 C(2)(d) **Pleadings or motions responding to allegations of right to attorney fees.**
23 Any allegation of a right to attorney fees in a pleading, motion, or response shall be deemed denied
24 and no responsive pleading shall be necessary. The opposing party may make a motion to strike the
25 allegation or to make the allegation more definite and certain. Any objection to the form or
26 specificity of the allegation of the facts, statute, or rule that provides a basis for the award of fees

1 shall be waived if not alleged prior to trial or hearing.

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

5 C(4) **Procedure for seeking attorney fees or costs and disbursements.** The procedure for
6 seeking attorney fees or costs and disbursements shall be as [follows:] **specified in this subsection.**

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

10 C(4)(a)(i) [*File*] **file** with the court a signed and detailed statement of the amount of
11 attorney fees or costs and disbursements that explains the application of any factors that ORS
12 20.075 or any other statute or rule requires or permits the court to consider in awarding or denying
13 attorney fees or costs and disbursements, together with proof of service, if any, in accordance with
14 Rule 9 C; and

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

17 C(4)(b) **Filing and serving objections. [Objections.]** A party may object to a
18 statement seeking attorney fees or costs and disbursements or any part thereof by a written
19 objection to the statement. The objection and supporting documents, if any, shall be **filed and**
20 served within 14 days after service on the objecting party of a copy of the statement. The objection
21 shall be specific and may be founded in law or in fact and shall be deemed controverted without
22 further pleading. The objecting party may present affidavits, declarations, and other evidence
23 relevant to any factual issue, including any factors that ORS 20.075 or any other statute or rule
24 requires or permits the court to consider in awarding or denying attorney fees or costs and
25 disbursements.

26 C(4)(c) **Response to objections.** The party seeking an award of attorney fees may file a

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

7 C(4)(d) **Amendments and enlargements of time.**

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

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

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

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

20 C(4)(e)(ii) **Court's ruling.** The court shall deny or award in whole or in part the amounts
21 sought as attorney fees or costs and disbursements.

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

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

1 including a request for findings and conclusions in the [title] **caption** of the statement of attorney
2 fees or costs and disbursements, objection, or response filed pursuant to paragraph [(a), (b), or (c)
3 of this subsection] **C(4)(a), C(4)(b), or C(4)(c) of this rule**. In the absence of a request under this
4 paragraph, the court may make either general or special findings of fact and may state its
5 conclusions of law regarding attorney fees.

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

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

10 **C(5)(b) [By supplemental] After entry of a judgment[: notice].**

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

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

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

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

23 **C(6)(b) Separate judgments for the same claim.** If more than one judgment is
24 entered for the same claim (when separate actions are brought for the same claim against several
25 parties who might have been joined as parties in the same action or, when pursuant to Rule 67 B,
26 separate limited judgments are entered against several parties for the same claim), attorney fees

1 [and] or costs and disbursements may be entered in each judgment as provided in this rule, but
2 satisfaction of one judgment bars recovery of attorney fees or costs and disbursements included in
3 all other judgments.

4 **C(7) Procedure for seeking attorney fees or costs and disbursements incurred in**
5 **enforcing judgments.**

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

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

2014-2015 BIENNIUM STAFF COMMENT TO RULE 68

Note: This staff comment is provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2014-2015 biennium. Language in this comment was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. This comment is neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor does it establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at www.counciloncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

Rule 68 is amended in three significant respects:

1. A new subparagraph [C(4)(d)(ii)] authorizes the court to exercise discretion to expand the 14 day period for filing and serving statements of attorney fees and objections thereto, and the 7 day period for filing and serving a response to any objection, and the court may in its discretion allow filing or service of those documents after the specified time has expired;
2. A new subparagraph [C(5)(b)(ii)] authorizes the court to exercise discretion to award attorney fees or costs and disbursements in the form of a limited judgment after the entry of a limited judgment that affects fewer than all of the parties or fewer than all of the claims or defenses in a case;
3. A new subsection [C(7)] is added to provide a procedure for a party to seek a supplemental judgment for attorney fees or costs and disbursements for those additional attorney fees and costs and disbursements incurred in collecting or enforcing the underlying judgment;

Other changes for clarification or consistency include a change to the title of the rule to more readily identify the rule as the procedure for drafting statements of attorney fees and the related objections and responses. Internal references to the rule are amended in subsection A(2), subsection C(3), subsection C(4), paragraph C(2)(a), and paragraph C(4)(g) for accuracy and consistency. Eight archaic or imprecise uses of "such" are deleted or reworded. The paragraphs within subsections C(1) and C(4) are amended to conform to the Council's format. Lead lines are added or amended from paragraph C(2)(b) through subparagraph C(5)(b)(ii). The word "or" is substituted for "and" in subsection C(3) and in paragraphs C(6)(a) and C(6)(b). The article "a" is added in paragraph C(4)(a). References to Rule 67 are deleted in paragraphs C(4)(a) and C(5)(a) as unnecessary. Clarification is made that objections and responses to objections are to be filed as well as served within their respective timelines in paragraphs C(4)(b) and C(4)(c), and the word "seven" is replaced with the Arabic numeral "7" in subparagraph C(4)(c) for consistency. The word "title" is replaced with "caption" in paragraph C(4)(g). The words "or supplemental" are added in subparagraph C(5)(b)(i) to more properly

describe the judgments to which the subparagraph refers. The amendments listed in this paragraph are made for the purpose of improved clarity and consistency and are not meant to effect a change in the rule's meaning or operation.