

**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:

<https://us02web.zoom.us/j/85876809199?pwd=cG96b2FPMEIMQjkvek03djNSY2JRdz09>
Teleconference option: 1-253-215-8782
Meeting ID: 858 7680 9199
Passcode: 026350

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**

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1 **SCOPE; CONSTRUCTION; APPLICATION; RULE; CITATION**

2 **RULE 1**

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

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

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

19 **D Definitions.**

20 **[D "Rule" defined and local rules.] D(1)** References to "these rules" [*shall*] include
21 Oregon Rules of Civil Procedure numbered 1 through 85. General references to **a** "rule" or
22 "rules" [*shall*] mean only **a** rule or rules of pleading, practice, and procedure established by ORS
23 1.745, or promulgated under ORS 1.006, 1.735, 2.130, and 305.425, unless otherwise defined
24 or limited. These rules do not preclude a court in which they apply from regulating pleading,
25 practice, and procedure in any manner not inconsistent with these rules.

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

1 [E(1) *Definition.*]

2 **D(2) As used in these rules, “signature” and “signed” mean the person’s name**
3 **subscribed on the document.**

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

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

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

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

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

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

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

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

9 | **G Citation.** These rules may be referred to as ORCP and may be cited, for example, by
10 | citation of Rule 7, section D, subsection (3), paragraph (a), subparagraph (iv), part (A), as ORCP
11 | 7 D(3)(a)(iv)(A).

1 **ABUSIVE LITIGANTS**

2 **RULE 35**

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

6 **B Definitions.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 **D Designation and security hearing.**

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

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

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

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

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

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

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

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

16 **E Requesting exception to designation order.**

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

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

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

1 | potentially valid claim.

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

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

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

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

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

3 **H Application to vacate designation order and set aside designation.**

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

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

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

1 **DEPOSITIONS ON ORAL EXAMINATION**

2 **RULE 39**

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

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

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

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

18 **C Notice of examination.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 **D Examination; record; oath; objections.**

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

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

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

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

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

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

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

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

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

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

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

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

14 **F Submission to witness; changes; statement.**

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

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

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

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

13 **G Certification; filing; exhibits; copies.**

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

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

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

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

24 **H Payment of expenses on failure to appear.**

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

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

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

12 **I Perpetuation of testimony after commencement of action.**

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

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

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

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

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

26 //

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 **A(6) Recipient obligations.**

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

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

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

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

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

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

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

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

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

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

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

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

18 **A(7) Motion to quash or modify. A party or person that is subpoenaed may move to**
19 **quash or move to modify the subpoena. A motion to quash or to modify must be filed with**
20 **the court and served on the party that issued the subpoena before the date set for the**
21 **recipient to appear or produce, but not more than 14 days after the date that the subpoena**
22 **was served. The court may quash or modify the subpoena if the subpoena is unreasonable**
23 **and oppressive, or may require that the party that served the subpoena pay the reasonable**
24 **costs of compliance.**

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

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

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

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

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

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

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

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

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

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

1 service, the subpoena may be mailed **or transmitted electronically** to the witness, but [*mail*]
2 **such** service is valid only if all of the following circumstances exist:

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

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

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

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

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

15 [*B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory]*

16 **B(2)(c)(i)(E) satisfactory** arrangements **were made** with the witness to ensure the
17 payment of [*fees and mileage,*] **fees for one day's attendance and the mileage as allowed by**
18 **law,** or the witness expressly declined payment; and

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

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

25 B(2)(d) **Service of a deposition subpoena on a nonparty organization pursuant to Rule**
26 **39 C(6).** A subpoena naming a nonparty organization as a deponent must be delivered, along

1 with fees for one day's attendance and [*mileage*,] **the mileage as allowed by law**, in the same
2 manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7
3 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

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

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

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

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

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

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

1 subpoenas.

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

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

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

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

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

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

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

25 C(1) **Combining subpoena for production with subpoena to appear and testify.** A
26 subpoena for production may be joined with a subpoena to appear and testify or may be

1 issued separately.

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

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

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

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

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

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

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

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

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

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

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

10 **D(4) Conditions on service of subpoena.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

23 | D(9) **Designation of responsible party when multiple parties subpoena CHI.** If more than
24 | one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of
25 | this rule, the custodian of records will be deemed to be the witness of the party [*who*] **that** first
26 | served such a subpoena.

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