MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, October 14, 2017, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Jay Beattie
Kenneth C. Crowley
Travis Eiva*
Jennifer Gates
Hon. Timothy C. Gerking
Hon. Norman R. Hill
Meredith Holley
Robert Keating*
Hon. David E. Leith
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Hon. Leslie Roberts
Sharon A. Rudnick
Derek D. Snelling
Hon. Douglas L. Tookey
Hon. John A. Wolf*
Deanna L. Wray

Members Absent:

Troy S. Bundy
Hon. R. Curtis Conover
Shenoa L. Payne

Guests:

John Bachofner, Jordan Ramis PC
Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
Discovery Filing Under Fictitious Names Probate/Protective Proceedings ORCP 7 ORCP 15 ORCP 22 ORCP 55 ORCP 71 ORCP 79	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 71		

I. Call to Order

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

II. Administrative Matters

A. Annual election of officers per ORS 1.730(2)(b)

1. Vice Chair

Mr. Keating reminded Council members that the Council had elected him as chair during the September 9, 2017, meeting but that the election of the vice chair had been carried over to the October meeting to give the members of the Council who typically represent the plaintiffs' bar time to confer among themselves. Mr. Keating asked for nominations for the vice chair position. Mr. Keating nominated Ms. Gates. The motion was seconded and approved unanimously without abstention.

Mr. Keating asked Ms. Gates to assume leadership of the meeting because he was participating by telephone and would have difficulty seeing the participants and helping facilitate the orderly procession of the conversation. Ms. Gates agreed.

2. Treasurer

Ms. Gates asked Prof. Peterson whether it was appropriate to entertain nominations for treasurer at this time. Prof. Peterson explained that a candidate for the Council's public member has been identified by Chief Justice Thomas Balmer, but that process dictates that the Supreme Court cannot appoint her until its November 16, 2017, session. Her name is Margurite Weeks and she is a support staff member at a law firm. She is planning to attend the Council's November 11, 2017, meeting as a guest but she will not be able to attend as a member until the December 9, 2017, meeting, at which time the Council may choose to nominate her as treasurer.

B. Introductions

Ms. Gates asked all members and guests to introduce themselves, mainly for the benefit of new Council members who had been unable to attend the first meeting of the biennium.

C. Approval of September 9, 2017, Minutes

Ms. Gates asked whether any Council members had changes to the September 9, 2017, minutes (Appendix A). Hearing none, she asked for a motion to approve the minutes. Judge Norby made a motion, Ms. Gates seconded it, and the September 9, 2017, minutes were approved unanimously without abstention.

D. Considerations for Drafting ORCP Amendments

Prof. Peterson explained that Council staff had drafted a short set of guidelines (Appendix B) that staff follows and that Council members may wish to consider when drafting amendments to the Oregon Rules of Civil Procedure (ORCP). He noted that there are several ways to handle amendments: sending the text the way the final rule should read; using Council format for showing additions and deletions; or simply interlineating a hard copy of the rule with handwriting. In any case, he asked that Council members send changes to Council staff prior to Council meetings so that they can be finalized before distribution to the Council. Prof. Peterson also noted that there are a few articles discussing the use of the word "shall" vs. the word "must" because this is an issue that the Council wants to focus on improving the rules' clarity.

III. Old Business

A. Items Carried Over from September 9, 2017, Meeting

1. ORCP 71: Potentially Conflicting Language

Prof. Peterson reminded the Council that Judge Patrick Henry had expressed a concern about whether there was an inconsistency in the language of ORCP 71 regarding relief from judgment. Prof. Peterson stated that it seemed to be the consensus of all Council members present at the September meeting that there was not an inconsistency, but that the Council wanted the members who were not present to have an opportunity to weigh in.

Prof. Peterson suggested that the existing language basically tells a party how to serve the Rule 71 motion if it is filed more than a year after entry of judgment as opposed to within that one year after entry of judgment. If that is the case, he stated that perhaps the rule does not need to be amended. Ms. Rudnick asked for clarification on the location of the potential inconsistency. Prof. Peterson explained that language in Rule 71 B(1) was the language in question:

> "The motion shall be made within a reasonable time, and for reasons (a), (b), and (c) not more than one year after receipt

> of notice by the moving party of the judgment. A copy of a motion filed within one year after the entry of the judgment shall be served on all parties as provided in Rule 9 B, and all other motions filed under this rule shall be served as provided in Rule 7."

Ms. Gates noted that the discussion about this issue from the September meeting begins on page 11 of those meeting minutes, if any Council member wanted to refresh his or her recollection. Prof. Peterson observed that the rule is perhaps not drafted as well as it could be, but he does not believe that there is an inconsistency. It is a use of different words but has to do with how the motion is served rather than anything else. He stated that, if any Council member feels differently, a committee can be formed to study the issue further.

Judge Roberts explained that she was concerned at first but, by the time the Council discussed the matter during the September meeting, it did not seem to be the problem it originally appeared to be. She stated that she is not sure that the rule requires redrafting, as it seems evident that the meaning is simply that the motion has to be served in a different way when more than a year has elapsed after entry of judgment.

The Council agreed that the issue does not require a committee.

2. Probate/Protective Proceedings

Judge Norby reminded the Council that, during the discussion of this issue at the September meeting, she had offered to reach out to the Clackamas County probate coordinator to get more information. She also spoke with the Multnomah County probate coordinator. She stated that both coordinators are on a committee with attorney Heather Gilmore, who initially raised the issue. They pointed Judge Norby to ORS 111.205, that does cross-reference a couple of ORCP indicating when the ORCP apply in probate proceedings. The implication appears to be that, if the statutes are not cross-referencing an ORCP, the ORCP does not apply. Judge Norby reported that both probate coordinators reported no issues with unintended consequences with the interrelationship between probate and protective proceedings and the ORCP in Clackamas or Multnomah counties or in most counties of which they are aware. They did report some issues in Marion County because of the way that county interprets the interrelationship between the statutes and the ORCP. She stated that the probate coordinators could not clarify the exact issues but that they reported hearing a lot of complaints from attorneys about Marion County's interpretation. Judge Norby stated that the probate coordinators felt it was perhaps an education issue for Marion County,

which may not even be aware that its practices differ from those of other counties. The probate coordinators stated that the issues that Ms. Gilmore mentioned were more of a Uniform Trial Court Rules (UTCR) problem and that, indeed, the only rules that can have some impact statewide are in the UTCR. They did not believe that a Council committee could solve any of the suggested problems.

Ms. Gates asked Prof. Peterson whether the Council has a history of reaching out to non-Council members regarding issues where a particular rule change is not being contemplated. Prof. Peterson stated that, because of the diverse membership of the Council, it is the hope that a lot of knowledge will be brought to the table; however, it is sometimes necessary to check with practitioners or staff who are more well-versed in certain issues. He noted that this issue may be the case of someone having had a bad individual experience that does not require a rule change but, rather, education of staff or lawyers.

Judge Norby stated that she had let the probate coordinators know that she will be on the Council for a few years and that they can reach out to her if any problems do arise.

3. ORCP 43: Amendment Suggested by Legislative Counsel

Prof. Peterson explained that Legislative Council creates documents informally known as "pink sheets" when they have a problem with an ORCP. They then forward these to the Council for action. He stated that the only pink sheet received this biennium was one for Rule 43 and involved a missing conjunction between subsection A(1) and subsection A(2). At the September meeting, the Council had charged Council staff with drafting a proposed amendment to fix the problem (Appendix C). He reported that simply adding the word “and” or the word “or” did not seem to fit with the meaning of the text, so Council staff changed the structure of the text a bit, changing each subsection into its own complete sentence. He noted that using a conjunction might lead one to think that a party had to make the requests specified in each subsection or had to pick just one, when this is not the case.

Prof. Peterson stated that, if the Council has any concerns, a committee can be formed. If the Council is satisfied with the staff’s changes, the Council may vote to put the amendment on the publication docket for the September, 2018, meeting, where it will be considered for publication along with any other amendments drafted by the Council during the biennium.

Judge Gerking made a motion to put the draft amendment on the publication docket for September, 2018. Ms. Wray seconded the motion, which passed unanimously with no objections.

B. Committee Reports

1. Discovery Committee

Judge Bailey reported that the committee had met the previous week (Appendix D) and had gone through the extensive list of suggestions regarding discovery that were received through the Council survey. He stated that the committee's conversation centered on two issues: 1) proportionality; and 2) the use of experts and interrogatories as opposed to Oregon's current "trial by ambush" approach. Judge Bailey noted that proportionality was pretty well discussed last biennium and that the committee generally felt that the rule itself already contained proportionality and that there was perhaps not a need to further define it. He noted that some judges are already allowing it while some are not, and suggested that perhaps it is a judicial education issue for those judges who do not.

Judge Bailey stated that e-discovery is the area most drastically affected by the concept of proportionality. He observed that some attorneys would still like to have a little bit more definition within the rule to allow for consideration of proportionality, including some attorneys working for the State of Oregon. The committee wanted the Council's opinion on how far into the issue the committee should look, since including a more formal definition of proportionality in the rule was already considered and ultimately did not pass last biennium.

Mr. Crowley agreed that the Council was thorough last biennium and that this entire process does not need to be repeated, but he emphasized that this is a continuing issue and that the bench and bar are currently in a process of adjustment. He proposed making an effort to reach out to the plaintiffs' bar and find ways to jointly address these issues. He noted that the amendment from last biennium regarding the initial discovery meeting was very positive and that, at the DOJ, this should be the practice in practically every one of their cases as a way of getting both sides invested in dealing with these issues on a practical level and understanding the practical consequences of making very broad discovery requests in this electronic age. He stated that working across the bar to make more practical efforts when it comes to initial discovery requests is a worthy goal.

Mr. Anderson remarked that he is a member of the plaintiffs' bar and stated that he does not see the need for a rule that says more about proportionality. On the plaintiff's side, if there is a smaller case, no plaintiff's attorney wants to be

burdened with massive discovery that needs to be gone through and, in every case, an attorney can reach out to the other side and formulate a plan. He stated that he did not see the need for a rule change. Mr. Crowley stated that he respects that, in some cases, the issue is not as big as it is in as other cases. However, the State's feeling is that there are not any "small cases" any more because the first request for production implicates large quantities of data virtually every time and the State is faced with the burden of how to handle it in a cost-effective way. He pointed out that the whole business world has moved toward digital information and, practically, lawyers have to start practicing law that way in both smaller and larger lawsuits. Mr. Crowley stated that the ORCP have always provided guidance on how to do discovery, so any change must be within that context.

Prof. Peterson stated that the committee worked really hard last biennium with both the plaintiffs' bar and defense bar members and that he hopes that the change to Rule 43 E with regard to meetings about electronically stored information (ESI) that will go into effect on January 1, 2018, will help to make a big change to align expectations with reality on both sides. Mr. Crowley stated that the State has already been having meetings regarding discovery, and that he also hopes that the change will be helpful. He stated that his concern is that, with the current rule as written, courts can apply the concept of proportionality but it is done inconsistently. He remarked that, without steady guidance from the rules, the discovery process becomes a challenge.

Judge Hill asked whether the inconsistently is with how judges appreciate the fact that they have the ability to apply proportionality, or whether it is inconsistency in the sense that, when judges apply the rule it will be dependent on the issues presented in every single case and either the plaintiff or the defendant may not like the individual ruling. He stated that it may not be a rule problem but, rather, that there simply has not been a development of consensus in the norms and ways of practice to define a range that judges will apply. Mr. Crowley stated that he was unsure of the answer to Judge Hill's question, but that the State is feeling a lot of inconsistently and a continuing burden because attorneys are not getting the answers they expect.

Mr. Bachofner stated that the committee did reach out to the Oregon Trial Lawyers' Association (OTLA) and the Oregon Association of Defense Counsel (OADC) last biennium and that he recalled specific conversations regarding inconsistently between Multnomah County and other counties regarding certain issues and concern that not everyone is following the same rules. He agreed with Mr. Anderson that the best situation is for people to act professionally and work through discovery issues and, in the best case scenario, it works. However, sometimes an attorney needs to go to court and file a motion and there should be

a way to minimize the amount of cases that require discovery rulings and take up that time. Judge Norby agreed that time is an important issue and stated that the ORCP help judges keep the timelines of cases reasonable. She stated that, even in small cases with ESI discovery motions, the expectation of the parties is they will keep getting continuances as long as it takes to go over terabytes of discovery, and she is not willing to do that. She stated that the goal is to arrange expectations early to make sure timelines do not change and magnify because the discovery has magnified.

Ms. Rudnick stated that she is on the defense side but that she understands the concerns about proportionality – just because a damage claim is small does not mean that a plaintiff is not entitled to the evidence that they are entitled to in order to prosecute their claim. She stated that, from her experience with complex designated cases, she believes that it would be helpful to include some factors that the court must consider in ruling on a motion to compel. Mr. Bachofner noted that this was where the big debate was last biennium, although he agreed with Ms. Rudnick personally. Ms. Rudnick observed that any decision must be in the judge's discretion in the end, as cases are too varied to simply say, "if it's $100 you get 10 documents; if it's $200 you get 20 documents." She observed that, right now, there are no standards in the rule that the judges apply in making the decision. She pointed out that something as simple as taking the criteria that the parties are supposed to talk about and, when a judge is ruling on a motion to compel or for a protective order, the judge will make findings on these factors. She stated that a list of criteria would at least be a step toward getting all the courts to consider the motions in the same way.

Judge Bailey wondered whether members of the Council, especially from the plaintiff's bar, would be able to agree to potential language such as listing items for the court to consider. Mr. Eiva stated that this was what happened last biennium. He noted that he was grateful for Mr. Crowley's suggestion that the Council try and work something out, but he felt that the discussion were pretty extensive last year and he was still exhausted by the debate. Mr. Eiva pointed out that there is currently a system in place: the protective order, where a defendant has the burden of showing an undue burden and a court has the authority to adjust the discovery request. He stated that, last biennium, when potential language was discussed it kept coming back to "undue burden." He noted that the plaintiffs' bar does not trust the source of the federal proportionality rule – large institutional defendants with current control over the advisory committee for the federal rules. He stated that plaintiffs' attorneys have the same fear expressed by most of the law professors who have reviewed the rule with regard to proportionality: that it is another barrier within the federal system to keep the parties from having their day in court. He expressed concern that, procedurally,

discovery rules are creating more barriers in that direction.

Mr. Eiva explained that, after the proportionality changes were rejected last biennium, he had the opportunity to be on a panel with Judge Stacie Beckerman and Judge Jolie Russo at the annual CLE at Skamania and moderated the issue of how proportionality is being used in the federal courts. He explained that judicial involvement is extensive in order for the rule to be applied fairly. Judges are on the telephone and engage in in-person conferences with counsel, even before a motion to compel is filed, and then are managing these circumstances through all of the conferences that are required. Mr. Eiva explained that federal judges did not think that adding proportionality to the ORCP would work without that kind of extensive involvement. He noted that the federal guidelines were proposed by the Duke Law Center and that, if they applied only to judges who handle cases designated as complex, rather than a global change in the ORCP, that would be a different story. He opined that they are one-size-fits-all guidelines for the very small number of cases against large institutions, when most cases do not involve this kind of discovery at all. He stated that his experience is that, when this type of rule is put in place, everyone uses it. He stated that this issue can be resolved by using complex case designation rules, and that lawyers with concerns can move to have every one of their cases moved to that designation and work with special courts that are really thinking about these issues and applying expertise to electronic discovery.

Judge Bailey stated that it seems clear that those from the plaintiffs' bar are not interested in any rule changes; however, he suggested that Mr. Crowley and the committee explore language suggested by Ms. Rudnick. Mr. Beattie pointed out that ESI comes up even in small cases, such as small wage claim cases with massive ESI requests, and that it can easily turn from a legitimate discovery inquiry to leverage. He noted that judges are fairly good at drawing the line between legitimate discovery and leverage, so the question to him is whether there are tools that the judges would like to help them better draw that line and do it more effectively and efficiently within time frames that would allow the case to go forward. Mr. Beattie stated that he thought that some of the framework and guidelines for judges that were proposed last biennium provided a nice analytical framework to allow the judges to reach these decisions with more guidance and more expeditiously. He stated that, whether the concept of proportionality is included is debatable, but creating that framework would be helpful. Judge Gerking observed that it would also help determine whether the request was driven by fee shifting. Ms. Rudnick stated that, to her, there is a difference between making judges get involved in discovery discussions in a non-complex case and creating a framework within which the court will exercise its discretion in cases where there is a motion to compel or motion for a protective order. She

pointed out that it is still a discretionary question, with the court not getting involved until there is a motion, but that a framework within which the court will exercise its discretion may create more consistency within courts.

Judge Leith stated that he is not seeing the evidence of the inconsistency in judicial rulings. Ms. Rudnick stated that attorneys certainly are. Judge Leith stated that, if different opinions are coming out of the different circuits regarding a judge's ability to implement proportionality, there may be a problem, but that he would be surprised if there are any judges who doubt their ability to implement proportionality with the rule in its current form. He stated that there are different ways that judges value the different aspects that are being weighed, but he has not seen anything to suggest a problem with consistency with what the judges understand that the law allows them to do. He stated that, if he saw such evidence, he would be more inclined to re-explore the issue. Ms. Rudnick clarified that she was not necessarily suggesting proportionality but, rather, simply factors to guide discretion. Judge Leith wondered if there was evidence that judges do not understand what is relevant. Mr. Crowley stated that this evidence exists within the suggestions in the Council's survey .

Judge Hill expressed concern about how the Council describing these factors for judges to exercise their discretion will play out in practice. He worried that it could become a weapon that parties use against each other. He stated that he is confident that a judge with a reasonable amount of experience will be able to judge where the line should be with punitive discovery. He noted that it is clear that there will be parties who will disagree and that, in comparing different cases, there will be different places where that line is drawn. His fear is that it is impossible to come up with factors that will universally deal with all cases because every case is unique and, by memorializing certain factors, the Council will merely create another framework for running up costs and fees arguing about whether or not a judge has properly applied those factors, rather than simply saying, "Judge, use your common sense." He observed that a party can make the same arguments without the need to have them in the rule, but putting them in the rule runs the risk of more parties trying to mandamus a ruling because a judge did not articulate the particular factors. Judge Hill wondered whether memorializing certain factors and giving them more weight might create a bigger problem rather than meeting the goal of curing runaway litigation.

