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

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Hon. Benjamin Bloom
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Lara Johnson
Eric Kekel
Derek Larwick
Julian Marrs
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Michael Shin
Hon. Scott Shorr
Stephen Voorhees
Margurite Weeks
Alicia Wilson

Members Absent:

Scott O'Donnell

Guests:

John Adams, Oregon Tax Court
Darnell Benitez
Kady Bourn, Brownstein Rask
"Carolyn D-K"
Jessie Minger, Schwabe Williamson & Wyatt
Matt Shields, Oregon State Bar
Rachel Trickett, Oregon Judicial Department
Stephanie Volin

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 Promulgated	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• Composition of Council • Discovery (ORCP 36-46) • Judges & the ORCP • Letters in Lieu of Motions • Mediation as ADR • Non-Precedential Opinions • ORCP/Administrative Law • ORCP/UTCR • Remote Probate • Service by Posting/Publication • Service in EPPDAPA Cases • Service, Generally • Uniform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	• ORCP 9 • ORCP 10 • ORCP 27 • ORCP 60 • Email Service • Requiring lawyers to indicate the history of judgments in the case when preparing judgments • Staff Comments to Published Rules

I. Call to Order

Mr. Andersen called the meeting to order at 9:30 a.m. He welcomed members and guests.

II. Administrative Matters

A. Approval of September 14, 2024, Meeting Minutes

Judge Norby made a motion to approve the draft September 14, 2024, minutes (Appendix A). Ms. Dahab seconded the motion, which was approved by voice vote with one abstention.

B. Election of Legislative Advisory Committee

Judge Peterson reminded Council members that the Council's authorizing statutes require biennial election of a Legislative Advisory Committee (LAC) to be available to the Legislature in the event that it has questions about the Council's promulgations or the Oregon Rules of Civil Procedure (ORCP). His recollection is that, during his time with the Council, the LAC has only been called on by the Legislature twice to answer questions. The statute indicates that the LAC should include two attorneys, the public member, and two judges. Judge Peterson asked for volunteers to serve on the LAC.

1. ACTION ITEM: Nominate and Vote on LAC

Mr. Goehler made a motion to include Judge Norby, Judge McHill, Mr. Goehler, Mr. Andersen, and Ms. Weeks on the LAC. Judge Hill seconded the motion, which was approved unanimously by voice vote.

C. Set First Council Meeting for September of 2025

After some discussion, the Council agreed to set the first Council meeting of the 2025-2027 biennium on September 13, 2025, and to follow a second-Saturday-of-the-month meeting schedule, unless the incoming Council later decides otherwise.

III. Old Business

A. Reports Regarding Last Biennium

1. ORS 45.400

Judge Peterson reminded the Council that, last biennium, the Council proposed a legislative change to remove the 30-day advance warning for wanting to take remote testimony in ORS 45.400. However, the Council did not have a sponsor for the bill in the Legislature, so it was not successful. This biennium, the Council proposed essentially the same change to ORS 45.400, and the Oregon State Bar

was willing to take it under their wing as part of their law reform package. Judge Peterson stated that he made a presentation to the Bar's committee, and they were enthusiastic about it. Legislative Council made some insignificant changes to the Council's proposal (Appendix B). With the proposed change being part of the OSB's package, it will likely pass. Mr. Shields stated that the OSB would probably ask Judge Peterson or someone else from the Council to provide testimony before the Legislature when the time comes.

2. Staff Comments

This item was carried over to the next biennium.

B. Discussion/Voting on Draft Amendments Published September 14, 2024

1. ORCP 1

Mr. Andersen referred the Council to the draft amendment of ORCP 1 published by the Council on September 14, 2024 (Appendix C). He asked Council members and guests whether they had any comments regarding this published amendment. Hearing none, he asked for a motion for promulgation.

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

Ms. Holley made a motion to promulgate the published draft amendment of ORCP 1. Ms. Dahab seconded the motion, which passed unanimously by roll call vote with 21 votes and no abstentions.

2. ORCP 14

Mr. Andersen referred the Council to the draft amendment of ORCP 14 published by the Council on September 14, 2024 (Appendix C). He asked Council members and guests whether they had any comments regarding this published amendment. Hearing none, he asked for a motion for promulgation.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 14

Mr. Goehler made a motion to promulgate the published draft amendment of ORCP 14. Judge Oden-Orr seconded the motion, which passed unanimously by roll call vote with 21 votes and no abstentions.

3. ORCP 35

Mr. Andersen noted that the published draft of Rule 35 (Appendix C), a completely new rule, had received a good deal of public comment (Appendix J). He welcomed the members of the public who were interested in speaking regarding Rule 35 and invited them to speak.

Kady Bourn introduced herself as an attorney with Brownstein Rask who has been in practice for 29 years. She spoke in her personal capacity, and stated that her practice area is primarily probate and protective proceedings. She noted that there are many areas of law that allow a party to receive or recover attorney fees from an abusive litigant, including family law and landlord tenant law. In probate and protected proceedings, there are no good statutory mechanisms to recover attorney fees, and there can be a lot of abuse from litigants. Those areas are particularly inclined to deter self-represented litigants from participating. However, she has been involved with several cases of unrepresented heirs who have been disinherited and who were so offended that they decided to make it so expensive for the actual heir that they would not have any money left by the time the litigation ended. She opined that, for such cases, there need to be guardrails in place. While the personal representative can get attorney fees reimbursed from the assets of the estate, they can only get them reimbursed from an abusive litigant by trying to rely on some fuzzy case law, and that is up to judicial discretion.

Ms. Bourn stated that she was involved in a protective proceeding with an abusive litigant who has cost her protected person client hundreds of thousands of dollars of attorney fees, between his own fees and liability for fees for his court-appointed guardian, conservator, and trustee. She stated that there are also self-represented litigants who repeatedly file objections and then do not show up for court. For these reasons, Ms. Bourn stated that she supports the rule strenuously.

Stephanie Volin spoke in opposition to Rule 35. She stated that she supports that the Council is attempting to bring some sunlight to this process, which is apparently already in use. However, her concern is that Rule 35 will be abused in a not insignificant number of cases. She stated that she could provide an example from her family's own case, which is long closed.

Ms. Volin explained that there are several people who were involved in her family's case, including an attorney who has been sanctioned for discovery abuse, who resigned her law license, and who was since federally convicted and incarcerated for forging court orders. There was a judicial assistant who was discovered at trial to be exchanging toxic emails with that now-disbarred attorney. There was a judge whose conduct forced Ms. Volin's family to have to file for a writ of mandamus against her because of her dilatory handling of the case, who resigned 6 days later and, on her way out the door, signed damaging and punitive,

legally unsupportable orders that were all authored by the now-disbarred attorney. There was a trial court administrator who unfortunately tampered with the Court of Appeals record and blocked attempts to authenticate a court order. That trial court administrator has also since been fired but, before she was fired, she managed to block all of Ms. Volin's family's attempts to authenticate the order with the presiding judge. The presiding judge, Hon. Norm Hill, has since refused to authenticate that order, asking Ms. Volin's family at a hearing in 2020 why they even cared any more after 5 years.

When Ms. Volin heard that this new proposed Rule 35 is being considered, she reviewed the Council's minutes and noticed Judge Norm Hill describing someone like her family (it may have even been them) and it kind of crystallized for her what she basically already understood: that Oregon courts keep a secret, informal, extrajudicial, orally transmitted "do not help" list that says that it is okay to disregard everything that those on the list file or say, and just label them as crazy harassers. Her reading of the Council's minutes seems to indicate that this list is informal, a hodgepodge, and done through a patchwork of means. That explains to Ms. Volin why so many orders that her family has received against them bore no relation to the actual things that they filed. So, somehow, her family are vexatious litigants, despite suffering a disbarred attorney, a convicted attorney, and two disgraced court staff.

Ms. Volin stated that the reason she cares about being on a "bad list" and having no rights is because being put on that list has crippled her family's access to justice, such that they cannot even get a simple court order authenticated by the presiding judge, which is a fundamental administrative duty of all presiding judges. She also cares about the prejudice that is rolled into other courthouses, such as Clackamas, where she has discovered that the trial court administrator is having extrajudicial conversations with judges. She stated that it is really horrible to have no rights in Oregon. Ms. Volin opined that, until the courts can distinguish between a person attempting to re-litigate a case and a person who is attempting, under the weight of extrinsic fraud, to get the courts to recognize that they are the victims of such fraud and prejudice, a rule like Rule 35 is not a tool that should be available in Oregon courts. She stated that she understands that the Council is leading the way here nationally and that this is not something that is in other courtrooms currently (except that she thinks she saw some hints that maybe there was some other state that is adopting something similar). She stated that, if the Council does adopt this rule, she would urge the replacement of the word "abusive" with "vexatious," which is the common parlance. She stated that it is really upsetting to think of the additional damage that would have been wrought on her family if their opponent had a judicial finding that they were abusive rather than vexatious; they could have done a lot more damage with that. Ms. Volin thanked the Council for their time.

Jessie Minger introduced herself as an attorney who has practiced for over 20

years, currently with a firm that has a presence in Washington and Oregon. She stated that she is before the Council today to request respectfully that it promulgate Rule 35. She stated that her heart goes out to anyone who feels like they do not receive justice in Oregon and that she appreciates that this sentiment might exist in some situations. However, she believes that Rule 35 was created to actually promote justice for more citizens of the State of Oregon. She noted that Ms. Bourne had already spoken regarding the kinds of issues faced in protective proceedings and in probate. She wished to echo and reiterate those comments, as they are consistent with her experience.

Ms. Minger stated that she appreciated that Rule 35 has been deeply discussed by the Council and that the rule is, from her perspective, exceptionally well written. One of the things about the rule that she found to be especially noteworthy is that it allows recourse for any individual who has been deemed to be an abusive litigant to reverse it. To her, that is critical and hyper indicative of the amount of thought that went into the rule. The rule creates transparency, so that the person deemed to be an abusive litigant can be aware of why this is the case instead of living with what may currently be a secretive, unknown, or undercover type of procedure. The rule then gives the opportunity for that individual to contest and reverse it, an opportunity that does not exist today. Ms. Minger stated that she finds that to be especially compelling. She also asserted that the focus in terms of the cost of abusive litigants tends to be on the cost of litigation, whether it is the cost to hire counsel to deal with an abusive litigant, the cost of legal fees incurred, or the cost to taxpayers to have the court systems regularly and routinely have to deal with individuals who have an ability to figure out how to file pleadings and use that talent to the great difficulty of others. However, the cost of abusive litigants is far more strenuous. For example, for an individual who works on an hourly basis and who has to repeatedly take time off work to appear in courtrooms for proceedings, their job and their ability to pay rent for that month is jeopardized. The time required to drive to the courthouse park, walk, wait, attend the hearing, and come back might be a full-day event. There are also secondary elements of non-financial stress, like finding childcare.

Ms. Minger stated that, when a litigant continuously pulls parties into courtrooms, basically knowing they are not going to prevail, understanding that their pleadings and other documents are not going to be successful, but using the process to create the type of negative impact they wish to have for those individuals because they can, it is indeed abusive for those families and individuals involved. That is why the word “abusive” is appropriate. She stated that she sincerely appreciates that there is an opportunity here to address the problem, to protect both sides, and to be transparent. She appreciates the clarity, the efficiency of the words, and the mechanisms put into the rule, and she encouraged Council members to consider supporting it. She thanked the Council for its time.

Judge Bloom reminded the Council that he has previously shared his feelings about Rule 35. He expressed concern with promulgating the rule, opining that the court has an inherent authority regarding these issues, and stated that he believes that the rule creates more problems than it fixes. He stated that the court system is designed to allow access to justice, and that he believes that proposed Rule 35 diminishes that access to justice. In terms of balancing hardships, he thinks that the rule does more harm than it is designed to fix, and deals with situations that are rare, but do happen and have consequences, at the cost of affecting many otherwise legitimate claims.

