MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 11, 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
Troy S. Bundy*
Kenneth C. Crowley
Jennifer Gates
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
Hon. Douglas L. Tookey
Hon. John A. Wolf*

Members Absent:

Hon. R. Curtis Conover
Travis Eiva
Hon. Timothy C. Gerking
Shenoa L. Payne
Derek D. Snelling
Deanna L. Wray

Guests:

John Bachofner, Jordan Ramis PC
Matt Shields, Oregon State Bar
Margurite Weeks, HKM Employment Law

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 Moved to Publication Docket this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 16 A ORCP 20 H ORCP 22 ORCP 26 A ORCP 27 ORCP 68 ORCP 79	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 68 ORCP 71	ORCP 43	

I. Call to Order

Ms. Gates called the meeting to order at 9:33 a.m.

II. Administrative Matters

A. Introductions

Prof. Peterson introduced Margurite Weeks, the Council's almost-appointed new member. He explained that there have been unprecedented delays in getting new members appointed this biennium and that the Supreme Court would not be able to vote on Ms. Weeks' appointment until its upcoming session on November 16, 2017.

Ms. Weeks explained that she is an executive assistant and legal assistant at HKM Employment Law. She stated that she writes all of the policy and procedure for their office and spends a lot of time reading the ORCP so she is very interested in the rules. She noted that not many people are as interested in the rules as she is so, when she learned from Prof. Peterson that there was an opening for the public member role on the Council, she applied eagerly. The Council welcomed Ms. Weeks and introductions were made around the table and by members on the telephone.

B. Approval of October 14, 2017, Minutes

Ms. Gates asked whether any members had corrections or other suggestions for changes to the October 14, 2017, minutes (Appendix A). Hearing none, she stated that she would entertain a motion to approve the minutes. Judge Roberts made a motion to approve the October 14, 2017, minutes. Judge Bailey seconded the motion, which was approved unanimously without objection.

C. Contacting Legislators

Prof. Peterson noted that Ms. Nilsson had sent an e-mail through Sign Up Genius asking members to sign up to contact legislators throughout the biennium and that the current list of those signed up was provided to Council members prior to the meeting (Appendix B). He asked those who had not yet signed up to do so. He explained that, several biennia ago, an enterprising Council member had devised the idea of letting the Legislature know what benefit the Council provides and keeping legislators informed so that they would not be surprised when they receive the Council's rules promulgation at the end of the biennium. He stated that, at one point in time, the Council's funding was in jeopardy due to a state budget crisis and concern by certain legislators related to an amendment to the class action rule, and these periodic missives to legislators were a way of helping them to understand the Council's role in the court system.

Prof. Peterson stated that the process is informal and that he typically prepares a periodic general statement that can be modified and sent as an e-mail or letter. He stated that the statement will be written with an eye to pointing out that the Council is trying to make the legal system work better. He noted that there are not a lot of lawyers in the Legislature, and even fewer former litigators, and that the Council's work may not be obvious to the legislators generally. He stated that it has been at least two biennia since the Council's Legislative Advisory Committee has been called before the Legislature to explain any of its amendments, and that the Legislature has not recently held any hearings regarding amendments nor made any changes to the Council's promulgations. This is an indication that the Legislature is aware that the Council is doing good work. This is a precedent we want to continue.

Prof. Peterson asked that Council members choose to communicate with legislators who represent the district in which they reside or where their office is located, or a legislator with whom they are acquainted. He stated that, if another Council member has picked a legislator that a Council member knows personally, it is all right to ask to trade. Even if we are unable to reach all legislators, it is most important to reach the leaders of key committees. Judge Tookey asked about the time frame for contacts. Prof. Peterson replied that he would attempt to get a draft to Council members as soon as possible.

III. Old Business

A. Committee Reports

1. Discovery Committee

Mr. Crowley stated that the committee had not met since the last Council meeting but that they would be meeting again soon and that he and Ms. Rudnick had been working on draft language regarding factors for judges to consider when ruling on a motion to compel or motion for a protective order regarding discovery.

2. Fictitious Names Committee

Mr. Crowley reported that the committee had a fairly productive meeting (Appendix C) that began by going over the tasks they set had out in the previous committee meeting: looking into how widespread the use of fictitious names is in Oregon practice and looking at the Supplemental Local Rules (SLR) in Multnomah and Clackamas counties that allow the practice. He stated that he had sent an e-mail to his colleagues in the Department of Justice (DOJ) to find out their experience with plaintiffs filing under fictitious names and that he did not get any meaningful feedback, which leads him to believe that it is not a big issue within the DOJ. He pointed out that the DOJ does encounter the issue with children in the

foster care system, which is appropriate under Rule 26, and that he is comfortable with that. Mr. Crowley stated that Judge Norby had investigated the two SLR in question and discovered that Clackamas County's rule has not been used a lot beyond its creation but that Multnomah County's rule is being used about 15 times a year and that it is valued by that county's presiding judge.

