MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 14, 2024, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Lara Johnson
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Michael Shin
Stephen Voorhees
Margurite Weeks
Hon. Wes Williams
Alicia Wilson

Members Absent:

Hon. D. Charles Bailey, Jr.
Eric Kekel
Hon. Melvin Oden-Orr
Scott O'Donnell
Hon. Scott Shorr

Guests:

Rachel Trickett, Oregon Judicial Department

Council Staff:

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

ORCP/Topics Discussed this Meeting		ORCP/Topics Discussed & Not Acted on this Biennium		ORCP Amendments Published	ORCP/Topics to be Reexamined Next Biennium
• Abusive Litigants (ORCP 35) • ORCP 1 • ORCP 14 • ORCP 39 • ORCP 55		• ORCP 10 • ORCP 12 • ORCP 15 • ORCP 19 • ORCP 21 • ORCP 23 • ORCP 58 • ORCP 68 • ORCP 69 • ORCP 71	• Annotated ORCP • Composition of Council • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate • Service by Posting/Publication • Service in EPPDAPA Cases • Service, Generally • Uniform Collaborative Law Act • UTCR 5.100	• ORCP 1 • ORCP 14 • ORCP 35 • ORCP 39 • ORCP 55	

I. Call to Order

Mr. Andersen called the meeting to order at 9:31 a.m. Members were welcomed, and Mr. Andersen emphasized the importance of fostering productive dialogue on the proposed amendments.

II. Administrative Matters

A. Approval of June 8, 2024, Minutes (Appendix A)

Judge Peterson identified three errors to be corrected:

- Page 4: include the article “the” before the phrase “May Council meeting”
- Page 9: eliminate repeated word "of"
- Page 12: Replace "committee on uniform laws" with "Uniform Laws Commission"

Ms. Dahab made a motion to approve the minutes with the amendments suggested by Judge Peterson. Judge Jon Hill seconded the motion, which passed unanimously.

B. Election of Officers

Mr. Goehler nominated Mr. Andersen as chair. Judge Williams moved to close the nominations for chair. Judge Jon Hill seconded that motion. Judge Jon Hill then moved to approve the nomination of Mr. Andersen. Judge Williams seconded the motion, which was approved unanimously.

Judge Jon Hill nominated Mr. Goehler as vice chair and Ms. Weeks as treasurer. Judge Williams seconded the motion, which was approved unanimously.

III. Old Business

A. Reports Regarding Last Biennium

1. ORS 45.400 (Appendix B)

Judge Peterson explained that the Council had suggested a change to ORS 45.400 to the Legislature last biennium but that this suggestion had not been successful. The change would be to remove the explicit requirement that motions for remote testimony be made 30 days in advance of the trial or hearing, which is honored more in the breach than in fact. He stated that he had recently made a presentation regarding the suggested change to ORS 45.400 to the Oregon State Bar’s Committee on Legislative Improvements. The committee agreed with the change and included it in the Bar’s package to the Legislature. Legislative Counsel made some very small stylistic changes that did no damage to the changes that

the Council wanted. Judge Peterson stated that the changes to ORS 45.400 will likely be enacted by the Legislature. He thanked the Bar for helping the Council get the recommended change before the Legislature.

2. Staff Comments

Judge Peterson indicated that his schedule had not allowed him to finalize the staff comments in the time since the last Council meeting.

B. Discussion of Draft Amendments

1. ORCP 1 (Appendix C)

Mr. Goehler gave a recap of the proposed changes to ORCP 1. He stated that the committee was originally tasked with looking at the new limited license paralegals admitted to the Oregon bar and addressing how the ORCP should name them in the rules. One thought was to change all of the individual rules to mention the paralegals, but a more elegant approach was to put a definition in ORCP 1. The committee also considered whether limited license paralegals are the only type of position to which such a change might apply. The language used in the Oregon Revised Statutes is "associate member of the Oregon State Bar practicing law in the member's approved scope of practice," leaving the door open for other professionals who might be permitted to do limited legal practice in the future. The committee decided to mirror the language in the statutes. Mr. Goehler stated that the committee also cleaned up the definition of "declaration" to make it less circular and more clear, and provided a definition of an affidavit to distinguish it from a declaration. He noted that there were some additional cleanup issues made by staff.

Judge Peterson explained that Ms. Wilson's committee on signatures had also made changes to the Rule 1. A new section E was added to clarify that the signature for declarations may be in the form approved for electronic filing.

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

Judge Jon Hill moved to publish the draft amendment of Rule 1. Judge Bloom seconded the motion, which passed unanimously.

2. ORCP 14 & ORCP 39 (Appendix D)

Mr. Goehler stated that it would make sense to consider ORCP 14 and 39 together, since the committee studied the two rules together and drafted the proposed amendments together. The issues at hand were the requirement that motions be in writing and the ability to obtain judicial assistance during a

deposition. He stated that the strict letter of current Rule 14 would seem to require a written motion when a lawyer wants assistance from a judge during a deposition. The goal of the committee was to allow the practice of obtaining remote assistance from a sitting judge during a deposition to continue. The proposed changes would allow for judges to assist with resolving deposition issues without requiring a written motion, but still leave a written motion as an option. So, for example, a lawyer could still halt a deposition and file a motion for a protective order. Mr. Goehler noted that this also mirrors practice in a lot of areas. He also stated that there were some minor cleanup changes made to both rules.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendments of ORCP 14 & ORCP 39

Judge Jon Hill moved to publish the draft amendments of Rule 14 and Rule 39. Ms. Holley seconded the motion, which passed unanimously.

3. ORCP 55 (Appendix E)

Ms. Nilsson noted that, during the June 8, 2024, Council meeting, Ms. Johnson had made additional suggestions for changes to the draft of Rule 55. The Council agreed that she should present those suggestions to Judge Norby. In the time between the June 8, 2024, meeting and the current meeting, Ms. Johnson, Judge Peterson, Judge Norby, and Ms. Nilsson communicated about those suggestions, which are reflected in the draft before the Council today.

Judge Peterson explained that the impetus for some of the changes to Rule 55 was a proposal in the last legislative session to amend Rule 55 to allow service of subpoenas not only by U.S. mail but by e-mail. Judge Peterson stated that he and Mr. Andersen had spoken before the House Judiciary Committee and suggested that the Legislature not act on the proposal at that time. He stated that he was not sure whether the testimony was effective but, in any case, the Legislature did not pass that bill. The gist of his and Mr. Andersen's testimony was that, in some cases, a "simple" legislative fix can cause more issues than the Legislature might realize. The Council's proposed amendment to Rule 55 allows service of subpoenas not only by e-mail, but also by other electronic means, to individuals who waive personal service. This broadens the reach substantially. The change also includes some guarantees that the proposed witness has agreed to electronic service; that payment arrangements have been made; that a time, date, and place was agreed on; and that the witness actually received the document. Judge Peterson opined that the simple legislative concept was substantially improved by the Council.

Judge Peterson also explained that the committee had originally included a change that a motion to quash or modify a subpoena had to be served before the

date and time set for the recipient to appear; however, during later communications with Judge Norby, Ms. Johnson, and Ms. Nilsson, he had expressed concern that this would allow a witness to literally show up at the very last minute with a motion to quash. He noted that it is not clear what effect that would have, since the judge would not have ruled on the motion. He had therefore suggested striking the words "and time," so that the motion must be filed before the date set for the recipient to do whatever it is that the subpoena is asking them to do. The subgroup also had some discussion with regard to what grounds would be appropriate to support a motion to quash or to modify, and had fallen back on the "unreasonable and oppressive" language in the existing rule, but changing the conjunctive to the disjunctive, and also adding language regarding whether the witness has a legal right not to testify. Another provision that was added, that was lost from the existing rule in the changes of the previous draft, provides that, in any case, the court may reasonably apportion the costs for compliance or shift the entire cost to the party that served the subpoena.

Ms. Johnson stated that one part of the current draft still causes her concern. The last sentence of subsection A(7) varies from the current standard, which is that the court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require the party who served the subpoena to pay the reasonable cost of production. She asked why the Council is seeking to modify that standard, and whether there is any case law that is being looked to, particularly with regard to the phrase, "if the witness subpoenaed to appear or testify proves a legal right not to testify." She stated that her concern is that there may be a witness who is subpoenaed to testify who might have a right not to testify on a limited topic on which they have been subpoenaed, but that right may not extend to other areas on which they have been subpoenaed. She noted that someone who has been subpoenaed always has the protection during a deposition to object to providing testimony and to refuse to testify based on a privilege. She stated that her preference would be to stick with the language in the existing rule.

Mr. Goehler stated that this seems to improve on the language in the current rule. He stated that it is hard to imagine a court saying that a subpoena is oppressive, but not unreasonable. Using the disjunctive seems to be an improvement over the conjunctive, rather than having it be a two part test. Ms. Johnson reiterated that her preference would be to stick with the current language. She stated that she was not aware of any parties having difficulty getting appropriate motions to quash or to modify granted based on a conjunctive as opposed to a disjunctive. She suggested replacing the last two sentences in subsection A(7) of the current draft, "The court may quash or modify the subpoena if the subpoena is unreasonable or oppressive, or if the witness subpoenaed to appear and testify proves a legal right not to testify. In any case, the court may reasonably apportion the costs for compliance or shift the entire cost of compliance to the party that served the subpoena," with the language in the current rule, "The court may

quash or modify the subpoena if the subpoena is unreasonable and oppressive, or may require that the party that served the subpoena pay the reasonable costs of production."