Ms. Dahab stated that she wanted to make a few remarks because she voted against the vexatious litigant rule in the last biennium. She stated that she is very much in favor of this biennium's Rule 35, because some things have changed since last biennium that have given her clarity about the fact that the rule is necessary. First, the proposed Rule 35 is very different from last biennium's published rule, and for many of the reasons that Ms. Minger just described. It is a very well written and focused rule that clearly gets at the problem that it seeks to address, and it also provides some relief to litigants who may be subject to an abusive litigant order to be able to remove that order. Second, since the last biennium, Ms. Dahab has defended many cases against a vexatious litigant. Through that experience, the side effects to litigants of being on the receiving end of abusive litigation have become very clear to her–the things that they experience physically, mentally, and emotionally, and within their families and relationships. She therefore realizes that the proposed rule is useful and will serve to protect litigants who are in this situation. Ms. Dahab stated that she understands that there has been much discussion of the inherent authority that courts already have; however, it seems to her that it is useful to provide the trial courts with clear guidance on how they can address these situations when they arise. For those reasons, she plans to vote in favor of the promulgating Rule 35.

Mr. Larwick stated that, like Judge Bloom, he has made his thoughts on the proposed rule known from the beginning of the biennium. He stated that many of the comments in support of the rule seem to be based on stories or experiences of unreasonable conduct by a litigant that can waste time and money. He noted that every single person on the Council can probably come up with stories where they felt frustrated due to the conduct of somebody on the other side of one of their cases. He shares that frustration but, nonetheless, he does not think that the proposed rule is appropriate. He stated that he has read the Malheur County case that cited to a general Oregon statute about court judges managing their courts, and he is not persuaded that Oregon judges have inherent authority to prophylactically prevent new filings by a litigant or restrict access of any person or party they have considered abusive. Mr. Larwick stated that he also thinks that the rule is in violation of the due process clause, because it is using a party's past conduct to prevent their access to the court in future filings. He believes that the due process clause would require each controversy to be litigated on the merits in some way.

Judge Norby reminded the Council that she has been discussing for the past two biennia why she wants to make a version of this rule happen, and why she has needed the help of everyone on the Council to determine all of the factors that needed to be in the rule to make it better and more viable. She stated that she had been preparing for today's meeting by reading the comments that the Council has received, and that she would like to give some additional comments herself, perhaps in a different way than she has done so previously. As a judge, she knows well that judges, lawyers, and members of society are aware that judges are not always at their best. In fact, some judges are never at their best. Oregon judges have looked at the question of abusive litigants, and they believe that they do have this inherent authority, authority that they sometimes use when abusive litigation is happening in front of them that needs to be handled. However, also as a judge, Judge Norby feels like she has become a tool of abusers and that there is nothing she can do to stop these scenarios from playing out in her courtroom over and over again. She pointed out that, when one is in the middle of a situation, that is the worst time to try to figure out how to manage it. The trial judges of Oregon have been using this inherent authority sporadically and poorly, not considering all of the nuances that the Council has thought of over the last three years to try to make a rule that is targeted, transparent, and consistent statewide. Her feeling is that, as a judge who knows that she is not at her best when everything is coming at her from all angles, she prefers to have a clear and consistent rule to apply. Judge Norby expressed appreciation for Council members' careful consideration, and understanding for those who still have misgivings. Mr. Andersen thanked Judge Norby for her time in drafting the rule.

Judge Peterson reiterated that judges are using abusive litigant procedures, but those procedures are not transparent or consistent. He noted that the published rule has been very carefully vetted. While he has no vote in the matter, he stated that it is likely that cases of abusive litigants will be seen rarely, but judges will know them when they see them. As a judge, he has seen them, and his experience is that enhanced prevailing party fees are not sufficient as a detriment. Attorney fees are not always available and, even if they are, they are not a sufficient deterrent if the other side is impecunious. He stated that he will be interested to see the vote.

Mr. Andersen noted that attorneys Donald Bowerman, Ken Crowley, John Lundeen, and Brent Summers had written in support of the rule. He asked whether any of them were present at the meeting to present their views. They were not. Mr. Andersen predicted that the vote would be very close. He noted that the public comments were overwhelmingly in favor of the rule. He stated that he had listened to the comments made this morning, and that he still was not sure how he was going to vote.

Ms. Nilsson pointed out that Legislative Counsel had made suggestions for minor changes to the language of the rule (Appendix D) as follows:

In subsection B(4), change the phrase “Supreme Court chief justice” to “Supreme Court Chief Justice” to conform with the standards of statutory drafting.

In subsection C(3), the change the phrase “party who” to “party that” to conform with the standards of Council drafting.

In subsection D(8), change the phrase “ORCP 71 A, 71 B, or 71 D” to “Rule 71 A, 71 B, or 71 D” to conform with the standards of Council drafting.

Judge Peterson reemphasized that the Council may make minor amendments to a published rule that do not change the rule in any way that affects the meaning or operation of the published changes.

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

Judge Norby made a motion to promulgate the published draft of Rule 35 with the changes suggested by Legislative Counsel. Judge Jon Hill seconded the motion, which passed by roll call vote with 17 votes in favor, 4 opposed, and no abstentions.

4. ORCP 39

Mr. Andersen referred the Council to the draft amendment of ORCP 39 published by the Council on September 14, 2024 (Appendix C). He asked Council members and guests whether they had any comments regarding this published amendment.

Judge Peterson noted that Legislative Counsel had suggested changes to the draft amendment of ORCP 39 (Appendix D):

In subsection C(2), change the phrase “the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) are satisfied” to “the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) of this subsection are satisfied” to conform with the standards of Council drafting.

In subsection C(6), remove the change of the word “shall” to the word “must,” as this change was already made during a previous biennium (i.e., the base text was incorrect in this instance).

Mr. Andersen asked for a motion for promulgation of the published rule with the changes suggested by Legislative Counsel.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 39

Ms. Holley made a motion to promulgate the published draft amendment of ORCP 39 with the changes suggested by Legislative Counsel. Mr. Goehler seconded the motion, which passed unanimously with 21 votes in favor and no abstentions.

5. ORCP 55

Mr. Andersen referred the Council to the published draft amendment of Rule 55 (Appendix C). He noted that there had been many public comments on the published amendment.

Judge Peterson stated that he had read the comments and noted they all reference how one resists a subpoena. He pointed out that, when Rule 55 was substantially reorganized last biennium, an inconsistency appeared in that there was a way to resist a document subpoena, but there was no real, clear procedure for resisting a subpoena that requires one to appear personally. Rule 55 was promulgated in 1978, as were all the early rules and, since then, there have been gentle baby steps toward getting document production. The rule has continued to change over time. *Vaughan v. Taylor* [79 Or App 359 (1986)] ruled that document production without appearance was not allowed, so Rule 55 was amended accordingly. In 1982, the Council decided that a subpoena could be served by mail to a person who is willing to accept it by mail. In 1986, the Council made the change that hospital records could also be subpoenaed by mail. It was specifically in 1990 that the Council allowed document subpoenas to be issued. They could not be mailed under Section B but, rather, personally served. However, sections A, B, and F of the 1990 promulgation did allow document subpoenas, and the sky did not come crashing down as a result.

Judge Peterson noted that the comments to the proposed changes to Rule 55 seem to be concerned about getting rid of the ability to simply object to stop a document subpoena. There is no such defense for a subpoena requiring a personal appearance. On the face of it, it does seem unfair, because someone who may not even be a party to the case has to take steps to resist a subpoena. He stated that he does understand this unfairness; however, one of the comments states that the status quo is an elegant solution–you simply object, and that is it. The objection should be in writing. The Council has had conversations over the years about objections, and they do stop everything. Judge Peterson observed that third parties do not have any interest in the litigation and, if they are subpoenaed, they would have to see a lawyer because a subpoena does not tell them the tools that are available to them. The subpoena merely says that, if you do not produce the document you are being required to produce, you may go to jail. So, although the objection has worked very well for attorneys who know that they can simply file a written objection, it does not work well for someone who

does not have that information available to them.

Judge Peterson also pointed out that, since lawyers know that judges are quite busy and do not care to spend a lot of time ruling on discovery disputes, he cannot imagine a lawyer who has served a subpoena on a third party and not received a response who would not reach out to have a conversation about what the issue might be and how that issue might be worked out. If the issue cannot be worked out, a motion to compel is in order. The argument that the objection works perfectly is rather illusory. Judge Peterson opined that the proposed change to Rule 55 will not create a lot more motion practice, because attorneys that know what they are doing are already having those conversations and will work things out. For electronic records, Rule 43 already requires a conference. He stated that he is unimpressed by concerns for the unrepresented recipient of a subpoena who now has this valuable objection tool taken away, a tool that is not evident in the subpoena, and that they would not know how to use unless they read Rule 55 and understood it.

Ms. Holley stated that she appreciated Judge Peterson's remarks. She noted that the part of the rule that addresses confidential health information, paragraph D(4)(b), still allows for an objection. However, in section A, the objection was removed. She stated that she is curious as to whether that creates a conflict or whether the Council was intentionally trying to have two different processes. Judge Peterson responded that there are, in fact, two different processes, and that the Council had received a comment from attorney Scott Lucas that was later withdrawn when Mr. Lucas realized that hospital records are handled differently. The more specific section D will prevail with regard to hospital records, and those seem to be less of a problem than trying to subpoena documents from a small business where they may not know what to do. Most hospitals have received document subpoenas before. Ms. Holley noted that language in subsection A(7) was removed that referred to records of confidential health information (CHI) as defined under subsection D(1), so she wanted to ensure that the intent was not to eliminate that process. Judge Peterson stated that this is not the intent, and thanked Ms. Holley for raising the question. He stated that the minutes and staff comment will reflect that hospital records are not impacted by removing the unwritten objection. Mr. Andersen reiterated that Mr. Lucas did withdraw his initial objection.

Mr. Marrs pointed out that section D(4)(b) seems to only offer the objection process to the person whose CHI is being sought or that person's attorney, rather than the producing party itself. He expressed concern that the changes to Rule 55 would actually change how subpoenas for CHI would work. He echoed some of the public comments and stated that, in his experience, the objection process has typically led to a conferral between him and the subpoenaing party or the party being subpoenaed, depending on which side he is on. They usually resolve the issue without having to go to the court. He stated that he would not support the rule as it is written, because it removes that tool.

Mr. Shin asked what would happen timing-wise if a motion to quash or modify is filed as allowed by the proposed rule change: for instance, whether or not the obligation to comply with the subpoena is stayed. He stated that this is a practical question that he was not certain had been addressed.

With regard to Mr. Marrs' comments, Ms. Johnson reiterated that the current ORCP 55 D only provides for notice to be given to the person whose CHI is sought or that person's attorney. That person or their attorney may make written objections. The way the rule is set up, based on her reading and experience, is that a party seeking CHI through subpoena must certify that the patient and/or the patient's attorney have not filed written objections. So, the change to the rule, with subsection A(7), and reading the specific over the general and looking very specifically at D(4)(a)(i), who receives the notice, and who would therefore then have the time to file the written objection, makes it clear to her that subsection A(7) does not make any changes with regard to CHI. With regard to Mr. Shin's question, she stated that she suspects that, once the motion to quash or modify is filed, the party who has filed that motion would then be able to let the court know that there is an issue for the court to address, such as that the subpoena is overly broad or sought confidential materials, and the court would rule accordingly.

Mr. Larwick stated that a theme in many of the written comments regarding Rule 55 is the suggestion that the ability to file a written motion or the ability for the parties to confer was being taken away. He pointed out that, obviously, the parties can still confer about anything they want to confer about, and they can still write each other written objections if they so choose. However, this change would basically make the subpoena presumptively valid and shift the burden to the non-party who is arguing that they do not have to comply with the subpoena in some way. He noted that, as the rule is currently written, a non-party can just make a blanket objection without having to produce anything, and then the subpoenaing party has to try to guess what kind of objection they are making and what privileges and confidentiality they are invoking. The rule in its current form does not require them to articulate that. Mr. Larwick argued that, just like in a protective order motion, the party stating that they should be protected from a legally valid subpoena should have to explain why. That is why the burden should be shifted to them to move to quash. Otherwise, a written objection would just be sort of like the invitation concept that the Council discussed throughout the biennium where a subpoena is sent and it is just sort of like, "Hey, you want to produce something?" And the answer is, "No, I don't think so." Under the current version of Rule 55, the subpoena really has no force of law, and it requires the issuing party to then move to compel production of the subpoena.