Mr. Crowley reminded the Council that Judge James Hargreaves had raised the question of where the authority comes from for using fictitious names in litigation. He observed that there are pretty specific limitations on using fictitious names in the ORCP at this point in Rule 26 and Rule 20 H where, if you do not know the name of the party, once you find out the name of the party you are supposed to include that in the pleadings. He stated that Ms. Holley had gathered information from OTLA members and learned of several specific instances where fictitious names have been used. Ms. Holley noted that the main concern that OTLA would have is when adults bring a claim based on childhood sexual abuse, for example, and that has been addressed in the courts by common law in other jurisdictions but not by Oregon common law. She stated that one lawyer with whom she corresponded is dealing with people who were prostituted as teenagers but are now bringing claims as adults. Other examples of stigmatizing or embarrassing cases could be: a case where someone got a sexually transmitted disease in some kind of negligent or intentional way; a person working with a victim rights organization who might be concerned that people's knowledge of her own experience would enter into her ability to help those victims and that she would not be able to continue with her job if she proceeded under her own name; and people in small towns raising cases against major institutions in that community.

Mr. Crowley acknowledged that there are legitimate individual privacy issues bumping up against the value of open courts. He stated that this tension is not addressed fully within the ORCP and the committee felt that it should come back to the Council for more guidance on its next steps.

Judge Norby explained that ORCP 26 A requires lawsuits to be brought under the name of the real party in interest, ORCP 16 A requires that parties' names must be in case captions, and ORCP 20 H requires parties' names used in the caption must be their true names as soon as their true names are known. She stated that there is limited legal authority to authorize a deviation, but all of that authority is for someone whose true name is unknown. There is no black letter law regarding the use of fictitious names in a case caption for someone whose name is known. She noted that courts have nevertheless been allowing the practice, including the Court of Appeals and the Supreme Court. Judge Hargreaves' letter brought attention to the fact that there are now different practices that are changing within different jurisdictions in Oregon.

Judge Norby stated that she had spoken with Multnomah County Presiding Judge Nan Waller, who is very committed to Multnomah County's current SLR, and discovered that Multnomah County's rule had been used 15 times in the last year, always in situations where a privacy interest was being protected. Judge Norby noted that Judge Waller confirmed that Multnomah County had trained its lawyers, prior to the implementation of the Odyssey online case filing system, to get a court order to allow them to file under a fictitious name prior to filing the case. She observed, however, that the Odyssey system will accept names without knowing they are fictitious and that there is no way to compel lawyers to follow this practice before filing. It may therefore be difficult to implement the practice of a pre-filing motion and order in jurisdictions where that procedure had not already been in place prior to Odyssey. The existence of an SLR on this subject in Multnomah County indicates a need for procedural guidance about the use of this practice statewide, for consistency throughout all jurisdictions, and to ensure that the practice is predictable and limited. In the absence of a statewide rule governing this currently unauthorized practice, the risk grows that it may be inconsistently implemented, unpredictably applied, and expanded beyond circumstances of clear necessity. The question for the Council is whether ORCP 20 H should be expanded to create conservative parameters for the use of fictitious names in case captions for parties whose true names are known. Inaction on this question would allow the informal practice to continue without procedural safeguards, legal authorization, or efforts at consistency among jurisdictions.

Ms. Holley observed that the main case that Judge Hargreaves raised has fictitious names on both the plaintiff and defense side, so it is mainly to protect individuals and is not of particular application to a plaintiff or defendant. Mr. Bachofner opined that it is self-evident that the Council should address the issue: if people are filing under fictitious names, the Council should amend the rules in some way. Ms. Rudnick agreed that the Council should address the issue in one way or another – either develop parameters for the process or say that it is not allowed. She stated that she has no issue with allowing people to file cases under fictitious names under appropriate circumstances to addresses legitimate concerns about privacy; however, she observed that there is also a constitutional issue related to Article 1, Section 10 of Oregon's Constitution. Ms. Rudnick stated that many trial court judges and some Court of Appeals opinions have not allowed filing under seal in light of that provision, saying it is unconstitutional. She observed that, if the Council is going to go down this road, it needs to be prepared to address this constitutionality question and tailor any rule change to avoid that concern. Mr. Bachofner wondered is the issue could be resolved by using language such as, "by good cause shown." Ms. Holley noted that there is case law that gives guidance on this issue. Ms. Rudnick opined that it can be done because there are cases where documents are allowed to be sealed from time to time. She agreed that any rule

change could be postured in such a way to be mindful of constitutional limitations.