Judge Bailey stated that, as a judge whose attorney experience was in criminal law and who was then placed on the civil docket, his reading of the rule is that it does not necessarily speak for itself that the court has inherent discretion to weigh all the factors that are mentioned. He stated that, in Washington County, there were four judges with criminal law experience on the civil team and at times there were

inconsistent rulings, even within his courthouse. He stated that there is clearly inconsistency not only on the federal level but, from all suggestions, on the state level. As the chair of the committee, he again suggested considering some language, something more like what Ms. Rudnick proposed but not as extensive as the federal rule.

Ms. Gates noted that the plaintiffs' representation on the Council has not changed that much and their views will not likely change much, so she suggested that it might be nice to do some outreach and find examples of the problems rather than relying on nebulous complaints. She stated that she represents many large corporations, even though she is on the plaintiffs's side, and she files these motions and has never had a judge say they do not see that factor in the rules and cannot consider it, or indicate that they do not know how to consider it. She stated that she has never felt that a judge was unable or unwilling to consider a factor. She stated that it would be helpful to educate the plaintiffs' bar members of the committee about specific circumstances. Ms. Gates pointed out that the concept of a list of factors in the rule was the issue last time, so new language might not be the most productive way to approach it.

Judge Roberts suggested that this is a political issue and that reasoning is not going to make any difference because it comes down to who thinks whose ox is being gored. She stated that, as long as a group with political clout thinks it might get hurt, nothing will happen. She suggested moving on and expending efforts on attainable goals.

Judge Gerking stated that he finds discovery disputes very frustrating and, as a judge, he finds it difficult to determine what should be disclosed and what should not be. He stated that his practice is to require the parties to confer and that exchanging e-mails is not good enough. He stated that he is a firm believer that, if the parties meet face to face, they will work it out. Judge Hill noted that this is also required by the UTCR. Prof. Peterson stated that the Council's amendment to Rule 43 E gives additional consequences if there is not a good-faith effort to participate in those conferences. Mr. Bachofner noted that UTCR 5.010 refers to conferring but not physically being together. Judge Hill stated that he has interpreted it similarly to Judge Gerking in that it must be live communication rather than e-mail.

Judge Bailey asked any Council members who have language they want to introduce regarding guidelines for judges to bring it to the committee. He then moved the conversation to the idea of expert witnesses. He brought up Mr. Beattie's idea of "federal lite": requiring discovery of experts 10 days before trial to include the name and a brief description of the areas that would be covered. He stated that some would like to know whether or not, for summary judgment

purposes, Rule 47 E certificates can be used in ways that timely identify the expert who has been retained to establish a genuine issue of material fact. He observed that this would be a wholesale change in Oregon's practices, and he was not sure if there was enough of a push on requiring expert discovery prior to summary judgments to consider it further. If not, the next question is whether there are beneficial rule changes in the area of requiring expert discovery a certain time period before the trial that might help, possibly in lieu of Oregon Evidence Code (OEC) 104 motions as far as to what the experts are going to be testifying. Judge Bailey noted that, as a judge, as soon as he starts the case, he requires disclosure of expert names so he can talk to the jurors about them. He observed that there could be a benefit as to how quickly trials could be done if we had a rule that required disclosure a certain number of days before trial.

Judge Bailey stated that the committee had expressed no interest in Interrogatories. Justice Nakamoto asked whether the interest was interrogatories for any subject, or just for expert witnesses. Judge Bailey stated that the committee was focused on experts but that it would not necessarily need to be limited to that. Mr. Beattie explained that the committee was addressing a collection of suggestions from practitioners over the fact that Oregon does not follow the federal rules, and the complaints were very vague. Ms. Rudnick remarked that, even on the defense side, she agrees that interrogatories in federal court are generally a very expensive waste of time. She stated that being able to use some form of interrogatory to get each other to authenticate exhibits might be helpful. Mr. Bachofner explained that, last biennium, the Council had promulgated an amendment to Rule 45 F that requests for admissions authenticating exhibits do not count against the limit of 30 such requests. He stated that the change goes into effect on January 1, 2018. Prof. Peterson stated that this is a prime example of where the Council actually makes things better for everybody.

Judge Norby stated that she had recently ordered limited interrogatories because the e-discovery requests were so broad and the requester claimed they did not know when certain things had happened. Either they were going to have do to another round of depositions to find out how to limit their request for discovery or find another way. Judge Norby stated that she ordered interrogatories because it was in the interest of accomplishing a limitation on the scope of what the e-discovery would cover. She posited that this can be done without a rule. Mr. Beattie pointed out that *State ex rel Union Pacific Railroad v. Crookham* [295 Or 66, 68-69, 663 P2d 763 (1983)] held that a trial court cannot order what is not on the menu; in that case, requiring parties to produce exhibit lists that were not documents already in existence that named witnesses was stricken on mandamus. He agreed that judges should have that kind of latitude but questioned whether interrogatories was the proper method. Judge Norby remarked that this can be

useful in limited purposes if it saves time and money and defines expectations, which she believes is what the ORCP can be doing. Mr. Bachofner stated that a judge can strongly encourage parties to confer and give time limits so that they can reasonably respond, as opposed to ordering interrogatories. He observed that this was more like a deposition through written questions, which is permitted by the rule. Judge Norby agreed that it would have been more appropriate to use the term "deposition through written questions."

Mr. Bachofner explained that he practices in Vancouver, Washington, where the cost of defense of cases is 15 to 20 percent greater than in Oregon because of interrogatories and expert discovery. He observed that depositions of experts are sometimes not really needed. Judge Hill stated that he feels strongly that lack of discovery of experts in Oregon civil practice is part of our birthright as Oregon lawyers and is as sacred as the Declaration of Independence. Ms. Rudnick stated that she understands the concern over expense but wondered what the harm would be in requiring, 10 or 20 days before trial, disclosure of the name of the expert witness bringing technical expertise and the subject matter to which he or she will testify. Judge Gerking opined that the problem is that there will be an immediate motion to postpone because now the party is not prepared. Judge Bailey replied that courts will not grant such motions. Judge Hill agreed and stated that judges would recognize that it would increases everyone's expense. He stated that all Oregon lawyers know the rules, and that there is risk and uncertainty involved, but that this concept is baked in the cake.

Ms. Rudnick observed that it would not increase costs to send a letter saying "these are the experts I intend to call." She stated that there would be no depositions and no requirement of a report and no postponement. She opined that there is no harm in telling each other so that parties can go in prepared. She stated that it is not like a fact witness where she knows her case and she can cross-examine but, rather, an expert witness bringing technical or scientific evidence a layperson is not able to discern on their own. She stated that such a letter would seem to assist parties in being prepared so that there is a fair trial. Mr. Anderson observed that, once that requirement is in place, it opens up discussions and the need for rules on how extensive that discovery needs to be: a paragraph, a page, two pages. He stated that it also raises the question of whether the disclosure can be used to impeach the expert if the expert says something that is inconsistent with the disclosure, simply because the attorney did not understand some issue as he or she drafted the disclosure. He noted that, pursuant to the federal rules, if an expert attempts to say something not in the disclosure, the expert cannot testify to it, despite many hours having been spent preparing the disclosure. He recalled a federal court case in which he participated several years ago where the preparation of the disclosures took longer than the trial.

Ms. Rudnick clarified that she was not talking about disclosures and that she agreed that this would not be helpful. She was merely suggesting a letter to state, for example, “I am going to call John as an expert to talk about negligence." She explained that it would just be the name and generic purpose that would not be binding on anyone or limiting their testimony. Judge Bailey stated that the rule could be written in a way to say that the disclosure does not bar any testimony. Justice Nakamoto suggested not including any associated subject matter but, rather, a simple statement regarding the experts one intends to call. Ms. Rudnick suggested a time frame of 10 days before trial, or as soon as the expert is retained if that is later. She stated that her only concern is that lawyers be able to try these cases competently on behalf of their clients. She observed that cross-examining experts on the fly is not good for clients on either side.

Mr. Eiva stated that, once disclosure deadlines happen, a party is stuck with those experts. He expressed concern that this could create an artificial bar to changing experts and that it would not be worth it. He stated that preparing for trial Is a lawyer’s work, and a lawyer should know their subject matter inside and out, consult with their experts, and know how to anticipate when things go awry. He pointed out that he is already doing enough work 10 days before trial and opined that it is actually useful not to know the names of experts because it reduces costs enormously. He stated that larger firms will put enormous hours into investigative research, while smaller firms will be at a disadvantage. Mr. Eiva stated that the rule is now even across the board: we have had discovery and both sides can prepare quite effectively. He stated that, as a plaintiffs’ attorney, the idea of increasing the cost of experts seems crazy, as they already pay so much and their clients are at risk of not getting true, fair recoveries. He expressed concern that cases are disappearing that should be going to trial because the cost of experts is going up, and envisioned a scenario with less justice and more experts. He stated that any more barriers to getting cases to trial is not good for Oregon and its system of jury trials.

Judge Roberts stated that her focus is on trial expense because of the drag on the access to the courtroom. She noted that limits on expert discovery by and large are helpful on reducing expense, but stated that some innovations might be useful in making things more efficient. She stated that there are practices that judges can implement, like requiring pretrial exchange of files of the experts so that time is not wasted in the courtroom, but she is not sure whether those should be put into the rules. Judge Roberts stated that another area of concern to her is finding a mechanism to reduce improper use of OEC 104 hearings as a form of expert discovery. She stated that some attorneys will ask for an OEC 104 hearing on an engineer when it is clear that they do not doubt the witness’ credentials as an engineer. She stated, however, that there is no way to refuse the hearing if they

object to the quality of the scientific evidence. She stated that perhaps disclosure of who the experts are a very short time before trial and an exchange of the files could be coupled with an ability to flat out deny an OEC 104 hearing that is just a stalking horse for discovery in the midst of trial.

Mr. Beattie stated that his original "expert discovery lite" proposal was simply a disclosure of who you are going to call as an expert because it is massively inefficient to learn at voir dire the names of experts and then activate the anthill to go out and get discovery on these people, find transcripts, and do ad hoc discovery on the Internet. He stated that, if he knows in advance what expert is going to be testifying, he can talk about them more effectively in his opening and he can work with his own experts. He observed that this would be helpful for both sides and should develop cross examination for both sides. He remarked that Mr. Eiva's paradigm assumes a simple personal injury case whereas he works on complicated cases that have a number of different expert issues where learning who the expert on the other side is may be conclusive.

Judge Leith pointed out that the only agenda item today is whether there is sufficient critical mass for the committee to look further into these issues. He agreed with the concerns about expert discovery expense and thinks that should be a driver of the conversation, as well as that some additional fairness could potentially be introduced through some limited disclosures prior to trial. He stated that it sounded like there was sufficient critical mass, despite concerns about where the committee could take us in potentially undermining our birthright as Oregonians, to have the committee look into the issue.

Mr. Bachofner stated that he respected what Judge Roberts said and also agreed with Judge Leith that it makes sense for the committee to take a look. He proposed shortening the time frame so that there is no risk of postponement; perhaps a requirement of three business days before trial to confer with opposing counsel and identify experts, and make arrangements for an exchange of expert files at least one day before the expert is going to testify at trial. He stated that the time period is short enough that there is not a likelihood of someone seeking a set over, which he does not feel should not be allowed anyway, and is also short enough that people will not scramble and change the outlook of the case because of it.

Judge Bailey stated that the committee can work on language regarding the "federal lite" proposal but that there was not a lot of interest in early discovery of experts or interrogatories. He wondered why requests for admission are limited to 30 and suggested that a higher number might be possible, but suggested that the Council's change to Rule 45 F last biennium may help make that a lesser issue.

2. Fictitious Names Committee

Mr. Crowley reported that the committee had met the previous week (Appendix E) and discussed its mission: the issue raised by Judge James Hargreaves in his letter to Chief Justice Balmer about the use of fictitious names in pleadings, perhaps without any legal authority, and that a few counties now have supplemental local rules (SLR) that seem to allow for it. Mr. Crowley stated that the committee is looking into how often the issue is occurring, trying to evaluate the legal authority and how it might impact the ORCP, and determining whether the Council needs to make any resulting changes to the ORCP. He stated that the committee had discussed the constitutionality of using fictitious names in pleadings and the balance between open courts and individual privacy interests and did not necessarily come to any conclusions about that.

As part of the committee's research, Mr. Crowley will look into how often the issue occurs at the DOJ, Judge Norby will ask about it at the Judicial Conference, and Ms. Holley will check with the OTLA listserv. The committee will also learn more about the origins of the Clackamas County SLR and the Multnomah County SLR. Once this information is gathered, the committee will report back to the Council with its findings. Mr. Crowley reported that committee members had exchanged a fair number of e-mails about potential changes to the rules but that they are not ready to present anything to the Council yet on that front.

3. ORCP 7 Committee

Judge Norby reported that the committee had met and discussed suggestions for changes to Rule 7 proposed by three different people. A report outlining those suggestions was provided to the Council (Appendix F).

The first proposal was received from Aaron Crowe of Nationwide Process Service, Inc. He expressed concern that Rule 7 A was creating a loophole being exploited by law firms who were essentially allowing staff to sign summonses electronically with a "/s" rather than having the party or attorney sign them. Mr. Crowe had suggested that a single word change in the rule would promote lawyers to do what they should be doing, i.e., personally sign the summons. Judge Norby stated that she had asked Mr. Crowe to suggest proposed language and that he had suggested inserting the word "issued" between "original" and "summons" to ensure that, when process servers receive something for service, it is not a "/s" that was filed through e-court but, in fact, a document signed by the appropriate party or attorney. She stated that the committee had decided that this change is probably not helpful and may possibly not even be correct because the rule never required a service summons to have a signature anyway, other than on the true copy line,

so it may not even be a concern for servers.

Mr. Bachofner asked whether, with the e-filing system, a "/s" is an indication that the attorney has signed the document. Judge Norby explained that the concern is that this is not what is happening, and that Mr. Crowe has spoken to people in firms who are having secretaries sign things. However, she opined that changing the rule is not a way to close that loop and that Prof. Peterson had suggested that perhaps education is a better way. Judge Bailey stated that, if a secretary has signed a document and the attorney has not read it, the attorney is responsible. Judge Norby stated that this does close the gap that Mr. Crowe has identified and that it is problematic. She stated that the committee had concluded that the proposal for a rule change would not help.

Judge Norby explained that the second suggestion was received by attorney Jay Bodzin and that it encouraged embracing e-mail as alternative service under Rule 7. At Judge Norby's request, Mr. Bodzin proposed some specific language that the committee will look at further before bringing a proposal before the full Council. She remarked that e-mail is being requested frequently as an alternative method of service but there is nothing in Rule 7 to help a practitioner to know how to accomplish that in the most efficient way to make service really happen. She stated that Mr. Bodzin's suggestion contained concise suggestions about how to ensure that and what to present to the court. She stated that Prof. Peterson would work on simplifying Mr. Bodzin's language.

Prof. Peterson expressed concern about personal jurisdiction attaching with an e-mail, since everyone has lost an e-mail at one time or another, but noted that sometimes the best way to work through a problem is to put it in writing and see what makes sense. He stated that he would be addressing some specific concerns about Mr. Bodzin's proposal. The first was that the proposal does not require consent to e-mail, which is not even true in Rule 9. The second is when service is deemed to have occurred; Mr. Bodzin proposed 24 hours, which is more generous than Rule 9 or Rule 10 for a non-summons. He stated that he was concerned about e-mail service generally but, as an alternative method of service, some guidelines might be helpful.

Judge Roberts stated that there are huge differences between service in Rule 9, which occurs after parties are already brought into a case, and service in Rule 7, which is initial service. She noted that one concern is return of service and having an effective way to assure the court that service has been made. She also questioned *where* service has occurred when it is performed by e-mail, since there is no physical location. Judge Norby stated that her court receives a lot of alternative service requests for service by e-mail now, and she is not certain that

the way this is being allowed is optimal nor whether the judges who receive a request for alternative service by e-mail know how to evaluate whether it is a proper request or whether it is being properly accomplished. She did state that e-mail service as an alternative method is growing more popular because virtually everyone has a cell phone these days with e-mail access, even homeless individuals.

Ms. Holley noted that there is a way to be more precise with e-mail than with regular service: if a read receipt is requested and received sometimes one can ascertain the IP address of the actual computer where the e-mail was received. Mr. Shields agreed that one can establish on which physical computer the e-mail was opened. Judge Roberts pointed out that there is no way of telling which set of eyes actually looked at the document. Ms. Holley opined that one could know more certainly that the intended recipient is accessing the e-mail because their e-mail account is likely password protected. Judge Roberts expressed skepticism about the reliability of passwords in this age of technological breaches.

Mr. Bachofner stated that he has personally experienced situations where he has inadvertently opened one e-mail when he intended to open another, or inadvertently deleted an e-mail that was in a list below another e-mail, and he did not even realize that the e-mail he had deleted was there, let alone read it. Ms Holley stated that, in such a case, a "read receipt" would not be sent. Mr. Beattie asked whether this change would just add an alternative means of service that would have to be approved by the court. Judge Norby replied that it would be in the alternative section, but that it would create a framework for the people who are making that request already, without a framework. Mr. Beattie noted that there are already a lot of faith-based service methods in the alternative section, such as posting. Prof. Peterson agreed that posting in the courthouse strikes him as much less effective than e-mail. Mr. Beattie stated that he cannot imagine many people starting their day with the thought: "I have to go to the courthouse today and see if anyone is trying to serve me."

Ms. Rudnick stated that she shares concerns regarding personal jurisdiction attaching by e-mail. She stated that there is alternative service because the reality of the world we live in is that people do not have traditional means of access any more, and mailing or bringing a summons to an office is not always feasible, so she supports e-mail as an alternate means when a judge thinks it is appropriate. Judge Norby noted that at least the committee is not proposing service by posting on Facebook yet. She stated that the committee will have clear language to bring to the Council at some point. Judge Bailey stated that, quite frankly, Facebook might be an easier and more certain method of knowing that someone received something. He stated that, when it comes to social media as a means of alternative

service, the Council can either be behind or ahead of the curve because in some areas it may be better than posting or publication. Judge Norby stated that she would be comfortable with considering social media. Mr. Anderson stated that he is on the committee and is well-versed in social media and would be willing to attempt to answer any questions for the committee.

Judge Norby explained that the last set of questions regarding Rule 7 came from Holly Rudolph of the Oregon Judicial Department (OJD). The first is to clarify whether a qualified server has to do the follow-up mailing when alternative service is used or whether anyone, including a self-represented party, can do the follow-up mailing. Ms. Rudolph felt that the rule was unclear. Judge Norby stated that the committee was split evenly on the question. During the committee meeting, Prof. Peterson had expressed concern that someone not authorized to do the follow-up mailing might not be including everything required in the envelope in order to complete a valid follow-up mailing. Judge Norby and Judge Wolf each said that they have never ruled that way and a lot of attorneys would be surprised to hear that this is how the rule was intended and how it should be, and that a change would be earth-shaking to those who had gotten used to doing it one way. Judge Norby stated that the committee felt that perhaps the rule needs clarification but was uncertain as to the manner in which to clarify it.