Mr. Larwick stated that he did not remember these changes as a committee member. He voiced the same concerns as Ms. Johnson about changing "unreasonable and oppressive," to "unreasonable or oppressive." He noted that much of the committee discussion involved trying to make it so that non parties who are subpoenaed, who have evidence that the parties need to resolve disputes, must have a high bar to show that they do not have to comply with the subpoena. He opined that changing the word "and" to the word "or" seems to lower that bar, which is something that the committee was trying to avoid.

Mr. Marrs asked about the rationale for eliminating the objection process that is in the existing rule under subparagraph A(7)(a)(ii). Judge Norby stated that the existing objection process only applies to motions to produce and that there was never a process for motions to quash in Rule 55. She stated that former Council chair Don Corson had objected to a proposed change to Rule 55 last biennium that may have had unintended consequences. Judge Norby had communication with Mr. Corson through Ms. Johnson, and the concurrence was that it would be better to finally have an objection process that applied to both motions to appear and testify and also motions to produce. The draft before the Council was an attempt to unify the process for all subpoenas.

Ms. Johnson stated that, under the current rule, if a party wants a document and subpoenas a third party to get that document or set of documents, the other side can simply state an objection to the subpoena and that is the end of it. If the party wants to have the other side move to quash the subpoena, the party has to join the subpoena for documents with a subpoena to appear at a deposition to get around this sort of unequal application of the rule. She stated that she sometimes has to subpoena the party or the custodian of the documents to appear at a deposition, which seems not to be the most efficient way to resolve issues to simply obtain documents. The thinking was to make the standards that apply to motions to quash consistent for a party seeking documents and a party seeking depositions: to have one single rule for all.

Judge Norby added that, when ORCP 55 was reorganized six years ago, nothing in the rule was changed; the goal was to simply make more sense of the existing procedures. In subsequent biennia, the Council has been trying to make improvements because, now that the rule has been reorganized, problems have come to light that need to be fixed. This is one of the issues that people realized needed clarity. Judge Peterson explained that he had actually pushed for this change at the time of the reorganization of Rule 55; however, Judge Norby was correct to point out that any changes to the rule should wait until after lawyers had time to get used to the reorganization.

Mr. Marrs asked whether the objection process language did not exist in the version of the rule older than six years ago. Judge Norby stated that it did exist for motions to produce; however, it was difficult to understand how it worked because pieces of the objection process were strewn throughout the 12-page rule. Once those pieces were brought together in a single section, the Council realized that there was not a process for subpoenas to appear and testify, and also that the existing process for subpoenas to produce had some flaws that needed to be smoothed out. Mr. Marrs stated that he understood the desire to have a consistent and clear rule, but not the rationale behind removing a tool from the toolbox of certain people when they are subpoenaed; in essence, to make it more convenient for a subpoenaing party. Judge Norby stated that it seems that there has been a balancing act throughout the years, because the original rule was not written at all with the public in mind or with the witnesses themselves in mind. It was written entirely for lawyers, and even lawyers had trouble with it. In recent years, the Council has been trying to balance making things easier for non lawyers, both self-represented litigants and non-party witnesses, but not making it so easy that they think they can do something they cannot, or that they are given a pass on something that lawyers could not equally achieve. That has been a pretty tough balancing act at times. Judge Norby noted that, last biennium, Judge Peterson was advocating requiring the inclusion of an objection form on the back of the subpoena, and that did not pass muster with the committee or the Council as a whole. In this case, it was a little harder to achieve the balance and to also create a process that could equally apply both to subpoenas to appear and testify as well as subpoenas to produce.

Mr. Larwick stated that part of the rationale was that the rule, as written, has such a low bar for the subpoenaed entity; they can just say, “I object,” without articulating the basis of their objection. The timeline for the objection is ambiguous, so when the parties in litigation are trying to schedule and get the evidence they need for their case, having the subpoenaed entity just say, “I object, I’m not going to participate,” is frustrating. The committee did not think the bar was high enough, and perhaps was partly inspired by some high-profile cases that were happening nationally where entities that were subpoenaed by the Senate refused to participate. Part of the committee’s process was to go through different iterations, with specific types of objections that would be sufficient to get a person out of their legal duty to respond to a subpoena. Then the committee scaled back, rather than trying to articulate every possible type of privilege or standard that could apply, and went with the more generic “unreasonable or oppressive” language so that a party that does not want to produce documents in response to a subpoena has a little bit of a higher bar.

Judge Peterson emphasized that the draft does not really take a tool out of the toolbox but, rather, names it correctly. An objection, which is asking the court to do or not to do something, is properly called a motion. He also noted that the most important change to the rule may be the language starting in subparagraph

A(1)(a)(vi), which states that language needs to be included on every subpoena that states that, if the recipient does not do what the subpoena says they are supposed to do, they could go to jail.

Judge Norby agreed that the draft correctly names the tool. She noted that the committee had discussed that the events around a subpoena occur outside of court. Waiting for the answer from the judge is something that lay people do not necessarily understand, and objecting seems like something one can do without waiting for an answer and then simply choose not to appear. With a motion, it is more clear, both to people in the professional realm and also to lay people, that an answer to the motion must be received before the request can be acted on. She stated that she presides over both criminal and civil trials and, in criminal trials, if a subpoenaed witness does not appear, judges typically issue a material witness warrant and ensure that the witness appears by holding them in custody until they testify. In a recent civil trial, the key witness was subpoenaed by both parties and told them both he was not going to appear. On the morning of voir dire, both attorneys asked Judge Norby what would happen if the witness did not appear. She responded that she assumed that the lawyers would submit paperwork to her for a material witness warrant. None of the four very experienced civil lawyers had ever done that in their careers, and were not really sure that it would work. The side that knew the witness better asked whether it would be all right to just tell the witness that this was a possibility and that the judge told him that she would sign the warrant. Judge Norby agreed and, once the witness learned that information, he did show up. This experience reminded her that civil lawyers do not always fully understand options that criminal lawyers use with some regularity, and that lay people, therefore, certainly would not be aware of. She agreed with Judge Peterson that requiring this “warning” language in subpoenas is one of the most important changes to the rule.

Judge Peterson explained that the draft also includes some grammatical changes. There was also an attempt to make the language around the payment of fees and mileage uniform so that it is parallel from place to place within the rule and so that it does not appear that the different instances are intending to say something different. There is also a change to the definition of law enforcement agency, as suggested by Ms. Wilson, to make it parallel current statutes.

Ms. Johnson made a motion to replace the last two sentences in subsection A(7) of the current draft, "The court may quash or modify the subpoena if the subpoena is unreasonable or oppressive, or if the witness subpoenaed to appear and testify proves a legal right not to testify. In any case, the court may reasonably apportion the costs for compliance or shift the entire cost of compliance to the party that served the subpoena," with the language in the current rule, "The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive, or may require that the party that served the subpoena pay the reasonable costs of production." Mr. Larwick seconded the motion.

Judge Norby explained that the reason for the change in the "reasonable costs of production" language was because there could also be costs associated with appearing, for example, transportation costs. The idea was to ensure that the allocation of costs would apply not just to production, but also to motions to appear and testify. Restoring the existing language would not give judges the authority to apportion costs if they find that it is oppressive.

Ms. Johnson withdrew her motion and made a new motion identical to the first, with the exception of replacing the word "production" with the word "compliance" in the final sentence. Mr. Larwick seconded the motion.

Mr. Shin noted that the motion has two different parts, and that Council members might agree with the change of the word "production" to "compliance," but they may not agree with the other change. He wondered whether the motion could be separated and two votes be taken. Mr. Andersen wondered what the best way to proceed would be. Mr. Larwick suggested seeing whether the current motion passes. If it does not, that means that someone is in disagreement with some aspects of the proposed change. Judge Norby stated that she liked Mr. Shin's idea of two separate votes because it seems more precise. Ms. Johnson stated that she would prefer to have a vote taken on her pending motion. The Council voted to adopt Ms. Johnson's changes to the draft by majority vote.

Judge Peterson mentioned to Ms. Trickett that this might be a nice opportunity for the Uniform Trial Court Rules Committee to add Rule 55 into UTCR 5.010 regarding the conferral duty that is required in discovery motions so that the person who files the motion to quash or to modify would at least need to have a conversation with the party who issued the subpoena.

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

Judge Norby made a motion to approve the draft amendment of Rule 55, as amended by Ms. Johnson's motion. Judge Jon Hill seconded the motion, which passed by majority vote (16 yes, 1 no, 1 abstention)

4. ORCP 35 (Appendix F)

Judge Norby stated that the draft of Rule 35 was unchanged since the Council approved it for the publication agenda, other than a very minor stylistic change made by staff. She stated that she had not prepared to make a presentation on the rule, as she assumed that discussion had already been completed and that today's meeting was just for voting. Ms. Nilsson stated that she did not believe there was any need for a big presentation, as the Council has already discussed the concept of the rule many times. However, this is an opportunity for people to ask questions. She reminded the Council that publishing a draft is a good opportunity to get feedback from the bench and bar. Voting to publish a rule does

not necessarily mean that a Council member will vote to promulgate it later. However, given how much work has been put into this rule, Ms. Nilsson's opinion as a staff member is that it would be very good to see it go to publication.