Mr. Larwick stated that another issue raised in some written comments was a sort of small business concern, where a non-party small business that is not a party to the litigation may have some documents that the parties want for their dispute in court, and that small business might have to hire a lawyer to help them figure out how to avoid complying with the subpoena that they have received. In several of

the comments, this small business example was healthcare providers. He stated that he did not feel sympathetic in this case. He noted that, if a healthcare provider examined and treated one of the parties to litigation and generated medical records or some other type of evidence that the parties now need in their proceeding, that provider should have to turn over those records. If it is an architecture firm that has documents, they should have to turn them over. If it is any type of small business that has information that the parties need, the subpoena should be effective upon receipt, and if the small business wants to argue that it does not have to comply with the subpoena, the burden should shift to that non-party to explain why not.

Judge Norby noted that she was just the scrivener of the rule changes, and someone who has not been a lawyer issuing subpoenas for almost 20 years. She stated that her goal all along has been to make Rule 55 crystal clear to practitioners. She stated that she does not have a personal feeling about the rule change either way. However, she stated that she is puzzled by the fact that people think that they have to be invited to confer by yet another rule, because they should be conferring as a matter of course. She also addressed the question of whether, when the motion to quash is made, it would stay the obligation to produce. She stated that she thought that could be easily written into a motion in the following way: "I am making this motion, here is my reason, and I would like a stay until you make your decision." As a judge who has made decisions on motions to compel discovery, Judge Norby stated that, if there are good reasons to hold it up, the likelihood of her giving a harsh penalty for not having produced is pretty small.

Judge Shorr stated that he was sympathetic to those comments that expressed concern that the Council is shifting the burden. He noted that he had missed a meeting and perhaps missed the discussion around that. He observed that the party that tries to bring in another party through some procedure generally has the burden of persuasion. He stated that it seems to make sense that this has worked in the past and, if someone wants to move to compel documents, the burden should be on them at that point. An objection should stop the process, whether that allows conferral, which is a good thing, or keeps the parties out of court. He stated that it does seem make some inherent sense to him that the burden should be on the party who is in the litigation seeking third-party documents to show that there is a reason they should be compelled.

Mr. Goehler stated that he wanted to echo Mr. Larwick's comments. In his practice, he has been on both sides, issuing subpoenas and, also, assisting non-parties with responses to subpoenas. He stated that he is in favor of the rule change and believes that the burden shifting is good because there are often situations where a party objects and then there is radio silence. He pointed out that the way to start a discussion is with a motion. Here, if someone is served with a subpoena and they have to file a protective order motion, before they do that they are going to reach out and talk about it. Mr. Goehler opined that the proposed amendments to Rule 55 actually push lawyers closer to conferral and

collaboration rather than further away, certainly on the production side. Even after receiving an objection, most lawyers who are assisting with production are going to reach out and discuss, for example, the time frame of the request and other things that can bring the parties closer to agreement. This may not happen if the party can just object. Then, as Mr. Larwick pointed out, the subpoenaing lawyer is just fishing around to see what the basis of the objection is. Mr. Goehler opined that the burden shifting is good and, while it is big change in practice, it is a productive change for the process.

Judge Peterson stated that, once a subpoena is received, the recipient has two choices: comply or not. If not, the recipient can file a motion. If the recipient does not do so, whoever issued the subpoena would reach out to them before filing a motion to compel. Judge Peterson stated that, although the proposed change seems to be shifting the burden, the tool in the toolbox of the recipient is a tool that only lawyers know about and one that, perhaps, not all lawyers necessarily know about. He opined that the proposed change would reduce frivolous objections. Judge Peterson noted that he had heard in past meetings that subpoena deuces tecum have been served because the issuers were anticipating that there would be an objection to producing the documents, but he pointed out that subpoenaing the person is more expensive and not a good use of resources.

Judge Peterson noted that there were no comments on the rest of the changes in the rule. He wanted to take a moment to congratulate the Rule 55 committee, particularly Judge Norby as the scrivener. He pointed out that the change to section B(2)(d) was prompted by a proposed legislative amendment last biennium that the Legislature did not enact. The idea was to allow willing witnesses to be served by email. Judge Peterson opined that the Council's version is far better than the bill that was before the Legislature. It will allow service on willing witnesses, especially in cases where there is frequently a time crunch, to be much faster, easier, less expensive, and clearer than the old U.S. mail method.

Judge Bloom stated that the way he understands the proposed rule change is that it just shifts the method of response: if the recipient wants to respond, they must file a motion. It is not good enough to say, "I object," and then have an open-ended deadline. He stated that he thinks that filing a motion prompts conferral, and it also stays the obligation to respond. Then, if the party that files the subpoena goes back to that same court and says that they want sanctions because they did not receive the documents, it is implicit that the court is going to say that this is what we were deciding. It takes the place of the objection period, so Judge Bloom does not think it is a failure or a reason for objection to the proposed change. The process is already in there by saying you have to go to court to file the motion.

Mr. Andersen asked whether any of the people who had sent in public comments regarding Rule 55 were present to speak: Drew Baumchen, Gary Berne, Christy Carter, Elleanor Chin, Dylan Hallman, Marilyn Heiken, Scott Lucas, William Macke, Fallon Nedirist, or Steve Seal. None of them was present.

Mr. Andersen noted that the public comments seem to state that the proposed rule, as drafted, provides that the documents must be produced even though the parties are conferring. Judge Bloom opined that the proposed changes do not state that. A party objects to the subpoena and that stops production. Mr. Andersen noted that the public comments state that the rule change would make the choices: 1) get a lawyer and go to court to make your motion; or 2) produce the documents. Whereas the current rule provides that parties can confer and not produce until they have ironed out what needs to be produced. Judge Peterson stated that, if a non-party receives a subpoena, they will either produce the documents or they will not. They could get a lawyer and file a motion. Judge Peterson's suggestion, both last biennium and this, was to put a motion to quash on the back of the subpoena to make it easier for non-parties, but the Council was reluctant to do that. He remarked that we are not telling subpoena recipients that this objection and conferral procedure exists. The objection has to be in writing but, absent reading Rule 55, a subpoena recipient would not know that. Judge Peterson suggested that, even if a subpoena recipient did not produce documents, it is unlikely that any court would hold them in contempt. There would have to be a motion to compel first. Judge Peterson stated that the proposed change puts the burden of conferring on the person who issued the subpoena, because they will not want to go to court and ask for some kind of discovery sanction against someone for not responding to a subpoena when they have not followed up by asking what the problem is.

Ms. Johnson echoed Mr. Goehler's comments, and stated that she believes that the proposed changes would encourage conferral. Her experience with serving third-party subpoenas on persons or entities is that they often do not respond at all–no telephone calls, emails, or written objections. If the party receiving the subpoena has to either produce documents or file a motion in court, she believes that it would encourage that person or party to reach out to the person serving the subpoena to confer to express their objections and try come to a resolution before going before the court with issues that cannot be resolved. Ms. Johnson stated that the proposed change encourages parties to talk. It also allows access to information that the parties need to put their case in front of the court and the jury, and narrows the issues that the court would have to resolve, because the parties are better informed about what the nature of the objections are. Mr. Andersen asked if Ms. Johnson is in favor of the proposed Rule 55. Ms. Johnson stated that she is.

Judge Shorr noted that the language in current paragraph A(7)(a) states that a written objection can be served, and subparagraph A(7)(a)(ii) states that the party that served the subpoena may move for a court order to compel production at any time. He pointed out that the proposed subparagraph A(7) appears to put the burden on the party that has received the subpoena to move to quash. He asked whether that is the general understanding. Mr. Larwick replied that there is not an inherent burden on the party who is receiving the subpoena; it is just that, if they want to not comply with the subpoena, the burden is increased from a mere written objection to a motion to quash in court. He stated that, as Judge Peterson

mentioned, the party receiving the subpoena can always comply with the subpoena. They do not have to fight it. It is only if they want to fight it that a mere written objection is not sufficient. Mr. Andersen asked if Mr. Larwick is in favor of the proposed Rule 55. Mr. Larwick stated that he is.

Ms. Nilsson noted that Legislative Counsel had some recommendations for the Council regarding Rule 55 (Appendix D). Council staff did not agree with the recommendation to make a change to the way subparagraph B(2)(c)(i) and its following parts are organized to be consistent with statutory drafting practices, as it would conflict with Council drafting practices. However, Council staff does agree with the following suggestions that do not change the rule in any way that affects the meaning or operation:

> In subparagraph A(1)(a)(v), change the phrase "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" to "under paragraph [A(6)(b), B(2)(a), B(2)(b), B(2)(c)(ii), B(2)(d), B(3)(a), or B(3)(b) of this rule.] A(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a), or B(3)(b), or part B(2)(c)(i)(E) of this rule; and" for grammatical correctness and clarity.
>
> In subparagraph B(3)(b)(i), change the phrase "marshal's office of the Judicial Department" to "Marshal's Office of the Judicial Department" to conform with the standards of statutory drafting.
>
> In subparagaph B(3)(b)(i), change the phrase "criminal justice division" to "Criminal Justice Division" to conform with the standards of statutory drafting.

Ms. Nilsson asked Council members their thoughts about Legislative Counsel's suggestion regarding the phrase "under ORS Chapter 352" in subparagaph B(3)(b)(i). Legislative Counsel pointed out that ORS Chapter 352 is a chapter for the sake of organization, but that it is not an official series for the purpose of definitions, penalties, or administrative procedures. Accordingly, there is no reference to ORS Chapter 352 in statute. Most statutes have a police department established by a university under ORS 352.121 or ORS 353.125, so Legislative Counsel suggested that the Council refer to those two specific statutes. However, Council Staff was concerned by that proposal, since statutes change and get renumbered.

Mr. Andersen asked for suggestions on how to solve this issue. Mr. Goehler pushed back a bit on Legislative Counsel's suggestion, as he felt that it is not critical to specify what the current statute is for the purposes of this rule. The idea is to point in the direction of where the police forces are established. Ms. Johnson suggested using the phrase "under Oregon Revised Statute." Judge Peterson agreed with Mr. Goehler, and stated that it is less likely that the numbering of an entire ORS chapter will be changed. However, he did like Ms. Johnson's suggestion

as well, although perhaps "pursuant to statute" would be sufficient.

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

Judge Jon Hill made a motion to promulgate the published draft amendment of ORCP 55 with the changes suggested by Legislative Counsel and Judge Peterson. Judge Norby seconded the motion, which passed with 16 votes in favor, 4 opposed, and 1 abstention.

C. Vote on Whether to Send Recommendation for Amendment of ORS 46.415 to Legislature

Judge Peterson reminded the Council that the recommendation for the amendment of ORS 46.415 had been thoroughly considered by the Council in the last biennium, and was passed in the format before the Council today (Appendix E). However, it would have only been recommended to the Legislature if the then-titled vexatious litigant rule had passed. It did not. However, now that Rule 35 has been promulgated by the Council, it is appropriate to consider the recommendation again.

ORCP 1 indicates that the ORCP do not apply in small claims departments unless they are specifically made applicable. Judge Peterson pointed out that abusive litigation can and does happen in the small claims department. The proposal is simply to add to ORS 46.415 that Rule 35 is to be applied in the small claims department as well as in other civil matters in the court. Judge Peterson noted that, if the Council does decide to make this recommendation, it will need to find an appropriate person or agency to carry it in the Legislature.

Judge Jon Hill agreed that "small claims" really are not that small anymore and can be quite contentious, so he thinks that this is a good recommendation. He made a motion to recommend to the Legislature the amendment of ORS 46.415. Judge Norby seconded the motion, which passed with 18 in favor, 2 opposed, and no abstentions.

IV. New Business

A. Staff Summaries of Rule Changes (to be sent with published rules) (Appendix F)
B. E-Mail Service (Appendix G)
C. ORCP 27 (Appendix H)
D. ORCP 60 (Appendix I)

Ms. Nilsson explained that attorney Richard Weill had suggested that it would be helpful for the staff to create summaries of the published rules, so that people who are reading the published rule packet could have a quick summary of the changes and understand better what is being changed and why. Judge Peterson stated that, the more time that expires between promulgation and the creation of the staff comments, the more difficult

it becomes to write them, so creating them earlier rather than later could be helpful–a sort of preliminary staff comments that are sent out with the published rules to allow people to focus on the parts that will really make changes as opposed to the changes that are more grammatical or for consistency within the rules. This would perhaps make the comments more meaningful, and it would mean that the staff comments are nearly done by the time any rules are promulgated.