Prof. Peterson stated that he would check with Oregon State Sheriffs' Association, because apparently some county sheriffs' offices also do the follow-up mailing when they do office or substituted service. He related a case where he garnished someone and the Multnomah County sheriff's office would not take the writ of garnishment out until he provided them with additional copies and envelopes because the sheriff wanted to be prepared if no one was at the business. Judge Hill wondered whether most law firms, in the normal course of business, are using a process server to serve by substituted service and then sending the follow-up mailing themselves. He stated that, apparently the lawyer may not be qualified because he or she is representing a party, but he was under the impression that this practice was universal. Judge Norby stated that it may not be not universal, but the reason Ms. Rudolph brought it up is that she is trying to advise self-represented parties whether they can do it. Judge Hill remarked that the answer to Prof. Peterson's concern is that, if the person performing follow-up mail service does not include everything required, there is no service. It does not really matter who delivered it. Judge Bailey agreed that a defendant can question whether service was appropriate or not because of what they got or did not get.

Prof. Peterson noted that the Council had made a change last biennium to require that a certificate of service must indicate not only who was served, when they were served, and how they were served, but also what was served, which he

believes will be helpful. He pointed out that the rule uses the language "cause to be served" and those extra words must mean something. He stated that he does not believe that the follow-up mailing should cost extra because it can be done by any qualified server. While it is not true mail service, so it cannot be the lawyer for the plaintiff, it could be a brother-in-law or friend. Judge Hill asked what value is gained by precluding the lawyer representing the party from doing the follow-up mailing. Prof. Peterson observed that, primarily for self-represented litigants, there will be a better record because the server will not be a party to the case. Mr. Snelling stated that he is of the opinion that of course self-represented litigants are allowed to do a follow-up mailing because attorneys do it all of the time. Judge Norby stated that she feels that it is worth looking into the intent of the Council in writing the rule, as Prof. Peterson felt strongly that the intent was to prevent lawyers from doing just that. She stated that the Council needs to determine exactly what its intent is and to clarify it if necessary. Mr. Snelling stated that he does not feel that there is a need for clarification. He observed that there is a lot of service by mail that attorneys do every day. Prof. Peterson stated that there is a difference between mail service, which is specifically covered in the rule, and follow-up service for substituted and office service. Mr. Snelling pointed out that the rule refers back to the mail service section. Ms. Gates stated that it is clear that many lawyers in the room are performing follow-up mail service and that the issue should be looked at more carefully.

Judge Norby stated that Ms. Rudolph had also suggested changing the language in Rule 7 F, using the word “declaration” instead of “certificate,” and substituting the word “declaration” for the word“affidavit” throughout the rule. She stated that the committee had decided that such changes were not necessary and would not bring any more clarity because affidavit and declaration are already the equivalent of each other and certificate has not been raised as an issue of confusion by anyone.

Judge Norby explained that Ms. Rudolph had also proposed considering updating the presumptive alternative service method of publication to either delete it, make it not presumptive, or to adjust how to select the appropriate form or location of the publication that can be used. She stated that the committee had not had a chance to discuss it that much. Prof. Peterson stated that there were questions about whether anyone is using publication in a newspaper. Judge Norby noted that governments do for foreclosures and that there are a few other places where newspapers are commonly used. Mr. Beattie stated that this occurs frequently in probate and estate cases. Judge Norby remarked that the current language of the rule says "where published" not "where distributed,” which has changed a lot over the last few years. Ms. Holley stated that, when she would publish for foreclosures, she would choose small publications because it was a lot

cheaper. She opined that Facebook might actually be a better way of reaching people.

Prof. Peterson suggested that one possibility, which would require a statutory change, would be to perhaps have the OJD start a website similar to that of the State Department of Lands that is one place for people to go and find out if they have been sued. Mr. Shields stated that, in principle, this is a good idea but, when it was attempted five or six years ago, it faced strong opposition from the newspaper industry. He observed that there are other issues with the statutory requirements for which publications one can use, such as not being able to use larger publications with a much broader reach because they do not have the right subscription base, or the right publication schedule, whereas very small ones with very few readers are paradoxically the preferred method. He noted that there is a big turf issue with who is making the money from publishing.

Judge Hill pointed out that there are hundreds of small newspapers for small communities that exist primarily because they take in revenue from publishing notices. Removing the requirement to publish in a newspaper could have an impact on these communities. Judge Norby observed that the Council's mission is not to think about the impact on small businesses or communities but, rather, to think about what constitutes better justice. Judge Hill stated that this is a great observation, but he also pointed out that, in small communities, the individual being sued might not read the notice but their neighbor or brother might. He noted that at least the current method puts information into the community, rather than requiring someone to go to an outside source. Judge Norby suggested the possibility of starting by making a notice website an alternative to publishing in a newspaper. Mr. Shields stated that there will still be controversy because, if there is a cheaper alternative, of course people will choose it and it will still have an impact on the newspapers. Prof. Peterson suggested that, along with publication in a newspaper, a requirement to also put the notice on a website could be required.

4. ORCP 15 Committee

Judge Gerking stated that the committee had met and discussed the issue brought to the Council by the Oregon State Bar (OSB) Practice and Procedure Committee. The committee prepared some draft language for the Council's consideration (Appendix G) that is primarily focused on section A. He stated that there is one particular sentence sets forth the time for responding to complaints, counterclaims, cross-claims and third-party complaints and that the existing rule refers the reader to ORCP 7 C (2), which says it is 30 days from service of the summons or, if the summons is published, 30 days from the first day of publication. The problem is that no summons is required for cross-claims and counterclaims. He stated that the draft amendment contains language to take care of that problem. Judge Gerking explained that another concern had been raised that the 10-day rule supplanted or replaced UTCR 5.030, which gives a responder 14 days to respond to a motion. The language in the draft amendment attempts to clarify that it is a different thing when moving against a new pleading.

Judge Gerking stated that the committee will also be addressing concerns about section D in a subsequent meeting. Prof. Peterson explained that, two biennia ago, the Council was making a revision to Rule 68 and could not understand some language in that rule, which it turned out was borrowed from Rule 15 D. He stated that he believes that the confusing language boils down to: 1) if a party is still within the time to answer but cannot answer on time, the party may ask the court to enlarge the time; and 2) if a party has blown the deadline but is ready to file something, the party may ask the court for permission to file anyway. Judge Norby wondered why the word "enlarge" was used instead of "extend." No one had an explanation.

Ms. Gates asked why the first part of the new language is included. Judge Gerking replied that it was included in the proposal received from the Practice and Procedure Committee. He stated that this language is already included in ORCP 7, so it is redundant, and that he had questioned whether we needed it. However, including it here completes all of the requirements so that the reader does not need to cross-reference. Judge Bailey observed that this is convenient, makes the rule clear, and allows it to stand on its own.

Judge Norby stated that the committee will also look at instances of the words "shall" and "must" and "may" to ensure that they are being used properly.

5. ORCP 22 Committee

Mr. Beattie reported that the committee had met a few weeks prior. He reminded the Council that the concern brought before the Council was regarding the part of C(1) that states that a third-party complaint can only be brought after 90 days with the consent of all of the parties. He pointed out that this essentially gives a plaintiff veto power. He stated that it has always been his position that this decision should be within the discretion of the court, and that he does not understand why this veto power is contained within this rule. He proposed removing the language, "with consent…" and leave the decision to the discretion of the court.

Judge Hill asked whether the practical result of the veto power now is that a party would simply file a separate case and move to consolidate. Judge Bailey agreed that it could be done that way. Judge Hill observed that this would get to the same place and nobody is really getting hurt. Judge Gerking stated that, if you are staring at a trial date, it may prevent that trial from happening. Ms. Rudnick stated that a statute of limitations could be problematic. It was noted that the claim would not relate back. Mr. Beattie observed that, after the elimination of joint and several liability, *Lasley v. Combined Transport, Inc.* [351 Or 1, 261 P3d 1215 (2011)] and *Eclectic Investment, LLC v. Patterson* [357 Or 25, 346 P3d 468, *modified*, 357 Or 327 (2015)], indemnity claims are basically gone now and everyone has to be at the table to have fault compared. He stated that there is the risk of a situation with a defendant who is primarily liable but has no money, a defendant who is not primarily liable but has money, and the impecunious defendant dismissed just before trial so there is no settlement and no ability to put that defendant on a verdict form because they are no longer a defendant in the case but, rather, a settled party whose fault will not be compared. Since there is only one defendant before the court, that defendant pays everything. Mr. Beattie noted that there is a right to allocation under the statute, but that it means nothing because you have an impecunious defendant.

Mr. Bachofner asked why, if a party was dismissed out, they would not be on the verdict form. Mr. Beattie replied that ORS 31.610 states that a jury may compare the parties and settled parties. Judge Hill pointed out that, if a defendant is dismissed out, he or she is not a settled party. Mr. Beattie stated that, in his scenario, a defendant would be dismissed because they are not good for the money anyway, a verdict is obtained against the remaining defendant with 100% fault against that defendant, so there is no allocation or reallocation potential because there are not two defendants, and one defendant ends up holding the bag, notwithstanding the elimination of joint and several liability. That defendant could file a third-party complaint to loop the dismissed defendant back in. Mr.

Anderson asked why a third-party complaint would be needed, as opposed to a separate lawsuit. Mr. Bachofner replied that it is to get the defendant on the verdict form. Judge Hill asked whether such a change to ORCP 22 would be designed to change a problem with the statute, which uses the term "settled party" and not "dismissed party." Mr. Bachofner suggested that this may be an issue to bring to the attention of the Oregon State Bar's Practice and Procedure Committee for referral to the Legislature. He stated that he had not conceived of the situation that Mr. Beattie posited.

Judge Hill noted that this is independent of the operation of ORCP 22, but that it does not undermine Mr. Beattie's other concern of why anyone but a judge would have veto power over allowing a third-party complaint. Mr. Beattie stated that it gives defendants access to justice and their day in court. Judge Roberts pointed out that the problem that Mr. Beattie raised applies even if the impecunious person has never been part of the lawsuit. Ms. Rudnick remarked that, if a separate lawsuit needs to be filed, there may be a statute of limitations problem and there is no relation back in a separate lawsuit.

Mr. Eiva stated that the current 90 day rule is a good rule and that it would solve the problem Mr. Beattie proposed because, if a defendant is worried that the plaintiff might dismiss a party, that defendant can file a cross-claim within the 90 days. He opined that 90 days is a good amount of time to define who the parties are. He suggested that there are already enough barriers to getting to trial and that, when another party is brought into a lawsuit, you are expanding the scope of discovery. He does not want a defendant to have the authority to change the parties one month before trial because it drastically expands the cost of litigation, creates another barrier to getting to trial, and causes more reason for delay, and that is not what the Council is working toward.

Mr. Eiva spoke of the end of joint and several liability and the beginning of the allocation of fault in Oregon and described a case where a highway construction worker was injured by an automobile. The highway construction company had a contract with the state that required it to have barriers between the workers and the highway, but it did not do so. A drunk driver, presumably uninsured, swerved and hit the construction worker. The jury found the drunk driver most culpable, allocating fault at 75% for the driver and 25% for the construction company. However, the plaintiff was crippled for life due to the inaction of the contractor. Mr. Eiva posited that Oregon now has a rule where a defendant that causes an injury gets to escape liability, and he accepts that this is the reality, but stated the Council's changing Rule 22 would actually increase that opportunity for a defendant to avoid liability. He stated that the upshot of such a change would be less opportunity for a plaintiff to obtain a full recovery if a defendant, late in the

game, figures out he or she wants to bring in another party. He opined that 90 days is plenty of time to make that determination. Mr. Eiva stated that this is a highly political issue and that the Council should not be expanding the application of this rule.

Judge Hill stated that he was having a hard time understanding why the situation that Mr. Eiva described is a problem. He noted that the defense had the ability within 90 days of service to join anybody they wanted to, and there is just a somewhat arbitrary barrier of 90 days that, when it expires, precludes them from doing that. He stated that he does not feel that it is appropriate to keep that barrier simply because the Council does not like a policy that the Legislature has chosen to have. Judge Hill stated that the question before the Council is how, given the policy the Legislature has made, can we have rules that are fair to everyone. He stated that this issue can also arise when there are multiple defendants and one wants to bring in a third party and another does not. Mr. Eiva opined that this is just framing and that it is not a plaintiffs' veto but merely a requirement that the parties agree to expand the litigation to include more parties. Judge Hill observed that Mr. Eiva was looking at the situation through the lens of a personal injury case, but there are other cases where it could be important, such as a business case, where a defendant does not know there is an additional defendant until after depositions are complete.

Judge Leith stated that he supports a change to Rule 22 because it is a strange anomaly: the only place in the ORCP where the court does not have discretion. He suggested sending the issue back to committee for more work rather than trying to make a decision at this meeting. The Council agreed.

6. ORCP 23 C/34 Committee

Ms. Wray reported that the committee has not yet met.

7. ORCP 55 Committee

Judge Gerking reported that most members of the committee had met the previous week. He noted that the concern raised about Rule 55 was that it was overly complicated, confusing, and contradictory. He stated that all committee members agreed that there are problems in terms of clarity, and there was general discussion about the best approach for improvement. Some suggestions were improving headings, attempting to eliminate redundancies, simplifying, and eliminating unnecessary portions. Judge Gerking explained that Judge Norby had volunteered to attempt a complete structural rewrite, but that he was somewhat hesitant about this approach and wanted to consult the full Council on its thoughts

about whether a full rewrite or small improvements would be more appropriate.

Judge Norby stated that she would really like to attempt a rewrite, even if it might be impossible. She explained that she enjoys puzzles like this and believes that this rule deserves a better rendition than its current organization and grammatical structure. She noted that it would probably take at least two months, but that she would like to try unless the Council objects. Judge Gerking suggested that the committee could operate on separate tracks and have separate options: one full rewrite and one more conservative approach. He pointed out that, other than Rule 7, Rule 55 is the most complicated rule in the ORCP and that it came together in various stages. Ms. Gates agreed that, if the committee is willing, the two tracks might be a good approach.

Judge Leith asked for clarification that the proposed rewrite is not to change the substance of the rule. Judge Norby stated that the goal would simply be to make the rule readable and understandable. Ms. Nilsson stated that she could provide the correct current base text for Judge Norby so that she would be starting from the right place.

8. ORCP 68 Committee

Mr. Eiva reported that the committee had not yet met. Ms. Nilsson asked that the committee add the new issue included in the agenda (Appendix H) to its charge.

9. ORCP 79 Workgroup

Mr. Crowley stated that the group had met a few weeks prior (Appendix I) and that it had begun by discussing the comments from the Council survey. He explained that Rule 79 has to do with temporary restraining orders (TRO) and preliminary injunctions and that the comments were fairly general and suggested that the rule could use clarity and simplification. Further, some comments indicated that practitioners look to the federal rules for guidance in this area, which is not appropriate since Oregon's rule differs from the federal rule.

Mr. Crowley noted that the Council has not looked at Rule 79 for some time. He explained that he had spoken to Renee Stineman at the Department of Justice's civil litigation unit, whose feedback focused on the fact that, after a TRO is implemented, in practice there can be a lag time between the TRO and the preliminary injunction hearing, which raises concerns about due process. He stated that the group had discussed this issue and that the response from the three judge members was that the rule does spell out time frames for that and how to go about getting exceptions, so it may not be as big of an issue as was suggested. The

group also focused on trying to get attorneys experienced in this area to join the workgroup over the next month and that Prof. Peterson had suggested reaching out to members of the OSB's Consumer Law Section. Other committee members had suggested contacting practitioners Charlie Hinkle and John Dunbar.

IV. New Business

No new business was raised.

V. Adjournment

Ms. Gates adjourned the meeting at 11:57 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 9, 2017, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Jay Beattie
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Jennifer Gates*
Hon. Timothy C. Gerking
Robert Keating
Hon. David E. Leith
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling
Hon. Douglas L. Tookey
Hon. John A. Wolf
Deanna L. Wray*

*Appeared by teleconference

Members Absent:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Travis Eiva
Hon. Norman R. Hill
Meredith Holley
Hon. Lynn R. Nakamoto
Sharon A. Rudnick

Guests:

John Bachofner, Outgoing Council Chair
Matt Shields, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 15 ORCP 22 ORCP 23 ORCP 34 ORCP 55 ORCP 68 ORCP 71 ORCP 79 Discovery Probate Practice	ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47		

I. Call to Order (Mr. Bachofner)

Mr. Bachofner called the meeting to order at 9:32 a.m.

II. Introductions

Mr. Bachofner welcomed new and returning Council members and noted that no guests required an introduction. He explained that the new Council members include Justice Lynn Nakamoto, Judge Douglas Tookey, Judge Norman Hill, Judge Susie Norby, Kelly Anderson, Meredith Holley, and Sharon Rudnick, but that only Judge Norby and Judge Tookey were able to be present at this first meeting of the biennium.

Mr. Bachofner stated that the Council is generally a collegial group with a delicate balance of defense and plaintiffs' attorneys, as well as judges and a public member, who are all working toward the betterment of the Oregon Rules of Civil Procedure. He explained that the group does a pretty good job of being collaborative and focusing on procedural rather than substantive changes, which are the purview of the Legislature.

Mr. Bachofner asked that those present and on the telephone introduce themselves. He stated that a current roster (Appendix A) was included in the meeting packet and asked that members review the information and let Ms. Nilsson know of any corrections.

III. Approval of December 3, 2016, Minutes

Mr. Bachofner asked whether any Council member had suggestions for changes or corrections to the December 3, 2016, minutes (Appendix B). Hearing none, Judge Gerking made a motion to approve these minutes. Ms. Payne seconded the motion, which was approved unanimously without abstention.

IV. Annual election of officers per ORS 1.730(2)(b)

Mr. Bachofner stated that the Council's tradition is to alternate between a plaintiffs' and a defense bar member to serve as chair, and that the chair generally is elected to two consecutive one-year terms. He explained that he had served for one year but that his term on the Council had expired before he had a chance to be re-elected. He noted that the Council had decided last year that it would be acceptable for Mr. Bachofner to serve as chair for just a single one-year term and then for another defense bar member to serve as chair for two consecutive one-year terms in the 2017-2019 biennium. Mr. Bachofner explained that Mr. Keating had been elected as vice chair last year and that the vice chair is typically elected as the next chair.