Mr. Goehler agreed with Ms. Nilsson. He stated that he is aware that Council members have positions on this issue, but that it would be nice to float this out to the bench and bar. If there is a storm of resistance, it will illuminate what the Council does in the future. If there is positive feedback, that could be incorporated. In any case, he anticipates a robust discussion in December if the rule is published.

Judge Bloom stated that he respects the work that was done on this draft, as well as the importance of the issue. He still remains adamantly opposed to it. He sees it as a well-intended fix to address some extreme situations, but as subject to abuse if it passes. He stated that he is also concerned about a procedure that is designed to give judges power or authority that they already have that is going to be subject to tactical litigation to exclude people from the courthouse. While well intended, it has significant detrimental effects on the people who most need access to the court. He also fears the message that the Council sends out by publishing this rule, because he thinks that it is so fundamentally unnecessary and controversial. He opined that this is a matter better left to the Legislature. Mr. Andersen asked whether Judge Bloom feels that, if the rule is published, it seems to carry the imprimatur of the Council. Judge Bloom agreed that he does have that concern. He stated that, when he was a lawyer on the Council, when the Council could not decide whether to publish a version of the class action rule, one of the members asked whether two versions of the rule could be published. His thinking then was that the Council would send a message that it could not make a decision after working on the rule for a year, so it would let the public decide. That is also his feeling here, and he would rather not give that impression.

Judge Norm Hill stated that he shares many of Judge Bloom's concerns; however, he is going to vote to publish the rule because he does want to see what the public opinion is. That does not necessarily mean that he will vote to promulgate the rule in December. However, in contrast to Judge Bloom's opinion, he believes that so much work has gone into this rule and it has been argued to death, so there is nothing more for the Council to come up with. He stated that the Council would benefit from having a general sense of what the bar thinks.

Judge Norby also noted that there are two Council members who have told her that their votes have changed from no to yes on this proposed rule. The reason she was given was that people are already being declared "vexatious litigants," but without guardrails, and the proposed rule creates some guardrails and specificity, as well including a method to "remove the scarlet letter." She pointed out that, if the rule is not ultimately promulgated by the Council, then it will be sent around to the circuit courts throughout the state to be considered as a supplemental local rule. That would result in a potential mismatch of rules and

inconsistency throughout the state, including making it more difficult for lawyers to find the names of abusive litigants. With regard to the concept of legislation, the Legislature did look at this issue in the past and tried to create a statute. It was not nearly as good as the proposed rule, and it failed. The Legislature created the Council to address the more nuanced issues that arise in the courts, and it relies on the Council to use its expertise, particularly since there are so few lawyers in the Legislature now. If the Council does not create this rule, it is very unlikely that it will be done by the Legislature.

Ms. Dahab stated that she had voted no on this rule last biennium, and for good reason. She shared a lot of concerns that people have already articulated on the last version of the rule, but that rule was very different from this current version. The last time the Council sent a draft of this rule to publication, it received a lot of good feedback from the bar that made clear that the concerns were widespread. The work that has been done since then has significantly changed the rule and made it more focused and easier to use in circumstances that merit it, and harder to use in circumstances that do not. These changes very much addressed the concerns from the bar last biennium. Ms. Dahab stated that she believes that it is generally useful to get the bar's feedback on such issues. She stated that she has the same concerns that Judge Norby has about inconsistent application across the different judicial districts. To her, it is a big problem to have various versions of a rule being adopted here and there, some with guardrails and some entirely without. She stated that she would vote to publish because she thinks that it is a good rule as written, very much better than last biennium, and that it is important to get feedback from the bar.

a. ACTION ITEM: Vote on Whether to Publish Draft of ORCP 35

Judge Jon Hill made a motion to publish the draft of Rule 35. Judge Williams seconded the motion, which passed by majority vote (14 yes, 4 no)

b. Recommendation to Legislature to Amend of ORS 46.415 (if ORCP 35 is published) (Appendix G)

Judge Peterson reminded the Council that, last biennium, with the thought that the proposed Rule 35 might be promulgated, the Council was prepared to propose a legislative change to explicitly make Rule 35 apply in the Small Claims Department, where there tends to be a good deal of mischief. Rule 1 indicates that the ORCP do not apply to the Small Claims Department unless otherwise indicated. If the published Rule 35 is promulgated, the Council would once again recommend a change to the legislature to add a new section to ORS 46.415 to say that the provisions of Rule 35 apply to cases filed in the Small Claims Department. Judge Peterson stated that there is nothing to vote on, but merely something to keep on the Council's radar in the eventuality that Rule 35 is promulgated.

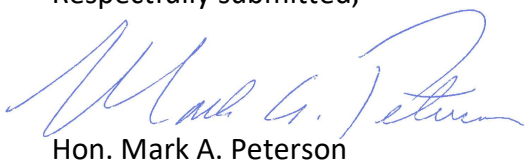
IV. New Business

No new business was raised.

V. Adjournment

Mr. Andersen thanked Council members for their hard work and generosity of spirit in considering opposing viewpoints and adapting as needed. He stated that it is an honor to serve with all of the members of the Council.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 8, 2024, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

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Hon. D. Charles Bailey, Jr.
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
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Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Michael Shin
Hon. Scott Shorr
Margurite Weeks

Members Absent:

Hon. Benjamin Bloom
Hon. Jonathan Hill
Hon. Norman R. Hill
Scott O'Donnell
Stephen Voorhees
Hon. Wes Williams
Alicia Wilson

Guests:

John Adams, Oregon Tax Court
Aja Holland, Oregon Dept. of Justice
Matt Shields, Oregon State Bar

Council Staff:

Hon. Mark A. Peterson, Executive Director

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I. Call to Order

II. Administrative Matters

A. Approval of May 11, 2024, Minutes

Judge Peterson pointed out the misspelling of the word “attorneys” on page 11 of the draft minutes (Appendix A). Judge Norby made a motion to approve the minutes with Judge Peterson’s suggested correction. Judge Oden-Orr seconded the motion, which was approved unanimously by voice vote.

III. Old Business

A. Reports Regarding Last Biennium

1. Staff Comments

Judge Peterson indicated that his schedule had not allowed him to finalize the staff comments in the time since the last Council meeting.

B. Review of Draft Rules Already on the Publication Agenda

1. ORCP 1

Judge Oden-Orr reminded the Council that the proposed changes to Rule 1 (Appendix B) are fairly non-controversial. The major changes are to include limited license paralegals. Changes were also made to reflect electronic signatures and to update the definition of “declaration” to make it non-circular. There were other minor cleanup changes as well.

Mr. Andersen asked why the new sentence in the rule, “All references in these rules to “attorney, lawyer,” or “counsel” include an associate member of the Oregon State Bar,” did not simply state “a member of the Oregon State Bar.” Judge Oden-Orr explained that the “associate member” term was chosen to track with the statutes that incorporate licensed paralegals under the new legislation. Licensed paralegals are associate members of the Bar. Judge Oden-Orr stated that his understanding was the definition “associate members” was created in anticipation of the possible future inclusion of others who are not regular members of the Bar. He stated that the committee spent a fair amount of time trying to think of a good definition, but then discovered that the statutes had already done the heavy lifting and that, for the sake of consistency, the Council should use the same term.

Mr. Goehler noted that the rules in section III.B. of the agenda have already been approved for the September agenda and that Ms. Nilsson had included them to

give Council members a final look to make sure there are no errors or issues before the September meeting. Mr. Andersen agreed and stated that new motions would not be necessary now, barring any additional changes.

2. ORCP 14 & 39

Mr. Goehler provided a brief recap on the proposed changes to Rule 14 and Rule 39 (Appendix C). He stated that the reason for the changes are to clarify that the rules permit contacting a circuit court judge during the course of a deposition. He reminded the Council that this is a permissive, rather than a mandatory, rule and the changes make it so that a written motion is not a requirement. Mr. Andersen observed that the practice is already happening, but that it is nice to clarify in the rule so that judges and attorneys know that it is permitted.

Judge Peterson pointed out an error in subsection C(2) of proposed rule 39, where a reference to subparagraphs should actually be paragraphs. He stated that Ms. Nilsson should make that change before the rule appears on the September agenda. The Council agreed.

C. Committee/Investigative Reports

1. Abusive Litigants

Judge Norby stated that she was very pleased and hopeful following the positive response to the changes she made to the draft of Rule 35 after the April Council meeting. Following another helpful discussion at May Council meeting, she came to even better understand the concerns raised by Council members, and appreciated the suggestions on how to make the proposed new rule better. After Ms. Nilsson put the draft into Council format following the May meeting, Judge Norby re-read that draft and decided that there could be additional improvements. She hoped that the Council would agree.