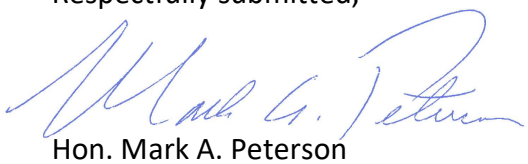
Mr. Goehler suggested that all items of new business be carried over to the agenda for the first meeting of the next biennium. He made a motion to do so. Judge McHill seconded the motion, which was passed unanimously by voice vote.

V. Adjournment

Judge Peterson thanked outgoing Council members for their years of service on the Council. He noted that this is important work that not many people take the time to volunteer for, and that each member has made a substantial contribution to Oregon civil procedure. Ms. Nilsson reminded outgoing members that they can also apply for CLE credit for their service.

Mr. Andersen thanked members for their work during this very productive biennium, and stated that he appreciated the collegiality, honesty, goodwill, and exchange of ideas. He adjourned the meeting at 11:23 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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.

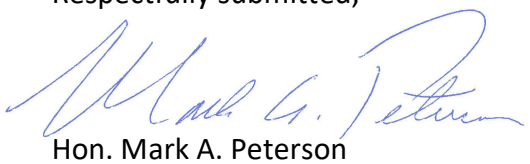
IV. New Business

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

LC 513
2025 Regular Session
OSB00-003
8/14/24 (MNJ/ps)

D R A F T

SUMMARY

Digest: The Act makes some new rules for remote location testimony. (Flesch Readability Score: 61.3).

Changes notice requirements and requirements related to facilities and technology for motions to allow remote location testimony.

A BILL FOR AN ACT

Relating to remote location testimony; creating new provisions; and amending ORS 45.400, 107.717 and 163.770.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 45.400 is amended to read:

45.400. (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. The court may allow written notice less than 30 days before the trial or hearing for good cause shown*] **sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow the nonmoving party to challenge the factors specified in subsection (3)(b) of this section and to establish the factors specified in subsection (3)(c) of this section**.

(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

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

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.

(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.*]

(E) 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.

(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.

SECTION 2. ORS 107.717 is amended to read:

107.717. (1) A party may file a motion under ORS 45.400 requesting that the court allow the appearance of the party or a witness by telephone or by other two-way electronic communication device in a proceeding under ORS 107.700 to 107.735.

(2) In [*exercising its discretion to allow written notice less than 30 days before the proceeding as required*] **determining whether notice is given sufficiently in advance of the proceeding** under ORS 45.400 (2), the court shall consider the expedited nature of a proceeding under ORS 107.700 to 107.735.

(3) In addition to the factors listed in ORS 45.400 (3)(b) that would support a finding of good cause, the court shall consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at a proceeding under ORS 107.700 to 107.735.

(4) A motion or good cause determination under this section or ORS 45.400 is not required for ex parte hearings held by telephone under ORS 107.718.

SECTION 3. ORS 163.770 is amended to read:

163.770. (1) A party may file a motion under ORS 45.400 requesting that the circuit court allow the appearance of the party or a witness by telephone or by other two-way electronic communication device in a proceeding under ORS 163.760 to 163.777.

(2) In determining whether [*to allow written notice less than 30 days before the proceeding*] **notice is given sufficiently in advance of the proceeding** under ORS 45.400 (2), the circuit court shall consider the expedited nature of a proceeding under ORS 163.760 to 163.777.

(3) In addition to the factors listed in ORS 45.400 (3)(b) that would support a finding of good cause, the circuit court shall consider whether the safety or welfare of the party or witness would be threatened if testimony were required to be provided in person at a proceeding under ORS 163.760 to 163.777.

(4) A motion or good cause determination is not required for ex parte

hearings held by telephone under ORS 163.765.

SECTION 4. The amendments to ORS 45.400, 107.717 and 163.770 by sections 1 to 3 of this 2025 Act apply to motions filed under ORS 45.400 on or after the effective date of this 2025 Act.

2024 PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

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

To receive full consideration by the Council, written comments regarding the proposed amendments to the Oregon Rules of Civil Procedure should be received by the Council no later than the close of business on December 3, 2024. Written comments may be sent by mail or by e-mail to:

Mark A. Peterson
Executive Director

Shari C. Nilsson
Executive Assistant

Council on Court Procedures
c/o Lewis and Clark Law School
10101 S. Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu
www.counciloncourtprocedures.org

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

December 14, 2024

ZOOM MEETING:

NOTE UPDATED MEETING LINK INFORMATION
https://us06web.zoom.us/j/82377203749?pwd=NrzKPpbkaJvbos2b8xcEqAF0BkarQa.1
Teleconference option: 1-253-215-8782
Meeting ID: 823 7720 3749 / Passcode: 193329

The Council will take final action on the proposed amendments at its December 14, 2024, meeting.

2024 PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION

RULE 1

A Scope. These rules govern [*procedure and practice*] **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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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.

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 close at hand 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.

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.

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

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 and oppressive, or may require that the party that served the subpoena pay the reasonable costs of compliance.

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.

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.

QUESTION: Should "papers" change to "documents" in Rule 17 B to match the language in this rule?

Council on Court Procedures
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Appendix D-1

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.

NOTE (suggested correction): Other rules (just two) have "Chief Justice of the Oregon Supreme Court" or "Chief Justice of the Supreme Court." The capitalization and phrasing also match legislative form and style. Consider changing to "Chief Justice of the Oregon Supreme Court." Consider capitalizing "Chief Justice."

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;

NOTE: In light of the changes in Rule 55, I just want to verify that this is supposed to be "party who" and not "party that."

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.

NOTE (suggested correction): verifying the use of "ORCP" instead of "Rule" here.

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 close at hand that denial of the request to commence the new action could foreclose the litigant's right to bring a

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.

NOTE (suggested correction): Add "of this rule" to conform with form and style? Also, since this citation is in subsection C(2), just making sure the citation shouldn't be "paragraphs (a) through (c) of this subsection."

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.

NOTE (correction): The text already has "must." Change was made from "shall" to "must" in the 2022 final promulgation.

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.

////

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

NOTE: If set out alone, B(2)(c)(i)(E) would be "part B(2)(c)(i)(E) of this rule" and not paragraph. A part is within a paragraph, but I thought I would make a note of this citation, just in case.

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

NOTE: My comments reflect the handling of statute law. My observation may not be consistent with CCP drafting practices. With statutes, we would need to have a subparagraph B(2)(c)(ii) of this rule -- if we have B(2)(c)(i), we must, at least, have B(2)(c)(ii). The lead-in at B(2)(c) -- lines 1 and 2 -- suggests multiple circumstances (and suggests a sequence with at least B(2)(c)(ii)). With the amendments, we have one main circumstance, "witness agreement," which has several requirements that relate to the one circumstance. I am noting this in case the lead-in or sequence needs any adjustment. Again, my observation is based on statute drafting and may not be appropriate in this instance.

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

NOTE (suggested correction): In statute, we capitalize "Marshal's Office" (in line 20) and "Criminal Justice Division" (line 21).

NOTE (suggested correction): While ORS chapter 352 is a chapter for the sake of organization, it's not an official series for purposes of definitions, penalties, administrative procedures, etc. As a result, there is no reference to "ORS chapter 352" in statute. Most statutes have "a police department established by a university under ORS 352.121 or 353.125."

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.

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Shari Nilsson <nilsson@lclark.edu>

proposed amendments

Richard Weill <rawpc@aol.com> Wed, Dec 4, 2024 at 10:35 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Staff, having served 2 terms on the UTCR committee years ago...I actually read these things when I see them on the bar's website. What would be helpful is if you would prepare summaries of the proposals so we understand the essence of what is being changed, reasons, who proposed, etc. Just a suggestion that would help I think in digesting the proposed amendments.

Richard A. Weill (OSB 821396)
TROUTDALE LAW FIRM
102 W. Historic Columbia Rvr. Hwy
Troutdale OR 97060
(503) 492-8911 fax 492-8705

Shari Nilsson <nilsson@lclark.edu>

ORCP 9(G) Amendment

Nik Yanchar <nik@yancharlawoffice.com> Thu, Sep 5, 2024 at 6:56 PM
To: nilsson@lclark.edu

Morning,

I am running into a lot of elder attorneys as opposing counsel who are requiring specific consent regarding email service, and require everything to be mailed (despite faxing being allowed and many of the same have e-fax which goes right to their email).

This is inefficient and needs to be brought up to the times of 2024 and post-covid when no one was in the office.

I am willing to help work this if needed, but I would like to see an amendment where if there is an attorney representing the opposing party (or an attorney self-representing themselves), that email service of other papers, motions, etc. is sufficient, that upon request from the attorney to have it mailed then such mailing needs to be done, but the party being served still gets the time prescribed in ORCP 10 (the 3 days for mailing). So there is no prejudice in getting by email, just faster, more efficient, and stops the games played by attorneys holding the "i didn't specifically agree" card to stop.

Best,

Nik Yanchar, Esq.
(he/him)
Yanchar Law Office, LLC
1826 NE Broadway
Portland, Oregon 97232
T: 503-893-9417
F: 503-334-2902
www.yancharlawoffice.com

Please note that the office will be closed Fridays unless otherwise scheduled.

Shari Nilsson <nilsson@lclark.edu>

RE: New Twist on ORCP 27

Susie Norby <Susie.L.Norby@ojd.state.or.us> Thu, Aug 29, 2024 at 1:05 AM
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>, Shari Nilsson <nilsson@lclark.edu>

I think the policy is essentially elevating parental rights over presumptions that minors are incapacitated by age. I think I agree with that, but I haven't put a lot of thought into it.

From: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 3:58 PM
To: Susie Norby <Susie.L.Norby@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: RE: New Twist on ORCP 27

In addition to being questionable in the policy department, the statute could be better written. I suspected there might be such a law, but is it saying that minors can represent themselves in those three limited kinds of proceedings or that they can sign waivers and settlement agreements and the like as a part of, e.g., a filiation case?.

Mark

Mark A. Peterson

Circuit Court Judge Pro Tem

Multnomah County Circuit Court

1200 SW First Avenue

Portland, OR 97204

Office: (971) 274-0453

Email: Mark.A.Peterson@ojd.state.or.us

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From: Susie Norby <Susie.L.Norby@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 3:51 PM
To: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: RE: New Twist on ORCP 27

Here's the obscure statute! But I still think ORCP 27 should refer to this situation somehow. 😊

109.112 Mother, father or putative father deemed to have attained majority. The mother, father or putative father of a child shall be deemed to have attained majority and, regardless of age, may give authorizations, releases or waivers, or enter into agreements, in adoption, juvenile court, filiation or other proceedings concerning the care or custody of the child. [1975 c.640 §10]

From: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 3:46 PM
To: Susie Norby <Susie.L.Norby@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: RE: New Twist on ORCP 27

Susie,

My initial thought is that minors should not be having babies! But, I stopped handling family law cases a long, long time ago, so what do I know. This is but one example of why there should be a couple of family law lawyers on the Council who spend time in the trenches and whose vantage point is not from a perch on the bench. Seriously, I think Role 27 B says they must have an adult in charge for the proceeding. However, there may be some obscure statute in the family law part of the ORS that points in another direction. Could use some family law practitioners. We should put this in the list of issues for next biennium's September meeting.

Mark

Mark A. Peterson

Circuit Court Judge Pro Tem

Multnomah County Circuit Court

1200 SW First Avenue

Portland, OR 97204

Office: (971) 274-0453

Email: Mark.A.Peterson@ojd.state.or.us

From: Susie Norby <Susie.L.Norby@ojd.state.or.us>
Sent: Wednesday, August 28, 2024 2:53 PM

To: Shari Nilsson <nilsson@lclark.edu>; Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: New Twist on ORCP 27

Something to put on the list for the next biennium!