Mr. Bachofner stated that he would entertain motions for both chair and vice chair, and pointed out that he had not heard from any members of the plaintiffs' bar as to whether anyone is

running for the vice chair position. Ms. Payne explained that she would prefer not to volunteer since she is currently over-committed. Ms. Gates stated that she is in a better position now than she was last biennium and that she would be happy to step up if no one else is interested; however, she suggested that Mr. Eiva might be interested and that someone might want to follow up with him since he was not able to attend this meeting.

Mr. Bachofner noted that the public member is usually nominated to be the Council's treasurer and that the Council's public member had not yet been appointed. Prof. Peterson suggested carrying over the election of both the treasurer and the vice chair to the next meeting, and asked Ms. Gates to discuss the vice chair position with Mr. Eiva.

Ms. Payne made a motion to nominate Mr. Keating as chair. Judge Gerking seconded the motion. Mr. Keating stated that he enjoys working on the Council and that he is willing to serve as chair, but that he unfortunately will not be able to attend the next two meetings in person due to family commitments. He noted that his telephone presence might be problematic in terms of conducting the meeting, and expressed concern that there would be no vice chair or treasurer who could assume the duties of the chair for those two meetings. Prof. Peterson suggested that Mr. Keating could nominate another Council member to act as his designee for those meetings.

The motion to elect Mr. Keating as chair of the Council passed unanimously without abstention. Mr. Keating took over the meeting.

Mr. Bachofner stated that his preference would be to decide on a vice chair now in order to have someone responsible for conducting the next meeting. Ms. Gates suggested that she could contact Mr. Eiva right away to ask whether he would like to serve as vice chair and fill in for those meetings and, if not, she could do so. Judge Norby asked if the Council is able to conduct votes via e-mail. Prof. Peterson stated that this is not possible due to the public records law. Mr. Bachofner suggested a special meeting by telephone. Mr. Keating asked Ms. Gates to get in contact with him as soon as possible after speaking with Mr. Eiva so that Mr. Keating can arrange a special telephone meeting to elect a vice chair.

Mr. Keating acknowledged Mr. Bachofner's many contributions to the Council and thanked him for his hard work and valuable insights. The Council presented Mr. Bachofner with a commemorative plaque with gratitude for his time, commitment, energy, and good spirit.

V. Council Rules of Procedure per ORS 1.730(2)(b) (Prof. Peterson)

A. Review

Prof. Peterson called the Council's attention to the Rules of Procedure (Appendix C). He noted that the Rules were amended in 2016 and that the Council's authorizing statute (ORS 1.730(2)(b)) requires them.

B. Council Timeline

Prof. Peterson also pointed out the Council timeline (Appendix D) that was created by Ms. Nilsson to help keep track of deadlines, most of which are statutory. He noted that Council staff has a copy of the timeline hanging in the office so that no deadlines are inadvertently missed.

VI. Reports Regarding Last Biennium (Chair)

A. Promulgated Rules (Prof. Peterson)

Prof. Peterson explained that the Council had amended eight rules last biennium, none of which was acted upon by the Legislature, so all of these amendments will become effective on January 1, 2018. He explained that the ORCP are the only part of the Oregon Revised Statutes bound volumes that are not required to be passed by both houses and signed by the Governor. When the Council does its work well, there are no legislative committee hearings; the Council transmits its promulgated amendments to the Legislature and, if the Legislature does nothing, the rules become effective January 1 of the following year.

Mr. Bachofner mentioned that Justice Jack Landau, formerly of the Council, had raised a question about the Council's authority in a footnote in a concurring opinion in a Supreme Court case approximately four years ago (*State v. Vanornum,* SC S060715, December 27, 2013 (Reversing and Remanding 250 Or App 693, 282 P3d 908 (2012)). Judge Norby asked for further information about Justice Landau's concern. Prof. Peterson explained that Justice Landau was not sure that the Council had the power to amend a rule that the Legislature has amended.

Prof. Peterson briefly outlined last biennium's amendments as noted below.

- Rule 9: an attempt to make service by e-mail a little better
- Rule 22: to make third party practice a little more accommodating
- Rule 27: a minor fix to add an inadvertently omitted disjunctive conjunction ("or")
- Rule 36: stylistic changes only
- Rule 43: to allow the court or parties to secure early meetings regarding electronically stored information to attempt to reach agreement and keep the costs of litigation down
- Rule 45: to add additional requests for admissions having to do with documents so that the custodian of records does not have to be called in to authenticate documents to which there will be no objection
- Rule 47: to allow affirmative defenses to also be subject to challenge by

summary judgment
- Rule 57: minor changes so that it reads like the rest of the rule

B. 79th Legislative Assembly's ORCP Amendments Outside of Council Amendments

1. Rules Amended: ORCP 4, 69, 80

Prof. Peterson briefly outlined the Legislature's amendments as noted below.

- Rule 4: to make family law statutes more gender neutral (change "paternity" to "parentage"). (SB 512)
- Rule 69: changed the citation to the Servicemembers Civil Relief Act and added a missing conjunction. (HB 2601)
- Rule 80: the Oregon Law Commission looked at receivership procedures and its recommendation to enact a new receivership act and to make some changes to Rule 80 were enacted by the Legislature. Unfortunately, the Council's workgroup on prejudgment remedies was unable to get organized and take any action in this regard last biennium. (SB 899)

2. New Statutory Mention of Rules: ORCP 68, 82

Prof. Peterson briefly outlined the Legislature's mention of the ORCP in HB 2986 as noted below.

- Prof. Peterson explained that the bill includes a new statutory mention of Rule 68 (at ORS 116.183) having to do with personal representatives and obtaining attorney fees. He noted that the Council had changed Rule 68 two biennia ago to specifically allow different timelines and procedures for obtaining attorney fees if a statute refers to Rule 68 and provides different timelines and procedures. The statute did just that, as the timelines provided in Rule 68 do not work well in guardianship and conservator cases. He confirmed that this is exactly how the Council's amendment was intended to work.
- Prof. Peterson stated that the bill included language in ORS 113.005(2)(a) and ORS 113.105(1)(a) stating that, when appointing a surety, the procedures in Rule 82 must be followed.

VII. Administrative Matters

A. Set Meeting Dates for Biennium

Mr. Keating stated that the Council has traditionally met on either the first or second Saturday of the month, and that the first Saturday sometimes causes traffic issues on I-5. Prof. Peterson stated that Council staff had conducted a poll of Council members and that the majority had expressed no preference for either the first or second Saturday but, of those who did express a preference, the second Saturday was the clear winner. Judge Roberts made a motion to schedule Council meetings on second Saturdays. Judge Norby seconded the motion, which passed unanimously without abstention.

Prof. Peterson noted that, at one time, the Council's authorizing statute required the Council to meet in each of the state's congressional districts. He stated that the statute has been changed and that it now states that the Council is to endeavor to meet in each of the congressional districts. He stated that the Council has attempted to do this in the past and that, if there is interest, the Council might want to consider doing so in those months when the weather is not bad. Judge Leith stated that he would be able to arrange a meeting in Salem. Mr. Keating suggested carrying over this item to the October meeting for further consideration but scheduling the October meeting at the Oregon State Bar. The Council agreed that this was a good idea.

B. Funding

Prof. Peterson stated that the Council had not had the opportunity to present testimony to the Legislature regarding its funding but that, thanks in part to Mr. Shields' fine work, the Council was allocated $53,427 for the biennium. He explained that this is enough to provide a stipend for the Executive Director, an hourly salary for the Executive Assistant, and relatively small expenses for two years.

C. Travel Reimbursement

Prof. Peterson reminded those members outside of the metropolitan area that they may apply for reimbursement for their mileage for travel to and from Council meetings. He asked that members fill out the Bar's travel reimbursement form and turn it into Ms. Nilsson for approval and signature. Ms. Nilsson will then submit the form to the Bar for reimbursement.

D. CLE Credit for Council Participation

Prof. Peterson explained that, since he was appointed as Executive Director of the Council in 2005, he has found it strange that those serving on committees such as the Civil Jury Instruction Committee were eligible for CLE credit while Council members were not. He noted that, last biennium, Mr. Beattie had raised this issue with the Bar's MCLE Committee, who indicated that Council members may be able to receive two hours of general credit under category three activities (volunteer activities). Prof. Peterson then read the CLE rules and made a suggestion for a proposed change that would allow for credit for Council members. The Committee voted to allow three hours of general CLE credit for nine hours of participation in regularly scheduled Council meetings and the OSB Board of Governors had approved the change.

E. Results of Survey of Bench and Bar: Generally

Prof. Peterson explained that, each biennium, the Council surveys select sections of the bar that relate to civil litigation, as well as all judges. He explained that this year's survey (Appendix E) resulted in 287 responses and that Arwen Bird, our former public member who has professional experience in designing surveys, helped to better craft the design of the survey instrument to help yield better data.

Judge Norby stated that she had taken the survey and noted that one of the survey questions asked about whether the ORCP promote the inexpensive determination of civil court actions. She wondered what the correlation is between the ORCP and costs. Several Council members mentioned the increasing costs of e-discovery. Prof. Peterson noted that, if the Council makes changes to a rule, there will be consequences. He gave the example of a potentially cost-saving change regarding alternate jurors a few biennia ago that made it somewhat easier to call an alternate juror back if a seated juror cannot continue, rather than going through the time and expense of declaring a mistrial. Prof. Peterson observed that the Council tries to avoid unforeseen consequences.

Judge Norby explained that she did not understand the question when taking the survey and that this may have also been the case with other survey takers. Prof. Peterson stated that the Council can make an effort to explain this question better for the next survey. He also stated that Chief Justice Thomas Balmer is part of a group looking at civil litigation generally and how to make it move more quickly and less expensively. He noted that this is a national concern, but that Oregon is far better than many states in terms of getting a case to trial. Judge Gerking observed that not having interrogatories or expert discovery is helpful in this regard.

Mr. Bachofner observed that practicing in states that use those tools can result in a 10-20% increase in trial cost. Mr. Bundy stated that those cases also tend to take much

longer. Mr. Beattie pointed out that the accuracy of the outcome needs to be taken into account as well, and stated that cases are decided differently in federal court than in Oregon's circuit courts because of the differences in discovery practices. Prof. Peterson stated that lawyers from other states are sometimes astonished that Oregon lawyers go to trial and have to be as extemporaneous as we have to be, but noted that it is a trade-off and that the plaintiff/defendant balance of the Council is helpful in determining what that trade-off should be.

F. Suggestions to the Council Regarding General Improvement (from survey)

Prof. Peterson noted that some respondents to the survey provided general feedback regarding the Council's operation, rather than regarding specific rules or rule changes. (Appendix F). He observed that many of the responses in this regard were generally favorable, while a few respondents were unhappy for one reason or another. He noted that one respondent claimed that the Council only makes rule changes that apply for the tri-county area, which he found odd since the Council's membership is geographically diverse. He noted that another respondent stated that the Council's amendments make it hard on defense firms, but half of the Council's attorney members are from the defense bar. Prof. Peterson asked Council members to read through the general suggestions and let staff or the chair know if they have any specific suggestions as to how to address them.

Prof. Peterson explained that the survey also asked about the Council's website, which is continually being updated and improved. He stated that the expectation is to have all of the Council's historical records on the website by the end of this biennium, which has been a huge project. He noted that this will be very helpful to practitioners, but that most of the survey takers were not aware of the website. Hopefully they will make use of it going forward now that they are aware.

Judge Norby asked about the Council's priority-setting process for each biennium. Prof. Peterson explained that there are typically carryover suggestions from the prior biennium; that suggestions are received at various times by Council staff and Council members from the bench and bar; Council members themselves make suggestions for improvements; and that the Council does its biennial survey asking for feedbadck. Prof. Peterson stated that former Council chair Don Corson had once observed that the most valuable thing that the Council does is to take hundreds of really bad ideas and consign them to oblivion. He stated that the Council will go through the carryover list, suggestions from the survey and other suggestions, and any suggestions that come in during the biennium. He noted that suggestions that arrive later in the biennium may be carried over to the next biennium, as there might not be time for full consideration and development of a potential amendment. For each suggestion, the Council decides if there is enough interest to form a committee. Each committee meets, does research, and makes proposals to the full Council; the Council then discusses and decides whether to publish and ultimately

promulgate an amendment.

VIII. New Business

A. Potential amendments carried over from last biennium (Appendix G)

1. ORCP 15: clarification regarding timing of responsive pleadings to counterclaims and cross-claims

Prof. Peterson stated that this suggestion had been made to the Council in May of 2016 and that there was not sufficient time for full consideration so it was carried over to the 2017-2019 biennium.

Mr. Bundy stated that he believes that the concern is that there is a gap in the rule with respect to when a responsive pleading to a counterclaim or a cross-claim needs to be filed. Prof. Peterson explained that the general assumption is that it is 30 days, but the cross-claims and counterclaims would not be accompanied with a summons and so the reference to 7 C(2) may be in applicable in those cases. He stated that he does not agree with the proposed amendment. He also pointed out that someone may decide to file a reply to an affirmative defense and that is not covered. Prof. Peterson noted that one comment from the Council survey was that the 10 day thing scares people because they do not read the whole rule and have a panic attack.

Mr. Bundy observed that he was perusing Rule 69 and default and stated that he does not think he has ever had a plaintiff send him a letter saying "I intend to appear and defend your cross-claim or counterclaim" and, if there is no notice that a plaintiff intends to do that, he does not have to give them 10 days before moving for a default judgment. He stated that everyone works under the assumption that, if they know someone is represented, they let the other side know and give 10 days written notice. However, in reading the rule, he stated that he does not believe that is necessary unless you receive a written notice to appear and answer. He suggested that it may be necessary to also examine other rules associated with ORCP 15.

Judge Roberts opined that there is a problem in that the rule, strictly speaking, states that a cross-claim need only be served on parties that have appeared. If the defendant against whom the cross-claim is stated does not appear, the cross-claim does not even need to be served on that defendant. She posited a hypothetical situation where a plaintiff serves a claim against a defendant for $100 and there is also a co-defendant. The original defendant against whom $100 claim is made does not appear, and the co-defendant serves a cross-claim against that non-

appearing defendant for $1 million. She observed that the original defendant would never know and that a default judgment could be entered against that defendant on a claim that has never been served on them. Prof. Peterson observed that Rule 9, Rule 15, and Rule 69 should all be part of the discussion.

Judge Conover stated that he believes that this issue may be worth looking into, but warned that it may fall under Judge Karsten Rasmussen's comment in the survey regarding making changes for the sake of making changes. He observed that, at first glance, he does not see it as a real life problem. He stated that, in a case where a counterclaim has been filed, that counterclaim is essentially a denial. If the counterclaimant were to ask for a default because there has been no formal response, he expects the responding party would say, "everybody knows this is a denial, this is not fair, these are all the same or similar issues," and he would not issue a default judgment because everyone knows that there is no surprise. He noted that, when it actually gets to the day of trial, he does not see it as being a real life issue because, whether it is 30 days or not, if the anticipated response is that it is simply a denial it does not make a difference. Judge Gerking pointed out that the rules do not say that, if no response is filed to the counterclaim, the allegations are deemed to be denied. He stated that civil judges with a lot of experience may handle such an issue easily, but that a judge who usually handles criminal matters who is assigned to a civil case may be confused if the rule is silent on that issue. Judge Conover reiterated that he believes that the issue is worth discussing.

Ms. Payne observed that there may not be time for the Council to substantively discuss everything today and that it may be best to focus on whether the issue should be referred to a committee. She noted that the first committee meeting may determine that an issue is not worth pursuing further. Prof. Peterson stated that, if there is obvious consensus from Council members who are present that there is interest in looking further at an issue, it is worth forming a committee now. However, he stated that there are five new Council members absent from this meeting and that it might be worth carrying over some issues to the next meeting if there is any question.

The Council decided to form a committee to look further into this issue.

2. ORCP 22: timing and discretion on allowing third-party claims (include attachment)

Mr. Keating noted that this issue came up in discussion of another part of Rule 22 last biennium and that it was suggested that this is the only provision in the ORCP that limits judicial discretion in that a defendant cannot add a third-party

defendant more than 90 days after that defendant has been served, which is frequently the first time that any defendant hears about the case, unless his or her opponent agrees, not just the court. He stated that this was a big enough issue that it was determined that it be postponed until the 2017-2019 biennium.

Judge Wolf also mentioned that Judge Roberts had raised an issue regarding ORCP 22 B(3), which states that the answer containing a cross-claim shall be served on parties that have appeared. He noted that this can allow a "sneaky" default judgment against a somewhat negligent defendant who made an intelligent decision not to respond to a complaint. Judge Roberts stated that when she was on the foreclosure panel, she encountered situations where a party getting foreclosed elected not to contest the foreclosure and, subsequently, a co-defendant filed a cross-claim, thus entitling that co-defendant to a default judgment. Judge Wolf stated that this appears to be what the rule allows, even though it does not seem fair.

The Council decided to form a committee to look further into this issue.

3. ORCP 71: potentially conflicting language

Prof. Peterson noted that this was a suggestion from Judge Patrick Henry. He stated that Rule 71 states that a moving party has one year from receipt of notice of a judgment to file a motion for relief, but that the rule later says that, if the motion is more than one year from entry of the judgment, the Rule 71 motion has to be served on the parties as provided in Rule 7. He stated that Judge Henry was concerned about the "after receipt of notice" language. He referred to a case where, at some point, a defendant learned of the judgment more than one year after entry because the plaintiff interfered with notice of the entry. Prof. Peterson observed that the second part is not inconsistent; it says that, if the Rule 71 motion is filed more than one year after entry, service of the motion must be in the manner of Rule 7, whereas, if it is less than a year after entry, a party can simply serve it per Rule 9. Judge Roberts stated that, at the time Judge Henry raised the issue, she believed that it was a problem, but that she is unsure now. Prof. Peterson agreed. Judge Wolf stated that the second reference ("receipt") deals with how the movant needs to serve the motion, Rule 7 or Rule 9.

Prof. Peterson suggested carrying over this item to the next meeting in case any members not present feel that it needs to be addressed.

4. Filing Under Fictitious Names

Prof. Peterson explained that Senior Judge James Hargreaves raised a concern about parties filing civil actions under fictitious names, which he feels that is a clear violation of the ORCP. Ms. Payne noted that Judge Hargreaves had written an article about this in the Litigation Section's "The Judge's Corner." Prof. Peterson stated that Judge Hargreaves had also addressed the issue in a Litigation Section CLE. Prof. Peterson observed that there may be some good reasons to file under fictitious names, but that the Council should perhaps take a look at the issue and whether it would be wise to make the ORCP specifically allow or disallow it.