Judge Norby stated that, when re-reading the draft rule, she realized that the language still required two orders: a designation order and a pre-filing order. She pointed out that, in previous drafts, a designation order could be moved for by a party. However, in the most recent draft, a change was made so that only judges may initiate the process to designate a party as an abusive litigant. This would eliminate the need for two separate orders. Judge Norby stated that the most current draft before the Council (Appendix D) includes only one order and one process. Now that only a judge can initiate the process, as well as designate a litigant as abusive, it no longer makes sense to have two separate orders; what was previously a pre-filing order should simply be a component of the designation order. Judge Norby pointed out that this also simplifies the question of to whom the single order is sent, and what to call the order. She asked Council members if they agree that this is a better approach.

Judge Oden-Orr pointed out that a reference to a pre-filing order was still located in subsection B(2) of the proposed rule. Judge Norby thanked Judge Oden-Orr for pointing out the oversight and stated that it would be removed in the next draft.

Ms. Johnson asked Judge Norby to explain the order that a judge would enter if they wish to designate a litigant as an abusive litigant. Judge Norby stated that it is just a designation order, as pre-filing orders have been removed from the rule. She stated that the pre-filing order was the component of the process that said that an abusive litigant would need to obtain the presiding judge's permission in order to file a subsequent lawsuit. That was going to be a separate order, because only a judge could grant that permission. However, there was a separate process for designating someone as an abusive litigant so that a pre-filing order might become appropriate. What was previously a two-step process is now a one-step process, and the single order is called a designation order. Part of that designation order can be a component that says, "because you are so designated, you must seek the presiding judge's permission to file future lawsuits unless an exception applies," as the Council discussed at the May meeting. Judge Norby explained that previous drafts of the rule were awkward because designating someone with an abusive litigant label had to do with present conduct, while a pre-filing order had to do with future conduct. A designation order would unify those two things.

Ms. Johnson stated that this explanation was helpful. She asked whether there would still be a separate order required if the abusive litigant seeks to file new litigation that is related to the underlying designation. Judge Norby stated that she did not know that it would have to be an order, but permission would need to be granted from the presiding judge.

Judge Norby stated that making the process more clear and specific may help make the proposed rule more acceptable to more Council and bar members. The process that is informally being used by judges now, without a rule, tends to be more emergent, broad, and permanent. She wondered whether it would be helpful to include an expiration date for the abusive litigant designation. She referred to Mr. Goehler's past reference to "removal of the Scarlet Letter," and noted that there is currently a provision included to have the Scarlet Letter removed, but none to make a subsequent request if that request is turned down within that year. She suggested including, for example, a 10-year life to the designation, where it would expire after 10 years unless there are future violations, and the 10 years restarting with each violation. The designation would automatically expire after the 10 years was up without the litigant needing to make a request. She asked the Council whether they agreed that this would be an improvement to the rule.

Judge Peterson stated that he thinks that the order is pretty narrowly tailored now, with a very simple procedure to remove the designation by appearing before a judge, even ex parte if circumstances are exigent. The abusive litigant could

explain, for example, “I was having a mental health crisis back when I was filing those terrible lawsuits and the designation should no longer apply.” He stated that it does not seem unreasonable to him that, once a litigant has been designated abusive, they would at least have to ask the court for the designation to be removed. It seems more complicated to have the designation automatically expire unless the person has been misbehaving in between. Judge Norby stated that she was just thinking that, for enforcement of judgments, there is an automatic tenure and they must be renewed. It is not exactly the same thing but, oftentimes, when the court is restricting people's ability to do something, she has seen the law make assumptions that, if nothing has gone wrong in a certain period of time, the assumption is that the situation no longer exists. She thought that this addition might appeal to some, but she is happy to leave the proposed rule as is if Council members are in agreement. Judge Peterson stated that he thinks that stalking orders are an apt analogy: they are orders of unlimited duration unless the person against whom the order was entered can convince the court to remove the order.

Mr. Andersen noted that the style of the sentences in paragraphs C(1)(a) through C(1)(f) varies, and asked Judge Norby if they could be changed to mirror each other. He suggested some language improvements. Judge Norby agreed to these changes. Mr. Andersen then asked if the paragraphs under subsection C(2) could somehow be merged with those under subsection C(1) to avoid unnecessary duplication and confusion. Judge Norby stated that she understood Mr. Andersen’s concerns but did not want to promise to make this change until she looked further at the rule. She stated that the rule had changed so much over the course of several meetings that some things that made sense in previous iterations may now be redundant.

Mr. Andersen noted that subsection D(3) talks about the need for the abusive litigant to post security, and states that the court must promptly issue a judgment on the merits against the abusive litigant if the litigant fails to do so. He asked how the court would do so. Judge Norby stated that the intent is that this would be a final judgment. Judge Peterson stated that “with prejudice” would be a better phrase, because the intent is that it should be appealable. Judge Norby agreed. Mr. Andersen wondered whether it would almost be like a default judgment in a sense, because the person has not posted security.

Mr. Andersen expressed concern over the pre-filing requirement in subsection D(5) prohibiting filing a new action or claim without leave of the presiding judge. He stated that an attorney representing a new client may not know that client has been designated an abusive litigant. Judge Norby noted that the Council did discuss this issue at the May meeting, but without a lot of closure. Ultimately, this is an implementation issue, where judicial districts would have to make that determination. It is not something that the Council will be able to dictate by rule. Judge Norby stated that Judge Jon Hill had previously mentioned that one benefit

of having a central rule that applies across the state, as opposed to creating supplemental local rules in each jurisdiction, is that an ORCP would be implemented in a statewide way. This would allow the Oregon Judicial Department to assist in statewide implementation of making the names of abusive litigants available. With supplemental local rules, each judicial district can decide how to, and whether or not to, make available the names of abusive litigants.

Mr. Andersen noted that there is an extra word "that" in paragraph E(1)(b). He also stated that the word "imminent" in that paragraph might be interpreted differently by different judges, and he wondered whether there might be a better way to phrase this. Judge Norby stated that she can ponder what other terms might be better, but noted that she had spent a great deal of time constructing the existing language. Mr. Andersen agreed that this might be the best available language. Judge Norby stated that this is backup language for the relation back provision; it is a double safety.

Judge Peterson suggested adding the word "the" before "security deposit" in section A. He suggested removing the word "actual" before "presiding judge" in the first sentence of subsection B(4), as it is superfluous. He also suggested changing the word "suits" in paragraph C(1)(d) to "actions" in accordance with Rule 2.

Judge Norby thanked Council members for helping her to understand their concerns. She opined that, if this rule is adopted, it could be the best rule in the country on abusive litigants in terms of specificity of scope and the ability to remove the designation. None of that would have happened if all of the members of the Council, including those who were not keen on the creation of the proposed rule, had not taken the time to work on it and articulate their concerns. The Council thanked Judge Norby for her work as well.

2. Composition of Council

Judge Bailey stated that both plaintiffs' and defense representatives on the committee agreed that no changes to the composition of the Council are desired. If the family law bar wishes to change the composition of the Council, it will need to ask the Legislature to make a statutory change.

Judge Peterson agreed that a statutory change would be needed to change the composition of the Council. He stated that the Oregon State Bar Board of Governors (BOG) makes attorney appointments, and it follows diversity practices, including looking at geographic diversity. It is not written anywhere that the Oregon Trial Lawyers Association (OTLA) or the Oregon Association of Defense Counsel (OADC) may submit a slate of "preferred candidates" for the BOG to choose from. However, the BOG has historically accepted input from both

organizations. Judge Peterson's understanding from committee discussion is that both OTLA and OADC had committed to having people from their respective organizations volunteer, and to try to cast the net a bit wider to include organization members who work in the family law and probate areas.

Ms. Johnson stated that she shared at the last committee meeting that OTLA would make an effort to offer its family law members the opportunity to apply and join the Council. She stated that OTLA's membership is a little bit broader than one might expect, including family law, probate, and even criminal defense members. Mr. Kekel stated that OADC has also made a commitment to reach out to those that practice family law and encourage them to apply.

3. ORCP 55

Judge Norby explained that a proposed draft of Rule 55 was on the verge of being put on the September meeting agenda, but that Ms. Wilson had commented a few meetings ago on expanding the definition of law enforcement. Judge Norby and Ms. Nilsson had made an effort at updating that definition and, at the last Council meeting, Judge Jon Hill had asked for further updates to the draft, which have now been made (Appendix E).

The committee had also received comments from former Council chair Don Corson. Judge Norby at first misunderstood Mr. Corson's comments to mean that he did not want a motion to quash to apply to subpoenas for documents but, rather, only to subpoenas to appear and testify. Mr. Corson's most recent feedback is that he thinks that it would be ideal to have a simple and unified motion to quash for both kinds of subpoenas. The alteration in subsection A(7) is to unify so that a motion to quash would have the same deadlines and the same propriety in trying to limit or halt either kind of subpoena. Currently, there is not really a system for how to quash a motion to produce. With this proposed change, the same motion to quash would apply to both kinds of subpoenas.

Mr. Andersen had a question about the language in proposed subsection A(7): "A motion to quash or to modify must be filed with the court and served on the party who issued the subpoena within 14 days of the date that the subpoena was served and before the date and time set for the recipient to appear or produce." He stated that the 14-day rule works well with production of documents, but pointed out that witnesses subpoenaed to testify at trial may have much shorter timelines, and they may be uncooperative. He stated that it seems to him that 14 days only works in the context of subpoenaing documents for production because there is a 14-day time for the opposing party to object, but it does not work for a witness subpoenaed to appear and testify.