Today a colleague came to see me to ask about the application of ORCP 27 to a specific Custody & Parenting Time court case.

The parties – Mother and Father to the child – are both under 18 years of age. Neither is emancipated. Neither has a GAL. My colleague asked whether he could proceed with the scheduled hearing in spite of their ages and their absence of a fiduciary of any kind.

I interpreted B(1)(a) to potentially allow a minor over 14 to apply to be his/her own GAL, if necessary. Therefore, I reasoned, my colleague should go ahead with the hearing without that odd step.

Then our (non-lawyer) Family Court Services employee advised, with assurance, that minors who are parents of a child need not have a fiduciary or GAL to proceed. So he did. But the employee did not cite us to any legal authority for her position.

The CCP may want to consider another amendment to ORCP 27 to clarify that minor parents of a child may litigate their family law cases without an adult representative.

Just thought I'd pass this on!

Susie

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COOPER WHITMAN LLC

TRIAL LAWYERS

November 8, 2024

Via email: ccp@lclark.edu

Hon. Mark A. Peterson
c/o Lewis & Clark Law School
10101 S. Terwilliger Blvd.
Portland OR 97219

Dear Judge Peterson:

I hope you, Shari and the Council members are well.

I write to propose a change to ORCP 60 to clarify one part of it.

The final sentence of the current rule is "[i]f a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict."

Without context this grant of discretion seems illogical and directly at odds with the purpose of the rule: to dismiss a claim when the party has not made a *prima facie* case before resting their case in chief.

I recently tried a jury trial for a defendant. I provide some of the facts to give context to the trial judge's perspective that drover her ruling.

Plaintiffs were neighbors of a decedent. I represented the trustee of the trust that held all her assets. It was conceded that for a number of years Plaintiffs had provided extraordinary levels of support and care to their neighbor. They testified that they did so because they believed she was leaving them her house in her trust and were motivated by gratitude for that expected future gift. Of course, no version of the trust ever contained a bequest for them at all.

Their claim was for unjust enrichment.

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I argued, that as a matter of law, services provided purely out of an expectation of a future gift, absent some agreement, can never produce enrichment which is unjust.

The trial judge agreed with me on the law and granted my motion, but the judge was clearly very moved by the uncontroverted evidence of the immense amount of time and efforts the Plaintiffs spent helping their elderly neighbor.

The judge, thus, acceded to Plaintiffs' counsel's request to enter a dismissal without prejudice as the plain language of the rule allows the Court to do.

The Council staff report from the 1978-79 biennium when this rule change was promulgated indicates this change was made because "[i]n a jury case, if the judge feels that a plaintiff should be given a chance to refile when the evidence presented by the plaintiff is insufficient, the judge can grant a judgment of dismissal without prejudice under ORCP 54, instead of directing a verdict."

In my case the motion was based on the legal insufficiency of otherwise uncontroverted evidence, it was not based on the failure of Plaintiffs to provide some, or sufficient evidence on any element of their claim.

I would recommend that the final sentence of ORCP 60 be modified to say "[i]f a motion for directed verdict is made by the party against whom the claim is asserted, the court may, at its discretion, give a judgment of dismissal without prejudice under Rule 54 rather than direct a verdict *if the court finds that the party against whom the motion was made filed to provide sufficient evidence to make a* prima facie *case but should be given a second chance to do so by refiling the case*."

As it exists the rule provides judicial discretion that is not sufficiently cabined to the intent of the rule. This leads, as in my case, to bad outcomes.

These parties had a trial (my predecessor counsel had chosen not to move for summary judgment and I did not have the required time to do so before trial when I assumed the role of counsel to the Defendant) and Plaintiffs put on all the evidence they chose to adduce. The Court found, *as a matter of law*, that their claim failed, not based on insufficiency of their evidence.

Having granted a without prejudice dismissal the Court has denied Plaintiffs the right to appeal if they choose (the dismissal is not final) and has bound the parties, if Plaintiffs wish, to re-litigate the exact same case to likely the same outcome (unless the appellate courts change our law of unjust enrichment).

Clarity in the rule can help these and future jurists and parties to avoid such duplication of efforts.

As always, I'd be glad to participate in any Council meeting where this proposal is discussed.

Sincerely,

/s/ Brooks Cooper
Chair of the Council in the 2011 – 2013 biennium

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COMBINED COMMENTS

ON

AMENDMENTS

PUBLISHED BY

OREGON COUNCIL ON COURT PROCEDURES

SEPTEMBER 14, 2024

COMMENTS

ON

DRAFT OF

RULE 35

PUBLISHED BY

OREGON COUNCIL ON COURT PROCEDURES

SEPTEMBER 14, 2024

Council on Court Procedures
December 14, 2024, Meeting
Appendix J-2

My Journey Through the Courts With an Industrious Abuser

by Barb Long, OTLA Guardian

As we all know, sometimes our representation of a client can start off straightforward but morph into something less manageable. When this happens, particularly to those of us who represent crime victims, we must decide not only what we have the time and desire to handle, but also whether we have the emotional bandwidth to do it. This is a story about finding, or perhaps not finding, that balance during my representation of a domestic violence survivor.

Kim Jensen met Ted Bowman after Jensen's partner of 22 years passed away. From the beginning, it was apparent that Bowman was not the ideal suitor. He had baggage, including a pretty hefty criminal record across a couple of states, and a story that didn't always make sense. Still, he convinced Jensen he was a changed man. A local media outlet had even published an article about how Bowman had cleaned-up his act after being a "thief, dope dealer and pimp." And despite being bright and well-employed, Jensen had never really learned how to live alone. She wanted a companion and Bowman promised to take care of her.

The first six months of the relationship went well. Bowman moved into Jensen's home, a home she proudly owned after years of diligently paying the mortgage. But the honeymoon didn't last long. Bowman's behavior became increasingly controlling and eventually turned physically abusive. There was the time he broke her phone because she wasn't paying attention to him. He isolated Jensen from her friends and family. He pushed her against a dresser, knocked her in the face and hit her with a belt. And there were the numerous times he threatened to kill her and burn her house down. The list goes on.

Jensen petitioned for a restraining order but dropped it after Bowman convinced her he would change. He didn't. She eventually mustered the courage to file another one after he slammed her into the refrigerator when she asked him to get a job. Bowman requested a contested hearing, letting Jensen know he wouldn't go down without a fight.

I met Jensen through my volunteer work with Legal Aid Services of Oregon, which helps domestic violence victims retain *pro bono* attorneys for contested restraining order hearings. I liked her immediately and was eager to help. She had solid grounds for a restraining order and this was exactly the type of pro bono work I enjoyed doing.

Jensen had fresh bruises when she showed up to court for the hearing. Bowman broke into her home and assaulted her. Fortunately, Jensen reported Bowman to the police this time and he was arrested. The court upheld the restraining order without a hearing when Bowman didn't show up to contest it.

A criminal case for the assault followed. I continued to advise Jensen and testified as a witness on the state's behalf at the trial. The jury convicted Bowman of three crimes constituting domestic violence, including two felonies, and the court sentenced him to over five years in prison. Jensen finally felt safe and I was happy to have helped a good person stop a bully.

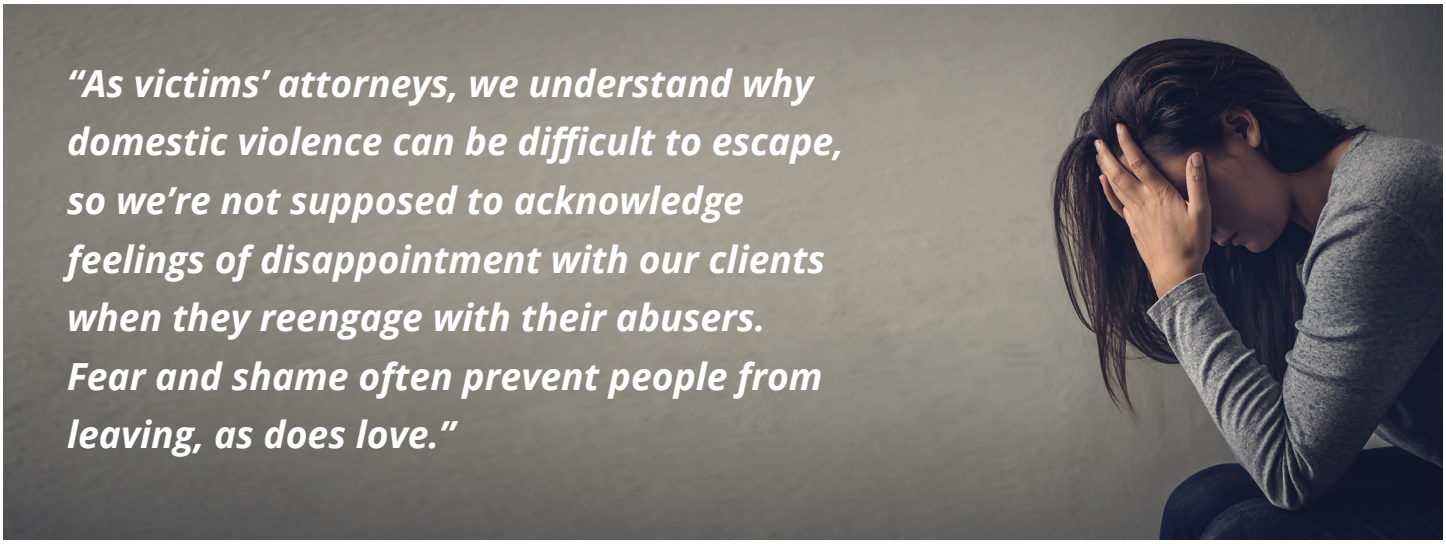
We both thought we were done with Bowman; we were wrong.

Jensen called my office crying. Nearly four years after the criminal trial, Bowman was suing her for two million dollars, accusing her of theft and intentional infliction of emotional distress. Although I had a busy law practice and was recently back from maternity leave, I agreed to help her with the case on a pro bono basis. This was a convicted abuser suing his victim for things that didn't happen. How hard could it be to get rid of him?

Bowman's lawsuit was poorly drafted but above average for a *pro se*, which made sense when I saw he filed over a dozen other lawsuits over the years. Most were dismissed early on but he recently obtained a default judgment in one and likely felt emboldened. He is also a person who does not give up easily, as evidenced by his pursuit of Jensen while he was in prison. He sent her numerous love letters and apologies, hoping to get her back upon his release. Only after his strategy failed did he file a lawsuit against her and begin publicly accusing her of stealing from him. The closer I looked at the case, the more I wondered what I had gotten myself into.

See My Journey Through the Courts With an Industrious Abuser p. 26

***BARB LONG** represents survivors of sexual abuse and other crimes in civil actions against individuals and institutions. Long contributes to the OTLA Guardians of Justice at the Sustaining level and is the principal of Long Law PC, 1500 1st Ave., Suite 1000, Portland, OR 97201. She can be reached at barb@longlawpc.com or 503-228-9858.*



My Journey Through the Courts With an Industrious Abuser continued from p. 25

I naively hoped the mere filing of an appearance might convince him to back down, that he would see Jensen was no longer isolated and had help. No such luck. My next strategy was to try to get the complaint dismissed or at least made more certain under ORCP 21. Those of you who have defended against pro se plaintiffs (or ineffective lawyers) know this can be trickier than you think it will be. You have to both identify what the actual claim is (which is not always easy) and try to attack it, giving them every benefit of the doubt as that is what the court will likely do. But you walk a fine line, because you risk educating the litigant about the law such that the next complaint is better. Here, I got all but the conversion claims dismissed, with an order to make some portions more definite and certain.

Bowman filed an amended complaint that didn't comply with the order, so I filed another motion. He then immediately filed a slightly better complaint.

It became clear the strategy of attacking his complaint was frustrating me more than it was him. Unfortunately, a worthy case with a particularly vexatious other side can result in a lot of anger and wheel-spinning, even if you know it's ultimately irrational and unproductive. This just wasn't the type of case I was going to be able to get dismissed. Bowman identified dozens of items Jensen supposedly stole from him, about which he could easily create a question of fact with his testimony alone. My options were to do my best to get the case to trial or convince him to relent some other way.