The Council decided to form a committee to look further into this issue.

B. Potential amendments received by Council Members or Staff (Appendix H)

1. ORCP 7: electronic signature on a summons
2. ORCP 7: does the sheriff need to do the follow-up mailing after office or substitute service

Prof. Peterson explained that Aaron Crowe of Nationwide Process Service, Inc. had written to the Council concerning lawyers who are apparently electronically signing summonses and that he does not believe this is correct. Mr. Crowe is suggesting a change to Rule 7 A. Prof. Peterson noted that ORCP 7 B and ORCP 7 C(1) state that the summons has to be subscribed, which he believes means physically signed. The complaint is filed to commence the action, but the summons would typically not be filed until the return of service gets filed. The rule pretty clearly states that the plaintiff or lawyer has to subscribe the summons, and Prof. Peterson observed that perhaps people are not reading the rule. Judge Norby observed that the electronic signature issue potentially has further reaching impacts. She believes that judges have some concern about the fact that all warrants are now being electronically signed. She stated that this may mean it is something that the Council does not want to tackle, but it may also mean that it is something the Council wants to examine further.

Judge Norby explained that the captain in the Clackamas County Sheriff's office had been working with her recently on this issue. The way that it came up is that the sheriff's office tries to be very diligent, especially with self-represented litigants and, even though the rule says that the plaintiff is required to do follow-up mailings, the sheriff takes on an added responsibility and worries about whether they have left someone in the lurch and created a problem where cases will just get dismissed because self-represented litigants are not aware of their responsibilities. She stated that the sheriffs were worried about whether they

should be taking on that added responsibility even though the word "plaintiff" is used. Prof. Peterson stated that this suggestion had come to the Council from Holly Rudolph, the forms coordinator for the Oregon Judicial Department, but that the conversation may have begun with the Clackamas County Sheriff's Office. Judge Leith asked whether the concern is that the plaintiff should be able to make the follow-up mailing after substituted or office service. Judge Wolf noted that there was some conflating of two issues: that the plaintiff is supposed to do the follow-up mailing but a self-represented litigant cannot serve by mail. He stated that there are apparently some counties where there is confusion about that and Ms. Rudolph's feeling was that when the sheriff does the service and it is substitute, the sheriffs are reading the rule to say that the sheriff is the only server who can perform the follow-up mailing, which he does not believe is what the rule states.

Mr. Bachofner stated that he was on the committee last biennium when the Council talked about how service by mail should be done. He observed that service is such an important aspect, conferring personal jurisdiction, that the Council was concerned about allowing service by mail by a self-represented litigant; however, the Council did not intend to have an impact on follow-up mailing. Judge Wolf stated that he does not believe that we do under the rule, but that it appears that there is confusion. Prof. Peterson acknowledged that requiring a third party to complete substituted or office service is getting in the way of these cases being able to move cheaply and efficiently. However, he expressed concern that self-represented litigants may not understand the importance of personal jurisdiction and parties would be well served by having better proof of the follow-up mailing. He noted that a plaintiff would not have to hire the sheriff to complete service accomplished by another qualified individual. Prof. Peterson wondered if it may be a training opportunity for the sheriffs. He recalled a time when the Multnomah County Sheriff sent back a writ of garnishment because sufficient copies were not included in the event that personal service could not be made, a part of their checklist. Judge Norby stated that the sheriffs are diligent about implementing processes, but they just need to know what to do. Prof. Peterson re-emphasized that the Council should strive for "inexpensive" procedures, but also needs to make sure people who are alleged to be served are actually served.

The Council decided to form a committee to look further into these Rule 7 issues.

3. ORCP 68: concern regarding language in the Council's previous amendment of ORCP 68 C(7)(a)

Prof. Peterson stated that attorney Bruce Orr had made an inquiry about the Council's prior change to Rule 68. Prof. Peterson observed that the Council's change was intended to make clear that a party can obtain court costs and attorney fees for post-judgment collection and enforcement work and when that party can apply for such expenses. The amendment included a provision that, without leave of court, a party may only apply for such supplemental costs and fees once a year. The amendment provides that, if a party alleged a basis in that party's original pleading, the party should be allowed to seek additional attorney fees for enforcement or collection. Mr. Orr claims that the amendment creates the potential for mischief. He pointed out that the other side may have waived any objection or the court may have said there was good cause to award costs and fees in obtaining the general judgment. Mr. Orr believes that, if a prevailing party has filed a statement for costs and fees and was awarded a supplemental judgment, that party should be allowed to seek costs and fees incurred in collection or enforcement of the general judgment. Prof. Peterson stated that Mr. Orr believes that some people are also adding in the attorney fees that they incurred in obtaining the general judgment and that this may be an unintended consequence of the Council's attempt to make things work more clearly and smoothly.

Judge Roberts stated that she was a little confused about Mr. Orr's comment that the Court of Appeals has decided that the statement of attorney fees is a pleading. Prof. Peterson clarified that the ORCP tell us what is and is not a pleading. Prof. Peterson suggested that a Court of Appeals case stated that a statement for attorney fees may be treated as a pleading for the purposes of raising the issue. Judge Roberts stated that Mr. Orr's suggestion that statements of attorney fees have been ruled to be pleadings is incorrect. Judge Norby agreed.

Prof. Peterson stated that he did not understand Mr. Orr's point that obtaining fees for work in obtaining findings and conclusions would not be compensated. Judge Gerking stated that he did not understand that either.

Prof. Peterson stated that, as the rule is currently written, if a party does not plead a right to attorney fees and obtains a supplemental judgment, even though the party obtains that supplemental judgment, the party cannot get additional money for collection and enforcement of the judgment. That is a value judgment. In terms of how this could cost a party, it could cost the party if they did not plead in their original pleading or motion that they had a right for attorney fees but somehow

got them in or after the general judgment. Judge Gerking noted that it could be a problem if a party received such an award in a default judgment. Mr. Bachofner observed that, if a contract provides for recovery of attorney fees, there is still a contractual right. Ms. Payne stated that one would still have to plead that right. Judge Gerking proposed a scenario where a party files a complaint and does not allege fees, although they may have been entitled to them, and obtains and begins collecting on a default judgment. He stated that the party would have a problem obtaining fees for collecting that judgment. Judge Wolf stated that, under the rule, a party should have a problem doing so. Mr. Bachofner wondered if it was res judicata as to excluding fees under the contract, or whether a separate action could be filed seeking the attorney fees.

The Council decided to form a committee to look further into this issue.

C. Potential amendments received from the Council Survey (Appendix I)

For ease of reference, the table of suggestions received from the Council survey (Appendix I) is copied here in slightly modified form. Each suggestion is listed exactly as it was received by the Council. The Council's discussion and resolution of each issue is noted in the final column on the right-hand side of the table. Note that some issues listed separately in the table were discussed as a single issue during the meeting and have accordingly been highlighted in gray to indicate this grouping.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
Class Actions (suggested by Susan Marmaduke) 32 O	the cy pres feature of ORCP 32, as amended, creates an unfair bias in favor of upholding a judgment in a class action because of the benefit to legal aid.	Cy pres is a substantive issue rather than a procedural one and is the purview of the Legislature.
Discovery (suggested by Vanessa Nordyke) 36 B(1) and (3)	ORCP 36 needs to set out a separate, and narrower standard of what's discoverable for e-discovery. The standard of "reasonably calculated to lead to the discovery of admissible evidence" is so broad that it can result in tens of thousands of emails, requiring one side to bear a disproportionate burden of receiving, processing, producing voluminous records at a moment's notice. Motions to compel do not take into the	Mr. Crowley proposed an ongoing E-discovery committee since this is such a prevalent issue in litigation. Judge Norby stated that she has noticed a trend of big and medium-sized law firms having an e-discovery management system that works fairly well, but smaller firms and solo practitioners generally do not and are afraid of being buried. Mr. Keating stated that he and other attorneys who believe that there should be rules regarding e-discovery feel that the courts should be empowered to take an active role in working out e-discovery issues. He opined that it is

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
	consideration the reality of the difficulties of timely producing voluminous e-discovery. Pre-trial discovery deadlines should be considered. Attorneys should not be able to ask for 10,000 emails/documents shortly before trial, because that ties up staff and attorney time responding to burdensome requests when they should be focusing on trial prep.	always one side that bears the burden, and that it is rarely the plaintiff's side. He noted that these issues are enormous no matter how big the law firm is. Ms. Nilsson suggested bundling all of the suggestions from the survey regarding discovery and forming a general discovery committee to look into them and report back to the Council. Judge Gerking asked if there is some way the Council could look at the definition of costs under ORCP 68 and whether a cost would include e-discovery. That may be one way to approach it. Judge Leith agreed that discovery is likely a big enough issue to have a standing committee and consider the suggestions. However, he suggested limiting the committee's charge so the same issues do not keep getting re-litigated. Judge Norby asked whether e-discovery was a topic of the Council's survey. Prof. Peterson stated that it was not, but that it may be a good topic for the future. Mr. Crowley observed that e-discovery is the State's biggest expense and that it has gone up exponentially over the last five years. He stated that this impacts justice. The Council formed a committee to research the suggestions received regarding discovery.
Discovery 36 B(1) and (3)	ORCP 36 should be amended to provide for discovery of experts similar to FRCP. ORCP 47 E should be eliminated.	
Discovery 36 B(1) and (3)	The no expert discovery rule does not promote the just and fair resolution of disputes. I realize this is not really a CCP issue at this point.	

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
Discovery 43	Streamlined procedures for rfp's, responses, motions to compel and protective orders. If at al possible.....	
Discovery 43 B(2)	The "reasonable time" provision in ORCP 43 should be reinstated. 30 days was always the default but now that it's mandated, it imposes an automatic 30 days or requires the time and expense of a court appearance to shorten the time. That defeats the purpose. Here's an example, party learns of document in deposition. Requests the document, lawyer says send me a request for production. Teeing that up for a motion will result in a 6 week delay. If there aren't burdensomeness issues, the decision of whether or not to produce can be made quickly.	
Discovery 43 E	Discovery, especially electronic discovery, should be proportional to the nature of the case, as in the federal rules.	
Discovery 43 E	It needs to be updated to address electronic discovery issues and proportionality test.	
Discovery 45 F	Revise ORCP 45 to permit more than 30 RFAs without permission, especially in order to obtain admissions that documents are authentic and fit within a hearsay exception.	
Discovery (suggested by Wm. Randolph Turnbow) 46 A(2)	The "Velure Rule" requiring a verbatim quote of a discovery request at the beginning of a motion to compel does not work when a party refuses to comply with a multi-page request for production or ORCP 39C(6) notice. You should allow attachments if the disputed provisions are lengthy.	
Discovery	The rules regarding discovery are onerous for the average citizen to afford. They are used by the	

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
	wealthier client as an abusive tool to force the adversary to give up. They are also frequently used and abused by lawyers as a means to "fee build" when the extent of discovery demanded far exceeds what is reasonably necessary for competent representation. I am an "av" lawyer and "super lawyer" with 42 years of experience in trial courts on a weekly basis. I know of what I speak. I am now inactive for approximately 2 years.	
Discovery (suggested by Gordon Hanna)	The rules seem most suited to large litigation for large sums of money or big issues. Onerous discovery issues make resolution of small matters too time consuming, to expensive, and too susceptible to "gotcha" discovery problems, especially when a small firm is dealing with a large firm. The smaller firm simply cannot deal with the flood of paper, admissions, interrogatories and often multiple RFPs. Either the rules need to address the potential excesSeptember 29, 2017s in motion practice and discovery or judges need to be admonished to take control of their docket and stop the abuse.	
Discovery	Expert discovery; interrogatories--both will make trial more efficient and less costly.	
Discovery (suggested by Andy McStay)	Oregon's failure to authorize interrogatories or pre-trial expert discovery continues to serve the justice system poorly. It results in gamesmanship and "hide the ball" approaches to case prosecution that accentuate unpredictability and create considerable waste in the discovery process and pre-trial preparation.	

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
Discovery (suggested by John Bennett)	It is time for Oregon to adopt interrogatories and expert witness disclosure.	
Discovery	The discovery rules should more closely follow the recent federal changes to help control discovery costs.	
Discovery	I wish the Oregon rules were closer to the federal rules and that we had interrogatories.	
Discovery	Interrogatories (appropriately limited to be consistent with Oregon's civil procedure) should be considered	
Discovery	Discovery rules should be modernized to include devices such as interrogatories and directly address issues such as privilege logs	
Discovery	Oregon continues to follow the "trial by ambush" approach. Lamentably, this approach enables lawyers to defer genuine assessment of facts and law, thereby unnecessarily perpetuating the case, rather than expediting resolution.	
Family Law	Different ORCPs for family law or waiver of certain requirements.	The Council concluded that this suggestion was not specific enough to take action.
Internal References	If there was a way to link similar statutes and rules (i.e UTCRs and other statutes) by mentioning them in ORCP or the other rules would be helpful. It just would make research easier. I realize that isn't your responsibility, but it could be a useful tool for practitioners. I moved here from a different state, and although there are similarities, there are distinct differences from where I practiced and it feels overwhelming at times not even knowing that there is another similar statute or rule that may be applicable that I may have overlooked.	Prof. Peterson recalled that, last biennium, there was a general feeling that internal references would be helpful, particularly to self-represented litigants, but a conclusion that they are cumbersome and very difficult to maintain, particularly for a small agency with a very-part time staff and volunteer members. The Council agreed that It is the practitioner's job to read all of the rules and that it is impractical for the Council to include internal references in the ORCP.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
Judicial Enforcement	Give the rules teeth! Too often judges are cowards and will not use the rules to promote swift and inexpensive discovery exchange, for example. It ends up making the rules nearly meaningless.	The Council agreed that suggestions regarding judicial enforcement may be a judicial education issue.
Judicial Enforcement	Yes, you should include a statement, maybe in ORCP 1, that instructs judges that the ORCPs are rules they are supposed to follow, not merely suggestions as many, many judges treat them. There should be a penalty for judges who do not follow the rules and instead make up the rules as they go.	
Pleadings and Motions (suggested by Jay Bodzin) 7	It may also be appropriate to allow ORCP 7 service by email when an address is known and other means of service have been ineffective.	The Council agreed that the court is already authorized to allow this if an attorney asks.
Pleadings and Motions (suggested by Kelly Andersen) 7 A	Get rid of the "true copy" requirement on documents filed with the court. This rule dates back to the days of scriveners. Photo copy machines have made the rule obsolete.	Done effective 1/1/08.
Pleadings and Motions (suggested by Jay Bodzin) 9 B, 9 C	ORCP 9 should be amended to allow service by email, when the parties have previously exchanged email addresses.	This was addressed in the 2015-17 biennium.
Pleadings and Motions 9 B, 9 C(3)	Service by email should be the preferred method. It saves time and paper.	This was addressed in the 2015-17 biennium.
Pleadings and Motions (suggested by Heather Gilmore) 9 C	The council needs to pay attention to the impact general rules unintentionally have on protective proceedings and probate. There are often conflicting obligations or obligations that require an attorney to do the same thing twice. For example - under ORS 111, we must file a proof of service. We are	Judge Norby wondered whether the Council should consider adding a statement or note somewhere in the ORCP that anything that is precisely duplicative of a requirement in a statute is not intended to duplicate the action or something to that effect. Prof. Peterson observed that, at worst, this situation requires filing two pieces of