Judge Norby stated that she had the same concern, but that no one besides Mr. Andersen had previously raised it. She noted that, with this rule, she has acted as a scrivener, so she drafted her interpretation of what Council members had asked

her to write. She stated that, if there is something different or better, she would try to write that. She pointed out that she has not served a subpoena, nor a motion to quash one, in 20 years. Her whole goal in the role of scrivener has been to try to convey what others have been suggesting. Mr. Goehler stated that he thinks that the drafted language does work. He noted that there are two requirements: to be within 14 days *and* before the date and time of the of the appearance. So naturally, if the subpoena is to testify tomorrow, and the person files a motion to quash today, it is both within 14 days and before the time set for hearing. He thinks that the 14 days is just the outer limit for when the motion to quash can be filed. Mr. Andersen stated that he had initially read it a little differently, but that Mr. Goehler's explanation makes sense.

Judge Peterson stated that, when the Council first did a major rework of Rule 55, he was of the opinion that objections should be removed, since they are a discovery tool and were reserved for documents. He stated that he likes the idea of unifying the process of asking the court for assistance being called a motion. He stated that he thinks that the 14-day limitation is primarily to avoid letting someone who was served with a subpoena weeks or months ago wait until just before a trial to try to quash.

Mr. Andersen suggested replacing the word "and" and using language similar to "within 14 days of the date that the subpoena was served, and in all events before the date and time set for the recipient to appear or produce." He expressed concern that others might read the sentence the way he did initially. Ms. Johnson stated she thinks that the current language is probably fine. However, if additional clarification is needed, reference to the date on which the subpoena is due could be used: "and in the event the subpoena requires production or attendance before 14 days come up before the date and time set for the recipient to appear or produce."

Judge Norby stated that she thinks that people will intuitively know that they cannot ask for something after it was supposed to happen. She felt like the last part is fairly intuitive and that the first part is just an outside parameter. However, she wanted to write the language the way that Council members think it makes the most sense. Mr. Larwick suggested, "A motion to quash or to modify must be filed with the court and served on the party who issued the subpoena before the date and time set for the recipient to appear or produce but not more than 14 days after the date the subpoena was served." Judge Norby and Mr. Andersen stated that they liked this language. Mr. Larwick noted that he just changed the order of the existing language.

Ms. Johnson asked about the final sentence in proposed subsection A(7) regarding the standard that the court would apply. It states that the court may quash or modify the subpoena if the subpoena creates an unjustifiable burden that is not outweighed by the party's need for the evidence, or if the witness subpoenaed to appear and testify proves a legal right not to testify. She wondered whether this

language is drawn from case law or from other rules. She stated that it seems to be a bit different from ORCP 36. Judge Norby stated that this sentence arose out of a long conversation in a Council meeting some time ago, when the Council was trying to identify all of the ways in which a person could validly quash a subpoena. The discussion was about people's privileges, and that is where the legal right not to testify language came from, because so many different categories of people have different categories of privileges, and the idea was to avoid listing them all. Judge Norby thought that the "outweighed by the party's need for the evidence" language arose from case law. She stated that she had researched the case and attempted to condense the law into this language.

Ms. Johnson stated that there is an "old standby" case, *Vaughn v. Taylor*, 79 Or App 359 *rev den* 301 Or 445 (1986), about discovery, where the court applied ORCP 36, the general discovery rule, to a subpoena. She asked Council members to let her know if she is misidentifying the case. She noted that this is a different standard than the one written into the proposed rule. She expressed concern that the proposed rule would conflict with case law. Judge Norby agreed that the Council does not want that. She asked Ms. Johnson to take a look at the case and let her know. She stated that she would change the standard to match the case law in a new draft for the September meeting.

Judge Peterson pointed out that the standard in Rule 36 C(1) is "annoyance, embarrassment, oppression, undue burden, or expense." Another possibility would be to refer to Rule 36 C(1) as one of the grounds, because privilege would be a very different basis for the motion. Ms. Johnson stated that Rule 36 (C)(1) is for when a party is seeking restrictions on discovery, not so much a challenge as to whether discovery, in and of itself, is appropriate. Judge Norby thanked Ms. Johnson for bringing up the issue now, so it can be ironed out before the September meeting.

Mr. Shin pointed out that the proposed deleted paragraph A(7)(b) uses the standard of "unreasonable and oppressive." Judge Norby recalled that the Council had discussed the word "unreasonable," and how broadly that can be defined, and that the many ways in which "unreasonable" could be defined probably would not be sufficient to quash a subpoena.

Judge Peterson noted that, in the proposed deleted paragraph A(7)(b), the court is given the opportunity to shift the cost of production. That is lost in the proposed subsection A(7). He stated that the court might know that is a possibility if it is creating an unjustifiable burden, but he wondered whether something is lost by removing that from the rule. Judge Norby stated that she found it a little challenging to try to unify the process for appearing and testifying versus production, because they are such different processes. She did not know if that language should be lost, but stated that it certainly would not apply to a subpoena to appear and testify.

Mr. Marrs asked for clarification about whether the entirety of current subparagraph A(7)(a)(ii) would be removed. Judge Norby stated that it would. Mr. Marrs pointed out that this would essentially eliminate the ability to object to suspend the obligation to produce.

Judge Peterson noted that certain motion practice invokes UTCR 5.010 and obligates a party to have a pre-filing conversation with the other side. UTCR 5.010 covers all of the discovery motions under Rule 36 and Rule 45. Judge Peterson suggested to Ms. Holland that she might suggest to the UTCR Committee that it add Rule 55 into the mix of requiring a certificate of conferral. Ms. Holland stated that she is happy to take that suggestion to the committee. Judge Peterson acknowledged that it may or may not work. He also acknowledged that some subpoenas are going to non parties, so it may be a challenge to help them to understand the need to confer. He recognized that this is a problem, but suggested that it could possibly be solved with language in the subpoena.

Judge Peterson asked for the addition of an Oxford comma in part B(2)(c)(i)(B).

Judge Shorr made a motion to put Rule 55 on the agenda for the September publication meeting with the changes proposed by the Council. Ms. Dahab seconded the motion, which was approved by voice vote.

4. Uniform Collaborative Law Act

Mr. Andersen stated that, at the May Council meeting, members were asked to think about the issue so that the Council could make a decision about whether to proceed or not at the June meeting. Since Ms. Wilson was not present, he asked Ms. Johnson to brief the Council on the issue.

Ms. Johnson reminded the Council that there exists Commission on Uniform Laws that is specifically set up under Oregon statute to review potential uniform laws. This Commission had actually considered the Collaborative Law Act and rejected it, in part because of the objections of the Oregon State Bar. Ms. Johnson talked to Susan Grabe at the Bar, who explained that the Bar's position is that the Act would have stepped into the role of dictating ethics and that its provisions would interfere with obligations between an attorney and a client. For example, in the Act, once the parties begin the collaborative process, if they are unable to resolve the case, both counsel must withdraw from representation. This requires their clients to obtain new counsel, which would violate the Bar's ethics rules. A more important issue is that making any changes to accommodate the Act is outside of the Council's province and scope, because there is already a Commission especially set up in Oregon to review the uniform laws that considered and rejected the Act.

Judge Peterson stated that the Council has spent a fair amount of time wondering what it is that the people who are asking the Council to implement parts of the

Act in some way want the Council to do. He stated that Ms. Wilson has spent some time reaching out to them. If they have a concrete proposal to put before the Council that applies to the ORCP, they may do so. It seems to Judge Peterson that anything regarding mediation would be statutory, and automatic stays belong in the Uniform Trial Court Rules. Judge Peterson suggested that the Council direct Ms. Wilson to communicate with the people she has been working with to come up with a proposal for next biennium, and also to inform them that they can approach the Committee on Uniform Laws or the Legislature to make additional suggestions. Judge Bailey stated that the Council cannot really take any action unless and until the Legislature passes laws adopting the Act.

Ms. Holley made a motion to disband the committee. Judge Bailey seconded the motion, which passed by voice vote.

IV. New Business

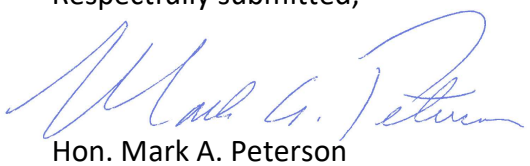
No new business was raised.

V. Adjournment

Judge Peterson stated that Ms. Nilsson would work on getting the remaining rules that are not quite in final form to the Council as soon as she returns from medical leave. He asked that Council members read through all of the rules as soon as they receive them and let Council staff know as soon as possible if they see any typographical errors, ambiguities, or other problems.

Mr. Andersen adjourned the meeting at 10:46 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

45.400 Remote location testimony; when authorized; notice; payment of costs. (1) A party to any civil proceeding or any proceeding under ORS chapter 419B may move that the party or any witness for the moving party may give remote location testimony.