Judge Norby stated that another question is how to enforce a judgment when a lawsuit is filed using a fictitious names. Ms. Holley stated that her understanding is that the names are in the judgment as debtor and creditor names but not in the caption. Judge Hill stated that not only is it bizarre but it has no effect. Judge Bailey stated that the court knows who the parties are but it is confidential. Judge Roberts noted that it is of concern to title companies and other entities that deal with judgments, not to the courts. She stated that there has always been a difference between the degree of confidentiality that can be reserved in proceedings involving minors and those involving adults, and that is something that needs to be considered. She stated that the constitutional problem is huge and needs serious consideration.

Mr. Anderson stated that he is pretty sure that fictitious names were used many times even dating back to colonial times. He stated that the Federalist Papers were written with fictitious names and important cases such as *Roe v. Wade* were litigated in that manner as well. He stated that it is hard to imagine constitutional problems if the history of filing under fictitious names goes back to colonial times. Judge Roberts noted that it is an issue under Oregon's constitution. Mr. Beattie observed that it is a legitimate concern if a defendant is being sued by a "frequent flier": someone who has sued already for the same damages. Ms. Holley observed that, typically, the parties know each others' identities. Mr. Beattie stated that he has no way of knowing whether "Party AB" has sued 30 times before as "Party CD," "Party EF," etc. Ms. Gates wondered how you would know that about anyone. Mr. Beattie stated that a party can usually look up a person's given name and see if they have filed suits in the past but, if parties are reporting civil suits under various names, there would be no way of knowing that.

Judge Norby stated that she did not think anyone was anticipating widespread use or broadening the practice but, rather, creating consistency in recognition that it happens from time to time. Mr. Beattie stated that is it now happening ad hoc. Judge Roberts again pointed out that there is an existing rule against it. Prof. Peterson noted that SLR in two counties state that one can. Judge Roberts observed that the ORCP would govern. Mr. Bundy asked whether the individual would petition the court to allow them to file as a fictitious party before they could file the complaint, or whether they would file the complaint and then petition the court to allow the complaint to be entered. He stated that, from the defense standpoint, he should have the ability to challenge this, because the filing of the suit tarnishes the reputation of the defendant just as much as it provides a stigma to the plaintiff. He took issue with the scenario being approached as if the defendant is guilty and the need is to protect the plaintiff. Judge Norby stated that

it was not the intention to present it that way but, rather, just to give historical examples of how it is already happening despite the absence of law. Mr. Bundy stated that the issue has come up in his cases before and he thinks the cases were originally filed under fictitious names and that he moved to compel a change in the caption, but his client was thrown in as the named defendant with their name all over the caption. He wondered how jurisdictions that are allowing it are implementing the rule. Judge Norby stated that, in Multnomah County, the SLR states that one must get an order first before filing. She noted that Clackamas County's SLR provides for the same thing, but that it is not being used

Ms. Gates observed that it is clear that this issue needs attention and that the committee has work to do. Judge Hill attempted to synthesize the issue as follows: the committee should look at whether allowing the practice is a good idea; whether it is appropriate, given the open courts provision of the Oregon Constitution; and, if it is going to happen, how to allow it to happen in a uniform way. Judge Norby pointed out that the practice is already happening and stated that the Council cannot dictate to people already using a practice in an inconsistent way. Judge Hill stated that he began by asking the first question because, if the Council believes that it is a bad idea from a policy standpoint, the Council should not promulgate a rule that enshrines it. Ms. Rudnick stated that the Council can promulgate a rule that says it is not allowed. Judge Roberts noted that there already is one. Ms. Rudnick stated that, just because it is happening, it does not mean that it is a good practice. She noted that the SLR in question are probably not valid in light of the current ORCP. She believes that the Council should either put something in the rules that allows it or say clearly that it is not allowed so that there is not inconsistent practice. Judge Norby agreed that the rules already do not allow it, but suggested those rules could be beefed up if the Council ultimately decides not to allow the practice. Ms. Gates suggested that it could also be a matter of judicial education.