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
	required by the ORCPs to file/attach a certificate of service for each document we electronically file. As a practical matter, this means we have to attach a certificate of service (under ORCP21) to the proof of service (ORS 111). This duplication is stupid.	electronic "paper." Judge Wolf stated that, if the two documents are being filed separately, each needs a certificate of service. He did not think that this is a big problem. Judge Roberts agreed, particularly since there are not actual pieces of paper being filed. Judge Norby asked if there were any other duplicative probate procedures identified by Ms. Gilmore. Prof. Peterson stated that there were not.
Pleadings and Motions 15 A	In general, I like the ORCP. I think the wording in 15A, "Any other motion... shall be filed not later than 10 days" could be improved, as on a quick reading it sounds like any and all motion responses are due in 10 days, not the 14 days (plus 3) that you actually get per UTCR 5.030. I have panicked upon reading this more than once, and I know I'm not alone.. :)	This suggestion was added to the charge of the Rule 15 committee.
Pleadings and Motions 21 A, E	ORCP 21A, 23 and 25. Need to clarify the procedure following an order granting a motion to dismiss. Case law demonstrates confusion and inconsistent application of the rules by trial courts.	Judge Gerking observed that this procedure is already covered in the ORCP and suggested that practitioners should read the rules carefully.
Pleadings and Motions 22 A	ORCP 22 should be amended to adopt a compulsory counterclaim rule.	Prof. Peterson stated that case law pretty much aligns Oregon with federal practice if the claims are closely related. Mr. Beattie, Judge Leith, and Judge Roberts pointed out that the suggestion was to amend an area of substantive law, which is outside the Council's purview.
Pleadings and Motions 22 C(1)	The 90 day rule on adding third parties, otherwise you need the other side's consent, is unfair to defendants and unrealistic.	This is a duplicate of a suggestion already charged to the Rule 22 committee.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
Pleadings and Motions (suggested by Vanessa Nordyke) 23 A	Allowing amendments to pleadings at or shortly before trial is highly prejudicial to defense. Why should one party be able to significantly pivot their case after the other side has shown its cards?	The Council agreed that this is a matter of judicial discretion.
Pleadings and Motions 47 C	Amend ORCP 47C to make it consistent with FRCP 56. Currently, in Oregon a defendant can move for summary judgment without having to introduce any evidence or otherwise prove that the plaintiff lacks evidence to prove an element. Two Two v. Fujitec America, Inc., 355 Ore. 319, 324, 325 P3d 707 (2014) (defendant only needs to raise an issue in the motion - there is no burden of production). This is inconsistent with federal law. See e.g. Celotex Corp. v. Catrett, 477 US 317, 330, 106 S Ct 2548, 477 US 317 (1986). As a result the MSJ in Oregon can be used to test a plaintiff's entire case before discovery is completed. This process is a waste of time and money and is fundamentally unfair to plaintiffs.	Mr. Beattie stated that he believes that ORCP 47 is already consistent with the federal rule. Ms. Payne and Mr. Bachofner agreed.
Pleadings and Motions (suggested by Kevin Lafky) 47 C	Motions for Summary Judgment should be required to be filed earlier in more involved cases; 60 days is too short; you are already preparing for trial 60 days out; SJ should be resolved prior to trial prep.	Mr. Keating stated that, in medical malpractice defense work, a privilege isn't waived until you've deposed the treating physician. All the plaintiff has to do is wait to depose the treating physician within 60 days of trial and then there is no way the defendant can complete discovery by talking to other doctors who have treated the patient for that particular problem until the privilege is waived, so a motion for summary judgment becomes unavailable. It is a tool, but if someone is obviously doing that, a party can go to the court and ask for either a reset of the trial date or an opportunity to file it within the 60 days. Judge Wolf stated that, if a party is afraid of being ambushed before trial, that party can ask for all summary judgments to be filed 120 days before trial.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
		The Council agreed that the court has discretion to modify the time and, if a practitioner sees something that is a potential problem, that practitioner should approach the court early for assistance.
Pleadings and Motions (suggested by Stephen McCarthy) 47 C	I believe that Rule 47 could use some work. I think there is still some misunderstanding regarding the burdens of proof following the "federalization" of the rule.	The Council declined to form a committee regarding this issue.
Pleadings and Motions (suggested by Wm. Randolph Turnbow)	In addition, although our of your jurisdiction, the "notice of signed document" procedure is not working in my experience.	This is not in the Council's purview. The Council suggested that Mr. Turnbow may want to contact the Oregon Judicial Department and/or the UTCR Committee.
Pleadings and Motions	The new rules on serving orders are not working very well for my clients. having to essentially serve the order, wait for an objection, and then reserve it with the certificate attached is cumbersome. I like the idea and I think it has slowed down the old habit of courts signing orders and judgments before the response periods had even run.	This is not in the Council's purview. The Council suggested that this is a matter for the UTCR Committee.
Pleadings and Motions (suggested by Michael Peterkin)	Change service time for form of orders and judgments to 3 days from date of emailing if simultaneous service by facsimile.	Prof. Peterson stated that there is a UTCR that addresses this issue but that ORCP 9 gives three days. Mr. Bachofner stated that the Council talked about whether to change the three day extension for e-mail service but decided not to, partly due to the large volume of e-mails received by practitioners.
Probate/ Protective Proceedings (suggested by Heather Gilmore)	First, I realize that the CCP is composed of volunteers and I appreciate their time and effort. As someone who regularly volunteers and donates my time, it is important to realize that not everything done by committee works perfectly. There are some issues that the CCP has been well intentioned on for probate - but they missed the mark. For	Judge Norby stated that she is on the probate rotation and that she would discuss the issue with the probate coordinator in her county to get his input. The issue will be carried over to the next meeting.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
	example, in both protective proceedings and probate, you never know if the matter will be contested until after the notice period has run. The certification required for orders and judgments tried to carve out an exception for uncontested probate matters - but you can't call any probate matter uncontested (except for the inventory) until after the objection period has run. In addition, with electronic filing rules and the service component, the rules vs. the statutory obligations are confusing for probate attorneys/those appearing in probate matters. The effort is appreciated, but the result is not practical. The ORCP's must be practical and the challenge for probate/protective proceedings is to have ORCP's and statutes that are complimentary.	
Self-Represented Litigants (suggested by Vanessa Nordyke)	No clear rules on self-represented litigants, which is the norm for landlord-tenant, family law, and increasingly in other areas.	The Council agreed that, despite the difficulties that self-represented litigants may face in reading the ORCP, the rules are the rules for everyone.
Trial Practice 23 C 34	Insofar as the personal representative (often none) of a decedent represents the rights of the decedent, tort victims of the decedent may be given no notice of the death of the decedent (e.g., no probate and no reason to think the tortfeasor might die), and the statute of limitations may lapse before the tort victim learns of the need to cause a PR to be appointed and served summons and complaint, should ORCP be amended to treat a PR as the decedent, avoid a trap of limitations unexpectedly barring the tort claim, and causing the consequent risk of a legal	Judge Roberts stated that the issue may be whether the substitution should relate back. Judge Norby wondered how the personal representative would identify the potential victims. Mr. Beattie stated that it seems like a statute of limitations issue, which is substantive. Ms. Payne stated that a party should have potentially filed an action against the decedent within the statute of limitations, so the only issue is whether the party substitutes after that. Judge Roberts pointed out that this is only if the decedent dies after the institution of the lawsuit; however, if the decedent is already dead when the lawsuit was filed, the lawsuit actually has not been filed because the defendant has not been served.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
	malpractice claim against the tort victim's lawyer? Or is the current situation just fine? Your call. I express no opinion. What do the PLF, OADC, or OTLA think? See Worthington v Estate of Davis, 250 Or App 755, 282 P3d 895 (2012). (PR not the equivalent of the decedent so claim barred).	Judge Wolf looked at the case cited by the person making the suggestion and stated that a motorist injured in an automobile accident filed a case against the second motorist, not realizing that the second motorist was dead. After the statute of limitations had passed, the plaintiff filed an amended complaint naming the deceased's estate and personal representative, but the case was dismissed because it was beyond the statute of limitation and did not relate back. The case was affirmed by the Court of Appeals. Judge Gerking asked whether relation back would exist if the personal representative were aware of the lawsuit. Judge Roberts noted that the defendant did not pass away in the accident; his later death was unrelated. Ms. Payne suggested that this might be an issue for the Legislature. Mr. Beattie opined that the only issue for the Council may be relation back. Judge Roberts stated that substitution of parties would also be an issue that the Council could address. Judge Leith agreed that the Council could look at the relation back section of Rule 23. Judge Wolf confirmed that Rule 23 C is cited in the case mentioned. Judge Gerking pointed out that Rule 23 C states that a plaintiff can change the name of the defendant if the newly added defendant was aware of the lawsuit and knew or should have known that he or she should have been named. Judge Roberts pointed out that this would not apply if a probate had not been opened for the decedent – who is it that should have known, the personal representative that did not yet exist? She stated that this situation is a conundrum. The Council formed a committee to look at these issues (Rules 23 C and 34).

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
Trial Practice 43 E	Litigation is getting more expensive all the time, which means that civil justice is moving out of reach for a greater number of people and companies all the time. Mandatory arbitration forces people to pay for justice. E-discovery costs permit one side (with deeper pockets, or with the fewest documents to produce) to force the other side into a terrible settlement because that side can't afford to get to trial. Our rules are no help.	The Council noted that an attorney may a request to be excused from mandatory arbitration. The other issues here were referred to the discovery committee for their examination.
Trial Practice (suggested by Richard Walsh) 45 F	Uniform system to approve/admit court exhibits in advance of trial without the expense of formal foundation and which included a system to meaningfully punish/charge the other side for unreasonably refusing to admit documents when there is no serious good faith belief in their authenticity. Basically this would look like a request for admission but should not be limited in number and the judges should actually enforce a consequence when an adverse party refuses to admit a document without a good faith basis or belief that the purported document is inadmissible. For example in auto cases that should routinely include medical records, bills, summary of bills, property damage estimates, photo's of automobiles and photographs and diagrams of the scene etc. (Just like we currently admit in arbitrations)	The Council noted that it made an amendment to ORCP 45 last biennium that allowed additional requests to admit the authenticity of a "reasonable number" of documents. Judge Leith suggested allowing that change to play out before making further changes to the rule. The Council agreed.
Trial Practice (suggested by Richard Walsh) 52	The urgency for timely trials is a worthy goal in most cases. However, when ALL PARTIES agree that they need or want more time (for whatever reason) the judge should be allowed, and even encouraged, to grant an unlimited	Mr. Beattie stated that the time within which a case must be set for trial is not embedded in the ORCP and that this suggestion is, therefore, not proper for the Council.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
	amount of requests for postponements no matter how old the case is. The one year rule/guideline (which was created to help litigants) is actually being used to punish litigants that have need for additional time. The need for addition time is common when the evidence is in flux due to ongoing treatment, discovery difficulties, or expert schedule conflicts or just because the parties want more time to try to settle the case. Sometimes plaintiff's need more time to obtain money and resources to have medical procedures or to hire additional experts to prove their case. What is the reason for pushing parties to trial faster than either party requests? Storage space of files should no longer be an issue now that we are all electronic. Wouldn't granting more extensions to parties that want them allow other cases (where the parties actually want and need a speedy trial) to move through the system faster? It does not serve the needs of justice to force parties to try a case before any of the parties are ready.	
Trial Practice (suggested by Gregory Skillman) 55	Please take a close look at ORCP 55 and attempt to revise it, break it into several rules or otherwise simplify and clarify it. Maybe I'm alone here, but it seems to be an unnecessarily complicated and confusing Rule.	The Council agreed that the rule is long and confusing. Prof. Peterson noted that the Council did attempt to simplify some sections when making other amendments. Judge Gerking agreed that the rule was improved by those changes and by adding lead lines for clarity. He suggested forming a committee to take another look at the rule and to see if it can be improved generally. A committee was formed for this purpose.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
Trial Practice 79	Provide more clarity and standardization re TRO's, preliminary injunctions and related procedures.	Prof. Peterson observed that this rule has not been examined in a long time and that the workgroup formed last biennium did not progress to the point of making a report to the full Council. He wondered if anyone on the Council does a significant amount of work regarding temporary restraining orders who would be willing to work on a committee regarding this issue. Judge Leith stated that he used to practice in this area. He noted that everyone looks to the federal rule and act as though it applies by analogy. Judge Roberts noted that the suggestion does not make clear exactly what the problem is. Judge Gerking stated that case law indicates that we do look at federal 9th circuit case law. Judge Leith agreed that it is worth forming a committee to look at the issue. Prof. Peterson stated that the Council has attempted to use a "checklist" format with some of the rules to make processes more clear to the litigants and the court and that it might be a good idea for this rule. Mr. Beattie asked whether the Council can invite non-members to participate in the committee. Prof. Peterson stated that, in that case, it would be called an work group. He stated that it is always a good idea to call in experts for specialized areas. Mr. Crowley stated that he would talk to Renee Stineman in his office to see if she would be willing to participate. A work group was formed to study this issue.
Trial Practice (suggested by Aaron Cronan)	The cost of litigating even relatively simple disputes has made the civil justice system in accessible to the average person or small business. As a moderately successful professional, I wouldn't be able to	The Council noted that this is an important issue to keep in mind generally, but that the problem cannot be solved by a Council committee.

Category/Rule	Suggestion for Amendment to ORCP	Discussion/Resolution
	afford my own fees if I were caught in litigation. The unfortunate side-effect is that parties with deeper pockets can steamroll or shake down a smaller opponent who is clearly in the right. I have no idea how to solve this problem, but we really need to reexamine the process of litigation before the landed gentry are the only ones with access to the rule of law.	
Trial Practice	Follow the Federal Rules, require initial disclosures, allow interrogatories (limited, but allow them), require pretrial procedure that requires disclosure of witnesses, anticipated testimony, anticipated exhibits, etc., all months in advance of trial.	The Council noted that there is always some interest on the part of some of the bar to "federalize" the rules, but the Council has long held the opinion that these procedures would make litigation less speedy and more expensive.
Trial Practice (suggested by Harold Harding)	The Certificate of Readiness requirement applied to all orders and judgments is a huge waste of time and money.	This is not in the Council's purview.
Trial Practice	Fee waivers should be automatic to all persons under 135% of the poverty guidelines and/or who are on food stamps. They should just be able to show an Oregon Trail card and get an automatic fee waiver.	This is statutory and not in the Council's purview.
Trial Practice (suggested by Vanessa Nordyke)	Rules should facilitate court appearances remotely, by video or telephone, make it easy to request and make the standard less onerous under ORS 45.400.	This is not in the Council's purview. ORS 45.400 was recently amended by the Legislature to improve the remote court appearance process.
Trial Practice	Encourage more use of ADR	This is not in the Council's purview.
Trial Practice (suggested by John Dunbar)	Consider a rule requiring civil cases to go to trial within a year, unless certain findings are made.	This is not in the Council's purview.

D. Potential amendments suggested by Legislative Counsel

Prof. Peterson explained that, this biennium, we have only received one suggestion from Legislative Counsel, and that is regarding a missing conjunction in Rule 43. He suggested that Council staff handle that draft amendment and refer it back to the Council for approval.

E. Appointment of committees regarding any items listed in VII A through D

Discovery Committee

Hon. Charles Bailey - CHAIR
Jay Beattie
Troy Bundy
Hon. Curtis Conover
Ken Crowley
Travis Eiva
Shenoa Payne
Derek Snelling

Fictitious Names Committee

Hon. Curtis Conover
Ken Crowley - CHAIR
Meredith Holley
Hon. Susie Norby

ORCP 7 Committee

Hon. Susie Norby - CHAIR
Prof. Mark Peterson
Derek Snelling
Hon. John Wolf
Deanna Wray

ORCP 15 Committee

Troy Bundy
Hon. Tim Gerking - CHAIR
Shenoa Payne
Prof. Mark Peterson

ORCP 22 Committee

Jay Beattie - CHAIR
Travis Eiva
Bob Keating
Hon. David Leith
Derek Snelling

Rule 23 C / 34 Committee

Hon. David Leith
Shenoa Payne
Hon. Leslie Roberts
Derek Snelling
Deanna Wray - CHAIR

Rule 55 Committee

Kelly Andersen
Hon. Tim Gerking - CHAIR
Bob Keating
Hon. Susie Norby

ORCP 68 Committee

Troy Bundy
Travis Eiva - CHAIR
Hon. Tim Gerking
Prof. Mark Peterson
Hon. Leslie Roberts

Rule 79 Workgroup

Ken Crowley - CHAIR
Jennifer Gates
Hon. David Leith
Prof. Mark Peterson
Hon. Leslie Roberts
Hon. John Wolf

IX. Adjournment

Mr. Keating adjourned the meeting at 12:27 p.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

A GENERAL GUIDE TO DRAFTING

AMENDMENTS TO THE OREGON RULES OF CIVIL PROCEDURE

A This is a section. Both the leadline and the uppercase letter in a section should be bolded.

A(1) **This is a subsection.** Leadlines for subsections, paragraphs, subparagraphs, parts, and subparts should be bolded; however, the letter/number combination preceding them should not be bolded.

A(1)(a) **This is a paragraph.** [*If you want to indicate that you are removing text from an ORCP, you should bracket that text and put the text within the brackets in italics.*]

A(1)(a)(i) **This is a subparagraph. If you want to indicate that you are adding text to an ORCP, you should underline and bold that text.**

A(1)(a)(i)(A) **This is a part.** Remember, if any subsection, paragraph, subparagraph, or part does not have a leadline, there will be no bolded text.

B Items to consider. When the Council looks at a rule, some items for consideration include:

B(1) **Archaic or "lawyerly" language.** Does the rule read clearly and easily? Does the rule include words and phrases like, "forthwith," or "when the presentation of the merits of the case will be subserved thereby"? Would the word "such" be better replaced by the word "that" or "any"? Should you replace "thereof" with an actual reference to the object being discussed? Would a self-represented litigant understand the phrases used?

B(2) **Grammar.** Check the rule for grammatical errors and inconsistency. Should the word "which" actually be the word "that"? Is the indefinite pronoun "it" used rather than a clear reference to the object to which "it" refers? Should the word "upon" be replaced with "on"?

B(3) **Internal references that are inconsistent with Council format.**

B(3)(a) **Internal references to the same rule.** Cite the section, subsection, paragraph, subparagraph, or part, followed by the phrase "of this rule." For example: "The plaintiff shall so

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state in the affidavit or declaration required by paragraph D(6)(a) of this rule."

B(3)(b) **Internal references to a different ORCP.** Cite using this format: "as provided in Rule 68" or "as provided in Rule 69 E."

B(4) Internal lettered/numbered headings that are inconsistent with Council format. There should never be a lettered or numbered paragraph that does not follow the "section/subsection/paragraph/subparagraph/part" numbering scheme. This is one example of how incorrectly numbered references should be changed: [*(1)*] one peremptory challenge if one or two alternate jurors are to be empanelled; [*(2)*] two peremptory challenges if three or four alternate jurors are to be empanelled; and [*(3)*] three peremptory challenges if five or six alternate jurors are to be empanelled. (Another alternative, depending on how detailed the information in each enumerated part is, would be to change the enumerated parts into subsections, paragraphs, subparagraphs, or parts.)

B(5) Shall, must, may, will, can. The word "shall" is ambiguous. It does not always mean "must," but it sometimes does. It sometimes shifts meaning in the middle of a rule, a section, or even the same sentence. The Council is shifting away from using the word "shall" in favor of the word "must" when "must" is the intention. "May" is discretionary, and we want to be certain that it is not accidentally used when a mandatory term is meant. "Will" is an expression of something that should happen in the future, and should be used sparingly. *(See, Garner's Dictionary of Legal Usage*, Bryan A. Garner, Third Edition, Oxford University Press; *What's the only word that means mandatory? Here's what law and policy say about "shall, will, may and must,"* Dr. Bruce V. Corsino, https://www.faa.gov/about/initiatives/plain_language/articles/mandatory/)

B(6) **Would this subsection, paragraph, subparagraph, or part be better served by the addition of a leadline for clarity?** The Council has been trying to better organize the rules, including in some instances using more of a "checklist" format, to better assist attorneys. Leadlines have proved to be helpful for this purpose.

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GARNER'S DICTIONARY OF LEGAL USAGE

THIRD EDITION

Bryan A. Garner

with a foreword by Judge Thomas M. Reavley

OXFORD
UNIVERSITY PRESS

inability to frame a workable provision (in a legislative bill, rule, contract, etc.) by suggesting that they will leave the "*wordsmithing*" to others—as if it were a ministerial matter for low-level colleagues at the bar. In fact, though, *wordsmithing* is the lawyer's stock in trade. Every entry in this dictionary is a matter of *wordsmithing*. And mastering the English vocabulary, and then the legal vocabulary, is one of the highest attainments to which a lawyer can aspire. Not always, but often, the lawyer who speaks of *wordsmithing* has little idea what it entails.

WORDS OF ART. See TERMS OF ART.

WORDS OF AUTHORITY. Few reforms would improve legal drafting more than if drafters were to begin paying closer attention to the modal verbs by which they set forth duties, rights, prohibitions, and entitlements. In the current state of common-law drafting, these verbs are a horrific muddle—and, what is even more surprising, few drafters even recognize this fact. The primary problem is *shall*, to which we must immediately turn.