(2) A party filing a motion under this section must give written notice to all other parties to the proceeding [*at least 30 days before the trial or hearing at which the remote location testimony will be offered.*] **sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow for the non-movant to challenge those factors specified in (3)(b) and to advance those factors specified in (3)(c).** [*The court may allow written notice less than 30 days before the trial or hearing for good cause shown.*]

(3)(a) Except as provided under subsection (5) of this section, the court may allow remote location testimony under this section upon a showing of good cause by the moving party, unless the court determines that the use of remote location testimony would result in prejudice to the nonmoving party and that prejudice outweighs the good cause for allowing the remote location testimony.

(b) Factors that a court may consider that would support a finding of good cause for the purpose of a motion under this subsection include:

(A) Whether the witness or party might be unavailable because of age, infirmity or mental or physical illness.

(B) Whether the party filing the motion seeks to take the remote location testimony of a witness whose attendance the party has been unable to secure by process or other reasonable means.

(C) Whether a personal appearance by the witness or party would be an undue hardship on the witness or party.

(D) Whether a perpetuation deposition under ORCP 39 I, or another alternative, provides a more practical means of presenting the testimony.

(E) Any other circumstances that constitute good cause.

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(c) Factors that a court may consider that would support a finding of prejudice under this subsection include:

(A) Whether the ability to evaluate the credibility and demeanor of a witness or party in person is critical to the outcome of the proceeding.

(B) Whether the nonmoving party demonstrates that face-to-face cross-examination is necessary because the issue or issues the witness or party will testify about may be determinative of the outcome.

(C) Whether the exhibits or documents the witness or party will testify about are too voluminous to make remote location testimony practical.

(D) The nature of the proceeding, with due consideration for a person's liberty or parental interests.

(E) [*Whether facilities that would permit the taking of remote location testimony are readily available.*] **Whether reliable facilities and technology that would permit the taking of remote location testimony are readily available to the court, counsel, parties and the witness.**

(F) Whether the nonmoving party demonstrates that other circumstances exist that require the personal appearance of a witness or party.

(4) In exercising its discretion to allow remote location testimony under this section, a court may authorize telephone or other nonvisual transmission only upon finding that video transmission is not readily available.

(5) The court may not allow use of remote location testimony in a jury trial unless good cause is shown and there is a compelling need for the use of remote location testimony.

(6) A party filing a motion for remote location testimony under this section must pay all costs of the remote location testimony, including the costs of alternative procedures or technologies used for the taking of remote location testimony. No part of those costs may be recovered by the party filing the [*motions*] **motion** as costs and disbursements in the proceeding.

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(7) This section does not apply to a workers' compensation hearing or to any other administrative proceeding.

(8) As used in this section:

(a) "Remote location testimony" means live testimony given by a witness or party from a physical location outside of the courtroom of record via simultaneous electronic transmission.

(b) "Simultaneous electronic transmission" means television, telephone or any other form of electronic communication transmission if the form of transmission allows:

(A) The court, the attorneys and the person testifying from a remote location to communicate with each other during the proceeding;

(B) A witness or party who is represented by counsel at the hearing to be able to consult privately with counsel during the proceeding; and

(C) The public to hear and, if the transmission includes a visual image, to see the witness or party if the public would otherwise have the right to hear and see the witness or party testifying in the courtroom of record.

SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION

RULE 1

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

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

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

D Definitions.

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

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

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[*E(1)* ***Definition.***]

D(2) As used in these rules, "signature" and "signed" mean the person's name subscribed on the document.

D(3) As used in these rules, "affidavit" means a statement, confirmed by the oath or affirmation of the party signing it, that is sworn to or affirmed before a person authorized by law to administer oaths in the place where the affidavit is signed.

D(4) As used in these rules, "declaration" means a [*declaration*] **statement signed** under penalty of perjury. [*A declaration may be used in lieu of any affidavit required or allowed by these rules. A declaration may be made without notice to adverse parties.*]

D(5) All references in these rules to "attorney," "lawyer," or "counsel" include an associate member of the Oregon State Bar practicing law in the member's approved scope of practice.

E Use of declaration under penalty of perjury in lieu of affidavit. A declaration may be used in lieu of any affidavit required or allowed by these rules. The signature for declarations may be in the form approved for electronic filing in accordance with these rules or any other rule of court.

[*E(2)*] **E(1)Declaration made within the United States.** A declaration made within the United States must be signed by the declarant and must include the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury."

[*E(3)*] **E(2) Declaration made outside the boundaries of the United States.** A declaration made outside the boundaries of the United States as defined in ORS 194.805 (1) must be signed by the declarant and must include the following language in prominent letters immediately [*following*] **above** the signature of the declarant: "I declare under penalty of perjury under the laws of Oregon that the foregoing is true and correct, and that I am

physically outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, and any territory or insular possession subject to the jurisdiction of the United States. Executed on the _____ (day) of _____ (month), _____ (year) at _____ (city or other location), _____ (country)."

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

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

MOTIONS

RULE 14

A Motions; in writing; grounds. An application for an order is a motion. [*Every motion, unless made during trial, shall be in writing, shall*] **Every motion must** state with particularity the grounds therefor[,] and [*shall*] **must** set forth the relief or order sought. **Unless made on the record during a court proceeding, or during a deposition in accordance with Rule 39 E, every motion must be in writing.**

B Form. The rules applicable to captions, signing, and other matters of form of pleadings, including Rule 17 A, apply to all motions and other [*papers*] **documents** provided for by these rules.

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DEPOSITIONS ON ORAL EXAMINATION

RULE 39

A When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition on oral examination. The attendance of a witness may be compelled by subpoena as provided in Rule 55. Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required:

A(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

A(2) a special notice is given as provided in subsection C(2) of this rule.

B Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition will be taken on [*such*] **the** terms [*as*] **that** the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C Notice of examination.

C(1) **General requirements.** A party desiring to take the deposition of any person on oral examination must give reasonable notice in writing to every other party to the action. The notice must state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify [*such*] **the** person or the particular class or group to which [*such*] **the** person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice.

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C(2) **Special notice.** Leave of court is not required for the taking of a deposition by **the** plaintiff if [*the notice:*] **the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) are satisfied.**

C(2)(a) **The notice** states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any [*defendant; and*] **defendant.**

C(2)(b) **The notice** sets forth facts to support the statement.

C(2)(c) The plaintiff's attorney [*must sign*] **signed** the notice, and [*such*] **that** signature constitutes a certification by the attorney that**,** to the best of [*such*] **the** attorney's knowledge, information, and belief**,** the statement and supporting facts are true.

C(2)(d) If a party shows that, when served with notice under subsection C(2) of this rule, the party was unable**,** through the exercise of diligence**,** to obtain counsel to represent [*such*] **the** party at the taking of the deposition, the deposition may not be used against [*such*] **the** party.

C(3) **Shorter or longer time.** The court may**,** for cause shown**,** enlarge or shorten the time for taking the deposition.

C(4) **Non-stenographic recording.** The notice of deposition required under subsection C(1) of this rule may provide that the testimony will be recorded by other than stenographic means, in which event the notice must designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) **Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedures of Rule 43 apply to the request.

C(6) **Deposition of organization.** A party may**,** in the notice and in a subpoena**,** name as the deponent a public or private corporation or a partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named **[*shall*]** **must** provide notice of no fewer than 3 days before the scheduled deposition, absent good cause or agreement of the parties and the deponent, designating the name(s) of one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and setting forth, for each person designated, the matters on which [*such*] **that** person will testify. A subpoena must advise a nonparty organization of its duty to make [*such a*] **this** designation. The persons so designated will testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

C(7) **Deposition by remote means.**

C(7)(a) The court may order, or approve a stipulation, that testimony be taken by remote means. If [*such*] testimony is taken by remote means pursuant to court order, the order must designate the conditions of taking and the manner of recording the testimony**,** and may include other provisions to ensure that the testimony will be accurately recorded and preserved. If testimony at a deposition is taken by remote means other than pursuant to a court order or a stipulation that is made a part of the record, then objections as to the taking of testimony by remote means, the manner of giving the oath or affirmation, and the manner of recording are waived unless objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the witness either in the presence of the person administering the oath or by remote means, at the election of the party taking the deposition.

C(7)(b) "Remote means" is defined as any form of real-time electronic communication that permits all participants to hear and speak with each other simultaneously and allows official court reporting when requested.

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D Examination; record; oath; objections.

D(1) **Examination; cross-examination; oath.** Examination and cross-examination of deponents may proceed as permitted at trial. The person described in Rule 38 will put the deponent on oath.

D(2) **Record of examination.** The testimony of the deponent must be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded pursuant to subsection C(4) of this rule, the party taking the deposition must retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. On request of a party or deponent and payment of the reasonable charges therefor, the testimony will be transcribed.

D(3) **Objections.** All objections made at the time of the examination must be noted on the record. A party or deponent must state objections concisely and in a non-argumentative and non-suggestive manner. Evidence will be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

D(3)(a) when necessary to present or preserve a motion under section E of this rule;

D(3)(b) to enforce a limitation on examination ordered by the court; or

D(3)(c) to preserve a privilege or constitutional or statutory right.

D(4) **Written questions as alternative.** In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who will propound them to the deponent on the record.

E [*Motion for court assistance; expenses.*] Assistance from the court; expenses.