Prof. Peterson asked more specifically the nature of Judge Hargreaves' concern – whether it was that it was not permitted in the rules, concern over open courts, or something else. Judge Norby stated that his article emphasized the rules. Prof. Peterson stated that, in terms of mechanics, when he has filed a case under a fictitious name, he went in ex parte and got a provisional order approving it subject to the other side having an opportunity to reverse it after a hearing. He observed that it kind of has to go that way, with the other side knowing the true identity of the plaintiff. He stated that, if the Council makes a change, the rule should probably say something about in which documents or in which parts of documents can fictitious names be substituted for the real parties. For example, although the form of the judgment is covered in chapter 18 of the Oregon Revised Statutes, would a rule amendment just change the caption and how would the real

name be handled further into the document, e.g., the money award portion of a judgment? He noted that none of that covers the open court issue, which is what should be dealt with first.

Judge Leith wondered whether there was specific statutory direction in any cases besides juvenile and commitment cases, where it is required to use initials. Mr. Crowley stated that there is limited statutory direction and that Rule 26 identifies juvenile cases, estates, and a handful of other cases. Judge Hill pointed out that, in juvenile cases, other than Court of Appeals cases, real names are used because the record is sealed automatically.

Judge Norby asked if Justice Nakamoto felt comfortable commenting. Justice Nakamoto stated that she did not want to give an opinion, but that it seemed to her that there could be a mandamus petition that comes up to challenge this in an appropriate case. She stated that her guess would be that, if the Council were to allow filing under fictitious names, it would have to be very, very narrow, as she sees some problems with defendants' abilities to litigate appropriately and their own interests given that, in a least some of the cases, the rationale is stigma attached to the claim.

Mr. Crowley stated that the question is still about law that supports this idea and observed that the state constitution says one thing, while other laws say another. He suggested that the committee take a closer look at the law and contact the Multnomah and Clackamas county benches to ask whether they did an assessment of the law before implementing their SLR. Judge Norby stated that Clackamas County did not and that the SLR was implemented by one of their civil supervisors. Ms. Holley stated that her research suggests that there is common law support for that idea as well as federal law and state statutes that could be helpful to examine. Ms. Rudnick pointed out that other states' statutes will not address the Oregon Constitution issue. Ms. Holley stated that there is case law on the open courts issue. Ms. Rudnick stated that there are also trial court and, possibly, some appellate court cases on the issue of sealing records that could offer a similar analysis that may be useful.

Mr. Crowley thanked the Council for helping the committee to narrow the issues to be examined and stated that the committee will report again at the next Council meeting.

3. ORCP 7 Committee

Judge Norby reported that the committee will be meeting again in the next few weeks. She stated that Prof. Peterson has been working on a draft but that the committee has not yet had a chance to review it.

Prof. Peterson stated that he had contacted the Oregon Sheriffs' Association (OSA) regarding the issue brought to the Council by Aaron Crowe of Nationwide Processing Service. He reminded the Council that Mr. Crowe was concerned about original summonses that were not signed by the plaintiff or the lawyer. He stated that the reply from the OSA indicated that they have not seen this as a problem and intimated that a sheriff would not serve the summons it if the original summons was not signed. Prof. Peterson also asked the OSA if there was any uniformity within the 36 Oregon counties for the follow-up mailing after substitute or office service and apparently there is: the sheriff gives it back to the plaintiff to do the follow-up mailing and does not offer that as an additional service.

4. ORCP 15 Committee

Prof. Peterson reported that the committee will be meeting soon. He reminded the Council that the committee had presented a draft at the October meeting and that it had then gone back to re-tool section D a bit because it was confusing. He stated that, two biennia ago, the Council had amended ORCP 68 to include language regarding enlarging time and had borrowed language from ORCP 15 D. At that time, the Council found the language confusing, so it clearly needs some clarification.

5. ORCP 22 Committee

Mr. Beattie stated that the committee had not had a formal meeting but that he had circulated a proposal to committee members that would change language in ORCP 22 C(1) to eliminate the plaintiff's veto to adding a third-party defendant after the 90 days had expired. He stated that the change was to simply changing the word "and" to "or" so that the language would read: "Otherwise the third-party plaintiff must obtain agreement of parties who have appeared *or* leave of court." He observed that this would allow the parties to agree among themselves to add a third-party defendant or, if they cannot reach agreement, a party could pursue leave from the court to file a third-party complaint.

Judge Hill suggested that a better solution might be to remove the language regarding agreement of the parties altogether and leave the decision up to the court's discretion, because Mr. Beattie's language could create a situation where

the parties have agreed to continue the trial date to add a new party and the court says it does not want to do that. Mr. Beattie stated that this is how the Washington rule and the federal rule read and that such a change would be acceptable to him. He stated that he had considered putting in additional language like that contained in ORCP 23 for amendments such as, "and leave shall be freely given when justice so requires," but he did not think that the courts needed that kind of direction and it is not in any other rules regarding third-party practice.