I filed an answer with counterclaims for defamation and intentional infliction of emotional distress, hoping the threat of a money judgment against him would force him to back down. I also obtained an order compelling him to respond to my request for production of documents, again hoping he would see the paucity of his case. Bowman remained undeterred.

After months of not producing documents despite court orders to do so and plenty of motion practice, the court finally dismissed Bowman's case as a discovery sanction. This took a lot of time and patience to set up and execute, given how important it was to give Bowman proper notice of what I was doing and to show the court the sanction was warranted. Not ready to give up, Bowman filed three motions to set aside the judgment, none of which were successful. All that remained was Jensen's counterclaims against him. By this time, we were a year into litigation and Jensen was ready to be done with him. I was too. Besides, it's not like he had any money from which to collect a judgment, even if we did get one. We decided to dismiss the counterclaims without prejudice and hoped that would be the end of it.

Of course, it wasn't.

Jensen called me three years later, again in distress. She had taken Bowman back and he assaulted her again. After pressing charges, asking the state to drop them and then asking for him to be re-charged, Bowman was again convicted of a domestic violence crime. And again, he sent a demand letter threatening to sue Jensen.

As unflattering as it is to admit, I initially felt burned and somewhat betrayed when I learned Jensen had taken Bowman back. As victims' attorneys, we understand why domestic violence can be difficult to escape, so we're not supposed to acknowledge feelings of disappointment with our clients when they reengage with their abusers. Fear and shame often prevent people from leaving, as does love, or at least something that feels like love. The abusers are often highly intelligent and skilled manipulators who know how to keep their hold. Jensen going back to Bowman of course had nothing to do with me or the quality of my legal work and I felt guilty for even thinking about myself as I saw her going through this.

Still, there was the legitimate question of whether I was up for helping her with another round of potential litigation. Jensen offered to take out a loan to pay me by the hour, but I still had reservations about getting drawn back in. I worried that getting involved again would be too emotionally draining with all of my other commitments to balance. This time, I had two small children and a caseload full of equally emotional and complex cases. After much consternation, I decided to help Jensen find another attorney.

Even as I did this, Jensen kept insisting she wanted me to represent her. She trusted me and believed I knew how Bowman's mind works. Her efforts to convince me were somewhat successful, in that I ultimately agreed to a limited representation to send Bowman a letter threatening to sue him again, with the understanding I would not go any further in her defense than that. I also offered to work with whomever she hired to sue him, if it came to that.

I had few illusions the letter would work. Bowman had never before been deterred by the idea that a jury would never believe a 12-time convicted felon over his long-suffering victim. Nonetheless, I wrote a letter telling him why he would lose and how I would prove it. And how, unlike last time, I wouldn't stop until I obtained a judgment on the counterclaims against him that would haunt him for the rest of his days.

Jensen and I held our breath awaiting a response. A couple weeks later, Bowman snuck past my office building's security to drop off a pile of documents at my office. As I looked at his documents, I saw this was going to be a potentially messy and involved litigation.

The first time Bowman sued my client, I went on the attack immediately and didn't let up until the case was dismissed. But what if I used another tried-and-true defense strategy: ignoring the case with the hope it'll go away. After all, he hadn't filed the case yet. The counterclaims had plenty of time on the statute of limitations, and I knew he was busy with other ventures. What if this time I didn't help him move the process along by educating him on the law? This would save Jensen money and limit my involvement. Jensen and I decided to maintain radio silence unless or until Bowman pressed further.

A month later, neither Jensen nor I had heard anything. As more months went by and we still didn't hear anything, I feared Jensen had decided to pay him off or worse yet, get back together with him.

Almost a year later I called Jensen to see how she was doing, bracing myself for what she might say. To my delight, she told me she hadn't heard anything from Bowman. He had apparently gotten married and had a whole new set of schemes he was running. Jensen was happy and thriving, hopeful about her life in a way I had never seen her. Although I felt bad for the new people potentially tangled in Bowman's web, I was just so happy it wasn't Jensen; and that it wasn't me.

I represented Jensen in the first restraining order in 2015 when I was an associate beginning my law practice in Portland. I said yes to far more cases back then and was less protective of my time and energy. Would I help defend Jensen for free in the first civil case if she walked through my door today, knowing what I know now? Probably. Would I have continued to defend her in the second civil case if the letter hadn't (apparently) succeeded? Perhaps. Reasonable minds can differ as to how successful I was in setting boundaries in handling this worthy case, but it's helped remind me that we are allowed to care about our clients and want to help people while caring about our own self-preservation.

BOWERMAN LAW GROUP, PC

Attorneys
BENJAMIN P. KEANE
SAMUEL S. NELSON
TRASA STALNAKER NELSON

406 Bluff Street
P.O. Box 100
Oregon City, Oregon 97045
(503) 650-0700
F: (503) 765-7515

December 4, 2024

Council on Court Procedures
ccp@lclark.edu

Sent via Email

RE: Rule 35, "Abusive Litigants"

Dear Council,

I write to express my support for passing Rule 35 to the Rules of Civil Procedure. As a member of the Oregon State Bar for 65 years, a Fellow in the American College of Trial Lawyers, former Chairman of the Professional Liability Fund, and a former *pro tem* judge in Clackamas Circuit Court, I have witnessed the procedural difficulties in handling abusive litigants. Rule 35 gives much-needed form to a substantive issue litigators and judges regularly face. Frankly, this codification is long overdue.

I strongly recommend that the rule pass to give our members a procedural framework that guides decision-making in the context of determining not only whether litigants should be classified as abusive, but how such litigants are dealt with from a procedural standpoint. Further, creating a list of so-classified litigants will assist our fellow litigators in running a check, similar to a conflict-check, prior to beginning representation. This will no doubt improve our Bar's efficacy. As such, Rule 35, as proposed, has 100% of my support.

Sincerely,

BOWERMAN LAW GROUP, PC

s/ *Donald B. Bowerman*

DONALD B. BOWERMAN

BPK/DBB/lbk
cc: Hon. Susie Norby

Shari Nilsson <nilsson@lclark.edu>

Proposed Rule 35 is a Pragmatic Approach to Vexatious Litigants

Crowley Kenneth C <Kenneth.C.Crowley@doj.oregon.gov> Sat, Nov 9, 2024 at 1:32 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council Members:

It's been a little more than a year since my time on the Council concluded, and I do like having my Saturdays back, but also miss the discourse. In looking over this year's proposed amendments, it looks like the Council has had another engaging year.

I appreciate that you have brought forward a proposed rule regarding vexatious litigants. That idea was raised during my last years on the Council and it was disappointing to me that we didn't get it approved during my time. Proposed Rule 35 addresses a problem that government lawyers and the courts have to deal with all the time.

Vexatious litigation slows down the judicial system. Processing repeat frivolous filers takes time and money, which could otherwise be devoted to addressing legitimate matters. As a government lawyer, I see these cases all the time. Every Assistant Attorney General that I work with in the Civil Litigation Section at the Department of Justice has these cases in their caseloads. Like the courts, it takes time and money for us to handle them; it seriously impacts our availability to work on other legitimate matters, which causes delay, and justice delayed is justice denied.

Vexatious litigation is a public resource issue that the new Rule 35 addresses. It should put the brakes on truly frivolous matters that have already been litigated, without denying good faith claimants their day in court. This Rule has the potential to benefit the entire judicial system. It will help focus judicial resources on the legitimate disputes that deserve it.

Please vote in favor of Rule 35. Thank you for your consideration.

Kenneth C. Crowley

Oregon Department of Justice

503.689.7260

kenneth.c.crowley@doj.oregon.gov

Council Chair: 2021-2023

JOHN W. "JACK" LUNDEEN
~~P.O. Box 1146~~
Lake Oswego, OR 97035
Cell 503 502 9750

2 November 2024

Mark A. Peterson
Executive Director
Oregon Council on Court Procedures
c/o Lewis and Clark Law School
10101 South Terwilliger Avenue
Portland, OR 97219

Re: **ORCP 35 Amendment**

Dear Mr. Peterson:

The Council on Court Procedures proposed amendment to ORCP 35 was brought to my attention recently. I took the time to read the proposed amendment, designed to interrupt abusive litigants, and I heartily support it.

That rule took me back to the early 80's, shortly after I was admitted in1979. I was retained by a chiropractor Daniel Beeson to defend him in some litigation initiated by his mentor and business partner Burl Pettibon. Pettibon was represented by Craig D. White. Representing Dr. Beeson took up a great deal of time and caused a great deal of anguish on my part as I defended Dan. We ultimately prevailed.

The actions are summarized in the disciplinary opinion *In Re White*, 311 Or 573, 815 P2d 1257 (1991). In the second paragraph of the opinion the Court summarized:

"We conclude that the accused filed unwarranted actions and advanced unwarranted claims merely to harass, in violation of DR 7-102(A)(1); that he accepted employment knowing that his client intended to bring actions merely to harass and to advance unwarranted claims, in violation of DR 2-109 (A)(1) and (2); that the conduct described above in addition to failures to appear for hearings, failure to follow an order concerning venue, and failures to prosecute claims prejudiced the administration of justice, in violation of DR 1-102 (a)(4); that the accused knowingly made a false statement to a

> court, in violation of DR 7-102(A)(5); and that the accused committed a criminal act that reelected adversely on his fitness to practice law, in violation of DR -1102(A)(2). We suspend the accused from the practice of law for three years."

This behavior by Mr. White took a toll on me. I was a new attorney and I tried to practice law in a calm and professional manner. I spent way too much time trying to figure out what Mr. White was up to, and to respond to his threats to me that I was violating ethics rules. I finally looked back at the history I had suffered and filed a bar complaint, that ended with *In Re* White.

Enough of my sad, sad story. I spent the next 30+ years continuing to practice law in a professional and cordial manner. When confronted by attorneys who didn't (and we all know who they are), I didn't find tools to interrupt their bad attitude and style. I believe that the proposed amendment to ORCP 35 will provide a mechanism for stopping in their tracks behavior that makes the practice of law generally and litigation particularly more unpleasant than it needs to be.

I have read the whole rule through a couple of times. The rule provides due process both for the accuser and the accused. The rule gives the accused ample opportunities to defend himself. Finally, and not unimportantly, the rule give the court the option to require the abusive party to post security that could ultimately be applied to the legal costs incurred in responding to abusive practices.

I would urge the Council on Court Proceedings to enact the amendment to ORCP 35.

Sincerely,

John W. Lundeen

Shari Nilsson <nilsson@lclark.edu>

Rule 35 - Abusive Litigants comment

Minger, Jessie Y. <JMinger@schwabe.com> Tue, Dec 3, 2024 at 2:15 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council,

Thank you for considering Rule 35 (Abusive Litigants).

I send this communication in support of Rule 35. I believe that Rule 35 will not only provide recourse to those dealing with abusive litigants, but in some cases even deter such behavior by virtue of this Rule's existence.

In the context of protective proceedings and probate matters, one abusive litigant can deplete the resources of a probate estate or a protected person. The injustice of this cannot be overstated.

I assert that this rule provides sufficient safeguards and recourse if an abusive litigant chose to change his/her approach.

I believe the need for this rule is significant and I respectfully request that the Council vote to promulgate this rule.

Thank you for your time and consideration.

Jessie Minger

Shareholder

(360) 597-0811

jminger@schwabe.com

Schwabe

Shari Nilsson <nilsson@lclark.edu>

Comments in Support of Proposed ORCP Rule 35

Brent Summers <brentsummers39@gmail.com> Thu, Nov 14, 2024 at 5:17 AM
To: ccp@lclark.edu

To: Mark A. Peterson
Shari C. Nilsson

Please confirm receipt by return email. Thank you.

I write in support of the enactment of proposed ORCP Rule 35. I took retirement status in November, 2022 after 40 years in an extremely busy private civil litigation practice.

Oregon's limited court resources was a huge concern throughout my entire career as a commercial trial lawyer.

So much so I prepared a 20-page Complaint fifteen years ago seeking to enjoin the Oregon Legislature from purposefully underfunding the judicial branch. The Attorney General wasn't interested, however, and I lacked standing to bring the action.

Numerous times we would be set for trial, with party representatives and expert witnesses in town ready to try a case over several days, only to be told we were set over in the regular course (at times up to nine months) due to a lack of available judges or jurors.