E(1) **Motion for court assistance.** At any time during the taking of a deposition, on motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in [*such*] **a** manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order

the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in [*section C of Rule 36.*] **Rule 36 C.** The motion must be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it will be resumed thereafter only on order of the court in which the action is pending. On demand of the moving party or deponent, the parties will suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) Court assistance via remote means. A court may provide the assistance described in subsection E(1) of this rule by remote means. "Remote means" is defined in paragraph C(7)(b) of this rule.

[*E(2)*] **E(3) Allowance of expenses.** [*Subsection A(4) of Rule 46*] **Rule 46 A(4)** applies to the award of expenses incurred in relation to a motion under this section.

F Submission to witness; changes; statement.

F(1) **Necessity of submission to witness for examination.** When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C(4) of this rule, and if any party or the witness so requests at the time the deposition is taken, the recording or transcription will be submitted to the witness for [*examination, changes, if any,*] **examination; changes, if any;** and statement of correctness. With leave of court [*such*] **the** request may be made by a party or witness at any time before trial.

F(2) **Procedure after examination.** Any changes that the witness desires to make will be entered on the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of [*such*] changes and reasons must promptly be served on all parties by the party taking the deposition. The witness must then state in writing that the transcription or

recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make [*such*] **the** statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time if so ordered by the court, after the deposition is submitted to the witness, the party taking the deposition must state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under Rule 41 D, the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F(3) **No request for examination.** If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

G Certification; filing; exhibits; copies.

G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter must certify, under oath, on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C(4) of this rule, and thereafter transcribed, the person transcribing it must certify, under oath, on the transcript that [*such*] **the** person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of [*such*] **the** recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or [*such*] **the** party's attorney, must certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

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G(2) **Filing.** If requested by any party, the transcript or the recording of the deposition must be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition must enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or [*such*] **any** other person as may by writing be agreed on, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed on request of any party under [*such*] **any** terms and conditions as the court may direct.

G(3) **Exhibits.** Documents and things produced for inspection during the examination of the witness will, on the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, [*such*] **the** person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they will be marked for identification and the person producing them must afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials will also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G(4) **Copies.** On payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition must furnish a copy of the deposition to any party or to the deponent.

H Payment of expenses on failure to appear.

H(1) **Failure of party to attend.** If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by

attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to [*such*] **the** other party the amount of the reasonable expenses incurred by [*such*] **the** other party and the attorney for [*such*] **the** other party in so attending, including reasonable attorney fees.

H(2) **Failure of witness to attend.** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena on the witness and the witness, because of [*such*] **this** failure, does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to [*such*] **the** other party the amount of the reasonable expenses incurred by [*such*] **the** other party and the attorney for [*such*] **the** other party in so attending, including reasonable attorney fees.

I Perpetuation of testimony after commencement of action.

I(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I(2) The notice is subject to subsection C(1) through subsection C(7) of this rule and must additionally state:

I(2)(a) A brief description of the subject areas of testimony of the witness; and

I(2)(b) The manner of recording the deposition.

I(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. Any objection will be governed by the standards of Rule 36 C. If no objection is filed, or if perpetuation is allowed, the testimony taken [*shall be*] **is** admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code. At any hearing on [*such*] an objection, the burden will be on the party seeking perpetuation to show that:

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I(3)(a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (1)(e) or ORS 45.250 (2)(a) through (2)(c);

I(3)(b) it would be an undue hardship on the witness to appear at the trial or hearing; or

I(3)(c) other good cause exists for allowing the perpetuation.

I(4) Any perpetuation deposition must be taken not less than 7 days before the trial or hearing on not less than 14 days' notice. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial on a showing of good cause.

I(5) To the extent that a discovery deposition is allowed by law, any party may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I(6) The perpetuation examination will proceed as set forth in section D of this rule. All objections to any testimony or evidence taken at the deposition must be made at the time and noted on the record. The court before which the testimony is offered will rule on any objections before the testimony is offered. Any objections not made at the deposition will be deemed waived.

party disobeys a subpoena, or refuses to be sworn or to answer as a witness, that party's complaint, answer, or other pleading may be stricken.

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

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

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

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

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

A(7) Recipient's option to move to quash, or to move to modify subpoena. A person who is subpoenaed may move to quash or move to modify the subpoena. A motion to quash or to modify must be filed with the court and served on the party who issued the subpoena within 14 days of the date that the subpoena was served and before the date and time set for the recipient to appear or produce. The court may quash or modify the subpoena if the subpoena creates an unjustifiable

burden that is not outweighed by the party's need for the evidence, or if the witness subpoenaed to appear and testify proves a legal right not to testify.

A(8) **Scope of discovery.** Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

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

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

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

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

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

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

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

SUBPOENA

RULE 55

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

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

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

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

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

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

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

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

A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in the person's possession, custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(C) produce records of confidential health information for inspection and copying as provided in section D of this [*rule; and*] **rule;**

A(1)(a)(v) alert the person to whom the subpoena is directed of the entitlement to fees and mileage under paragraph A(6)(b), B(2)(a), B(2)(b), [*B(2)(c)(ii),*] **B(2)(c)(i)(E),** B(2)(d), B(3)(a), or B(3)(b) of this [*rule.*] **rule; and**

A(1)(a)(vi) state the following in substantively similar terms:

A(1)(a)(vi)(A) that all subpoenas must be obeyed unless a judge orders otherwise; and

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A(1)(a)(vi)(B) that disobedience of a subpoena is punishable by a fine or jail time.

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

A(3) **Who may issue.**

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

A(3)(b) **Clerk of court.** The clerk of the court in which the action is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may 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.

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

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

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

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

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

A(5) **Proof of service.** Proving service of a subpoena is done in the same way as provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow

being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) **Recipient obligations.**

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

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

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

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

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

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

[*A(7)* ***Recipient's option to object, to move to quash, or to move to modify subpoena for***

production. *A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule, may object, or move to quash or move to modify the subpoena, as follows.*

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

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

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

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

A(7) Motion to quash or modify. A party or person that is subpoenaed may move to quash or move to modify the subpoena. A motion to quash or to modify must be filed with the court and served on the party that issued the subpoena before the date set for the recipient to appear or produce, but not more than 14 days after the date that the subpoena was served. The court may quash or modify the subpoena if the subpoena is unreasonable or oppressive, or if the witness subpoenaed to appear and testify proves a legal right not to testify. In any case, the court may reasonably apportion the costs for compliance or shift the entire cost of compliance to the party that served the subpoena.

A(8) **Scope of discovery.** Notwithstanding any other provision, this rule does not expand

the scope of discovery beyond that provided in Rule 36 or Rule 44.

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

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

B(1)(a) **Civil actions.** A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or on the taking of a deposition in an action pending **therein;** [*therein.*]

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

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

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

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

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

B(2)(c) **Service on individuals waiving personal service.** If the witness waives personal service, the subpoena may be mailed **or transmitted electronically** to the witness, but [*mail*] **such** service is valid only if all of the following circumstances exist:

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

B(2)(c)(i)(A) the witness agreed to appear and testify if subpoenaed by a specified date using mail or electronic transmission to a designated e-mail, text message, facsimile, or other electronic account that the witness confirmed is accurate;

B(2)(c)(i)(B) the specific date, time, and place for the witness to appear and testify was coordinated with the witness and agreed on;

B(2)(c)(i)(C) The mail or electronic account used to deliver the subpoena contained no typographical or other errors that would affect delivery, and a copy of the electronic transmission is attached to the certification document;

B(2)(c)(i)(D) The mail or transmission was sent by the specific date agreed on;

[*B(2)(c)(ii)* ***Fee arrangements.*** *The party's attorney or attorney's agent made satisfactory*] **B(2)(c)(i)(E) Satisfactory** arrangements **were made** with the witness to ensure the payment of [*fees and mileage,*] **fees for one day's attendance and the mileage as allowed by law,** or the witness expressly declined payment; and

B(2)(c)(i)(F) The party has written, recorded, or electronic confirmation from the witness that the witness received the subpoena.

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

B(2)(d) **Service of a deposition subpoena on a nonparty organization pursuant to Rule**

39 C(6). A subpoena naming a nonparty organization as a deponent must be delivered, along with fees for one day's attendance and [*mileage,*] **the mileage as allowed by law,** in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

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

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

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

B(3)(b)(i) **"Law enforcement agency" defined.** For purposes of this subsection, a law enforcement agency means the Oregon State Police, a county sheriff's department, a city police department, [*or a municipal police department.*] **a municipal police department, the marshal's office of the Judicial Department, an authorized tribal police department, a police department established by a university under ORS Chapter 352, the criminal justice division of the Department of Justice, the investigative office of a district attorney's office, or the investigative office of a humane society.**

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

B(3)(b)(ii)(A) **Designating representative.** All law enforcement agencies must designate

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

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

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

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

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

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

B(5) **Service of subpoenas requiring the appearance or testimony of individuals who are parties to the case or party organizations.** A subpoena directed to a party [*who*] **that** has appeared in the case, including an officer, director, or member of a party organization, may be served as provided in Rule 9 B, without any payment of fees and mileage otherwise required by this rule.

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

C(1) **Combining subpoena for production with subpoena to appear and testify.** A

subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

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

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

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

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

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

D Subpoenas for documents and things containing confidential health information ("CHI").