Ms. Gates asked whether the committee expects to have a copy available for the Council. Mr. Beattie stated that he would send his suggested changes to Ms. Nilsson for her to circulate to the Council. Prof. Peterson noted for the record that Mr. Eiva, a vocal opponent of this type of change to Rule 22, was not present to comment today.

6. ORCP 23 C/34 Committee

Council Chair Ms. Wray was not present and the committee did not report.

7. ORCP 55 Committee

Judge Norby stated that the committee would be meeting on November 29 and had nothing to report at this time.

8. ORCP 68 Committee

Prof. Peterson reported that the ORCP 68 committee had met and been very efficient. He reminded the Council that attorney Bruce Orr had written to Council staff and suggested that the Council had made an error when it amended ORCP 68 to codify and clarify how to obtain post-judgment attorney fees for enforcement or collection of the judgment. The amendment requires the party to have pleaded an entitlement to fees, as is required by the rule. Mr. Orr thought that the rule should say that, if a party has been awarded attorney fees, that party should be able to come back to the well to get more attorney fees for post-judgment work because the plaintiff had either waived any objection or the court had found some other reason to award fees. The committee disagreed with this interpretation with the reasoning that, if you did not plead it, you are not entitled to it. The committee also felt that one mistake is not improved by a second one.

Prof. Peterson stated that Mr. Orr also had a question about whether a party was not getting paid for findings and conclusions as part of the general judgment or the findings and conclusions asked for as part of the fee petition. Prof. Peterson stated that he had e-mailed a response to Mr. Orr indicating that a party can clearly get

attorney fees for findings and conclusions as part of the general judgment and that a party is entitled to seek findings and conclusions on the attorney fee portion of the case in Rule 68 and that he did not see any reason that a party could not get compensation for those findings and conclusions also. Mr. Orr did not reply, so Prof. Peterson believes that question was answered.

Prof. Peterson stated that another issue brought before the committee was a suggestion to add a little more weight to the rule to make it clear that a party can take advantage of discovery. He observed that the Council sometimes has a suggestion for a rule change that the plaintiffs' side does not like, sometimes it has a rule change that the defense side does not like, but he was pretty confident from the committee meeting that this was a suggestion on which the judges would vote as a block to say "no." He observed that additional discovery tools do not need to be added to Rule 68 because the current situation, where a party can file a statement, can reply to any objections, and can have expert testimony at the hearing is sufficient. He stated that, if language is inserted into the rule saying that parties have access to discovery, parties will use it. Ms. Rudnick agreed and stated that she has been in situations where the court has used its inherent power to allow limited discovery. She pointed out that it is not that it is not available, just that it is up to the court. Prof. Peterson stated that the judges on the committee agree that the current situation is working pretty well.

The Council agreed that the ORCP 68 committee may disband and that the item may be taken off of the agenda.

9. ORCP 79 Workgroup

Mr. Crowley reminded the Council that the workgroup is looking a the current state of the ORCP regarding temporary restraining orders (TRO) and preliminary injunctions. He noted that one task was to find practitioners experienced in this area to get additional input. He stated that Prof. Peterson has been working on getting input from members of the Oregon State Bar's Consumer Law Section and that other committee members have reached out to private bar members. Mr. Crowley reported that, at the committee's last committee meeting, an assistant attorney general from the DOJ's litigation section who works on cases that deal with Rule 79 talked about her experiences. She has concerns with the delay between the time a TRO is entered and both the preliminary injunction hearing and the preliminary injunction ruling. She stated that this puts a lot of pressure on her in dealing with her client and questioned whether it is appropriate under the rule. Mr. Crowley observed that the timelines in the rule seem to be pretty narrow. He wondered what, in practical terms, is the best way of dealing with delays: whether staff needs to bring it to the attention of the judge that there are

set timelines or whether the rule needs to be changed. He stated that the committee's work is ongoing.

Mr. Crowley stated that one of the things that has come to the attention of the committee is an article in the OSB's Litigation Journal by a lawyer at Markowitz Herbold that is attached to the committee's latest report to the Council (Appendix D). He encouraged Council members to read it. He stated that it is fairly common for lawyers to look to the federal rules for guidance about how to handle TRO and preliminary injunctions under our state rules and that the article makes a pretty convincing case that lawyers should not do so. He stated that lawyers are left with a situation where there is not a lot of legal authority under state law to pursue these matters and where lawyers tend to rely on federal law, and that perhaps that should not be happening. He stated that the committee is investigating whether the Council should we do something within our own state court rules to specify the proper standards. Ms. Gates observed that some committee members felt that the article is worthwhile, but others felt that it ignored the fact that there are also Oregon cases that look to the federal standards. She noted that the article advocates that the plain language in the Oregon rule should be the focus.