A. *Shall.* This word runs afoul of several basic principles of good drafting. The first is that a word used repeatedly in a given context is presumed to bear the same meaning throughout. (*Shall* commonly shifts its meaning even in midsentence.) The second principle is strongly allied with the first: when a word takes on too many senses and cannot be confined to one sense in a given document, it becomes useless to the drafter. (Depending on how finely you slice the semantic nuances, *shall* can bear five to eight senses even in a single document. *Black's Law Dictionary* (9th ed. 2009) lists five main senses.) The third principle has been recognized in the literature on legal drafting since the mid-19th century: good drafting generally ought to be in the present tense, not the future. (*Shall* is commonly used as a future-tense modal verb.) In fact, the selfsame quality in *shall*—the fact that it is a CHAMELEON-HUED WORD—causes it to violate each of those principles.

How can *shall* be so slippery, one may ask, when every lawyer knows that it denotes a mandatory action? Well, perhaps every lawyer has heard that it's mandatory, but very few consistently use it in that way. And as a result, courts in virtually every English-speaking jurisdiction have held—by necessity—that *shall* means *may* in some contexts, and vice versa. These holdings have been necessary primarily to give effect to slipshod drafting.

What, then, are the meanings of *shall*? The shadings are sometimes subtle, but the following examples illustrate the more common shades:

- "The court *shall* enter an order directing the county clerk to issue a tax deed." *Strong v. City of Peoria*, 930 N.E.2d 561, 564 (Ill. App. Ct. 2010). The word imposes a duty on the subject of the sentence. This is the most traditional and correct use of the term—the one that most drafters think they're using most of the time.
- "Service *shall* be made, whenever possible, upon the more responsible officers." *Imperial Towers, Inc. v. Dade Home Servs., Inc.*, 199 So.2d 518, 520–21 (Fla. Dist. Ct. App. 1967). The word imposes a duty on an unnamed person, but not on the subject of the sentence (*service*, an abstract thing).
- "Such time *shall* not be further extended except for cause shown." *In re Maurice*, 167 B.R. 114, 123 (Bankr. N.D. Ill. 1994). The word *shall* gives permission (as opposed to a duty), and *shall not* denies permission (i.e., it means "may not"). This problem *shall* being equivalent to *may* frequently appears also in the statutory phrase *No person shall.* Logically the correct construction is *No person may*, because the provision negates permission, not a duty. See (E).
- "The sender *shall* have fully complied with the requirement to send notice when the sender obtains electronic confirmation that the transmission has been received." *In re Nowling*, 279 B.R. 607, 610 (Bankr. S.D. Fla. 2002). The word acts as a future-tense modal verb (the full verb phrase being the future perfect). Many readers of this sentence, however, encounter a MISCUE in reading the sentence, which confusingly suggests that the sender has a duty.
- "The debtor *shall* be brought forthwith before the court that issued the order." 11 U.S.C.A. § 2005 (West 2005). The word seems at first to impose a duty on the debtor but actually imposes it on some unnamed actor.
- "Any objection to the proposed modification *shall* be filed and served on the debtor." *In re Smith*, 388 B.R. 603, 607 (Bankr. E.D. Pa. 2008). The word purports to impose a duty on parties to object to proposed modifications, though the decision to object is discretionary. This amounts to a conditional duty: a party that wants to object must file and serve the objections.
- "The prevailing party *shall* be reimbursed by the other for all reasonable costs." *Monarch Fire Protec. Dist. v. Freedom Consulting & Auditing Servs., Inc.*, 678 F.Supp.2d 927, 940 (E.D. Mo. 2009). The word expresses an entitlement, not a duty.
- "If any person *shall* curse or abuse anyone, or use vulgar, profane, or threatening or indecent language over any telephone in this state, he *shall* be guilty of a misdemeanor." Va. Code Ann. § 18.1-238 (1975). The first *shall* is the "false future"; it should simply be a present-tense verb (*curses or abuses*). The second *shall* is a true future, equivalent to *will*. But it would all be better in present tense. A suggested revision: *Any person who curses or abuses anyone—or uses vulgar, profane, or threatening or indecent language—over any telephone in this state is guilty of a misdemeanor.*

So much for the "Golden Rule" of legal drafting, which Reed Dickerson put this way: "The competent draftsman makes sure that each recurring word or term has been used consistently. He carefully avoids using the same word or term in more than one sense . . . . In brief, he always expresses the same idea in the same way and always expresses different ideas differently." *The Fundamentals of Legal Drafting* § 2.3.1, at 15–16 (2d ed. 1986).

One solution to the problem that *shall* poses is to restrict it to one sense. This solution—called the "American rule" because it is an approach followed by some careful American drafters—is to use *shall* only to mean "has a duty to." Under the American rule, only the first of the eight bulleted items above would be correct. The drafter might well say that a party *shall*

send notice, but not that notice *shall* be sent by the party. (If this "has-a-duty-to" sense is the drafter's convention, *must* serves when the subject of the sentence is an inanimate object.) This solution leads to much greater consistency than is generally found in American drafting.

Another solution is the "ABC rule," so called because, in the late 1980s, it was most strongly advocated by certain Australian, British, and Canadian drafters. The ABC rule holds that legal drafters cannot be trusted to use the word *shall* under any circumstances. Under this view, lawyers are not educable on the subject of *shall*, so the only solution is complete abstinence. As a result, the drafter must always choose a more appropriate word: *must*, *may*, *will*, *is entitled to*, or some other expression.

This view has much to be said for it. American lawyers and judges who try to restrict *shall* to the sense "has a duty to" find it difficult to apply the convention consistently. Indeed, few lawyers have the semantic acuity to identify correct and incorrect *shall*s even after a few hours of study. That being so, there can hardly be much hope of the profession's using *shall* consistently.

Small wonder, then, that the ABC rule has fast been gaining ground in the U.S. For example, the federal government's Style Subcommittee—part of the Standing Committee on Rules of Practice and Procedure—a subcommittee that since 1991 has worked on all amendments to the various sets of federal court rules, adopted the approach of disallowing *shall* in late 1992. (This came after a year of using *shall* only to impose a duty on the subject of the verb.) As a result, the rules have become sharper because the drafters are invariably forced into thinking more clearly and specifically about meaning.

There is, of course, a third approach: to allow *shall* its traditional promiscuity while pretending, as we have for centuries, that preserving its chastity is either hopeless or unimportant. Of course, that approach breeds litigation, as attested in more than 120 pages of small-type cases reported in *Words and Phrases*, all interpreting the word *shall*. As long as the mass of the profession remains unsensitized to the problems that *shall* causes, this appears to be the most likely course of inaction.

For more on the use of *must* as opposed to *shall* under the ABC rule, see (C). For further discussion of the general problem, see Dale E. Sutton, *Use of "Shall" in Statutes*, 4 John Marshall L.Q. 204 (1938–39); Robert Eagleson & Michèle Asprey, *Must We Continue with "Shall"?*, 63 Austl. L.J. 75 (1989); Robert Eagleson & Michèle Asprey, *We Must Abandon "Shall"*, 63 Austl. L.J. 726 (1989); Jim Main, *"Must" Versus "Shall"*, 63 Austl. L.J. 860 (1989); Michèle Asprey, *Plain Language for Lawyers* 149–52 (1991); Joseph Kimble, *The Many Misuses of "Shall"*, 3 Scribes J. Legal Writing 61 (1992); Michèle Asprey, *"Shall" Must Go*, 3 Scribes J. Legal Writing 79 (1992); Bryan A. Garner, *Legal Writing in Plain English* 105–07 (2001). For a contrary (and unpersuasive) point of view, see J.M. Bennett, *In Defence of "Shall"*, 63 Austl. L.J. 522 (1989); J.M. Bennett, *Final Observations on the Use of "Shall"*, 64 Austl. L.J. 168 (1990); Kenneth A. Adams, *A Manual of Style for Contract Drafting* 31–44 (2d ed. 2008).

A major cause of the litigation over *shall* is the relative strength of the word. That is, what are the consequences when somebody fails to honor a contractual or statutory duty? If it's a contractual duty, does a failure to honor a *shall*-provision always amount to a breach? Does it entitle the other party to rescind? If it's a statutory requirement, does a violation invalidate the proceedings? Or is it merely a directory provision? This unclarity about consequences is a continuing problem in any system that we adopt, however linguistically principled that system might be.

B. *Shall not.* Under the American rule (see (A)), this phrasing works as long as it means "has a duty not to." So "Thou *shalt not* steal" works, but not "The money *shall not* remain in the court's registry for more than 30 days." In the latter example, the proper choice is either *must not* or *may not*. See (F).

C. *Must.* Under the American rule (see (A)), this word means "is required to" and is used primarily when an inanimate object appears as subject of the clause. Hence, "Notice *must* be sent within 30 days."

Under the ABC rule (see (A)), *must* denotes all required actions, whether or not the subject of the clause performs the action of the verb—e.g.:

- "The employee *must* send notice within 30 days."
- "Notice *must* be sent within 30 days."

The advantage of *must* over *shall* is that its meaning is fastened down more tightly in any given sentence. Take, for example, a sentence from a widely used commercial lease: "The premises *shall* be used by the tenant for general office purposes and for no other purposes." Once one decides to follow the ABC rule, the dilemma in meaning becomes clear: are we mandating something with that sentence (use of the premises), or are we merely limiting the tenant's freedom to use the premises for other purposes? One might revise the sentence—removing the PASSIVE VOICE—in either of two ways: (1) *The tenant must use the premises for general office purposes*; or (2) *The tenant may use the premises only for general office purposes*. Which meaning is correct? Perhaps somebody should litigate the question so that we might all find out.

In private drafting—contracts as opposed to statutes, rules, and regulations—some drafters consider *must* inappropriately bossy. The word may strike the wrong tone particularly when both parties to a contract are

known quantities, such as two well-known corporations. It seems unlikely that, for example, an American car manufacturer and a Japanese car manufacturer engaging in a joint venture would want the word *must* to set forth their various responsibilities. Indeed, it seems odd to draft one's own contractual responsibilities with *must*: a lawyer for Ford Motor Company is unlikely to write *Ford must . . . Ford must . . . Ford must . . . .* The word *will* is probably the best solution here. See (D).

On the other hand, in a consumer contract or other adhesion contract, *must* is entirely appropriate for the party lacking the bargaining power. In the 1994 revision of its form residential lease—a document signed by a million Texas residents every year—the Texas Apartment Association changed the traditional *shall* to either *must* or *will*. The landlord became *we*, and the tenant became *you*, so that the form reads as follows: *You must . . . You must . . . You must . . . We will . . . We will . . . We will . . . .* Although one might think that the resulting tone would be irksome, none of the typical users on whom the form was tested expressed that thought. Indeed, the distinctive use of *must* for the tenant and *will* for the landlord is very much in keeping with the natural rhetoric of an adhesion contract. And it certainly informs the consumer precisely what his or her obligations are.

Must is a useful device to uncover client misunderstandings about obligations. Hence, some lawyers use it despite the danger of a bossy tone. And because present-tense drafting reduces the incidence of *must*, the *musts* that remain in a given document will—in many contexts—offend no one.

D. *Will.* This word, like any other, ought to bear a consistent meaning within any drafted document. Two of its possible meanings are discussed in (C): it may express one's own client's obligations in an adhesion contract (as in a residential lease), or it may express both parties' obligations when the relationship is a delicate one (as in a corporate joint venture).

There is still a third possibility: if a future tense really is needed, as to express a future contingency, then *will* is the word. But this circumstance is not common, since the best drafting should generally be in the present, not the future, tense. See LEGISLATIVE DRAFTING.

E. *May.* This term, very simply, means "has discretion to; is permitted to." It should be the only term used to denote these senses. One would never write *the licensee is free to sell as many units as it desires*, as opposed to *the licensee may sell as many units as it desires*.

Sometimes, *may* should replace *shall*—e.g.: "No person *shall* [read *may*] enter upon immovable property owned by another without express, legal, or implied authorization." La. Rev. Stat. 14:63(B) (2009). That sentence does not negate a duty; it negates permission. This formulation is a pervasive problem. See (A) & LEGISLATIVE DRAFTING.

F. *Must not; may not.* These two are nearly synonymous. *Must not* = is required not to. *May not* = is not permitted to. For those following the ABC rule (see (A)), the phrase *must not* is usually the more appropriate wording.

Some drafters avoid *may not* because it is sometimes ambiguous—it can mean either "is not permitted to" or (especially in AmE) "might not." For example, an application to a law school states: "This office *may not* consider applications received after April 30." Some readers would take that to mean that the office has discretion whether to consider applications received after April 30, whereas others would infer that some rule or regulation prohibits the office from doing so.

G. *Is entitled to.* This is the wording for expressing an entitlement. It means "has a right to." E.g.: "Guardians ad litem *shall* [read *are entitled to*] be reimbursed for the mileage expenses incurred in representing their client." N.H. Sup. Ct. Rule 48-A (2008). See (A).

H. Using a Consistent Glossary. A disciplined drafter uses words of authority consistently. This involves, in part, restricting the vocabulary by which one sets forth duties, rights, prohibitions, and entitlements. The drafter who proliferates ways of wording duties, for example, flirts with the danger that somebody interpreting the document—most disastrously, in court—will presume that a difference in wording imports a difference in meaning.

Yet drafted documents are commonly riddled with inconsistencies. It is not uncommon, in American contracts, to find the following variations in paragraph after paragraph:

- "The employee *shall follow . . . .*"
- "The employee *agrees to follow . . . .*"
- "The employee *is to follow . . . .*"
- "The employee *must follow . . . .*"
- "The employee *understands her duty to follow . . . .*"
- "The employee *will follow . . . .*"
- "*It is the responsibility* of the employee *to follow . . . .*"

The better practice is this: after the lead-in (which states, "The parties therefore agree as follows: . . . ."), use only words of authority. An adherent of the American rule would make each of the above items *the employee shall follow*; an adherent of the ABC rule would make each one *the employee must follow*.

The careful drafter might consider adopting either of the following glossaries, preferably the latter:

American Rule		
shall	=	has a duty to
must	=	is required to [used for all requirements that are not duties imposed on the subject of the clause]
may not	=	is not permitted to; is disallowed from
must not	=	is required not to; is disallowed from; is not permitted to
may	=	has discretion to; is permitted to
is entitled to	=	has a right to
will	=	(expresses a future contingency)
should	=	(denotes a directory provision)

ABC Rule (Preferred)

must	=	is required to
must not	=	is required not to; is disallowed from; is not permitted to
may	=	has discretion to; is permitted to
may not	=	is not permitted to; is disallowed from
is entitled to	=	has a right to
will	=	[one of the following:] a. expresses a future contingency b. in an adhesion contract, expresses one's own client's obligations c. where the relationship is a delicate one, expresses both parties' obligations
should	=	denotes a directory provision

words of conveyance are the words—usually DOUBLETS, TRIPLETS, AND SYNONYM-STRINGS—that effect a transfer of ownership in a deed. In a warranty deed, for example, the standard words of conveyance are *convey and warrant* or *grant, bargain, and sell*; in a quitclaim deed, the words are usually *remise, release, and forever quitclaim* or *convey and quitclaim*.

words of purchase; words of limitation. In a grant or conveyance of a freehold estate, *words of purchase* designate the persons who are to receive the grant, and *words of limitation* describe the extent or quality of the estate. E.g.: "In a transfer 'to A and his heirs,' the words 'and his heirs' are now *words of limitation* (words denoting the duration of the estate), not *words of purchase* (words denoting who is getting the estate). The name 'A' is the only *word of purchase*; A is the only person who is getting an estate." Thomas F. Bergin & Paul G. Haskell, *Preface to Estates in Land and Future Interests* 27 (2d ed. 1984).

wordy does not mean "sesquipedalian," as many seem to suppose; it means, rather, "verbose; prolix."

workaholic. See -AHOLIC & MORPHOLOGICAL DEFORMITIES.

work an ademption. See **adeem & ademption.**

worker. See **workman.**

worker's comp. See **comp.**

workers' compensation; workmen's compensation. These words contain a plural possessive, hence *workers'* and *workmen's*, not *worker's* and *workman's*. The former phrase is becoming more and more common, doubtless because of a sensitivity to the SEXISM of the other.

workforce; workload. Each is one word.

working man. See **workman.**

workload. See **workforce.**

workman; workingman. Because of the growing awareness of sexism, it is better to use *worker* rather than either of these words. See SEXISM (B).

workplace. One word. Cf. **worksite.**

workproduct is increasingly spelled as one word. The dictionaries still record the term as two words. But in legal contexts the trend, which is wholly salutary, is to hyphenate it or make it one word. E.g.: "To what extent is the Court's equal-protection *workproduct* based on a determinate political-moral principle?" Michael J. Perry, *Modern Equal Protection*, 79 Colum. L. Rev. 1023, 1024 (1979). Cf. **decision-making & policymaking.**

worksite. One word. Cf. **jobsite.**

World Court; International Court of Justice in The Hague. The second is the official name, the former the popular name, for the tribunal that adjudicates international disputes between nations. The principal judicial organ of the U.N., it is the successor to the Permanent Court of International Justice, set up in 1920 under the League of Nations.

WORLD COURT PLEADINGS. The pleadings in an action before the World Court are as follows: (1) a *memorial* by the applicant state; (2) a *countermemorial* by the respondent state; (3) a *reply* by the applicant state; and (4) a *rejoinder* by the respondent state. Cf. COMMON-LAW PLEADINGS & EQUITY PLEADINGS.

worse comes to worst. See **worst comes to worst.**

worshiped; worshipped; worshiping; worshipping; worshiper; worshipper. The *-p-* spellings are the preferred forms in AmE; the *-pp-* forms appear in BrE. See DOUBLING OF FINAL CONSONANTS.

worst comes to worst; worse comes to worst. The traditional idiom, evidenced in the *OED* consistently from the 16th century, is *worst comes to (the) worst* (= [if] things turn out as badly as possible). But the more modern and more logical idiom, *worse comes to worst*—with its progression from comparative to superlative—is equally common in legal sources and is the better choice. E.g.:

- "The total cost to the customer if *worse comes to worst* will be at most $100 (and likely much less, after discounting for the time value of money)." Ken Heyer, *Predicting the Competitive Effects of Mergers by Listening to Customers*, 74 Antitrust L.J. 87, 103 (2007).
- "And, if *worse comes to worst*, in the end who really knows what is truth?" Andrew L. Kaufman & David B. Wilkins, *Problems in Professional Responsibility for a Changing Profession* 155 (2009).

SEE ILLOGIC.

worth. When this word is used with amounts, the preceding term denoting the amount should be possessive. E.g.:

Federal Aviation Administration

What's the only word that means mandatory? Here's what law and policy say about "shall, will, may and must."