Another concern, especially over the last 20 years of my 40-year career, was the reluctance of most judges to protect the court against abusive litigants and abusive litigation tactics.

Any well written, well thought out procedural rule that will preserve and protect the limited resources of the Oregon courts should be strongly supported before the Legislature.

Likewise, the enactment, publication and rollout of out of such a new ORCP Rule will shine a bright light on the existing inherent power of the courts to punish vexatious or abusive litigants and remove them from the system. Proposed Rule 35 provides a fair and comprehensive process for doing so. The proposed rule contains the built-in safeguard that the attack on an abusive litigant is made on the court's motion, not a motion by the defendant(s). It is not a weapon to be wielded (or abused) by a defendant seeking to gain an advantage in the litigation.

Further, the enactment, publication and roll out of proposed ORCP Rule 35 may, by itself, serve as a deterrent to abusive litigants. It should also serve as a deterrent to abusers (and their lawyers) of other aspects of the civil litigation system, such as discovery and motion practice abusers.

Again, proposed ORCP Rule 35 should be enacted because it is a mechanism to protect Oregon's precious judicial resources and help assure they are used efficiently and not wastefully.

In my retirement, I live in Texas six months out of the year. I looked up the Texas vexatious litigant statute that was passed in 1997 and amended in 2013.

A key procedural difference between the Texas rules and proposed ORCP 35 is in Texas, the matter comes before the court on a defendant's motion made early in the case. The litigation is stayed while the court conducts a hearing on whether the plaintiff is a vexatious litigant under the statue.

The Texas rules and Oregon rules are similar with regard to: the criteria to be considered in determining whether a litigant is abusive; holding a hearing on whether a litigant is abusive; the keeping of a list of such abusive litigants; the prohibition against such litigants filing new cases; and the application by such litigants for a hearing to determine if they may be removed from the list.

To put the comparison in context, Texas has a population of 31,000,000+ and courts in 254 counties with 3,151 judges.

As of the first week of November, 2024 there are 506 vexatious litigants on the statewide list.

The Texas Office of Court Administration keeps the list in accordance with Section 11.104 of the Texas Civil Practice and

Remedies Code. All persons on the list have been found by a court, after notice and hearing, to be a vexatious litigant, pursuant to the process found in Chapter 11 of the Civil Practice and Remedies Code.

Before a person on the list may file a new civil action, that person must apply for a court order authorizing the filing and show cause why said person should be removed from the list.

I looked for, but could not find how many total vexatious litigant proceedings have been brought by defendants in Texas including where the motions were denied.

Given the above numbers, it does not appear the vexatious litigant rules have been weaponized in Texas. And again, under the Oregon proposed rules, the court makes the initial motion to declare a litigant abusive, not the opposing defendant (s).

Please consider the foregoing in support of passage of proposed ORCP Rule 35.

/s/ Brent G. Summers
OSB No. 824060 (retired)

Sent from my iPhone

December 3, 2024

Mark Peterson, Executive Director
Council on Court Procedures

Re: **Proposed ORCP 35 - "abusive" litigants**

Dear Mr. Peterson and Councilmembers,

I read with concern that the Council has proposed and is considering ORCP 35, an entirely new rule, created to deal exclusively with the "abusive litigants" who are apparently jamming Oregon's courts.

I was therefore surprised to learn (through a review of the minutes from your meetings) that there has been no study conducted or report made[1] that gauged the expense, reduced productivity, or damage caused by this purported plague. In fact, this new rule appears to be constructed entirely upon *anecdotal evidence* supplied by the judges on the Council. Let's put a pin in that for a moment.

As evidenced by the record of your debate on this matter, ORCP 35 is situated to unfairly target self-represented litigants, leaving an already-marginalized group helpless and branded, with no realistic process through which to redeem their name or their cause. ORCP 35 will certainly be abused by powerful opponents to extinguish the remaining rights of the self-represented, and *poorly* represented; and it is reasonable to expect that ORCP 35 will be used as a cudgel in that manner, at least as often as the label of "abusive" is actually warranted.

Of equal or greater interest to the public, however, is the disturbing revelation that Oregon judges are already curtailing the rights of such litigants, *covertly*, by keeping secret sh*t lists, created through random, disparate, county-specific means.

Coming back to the pin: The Council's discussion of those secret lists revealed how easily and deliberately prejudice against a litigant can be transmitted to a judge *by court staff*. That is, the Councilmembers' anecdotes were clearly at least partially fueled by courthouse gossip and word of mouth.

I ask you to consider whether your secret lists are even written down somewhere, or if you instead rely upon staff to remember who the "problem people" are. I intend to

[1] Forgive me if I overlooked while reading your records—as closely as time allowed—any reference to an actual study of the problem.

provide additional testimony on this very subject at the Council's meeting on December 14, 2024. It will not be anecdotal.

Until then, I will note that "abusive" is not at all a synonym for "vexatious," the common parlance used federally, and in other states. That the Council opted to use such a harsh and loaded word reveals an apparent desire to punish people, and saddle them with a "finding" that they are "abusers." That is far too much power to grant Oregon's judges, and those who work so diligently to influence them.

Regards,

/s/ Stephanie Volin
SLLVOLIN@gmail.com

COMMENTS

ON

AMENDED DRAFT

OF

RULE 39

PUBLISHED BY

OREGON COUNCIL ON COURT PROCEDURES

SEPTEMBER 14, 2024

Council on Court Procedures
December 14, 2024, Meeting
Appendix J-15

Shari Nilsson <nilsson@lclark.edu>

Comments on proposed amendments to Oregon Court Rule 39

Melinda Wilde <mwildeatty@gmail.com> Wed, Oct 30, 2024 at 12:09 AM
To: ccp@lclark.edu

I wish to make the following comment about the proposed change to ORCP 39C2(a).

As long as this rule is being amended, I think the language "or is bound on a voyage to sea" should be removed because it no longer reflects the reality of modern travel. It should be sufficient for the purpose of this rule to permit an expedited examination if the person is about to go out of state without including a voyage to sea because it is redundant unless the sea voyage is only 3 miles from the coast line. I have included my proposed change below:

the requirements of paragraphs C(2)(a), C(2)(b), and C(2)(c) are [each] 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.

Very truly yours,

Melinda Wilde

--
Melinda B. Wilde, LLC
Attorney at Law
NMLS #228277
P.O. Box 14652
Portland, OR 97293
(503)238-6658
email: mwildeatty@gmail.com

COMMENTS

ON

AMENDED DRAFT

OF

RULE 55

PUBLISHED BY

OREGON COUNCIL ON COURT PROCEDURES

SEPTEMBER 14, 2024

Council on Court Procedures
December 14, 2024, Meeting
Appendix J-17

Shari Nilsson <nilsson@lclark.edu>

Proposed amendments to ORCP 55

Baumchen Drew <Drew.Baumchen@doj.oregon.gov> Sat, Nov 23, 2024 at 3:52 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Mr. Peterson & Council on Court Procedures:

I am writing to strongly recommend against the proposed change to ORCP 55, which currently allows the recipient of a document subpoena to make a timely objection, thereby suspending the obligation to produce.

I have been on both sides of document subpoenas (sending and responding to) in my current capacity and previous private practice. The option to object to a subpoena necessarily forces the parties to confer and seek conciliation, which is a desirable end. Certainly, there is room for abuse of this rule but I believe there is much greater room for abuse of the subpoena power when subpoenas are overbroad, oppressive, or simply inartfully drafted. I am confident that I, myself, have fallen victim to the latter at least once or twice.

Removing the option to object to a subpoena prior to needing to seek relief from a court would inappropriately foist the burden to non-parties to seek legal counsel and court intervention to resist unfair subpoenas. Or, alternatively, it could result in more litigation trying to enforce subpoenas that are simply ignored, instead of keeping the burden with the requesting party to demonstrate reasonableness and willingness to front reasonable costs. Shifting this burden would inevitably place higher practical and financial costs on small businesses and individuals, which runs counter to notions of access to justice.

As a government lawyer, I have had many occasions where I have had to object to and sometimes litigate the objections to document subpoenas. In the vast majority of cases, simple conferral with the requesting attorney resolves the issue, typically by narrowing the scope or addressing basic concerns. In other cases, I have been able to facilitate communication between a requesting attorney and recipient, which sometimes comes down to simple things along the lines of “you requested documents about apples but we, in fact, only sell oranges. We’d be happy to discuss providing documents about the oranges that we sell.”

Like any other discovery dispute, judges do not want to mediate these disputes and this proposed amendment would place even further strain on our under-resourced trial courts.

Undoubtedly, the proponents of this amendment think it will improve the efficiencies of our justice system. For the foregoing reasons, I respectfully (and vehemently) disagree.

I hope that these comments – which reflect my own views and 20 years of legal experience – are well received and considered by the Committee.

Thank you,

Drew K. Baumchen

Council on Court Procedures
December 14, 2024, Meeting
Appendix 3-12

Senior Assistant Attorney General | Trial Division | Civil Litigation Section

Oregon Department of Justice

100 SW Market St, Portland, OR 97201

503.947.4700

Please Note: Beginning May 31, 2024, my email address will be: drew.baumchen@doj.oregon.gov

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Shari Nilsson <nilsson@lclark.edu>

ORCP 55 proposed changes

Gary Berne <GBerne@stollberne.com> Tue, Dec 3, 2024 at 8:30 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Council:
Doing away with the ability to make a simple written objection is unfair to subpoenaed parties who no longer would have a no-cost simple mechanism to put the initial burden on the litigating party who already has a lawyer. The subpoenaed party would have to rush to find a lawyer and likely pay a retainer. I have never found the existing procedure to be a problem in 47 years of practice. I think forcing a subpoenaed party to hire a lawyer also serves to make people angry with the legal system.

Thank you.
Gary Berne

Shari Nilsson <nilsson@lclark.edu>

Late submission public comment - 2024 Proposed Amendments to ORCP

Carter, Christy <Christy.Carter@portlandoregon.gov> Thu, Dec 5, 2024 at 2:04 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

To Whom it may concern:

I apologize for the late submission and understand if it can't be accepted. If this comment can be considered, please see the below.

ORCP 55, Section A(7)(a)(ii) & A(7)(b)– Objection Suspends Obligation to Produce

The City of Portland relies on this provision of the rules to ensure adequate time to respond to a subpoena, including filing objections and presenting arguments before the court, without being compelled to produce records prematurely. While the rules provide a mechanism for resolving disputes over subpoenas, they do not negate the need for a stay. Without the automatic suspension of the obligation to produce upon objection, the subpoenaing party could seek enforcement without allowing the subpoenaed party sufficient time to respond or be heard.

This stay is crucial to ensure that objections can be fully presented and resolved by the court before production occurs. Without it, the subpoenaing party could circumvent the objection process, forcing premature compliance and risking the improper disclosure of sensitive or protected records. Furthermore, subpoenas are often issued without proper witness fees, rendering them invalid on their face, yet the absence of a stay could compel compliance before such defects are addressed. Retaining the stay language ensures procedural fairness and safeguards the rights of the subpoenaed party to challenge the subpoena effectively.

Thank you and best regards,

CHRISTY CARTER | **PARALEGAL** (She/Her)

PORTLAND OFFICE OF THE CITY ATTORNEY

1221 SW Fourth Avenue, Room 430

Portland, OR 97204

Voice: 503-823-8158 | Fax: 503-823-3089

christy.carter@portlandoregon.gov

Paralegal for Anika Bent-Albert, Mike Porter & Victor Mercado Negro

Shari Nilsson <nilsson@lclark.edu>

Comments to proposed changes to Rule 55

Chin Elleanor <Elleanor.Chin@doj.oregon.gov> Wed, Nov 6, 2024 at 9:17 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>
Cc: Crowley Kenneth C <Kenneth.C.Crowley@doj.oregon.gov>

The proposed changes to ORCP 55 A(7) are a significant change in third party discovery practice that unfairly places the burden of motion practice on non-parties to litigation. The existing rule, providing for objection in writing, including particularly to "part" of the subpoena, allows for parties to confer on the scope of the subpoena, reserve motion practice, and have meaningful negotiation over the substantive content the serving party seeks to obtain. The proposed rule would eliminate this more phased, nuanced approach and force a non-party to the litigation to file a motion as their only option. While this might be an effective way of streamlining discovery practice and allocating the procedural burden in party discovery, it is bad policy to force non-parties, particularly individuals and unsophisticated litigants, to appear and engage in motion practice as their only option. With respect to the most vulnerable potential litigants who are non-parties, it is ripe for abuse and subjects non-parties to potential sanctions for failure to comply if they are unable to engage in motion practice. This is an equity issue.