Mr. Crowley stated that Judge Leith had also sent him a couple of e-mails from attorneys John Dunbar and Greg Chaimov that he will circulate to the rest of the committee for discussion. Mr. Beattie noted that, because of the way appeals in this area are handled, there will not be much appellate law developed regarding temporary restraining orders, so it falls to the Council to do what the courts would do in the federal system but not necessarily in the state system. He stated that mandamus does not happen in these cases because they come and go so quickly.

Prof. Peterson observed that, with both the fictitious names committee and this workgroup, if the Council decides not to make a change, its minutes will perhaps provide fodder for someone who has an adverse position to the requested change. Either the Council will make a change or will not, but a log will be thrown on the fire either way.

IV. New Business

Prof. Peterson asked the Council to take a moment to observe Veteran's Day and to think about the 326,000 veterans in Oregon. He asked whether any Council members had served in the armed forces. Judge Bailey stated that he had served in the Navy. The Council thanked him for his service.

V. Adjournment

Ms. Gates adjourned the meeting at 10:30 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
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Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

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Guests:

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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

Council on Court Procedures
Senator Contact List
2017

Council Member	Full Title	Party	District	Geographic Areas	Significant Committees
Andersen, Kelly	Senator Alan DeBoer	Republican	3	Medford, Ashland	
Andersen, Kelly	Senator Peter Courtney	Democrat	11	Keizer, Woodburn	Senate President
Bailey, Hon. D. Charles	Senator Jeff Kruse	Republican	1	S Coast, Roseburg	Judiciary Committee
Bailey, Hon. D. Charles	Senator Dennis Linthicum	Republican	28	S Central, Klamath	Judiciary Committee
Hill, Hon. Norm	Senator Brian Boquist	Republican	12	W Central Willamette V	
Leith, Hon. David	Senator Jackie Winters	Republican	10	Salem, S Marion	Ways & Means - Public Safety (Co-Chair)
Nakamoto, Hon. Lynn	Senator Elizabeth Steiner Hayward	Democrat	17	NW PX, NE Wash Co	Ways & Means - Public Safety
Payne, Shenoa	Senator Kathleen Taylor	Democrat	21	SE Portland, Milwaukie	
Payne, Shenoa	Senator Lew Frederick	Democrat	22	N, NE Portland	Ways & Means - Public Safety
Rudnick, Sharon	Senator Floyd Prozanski	Democrat	4	S Eugene, Lane Co	Judiciary Committee (chair)
Rudnick, Sharon	Senator Betsy Johnson	Democrat	16	St Helens, N Coast	
Tookey, Hon. Doug	Senator Mark Hass	Democrat	14	Beaverton	
Tookey, Hon. Doug	Senator Michael Dembrow	Democrat	23	Inner NE, SE Portland	Judiciary Committee
Wolf, Hon. John	Senator Chuck Thomsen	Republican	26	E Clack, Hood River	
Wolf, Hon. John	Senator Ted Ferrioli	Republican	30	Greater E Oregon	Senate Republican Leader
	Senator Herman Baertschiger Jr.	Republican	2	Jackson, Josephine	
	Senator Arnie Roblan	Democrat	5	Mid-Coast	
	Senator Lee Beyer	Democrat	6	Springfield, Eugene	
	Senator James I. Manning Jr.	Democrat	7	Eugene, N Lane	Judiciary Committee
	Senator Sara Gelser	Democrat	8	Albany, Corvallis	Judiciary Committee
	Senator Fred Girod	Republican	9	E Central Willamette Valley	
	Senator Kim Thatcher	Republican	13	Newberg, Wilsonville	Judiciary Committee (vice-chair)
	Senator Chuck Riley	Democrat	15	Hillsboro, Forest Grove	
	Senator Ginny Burdick	Democrat	18	SW Portland, Tigard	Senate Democratic Leader
	Senator Richard Devlin	Democrat	19	Lake Oswego, W Linn	
	Senator Alan Olsen	Republican	20	Canby, Gladstone	
	Senator Rod Monroe	Democrat	24	Mid Multnomah Co	
	Senator Laurie Monnes Anderson	Democrat	25	Gresham	
	Senator Tim Knopp	Republican	27	Deschutes	
	Senator Bill Hansell	Republican	29	NE Oregon	