D(1) **Application of this section; "confidential health information" defined.** This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means 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:

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

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

person.

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

D(3) **Compliance with state and federal law.** A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

D(4) Conditions on service of subpoena.

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

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

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

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

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

received.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D(8)(a) **Mail or delivery by a nonparty, along with declaration.** A custodian of CHI who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI subpoenaed within five days after the subpoena is received, along with a declaration that

complies with paragraph D(8)(b) of this rule.

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

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

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

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

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

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

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

D(8)(c) **Declaration of custodian of records when not all CHI produced.** When the custodian of records produces no CHI, or less information than requested, the custodian of records must specify this in the declaration. The custodian may only send CHI 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 CHI.** If more than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party [*who*] **that** first served such a subpoena.

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

ABUSIVE LITIGANTS

RULE 35

A Abusive litigants. The presiding judge of any judicial district may, with due process, issue an order designating a party as an abusive litigant, restricting ongoing abusive filings, and requiring the posting of a security deposit, as provided in this rule.

B Definitions.

B(1) For purposes of this rule, "abusive litigant" means a person who is a party to a civil action or proceeding who in bad faith, through court filings, harasses, coerces, intimidates, discriminates against, or abuses another party to litigation.

B(2) For purposes of this rule, "designation order" means a presiding judge order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

B(3) For purposes of this rule, "security" means an undertaking by an abusive litigant to ensure payment to an opposing party in an amount deemed sufficient to cover the opposing party's anticipated reasonable expenses of litigation, including attorney fees and costs.

B(4) For purposes of this rule, "presiding judge" means either the presiding judge appointed by the Supreme Court chief justice, the judicial officer designated to fulfill presiding judge duties in the absence of the appointed presiding judge, or the judicial officer designated by the appointed presiding judge to oversee proceedings brought under this rule.

C Factors the court may consider. To determine whether a party is an abusive litigant as set forth in subsection B(1) of this rule, in addition to any other indicia of bad faith, the court may consider:

C(1) if the litigant is represented by counsel;

C(2) if the litigant has a good faith expectation of prevailing;

C(3) if the litigant is attempting to relitigate a resolved claim against the same party who prevailed, without first having diligently pursued appeal;

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C(4) if the litigant has a good faith motive in pursuing the litigation;

C(5) if the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts;

C(6) if the litigant is filing frivolous motions, pleadings, or other documents without any apparent basis in fact or law;

C(7) if the litigant has been restrained from contact with the opposing party by a court order that is active at the time of the new court filings;

C(8) if the litigant has a history of abusive litigation;

C(9) if the litigant has previously been declared a vexatious or abusive litigant in another jurisdiction; or

C(10) if there are any other considerations that shed light on the circumstances of the litigation.

D Designation and security hearing.

D(1) In any case pending in any court of this state, including a case filed in the small claims department, the presiding judge may, on the court's own motion, set a hearing to determine whether a litigant has engaged in abusive litigation. At the hearing on the motion, the court may request and consider any evidence, written or oral, by witness or affidavit or declaration, or through judicial notice, that may be relevant to the motion.

D(2) If, after considering all of the evidence, the court designates a party as an abusive litigant, the court must state its reasons on the record or in its written order. The court's order must be narrowly tailored to protect only the parties, persons, or category of people targeted by the abusive litigation, and to restrict only the disallowed topic or issues.

D(3) The court may require the abusive litigant to post security in an amount and within such time as the court deems appropriate in order for the litigation to continue. If the abusive litigant fails to post security in the time required by the court, the court must promptly issue a judgment by default with prejudice against the abusive litigant.

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D(4) A determination made by the court in such a hearing is not admissible on the merits of the action or claim, nor deemed to be a decision on any issue in the action or claim.

D(5) A designation order will include a pre-filing requirement prohibiting an abusive litigant from commencing any new action or claim in the courts of that judicial district that falls within the scope of the designation made under subsection D(2) of this rule without first obtaining leave of the presiding judge.

D(6) On entry, a copy of the designation order must be sent by the court to: the person designated to be an abusive litigant at the last known address listed in court records, that person's attorney of record, if any, and the opposing parties, if any. Disobedience of such an order may be punished as a contempt of court, in addition to any other remedy in this rule.

D(7) A designation order does not prohibit an abusive litigant from filing responsive pleadings to any new action or claim commenced against them by another person.

D(8) A designation order is a presiding judge order, whether or not it is entered in the context of an active case proceeding. As a presiding judge order, a designation order is not subject to ORCP 71 A, 71 B, or 71 D.

E Requesting exception to designation order.

E(1) **Procedure.** An abusive litigant or their attorney representative may request to initiate new litigation that would otherwise violate the court's designation order only by petition to the presiding judge, which may be made ex parte if no action is pending. The petition must be accompanied by an affidavit or a declaration and must include a copy of the document that the litigant proposes to file as an exhibit. The petition will only be granted on a showing that:

E(1)(a) the filing is made in good faith and not for the purpose of harassment, coercion, intimidation, discrimination, or abuse of another; or

E(1)(b) a statute of limitations or ultimate repose deadline is so imminent that denial of the request to commence the new action could foreclose the litigant's right to bring a

potentially valid claim.

E(2) **Deposit of security.** The presiding judge may condition the filing of the proposed action or claim on a deposit of security as provided in this rule.

E(3) **Relation back.** If the presiding judge issues an order allowing the filing of the action, then the filing date of the complaint or other case-initiating document relates back to the date of filing of the petition requesting leave to file. On request to the presiding judge, in any proposed action with an imminent risk of obsolescence under a statute of limitations, the filing party may be permitted to serve a complete copy of the petition, affidavit, or declaration, and proposed pleading, on any party for whom expedited service is necessary to perfect jurisdiction under ORS 12.020.

F Setting a hearing stays pleading or response deadline. A court decision to set a hearing to designate a party as an abusive litigant stays pleading or response deadlines. After the presiding judge makes a determination on the merits of the motion, deadlines are set at the longest of the following, unless the court directs otherwise: their original date, within 10 days of service of the order, or within 10 days of the deposit of security.

G Cases filed without leave of the presiding judge. If an abusive litigant initiates new litigation that falls within the parameters of the designation order entered under subsection D(2) of this rule without first obtaining leave of the presiding judge, then any party to the action or claim, or the court on its own motion, may file a notice stating that the abusive litigant is subject to a designation order. The notice must be served on the litigant and all parties at the most current address entered in court records. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must dismiss the action or claim unless the abusive litigant files a motion for leave to proceed within 10 days of service of the notice. If the presiding judge issues an order allowing the action to proceed, then the abusive litigant must serve a copy of that order on all other parties. Each party must plead or otherwise respond to the action or claim within the time remaining for response to the original pleading

or within 10 days after service of that order, whichever period is longer, unless the court otherwise directs.

H Application to vacate designation order and set aside designation.

H(1) **Procedure**. An abusive litigant may file an application to vacate the designation order and set aside the "abusive litigant" designation. The application must be filed in the court that entered the designation order, either in the action in which the designation order was entered, or contemporaneously with a request to the presiding judge to file new litigation under section E of this rule. The application must be accompanied by evidence in the form of declarations or exhibits that support the premise that there has been a material change in the facts on which the order was granted and that justice would be served by vacating the order.

H(2) A court may vacate a designation order and set aside the abusive litigant designation on a showing of material change in the facts on which the order was granted and that justice would be served by vacating the order. An evidentiary hearing on an application under this section may be set at the court's discretion.

H(3) An abusive litigant whose application to vacate a designation order and set aside the designation is denied will not be permitted to file another similar application for one year after the date of denial of the previous application. An application to vacate under this subsection does not require an exception to a designation order under subsection E(1) of this rule.

46.415 Circuit judges to sit in department; procedure. (1) The judges of a circuit court shall sit as judges of the small claims department.

(2) No formal pleadings other than the claim shall be necessary.

(3) The provisions of ORCP 35 apply to cases filed in the small claims department.

[*(3)*] **(4)** The hearing and disposition of all cases shall be informal, the sole object being to dispense justice promptly and economically between the litigants. The parties shall have the privilege of offering evidence and testimony of witnesses at the hearing. The judge may informally consult witnesses or otherwise investigate the controversy and give judgment or make such orders as the judge deems to be right, just and equitable for the disposition of the controversy.

[*(4)*] **(5)** No attorney at law or person other than the plaintiff and defendant and their witnesses shall appear on behalf of any party in litigation in the small claims department without the consent of the judge of the court.

[*(5)*] **(6)** Notwithstanding the provisions of ORS 9.320, a party that is not a natural person, the state or any city, county, district or other political subdivision or public corporation in this state, without appearance by attorney, may appear as a party to any action in the small claims department and in any supplementary proceeding in aid of execution after entry of a small claims judgment.

[*(6)*] **(7)** Assigned claims may be prosecuted by an assignee in **the** small claims department to the same extent they may be prosecuted in any other state court.

[*(7)*] **(8)** When spouses are both parties to a case, one spouse may appear on behalf of both spouses in mediation or litigation in the small claims department:

(a) With the written consent of the other spouse; or

(b) If the appearing spouse declares under penalty of perjury that the other spouse consents.