Elleanor H. Chin

Senior Assistant Attorney General | Trial Division | Oregon Department of Justice

100 Market Street

Portland OR 97201

503.947.4700 | Fax 503 947.4791

elleanor.chin@doj.oregon.gov

IMPORTANT! Please take note of the following information:

The State Data Center is undergoing changes, and the email address to which this message was sent will no longer be valid after June 10, 2024.

To continue receiving emails from this sender, please update the email address to elleanor.chin@doj.oregon.gov before June 10, 2024.

Shari Nilsson <nilsson@lclark.edu>

Opposition to Removal of ORCP 55 A(7)

Hallman Dylan <Dylan.Hallman@doj.oregon.gov> Wed, Nov 6, 2024 at 10:02 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Good afternoon,

The proposed amendments remove the current ORCP 55 A(7) and its subparts, which provide a responding party the opportunity to serve a written objection to suspend its obligation to produce. Without that provision, a responding party must file a motion to quash or modify to achieve the same objective.

Written objections give the parties an opportunity to discuss the apparent deficiencies with a subpoena without resorting to motion practice. By removing that provision, the new rule will encourage needless litigation. For that reason, I believe ORCP 55 A(7), as currently written, should be restored.

Best,

Dylan J. Hallman (he/him/his)

Assistant Attorney-in-Charge

Corrections Litigation Unit | Trial Division

Oregon Department of Justice

503.983.5769

Please Note: Beginning May 31, 2024, my email address will be: dylan.hallman@doj.oregon.gov

Shari Nilsson <nilsson@lclark.edu>

Proposed Changes to Rule 55

Marilyn Heiken <mheiken@justicelawyers.com> Tue, Dec 3, 2024 at 6:43 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>

I am writing to express my concern about the proposed changes to Rule 55. I have been a practicing attorney in Oregon since 1992, and I specialize in civil litigation representing injured people. When an injured person files a lawsuit, some of their medical records become relevant to their case, but not all. Only medical records which relate to the injury complained of are discoverable and relevant. See ORCP 36 and ORCP 44.

Removing the plaintiff's ability to monitor and object to subpoenas before they are sent, and requiring the plaintiff to file a motion to quash or modify each unnecessary or overly broad subpoena, runs the risk of exposing a plaintiff's private and irrelevant medical records to the defendant. This would violate HIPAA, ORCP 36, and the physician patient privilege. Medical records are private and protected under Federal Law, Oregon's discovery rules, and the physician patient privilege. Any Oregon procedural rule change weakening those protections should not be considered.

Marilyn Heiken

Marilyn Heiken | Shareholder

541-484-2434 | Fax: 541-484-0882

Johnson Johnson Lucas & Middleton, PC

975 Oak Street, Suite 1050

Eugene, Oregon 97401

mheiken@justicelawyers.com

Shari Nilsson <nilsson@lclark.edu>

Proposed change to ORCP 55

Scott Lucas <slucas@justicelawyers.com> Tue, Dec 3, 2024 at 1:59 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

The proposed change to ORCP 55 shifting the burden of seeking court assistance to recipients of overbroad or other otherwise unfair subpoenas is a bad idea. Over the past several years we have experienced a substantial increase in overbroad subpoenas being proposed in our cases. Sometimes we are able to work with defense counsel to narrow them, or at least modify them so that the documents are sent to our office for our review prior to production to defense. However, the recipients of overbroad or otherwise unfair subpoenas are often not equipped (or motivated) to drop everything and go to court to fight them. Often medical providers or similarly situated subpoena recipients will tell me that they don't want to produce the requested records, but they don't feel like they have a choice. The proposed burden shifting will greatly exacerbate this problem.

We oppose this proposed change to the rules.

Scott C. Lucas

OSB #970030

SCOTT C. LUCAS | ATTORNEY

541-484-2434 | Fax: 541-484-0882

JOHNSON JOHNSON LUCAS & MIDDLETON, PC

975 Oak Street, Suite 1050

Eugene, Oregon 97401

slucas@justicelawyers.com

Rated A/V Preeminent

Shari Nilsson <nilsson@lclark.edu>

ORCP 55

William Macke <will@mackefrazier.com> Tue, Dec 3, 2024 at 6:45 PM
To: ccp@lclark.edu

I join the concerns expressed by others as to the proposed changes to ORCP 55. I don't find operation of the current version of the rule to be problematic, and think there could be unintended consequences weakening privacy protections in the proposed amendments.

--
William Macke

Macke Frazier Law
2455 NW Marshall St., #6
Portland, OR 97210
d: 503-206-7913
f: 503-886-8918

Shari Nilsson <nilsson@lclark.edu>

Comment on proposed changes to ORCP Rule 55

Niedrist, Fallon <Fallon.Niedrist@portlandoregon.gov> Wed, Oct 30, 2024 at 11:34 PM
To: "ccp@lclark.edu" <ccp@lclark.edu>
Cc: "Garcia, Tony" <Tony.Garcia@portlandoregon.gov>, "Taylor, Robert" <Robert.Taylor@portlandoregon.gov>

Dear Council on Court Procedures -

I would like to submit comment on proposed changes to ORCP Rule 55, specifically, the revisions to Rule 55 A(7) concerning objections to and motions to quash subpoenas. The revisions appear to consolidate a number of subsections into one primary section on motions to quash while removing the option to submit a letter of objection. The revision also excludes the provision of Rule 55A(7)(a)(ii), which provides that the filing of an objection to a subpoena suspends the obligation to produce records.

I work as a Deputy City Attorney for the City of Portland, and attorneys in our office regularly respond to subpoenas for records for a variety of matters. I can say with confidence that our office works hard to be collegial, professional, and helpful in responding to subpoenas for records, including helping those requesting records find exactly what it is they are looking for when not well-described in their subpoena.

With that in mind, I would recommend that the Council reconsider keeping the option to object to subpoenas, or at least clarify that when motions to quash are filed, that the obligation to respond is suspended until such time as the motion is decided. The letter of objection is a critical and helpful tool for parties to be able to discuss, clarify, and narrow subpoenas, especially when those submitting subpoenas for records may not know how to describe with specificity the types of records sought. Part of the criticality of this tool is being able to pause the need to produce records while we work with counsel to narrow what it is they are looking for. Having to produce potentially extraordinary amounts of records while the parties work to narrow the scope, or have a court decide the appropriate scope for the parties, is not only burdensome to the party producing records, but also usually is not all that advantageous or helpful to the party requesting records.

In my experience, I have found the option to object to subpoenas not a means to avoid production of records or force a motion to compel, but rather, a tool to help the parties find a resolution to disagreement around the scope and avoid motions practice. At the very least, please consider clarifying that records do not need to be produced while a motion to quash is pending, so that the parties have an opportunity to continue to work out the subpoena together after filing a motion.

Kind regards, and thank you for your consideration,

Fallon Niedrist de Guzman | Deputy Attorney (She/Her)
Portland Office of the City Attorney
1221 SW Fourth Avenue, Room 430
Portland, OR 97204
Voice: 503-823-6418 (cell)
fallon.niedrist@portlandoregon.gov

Shari Nilsson <nilsson@lclark.edu>

Re: Comment on proposed changes to ORCP Rule 55

Niedrist, Fallon <Fallon.Niedrist@portlandoregon.gov> Tue, Nov 26, 2024 at 4:18 PM
To: Shari Nilsson <nilsson@lclark.edu>
Cc: "Garcia, Tony" <Tony.Garcia@portlandoregon.gov>, "Taylor, Robert" <Robert.Taylor@portlandoregon.gov>, Mark Peterson <mpeterso@lclark.edu>

Hi Shari -

I wanted to send some additional comment after speaking with some colleagues about the proposed changes as well:

First, I wanted to raise to the Council concerns about equity in responding to subpoenas to documents in removing the option for letters of objections. By their nature, subpoenas are sent to non-parties to litigation, and those parties may not have access to resources to hire legal counsel to assist in responding. Objection letters are an easy, low-cost option for working through subpoena issues: a subpoena recipient could send an objection letter themselves without legal counsel or with limited advice, or hiring an attorney for such a limited representation would be reasonably cost effective. By contrast, requiring parties to file motions to quash necessitates the subpoenaed party to hire a lawyer to draft a motion and appear in court, a far more costly proposition than responding via informal objection letter. This required cost would disadvantage those subpoenaed parties without financial resources in a way the current rule does not, and even potentially lead to higher non-response rates to subpoenas due to financial barriers.

Second, by removing the option for objection letter, the onus of proper compliance with subpoena requirements is effectively shifted from the party sending the subpoena to the party receiving the subpoena. Under the original rule, the party receiving the subpoena could easily object and notify the sending party of subpoena deficiencies, and then the sending party would either have to correct those deficiencies, or move to compel the records. By contrast, under the new proposed rule, the recipient of a deficient subpoena has to be hailed into court and demonstrate the subpoena is deficient. This unfairly shifts litigation burden to non-parties in the litigation.

An excellent, and frequent, example of this is compliance with the steps to subpoena medical records. We often find that parties who subpoena medical records do not comply with the requirements set out in Rule 55D. Under the current rule, this problem is easily remedied by sending an objection letter pointing out the deficiencies, and allowing the party to correct those deficiencies without having to produce sensitive records. The burden remains with the issuing party to properly comply with Rule 55 if they want to obtain records. Under the proposed rule, the remedy for non-compliance with Rule 55D would be to file a motion to quash, and the subpoenaed party would have to demonstrate in court that the subpoena is deficient, upon threat of fines or producing confidential records without proper procedures being followed. Not only does this change improperly foist monitoring subpoena rule compliance onto the subpoenaed party but also does not appear to be the best use of judicial resources.

Thank you for your consideration.

F

Fallon Niedrist de Guzman | Deputy Attorney (She/Her)

Council on Court Procedures
December 14, 2024, Meeting
Appendix 3-25

Shari Nilsson <nilsson@lclark.edu>

comment against proposed change to ORCP 55

Steve Seal <steve@steveseallaw.com> Tue, Dec 3, 2024 at 7:58 PM
To: ccp@lclark.edu

Good morning,
I am writing to express grave concern about the proposed change to ORCP 55. I have 16 years experience representing plaintiffs in personal injury and products liability litigation. I am concerned that the contemplated changes to ORCP 55 will adversely impact patient-physician privilege, increase motion practice, and burden medical providers.

At the outset, it bears mentioning that the current rule works well in the vast, vast majority of cases in my personal experience. Under the current system, the burden of proceeding rightfully falls on the party seeking discovery if a subpoena's receipient or patient objects to a subpoena. This works well to prevent overly broad discovery of sensitive information and allows me to work with defense counsel to narrow the scope of a subpoena, or require that a medical provider produce records to my office for a first-look/privilege review. Omitting the objection mechanism will require me to file substantially more motions to quash or modify, which needlessly drains court resources and increases the already high cost of litigation.

The current rule that allows for objections to toll the time to respond to a subpoena is elegant. The burden of justifying a subpoena should rest with the party who serves it. I have seen no evidence of in my practice that the current rule is broken, i.e. when I have objected to a subpoena I have always been able to reach an agreement with opposing counsel that addressed my concerns while allowing the defense to get necessary discovery. In other words, I have never had to file a motion to quash a subpoena and I cannot recall having to litigate a motion to allow a subpoena. This will, apparently by design, change if the proposed rule is enacted.

I am available if the Council would like to hear more or has questions. Thank you for your consideration.

Best regards,
Steve Seal
OSB 085384

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Steve Seal
(he/him)

Law Office of Steve Seal, LLC
2950 SE Stark St., Suite 110
Portland, OR 97214
Phone: 503.577.0137
Fax: 503.782.4885