Council on Court Procedures
November 11, 2017, Meeting
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Council on Court Procedures
Representative Contact List
2017

Council Member	Full Title	Party	District	Geographic Areas	Significant Committees
Andersen, Kelly	Representative Carl Wilson	Republican	3	Grants Pass	
Andersen, Kelly	Representative Duane Stark	Republican	4	Central Point	Judiciary Committee, Ways and Means - Public Safety (co-chair)
Andersen, Kelly	Representative Sal Esquivel	Republican	6	Medford	
Bailey, Hon. D. Charles	Representative Jeff Barker	Democrat	28	Beaverton	Judiciary Committee (chair), Ways & Means - Public Safety
Bailey, Hon. D. Charles	Representative Susan McLain	Democrat	29	W Wash Co	
Hill, Hon. Norm	Representative Paul Evans	Democrat	20	West Salem	
Hill, Hon. Norm	Representative Mike Nearman	Republican	23	Polk, Benton	
Hill, Hon. Norm	Representative A. Richard Vial	Republican	26	Wilsonville	Judiciary Committee
Leith, Hon. David	Representative Andy Olson	Republican	15	Albany	Judiciary Committee (vice-chair)
Nakamoto, Hon. Lynn	Representative Brian Clem	Democrat	21	Salem	
Nakamoto, Hon. Lynn	Representative Mitch Greenlick	Democrat	33	NW Portland	Judiciary Committee
Nakamoto, Hon. Lynn	Representative Tawna D. Sanchez	Democrat	43	NE Portland	Judiciary Committee, Ways and Means - Public Safety
Rudnick, Sharon	Representative Paul Holvey	Democrat	8	S Eugene	
Rudnick, Sharon	Representative Nancy Nathanson	Democrat	13	Eugene, N Lane	
Tookey, Hon. Doug	Representative Jennifer Williamson	Democrat	36	SW Portland	Judiciary Committee (vice-chair), House Democratic Leader
Tookey, Hon. Doug	Representative Alissa Keny-Guyer	Democrat	46	Inner SE Portland	
Wolf, Hon. John	Representative Mark Johnson	Republican	52	Hood River	
Wolf, Hon. John	Representative Greg Smith	Republican	57	NE OR	
Wolf, Hon. John	Representative John Huffman	Republican	59	N Central OR	Ways & Means - Public Safety
Wray, Deanna	Representative David Gomberg	Democrat	10	N Central Coast	
Wray, Deanna	Representative Bill Post	Republican	25	Kiezer, Newberg	Judiciary Committee
Wray, Deanna	Representative Sheri Malstrom	Democrat	27	Beaverton	
Wray, Deanna	Representative Andrea Salinas	Democrat	38	Lake Oswego	
	Representative David Brock Smith	Republican	1	S Coast	
	Representative Dallas Heard	Republican	2	Roseburg	
	Representative Pam Marsh	Democrat	5	Ashland	
	Representative Cedric Hayden	Republican	7	S Lane	
	Representative Caddy McKeown	Democrat	9	S Central Coast	
	Representative Phil Barnhart	Democrat	11	Eugene, N Lane	
	Representative John Lively	Democrat	12	Springfield	
	Representative Julie Fahey	Democrat	14	N Central Lane	
	Representative Dan Rayfield	Democrat	16	Corvallis	
	Representative Sherrie Sprenger	Republican	17	E Linn, Marion	Judiciary Committee
	Representative Rick Lewis	Republican	18	S Clack, E. Marion	
	Representative Jodi Hack	Republican	19	S Salem	
	Representative Teresa Alonso Leon	Democrat	22	Woodburn	
	Representative Ron Noble	Republican	24	Yamhill	
	Representative Janeen A. Sollman	Democrat	30	Hillsboro	
	Representative Brad Witt	Democrat	31	St Helens	
	Representative Deborah Boone	Democrat	32	N Coast	
	Representative Ken Helm	Democrat	34	NE Wash Co	