We call "must" and "must not" words of obligation. "Must" is the only word that imposes a legal obligation on your readers to tell them something is mandatory. Also, "must not" are the only words you can use to say something is prohibited. Who says so and why?

Nearly every jurisdiction has held that the word "shall" is confusing because it can also mean "may, will or must." Legal reference books like the *Federal Rules of Civil Procedure* no longer use the word "shall." Even the Supreme Court ruled that when the word "shall" appears in statutes, it means "may."

Bryan Garner, the legal writing scholar and editor of *Black's Law Dictionary* wrote that "In most legal instruments, *shall* violates the presumption of consistency…which is why *shall* is among the most heavily litigated words in the English language."

Those are some of the reasons why these documents compel us to use the word "must" when we mean "mandatory:"

- The Federal Register Document Drafting Handbook (Section 3) (http://www.archives.gov/federal-register/write/legal-docs/clear-writing.html) states "Use 'must' instead of 'shall' to impose a legal obligation on your reader."

- The Federal Plain Language Guidelines (page 25) (http://www.plainlanguage.gov/howto/guidelines/bigdoc/fullbigdoc.pdf) (PDF) referred to in the Federal Plain Writing Act of 2010, compel the FAA and every federal department to "use 'must,' not 'shall'" to indicate requirements.

- FAA Plain Language Writing Order 1000.36, (page 4) (www.faa.gov/documentlibrary/media/order/branding_writing/order1000_36.pdf) (PDF) says avoid the word "shall" and use "must" to impose requirements, including contracts.

Until recently, law schools taught attorneys that "shall" means "must." That's why many attorneys and executives think "shall" means "must." It's not their fault. The *Federal Plain Writing Act* and the *Federal Plain Language Guidelines* only appeared in 2010. And the fact is, even though "must" has come to be the only clear, valid way to express "mandatory," most parts of the Code of Federal Regulations (CFRs) that govern federal departments still use the word "shall" for that purpose.

With time, laws evolve to reflect new knowledge and standards. During this transition, "must" remains the safe, enlightened choice not only because it imposes clarity on the concept of obligation, but also because it does not contradict any instance of "shall" in the CFRs." Right now, federal departments go through their documents to replace all the "shalls" with "must." It's a big hassle. If you look at page A-2, section q (www.faa.gov/documentlibrary/media/order/nd/1000.37.pdf) (PDF) of this link, it shows a sample of how a typical federal order describes this shift from "shall" to "must." Don't go through this tedious process. If you mean mandatory, write "must." If you mean prohibited, write "must not."

What should you say if someone tells you "shall is a perfectly good word?" Always *agree* with them because they're correct! But in your next breath, be sure to say "yes, shall is a perfectly good word, but it's *not* a perfectly good word of obligation."

If you've got comments or questions about this, please contact:

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PRODUCTION OF DOCUMENTS AND THINGS AND ENTERING PROPERTY FOR INSPECTION AND OTHER PURPOSES

RULE 43

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

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

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

B Procedure.

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

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

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

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

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

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

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

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

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

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

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

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

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

E Electronically stored information ("ESI").

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

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

Council on Court Procedures—Discovery Committee Notes for Meeting 10-11-17 (via conference call)

Present: J. Bailey, Ken Crowley, Jay Beattie, and

Rule	Notes	Suggestion	Suggested by	Committee Notes
36 B(1) And (3)	E-Discovery	Separate and narrower standard for E-Discovery. Issue: Attorneys should not be able to ask for 10,000 emails/documents shortly before trial.	Vanessa Nordyke Gordon Hanna	• "Proportionality Rule". FRCP 26(b) • Discussed last session but defeated by predominantly plaintiff bar • Believe appropriate to see if plaintiff bar has any suggested language that would not be so broad as to garner major objections but would still address the difficulties parties are having complying with some e-file discovery requests. • Some discussion that current ORCP 36 B.(2)(b) and 36 C. already allows for proportionality but not consistent application among the bench. • Would comment or suggestion somewhere in rules be helpful to alert judges to get more consistent application?
36 B(1) And (3); 47 E	Pre-Trial discovery of expert and relevant materials within experts control	• Rules should be amended to allow discovery of experts similar to FRCP 26. • Interrogatories	Andy McStay John Bennett	• Federal Light: Require discovery 10 days before trial to include name and brief description of area of expertise and testimony ("Disclosure statement"). This could be helpful to alert court and/or parties for 104 hearings • Interrogatories: Ask question about and to experts. Would obviously require disclosure of experts earlier than before trial. • Dismiss 47 E certificate and require actual facts to be presented at SJM as to what expert will testify to which creates factual issue. Benefit might be to take away some gamesmanship being used to avoid SJM dismissals.

45 F	RFAs	• Rule should not limit the number of RFP/RFA requests to 30. • Should require "word" list along with the RFP for easier responses.	John Dunbar	• Not sure if an issue needs to be addressed. Could it be part of UTCR, especially in complex case designations. • If an issue, perhaps the better place to be addressed is with the UTCR committee, similar to Federal LR
46 A(2)	Council amended contra effective 1/1/16	"Velure Rule" requiring verbatim quote of a discovery request does not work. Allow attachments if disputed provision is lengthy	Wm. Randolph Turnbow	• Didn't see any issue that needed to be dealt with. Likely a rule for specific judge.

Oregon Council on Court Procedure

Fictitious Names Committee

October 9, 2017 – Meeting Report

Members Attended: Ken Crowley (Chair), Meredith Holley, and Hon. Susie Norby.

The meeting was held by phone conference, and began with a discussion about the purpose for the committee. Judge Hargreaves had written to Chief Justice Balmer about his concern that some Oregon courts were allowing the use of fictitious names in pleadings without in legal authority to do so. The letter specifically reference supplemental local rules in Multnomah and Clackamas Counties. The letter was forwarded to the Council and at our September meeting.

As a result, the Council formed a committee to look into the practice of using fictitious names, consider the legal authority, evaluate whether ORCPs are impacted, or should address issue in any particular way.

Our specific tasks before the next meeting are:

(1) Look into how wide spread the practice of using fictitious names has become. I'm can send an inquiry to my DOJ colleagues. Judge Norby mentioned bringing the subject up at the Judicial Conference. And Meredith could survey the OTLA list serve.
(2) Research the Clackamas County and Multnomah County SLRs, what were their origins, how are they used, how often are they relied upon?

We also had a good deal of discussion at the meeting about the Constitutionality of using fictitious names, the balance between privacy interests and open courts. Whether this kind of changes would fall within the Council's authority. Substance v. Procedure.

After the meeting, there was a good deal of email follow up with examples of cases on the subject and even some discussion about proposed ORCP rule changes.

But, the main focus for our next meeting will be reviewing or findings and beginning the discussion about whether those findings suggests that action should be considered by the Council.

CCP Summary – Rule 7 Committee Mtg
October 9, 2017

Members Attending: Judge Norby, Judge Wolf, Derek Snelling, Prof. Mark Peterson

Absent: Deanna Wray

Summary:

The Committee reviewed proposals from Aaron Crowe, Jay Bodzin, and Holly Rudolph.

A) Aaron Crowe Proposal – Concern that Summonses are being served with only /s/ rather than an actual signature of an attorney or party authorized to bring the suit. Suggested that the word: "issued" be added to Rule 7(A) between the words "original" and "summons" to eliminate loopholes that may be allowing unauthorized staff at law firms to both efile pleadings and complete summonses.

Committee Discussion – The Committee appreciated Mr. Crowe's perspective, but disagreed with the accuracy and propriety of the proposed change. Mark noted that the Rule never required a "service" summons to have an original signature, only a "true copy" signature. Regarding the concern over whether unauthorized staff use the /s/ to circumvent Rule requirements that only authorized people initiate lawsuits, the Committee believes that is not something an ORCP amendment can meaningfully address – it would be better dealt with as an attorney education issue. The Committee agreed not to pursue this proposal further.

B) Jay Bodzin Proposal – Encourages embracing E-mail as a viable method of alternative service and creating a particularized process that guards against pitfalls in its use and ensure that it is reasonably calculated to result in actual notice.

Committee Discussion – The Committee members acknowledged our initial reluctance to assimilate this proposal into Rule 7, but three members found the specific suggested language made by Mr. Bodzin to be persuasive, though not acceptable as written. We conversed about the frequency with which email is used as an Alternative Method of Service already, and the legitimate concern that it's legitimization through a Rule amendment could ensure that it is used responsibly. We also acknowledged that e-mails can be "slippery" and are easily lost, not read, accidentally deleted, sent to junk file. However, that point cuts both ways. Given that e-mail is an alternative form of service often used, it seems responsible to detail a methodology to forestall common problems. The Committee agreed that some details in the proposed language were helpful, while others were confusing. Mark agreed to draft alternative language to bring to our next meeting, so that we can continue the discussion about whether this would be a necessary and beneficial amendment to try to adopt.

C) Holly Rudolph Proposals – (1) Clarify whether a qualified server must do follow-up mailing when alternative service is used, or whether anyone (including an unrepresented party) can do the follow-up mailing after a qualified server does the initial mailing. (2) Update the language in Rule 7F to change the word "Certificate" to the word "Declaration." Update the term "Affidavit" to "Declaration" elsewhere in Rule. (3) Update the presumptive alternative service method of publication to either delete it, or to make it not presumptive, or to adjust how to select the appropriate form or location of the publication that can be used.

Committee Discussion – (1) Mark explained his belief that the Rules have always required follow-up mailing to be done by a qualified server, but Judge Wolf and Judge Norby confirmed that they have not interpreted the Rule that way. A robust discussion ensued. Mark's explanation included a concern that if a person who is not qualified to do service does the follow-up, there is too much risk that it will be done improperly. He believes that "*caused* to be served" must mean something other than "serve." Mark suggested that some attorney education and better instructions for pro se litigants may be in order rather than a looser interpretation, or clarification. (Mark also noted that §G should save the plaintiff where the objection to service is merely technical. In counterpoint, Judge Wolf suggested that a plaintiff and/or their attorney may do the follow up service under the Rule, and that is common practice. Though some courts may disagree, Judge Wolf thought it would surprise many attorneys if they were told they can't do the follow up service. He believes that the exception to attorneys serving by mail contained in ORCP 7E only applies to mail service under D(2)(d) and does not apply to follow up service. So, if self-represented parties can't do follow up service neither can attorneys. The Committee did not reach consensus on which interpretation is correct and justified, and that consensus must be reached before a clarification may be considered. All agreed that the current language of §E is inadequate. Discussion will be continued at the next meeting, and Mark will contact the Sheriff's Association to inquire about their position on Sheriffs doing follow-up mailings.

(2) The Committee agreed that changing "Certificate" to "Declaration" in ORCP 7F would be more confusing than helpful. It is unnecessary to update the term "Affidavit" because that term already correlates to "Declaration" by definition.

(3) The Committee decided to wait to fully discuss the publication questions so that Deanna Wray can be involved in that discussion.

HOMEWORK ASSIGNMENTS

1. Mark will draft a new suggested section on using e-mail as an alternative service method.
2. Mark will contact the Sherriff's Association to collect information on the reported problem with Sheriffs' willingness to do follow-up mailings after alternative service.
3. Judge Norby will contact Mr. Crowe to explain the Committee's decision on his proposal.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. A motion or answer to the complaint or [*third party*] **third-party** complaint [*and the reply to a counterclaim or answer to a cross-claim*] shall be filed with the clerk [*by*] **within** the time required by Rule 7 C(2) to appear and defend. **If the summons is served by publication, the defendant shall appear and defend within 30 days of the date of first publication. A reply to a counterclaim or an answer to a cross-claim shall be filed within 30 days from the date of service on the party in any manner other than publication.** Any other [*motion or*] responsive pleading **or motion directed against a pleading** shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.

B Pleading after motion.

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

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

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

D Enlarging time to plead or do other act. The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or allow any other pleading or motion after the time limited by the procedural rules, or by an order enlarge such time.

Council on Court Procedures
October 14, 2017, Meeting
Appendix G-1

Shari Nilsson <nilsson@lclark.edu>

Fwd: OSB Procedure & Practice Committee -- procedures for recovery of attorney fees/ORCP 68

Mark Peterson <mpeterso@lclark.edu> Wed, Oct 11, 2017 at 1:54 PM
To: Shari Nilsson <nilsson@lclark.edu>

Sent from my iPhone

Begin forwarded message:

From: John Bachofner <john.bachofner@jordanramis.com>
Date: October 4, 2017 at 3:07:38 PM PDT
To: "Jonathan M. Radmacher" <jonathanr@mcewengisvold.com>
Cc: Ben Cox <ben@coxlawpdx.com>, Sarah Hackbart <SHackbart@osbar.org>, "Amanda Thorpe (amanda.thorpe@southernoregonlawyer.com)" <amanda.thorpe@southernoregonlawyer.com>, "Erin Galli (erin.k.galli@doj.state.or.us)" <erin.k.galli@doj.state.or.us>, "Kristian Spencer Roggendorf (kr@roggendorf-law.com)" <kr@roggendorf-law.com>, "Marilyn Litzenberger (marilyn.e.litzenberger@ojd.state.or.us)" <marilyn.e.litzenberger@ojd.state.or.us>, Matt Shields <mshields@osbar.org>, "Melissa Bobadilla (melissa@bobadillamlaw.com)" <melissa@bobadillamlaw.com>, "Nathan Robert Morales (nathan.morales@harrang.com)" <nathan.morales@harrang.com>, "Rachele Selvig (rselvig@thecaublefirm.com)" <rselvig@thecaublefirm.com>, "Ryan Cresswell Kaiser (ryan@brokentoplaw.com)" <ryan@brokentoplaw.com>, "Samantha Malloy (smalloy@samanthadmalloy.com)" <smalloy@samanthadmalloy.com>, "Sarah Mae Kutil (smkutil@bpa.gov)" <smkutil@bpa.gov>, "Susan Pitchford (sdp@chernofflaw.com)" <sdp@chernofflaw.com>, "W Greg Lockwood (wglockwood@gordonrees.com)" <wglockwood@gordonrees.com>, "William Boaz (william@boazlaw.com)" <william@boazlaw.com>, Mark Peterson <mpeterso@lclark.edu>, Robert Keating <rkeating@keatingjones.com>
Subject: RE: OSB Procedure & Practice Committee -- procedures for recovery of attorney fees/ORCP 68

Jonathan,

Interesting idea. If it would involve ORCP 68, then it is within the realm of the Council on Court Procedures. If am copying Mark Peterson and Robert Keating on this so it is on the Council's radar as I just rolled off the Council.

Thanks for participating.

JOHN R. BACHOFNER | Shareholder

Jordan Ramis PC | Attorneys at Law

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From: Jonathan M. Radmacher [mailto:jonathanr@mcewengisvold.com]
Sent: Wednesday, October 04, 2017 1:21 PM
To: Ben Cox; Sarah Hackbart; Amanda Thorpe (amanda.thorpe@southernoregonlawyer.com); Erin Galli (erin.k.galli@doj.state.or.us); John Bachofner; Kristian Spencer Roggendorf (kr@roggendorf-law.com); Marilyn Litzenberger (marilyn.e.litzenberger@ojd.state.or.us); Matt Shields; Melissa Bobadilla (melissa@bobadillamlaw.com); Nathan Robert Morales (nathan.morales@harrang.com); Rachele Selvig (rselvig@thecaublefirm.com); Ryan Cresswell Kaiser (ryan@brokentoplaw.com); Samantha Malloy (smalloy@samanthadmalloy.com); Sarah Mae Kutil (smkutil@bpa.gov); Susan Pitchford (sdp@chernofflaw.com); W Greg Lockwood (wglockwood@gordonrees.com); William Boaz (william@boazlaw.com)
Subject: OSB Procedure & Practice Committee -- procedures for recovery of attorney fees/ORCP 68

Counsel:

I am curious if anyone else has thought about and/or believes it would be a good idea to have additions to ORCP 68 that more specifically address issues that arise in many attorney fee disputes. Given that the dollar figures at issue can often eclipse the amount of damages sought by the parties on the substantive claims, the absence of any guidance about due process associated with attorney fee awards is a little puzzling to me. Some questions would include: the nature and scope of discovery (I've been told by one longstanding judge that her experience has been that judges from a civil background would allow some discovery, but judges from a criminal background would not); procedures related to the presentation of evidence; guidelines about the methods the court should use to assess issues (essentially codifying case law, perhaps including federal cases that more exhaustively address block billing, privilege, etc., or maybe only flushing out *McCarthy* factors). Ideally, a more defined process might help practitioners better predict how a court might rule, and might then contribute to resolution of disputes.

I have not started to research whether other states have ventured down this path, and was mainly curious if anyone thought it was a topic worthy of discussion.

Thanks.

Jonathan Radmacher

Jonathan M. Radmacher | Attorney at Law | Partner

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Oregon Council on Court Procedure

Rule 79 Workgroup

October 5, 2017 – Meeting Report

Members Attended: Ken Crowley (Chair), Jennifer Gates, Hon. David Leith, Prof. Mark Peterson, Hon. Leslie Roberts, and Hon. John Wolf.

The meeting was held by phone conference over the noon hour, and began with a discussion about the purpose for the workgroup. The Council Survey received comments about Rule 79, which provides procedures for TROs and Preliminary Injunctions. The comments included things like: needs more clarity, and standardization. Professor Peterson indicated that it had been a long time since Rule 79 had been reviewed. Judge Leith indicated that many practitioners tend to look to the Federal rules for guidance. But, Judge Roberts said the Oregon rule does not necessarily align with the Federal rule.

So, the first questions for the workgroup is to get an idea about what's going on in practice, and whether there is anything that needs to be done within the ORCPs to make thing run more smoothly.

I reported on my conversation with Renee Stineman, the DOJ Attorney in Charge, for Special Litigation, which handles a number of TRO/preliminary injunction matters at DOJ. She indicated a concern about TROs coming easily, and then there can be a lack of timely follow up for preliminary injunction hearings, which raises due process concerns. However, workgroup members pointed out that the current rule spells out timelines, and expressed skepticism about whether changes would need to be made to provide greater protection.

In addition, we talked about comparisons between the Federal rule and Oregon rule, and about whether the Oregon rule should have standards built into the rule.

The workgroup wants more information, so we discussed reaching out to segments within the bar that do TRO/preliminary injunction work, and having them participate in our meetings to give firsthand input. I will be recruiting Renee Stineman, or someone else from SLU, as well as someone from DOJ Civil Enforcement. Mark Peterson is going to reachout to the Consumer law Section, other potential guests also suggested, included Charlie Hinkle, John Dunbar, and others.