Council on Court Procedures
November 11, 2017, Meeting
Appendix B-2

Council on Court Procedures
Representative Contact List
2017

Council Member	Full Title	Party	District	Geographic Areas	Significant Committees
	Representative Margaret Doherty	Democrat	35	Tigard	
	Representative Julie Parrish	Republican	37	West Linn	
	Representative Bill Kennemer	Republican	39	Canby, OR City	
	Representative Mark W. Meek	Democrat	40	Gladstone	
	Representative Karin A. Power	Democrat	41	Milwaukie	
	Representative Rob Nosse	Democrat	42	Inner SE Portland	
	Representative Tina Kotek	Democrat	44	N Portland	Speaker of the House
	Representative Barbara Smith Warner	Democrat	45	Inner NE Portland	
	Representative Diego Hernandez	Democrat	47	N Central Mult Co	
	Representative Jeff Reardon	Democrat	48	S Central Mult Co	
	Representative Chris Gorsek	Democrat	49	N Gresham	Judiciary Committee
	Representative Carla Piluso	Democrat	50	S Gresham	Ways & Means - Public Safety
	Representative Janelle Bynum	Democrat	51	East Clack Co	
	Representative Gene Whisnant	Republican	53	Deschutes	
	Representative Knute Buehler	Republican	54	Bend	
	Representative Mike McLane	Republican	55	S Central OR	House Republican Leader
	Representative E. Werner Reschke	Republican	56	Klamath	
	Representative Greg Barreto	Republican	58	Pendleton	
	Representative Cliff Bentz	Republican	60	SE OR	

Oregon Council on Court Procedure

Fictitious Names Committee

November 7, 2017 – Meeting Report

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

The meeting was held by phone conference, and began with a discussion of our tasks carrying over from the last meeting.

(1) Look into how wide spread the practice of using fictitious names has become.

(2) Research the Clackamas County and Multnomah County SLRs, what were their origins, how are they used, how often are they relied upon?

I sent out an inquiry to my DOJ colleagues, which resulted in no response. My conclusions is that we are see few examples of the concern raised by Judge Hargreaves' letter.

Judge Norby investigated the SLRs in Clackamas County and Multnomah County. Her finding was that Multnomah County's SLR comes into use approximately 15 times of year, and the presiding judge finds it to be useful. The Clackamas County SLR has not gotten much use following its initial creation.

Next our discussion was about where to go from here. Judge Hargreaves' letter raised the question about whether expansion of the use of fictitious names by SLR or otherwise is supported by legal authority. The ORCPs do not provide for use of fictitious names as broadly as the SLRs permit. Should the ORCPs address the question further? Or is that a substantive change that requires other legal authority? The meeting concluded with Judge Norby offering to write up a question from the committee for the Council's consideration.

After the meeting, the discussion continued by email. Meredith circulated an email with attachments from OTLA members about their experiences using fictitious names. Also, Judge Norby circulated a draft of the committee's question for the Council.

The Hargreaves Letter notes that: (1) ORCP 26A requires lawsuits to be brought in the name of the real party in interest, (2) ORCP 16A requires that parties' names must be set forth in case captions, and (3) ORCP 20H requires that the parties' names used in the caption must be their *true names* as soon as their true names are known. Currently, fictitious names are only authorized when a party's true name is *unknown*.

The only limited legal authority that currently exists to authorize a deviation from the use of known true names in case captions involves the protection of juvenile parties' identities through the use of initials, and the use of alternative individuals' true names as substitutes for real parties in interest when estate proceedings, guardianships, or contracts for the benefit of another are the basis of a litigation.

The practice of using fictitious names in captions to protect the known true names of crime victims from injury to reputation is *un*authorized by any existing statute or rule of civil procedure. Never-the-less, Multnomah County enacted a Supplementary Local Rule to formalize a process to implement that practice. That county reports that its SLR is invoked regularly, and estimates that 15+ cases were filed with fictitious names after orders entered under the SLR in the past year.

The existence of an SLR on this subject in Multnomah County indicates a need for procedural guidance about the use of this practice statewide, for consistency throughout all jurisdictions, and to ensure that the practice is predictable and limited. In the absence of a statewide rule governing this currently unauthorized practice, the risk grows that it may be inconsistently implemented, unpredictably applied, and expanded beyond circumstances of clear necessity.

The question for the CCP is whether ORCP 20H should be expanded to create conservative parameters for the use of fictitious names in case captions for parties whose true names are known. Inaction on this question would allow the informal practice to continue without procedural safeguards or legal authorization.

Oregon Council on Court Procedure

Rule 79 Workgroup

November 1, 2017 – Meeting Report

Members Present: Ken Crowley (Chair), Jennifer Gates, Hon. David Leith, Prof. Mark Peterson, Hon. John Wolf, and Hon. Norm Hill.

Guest: AAG Sarah Weston, Special Litigation Unit/DOJ

The meeting was held by phone conference over the noon hour, and began with a review of our tasks. Professor Peterson is still working on getting input from the Consumer Law Section about experiences with Rule 79. Also, there were a couple of practitioners with TRO/preliminary injunction experience that committee members were still planning to contact.

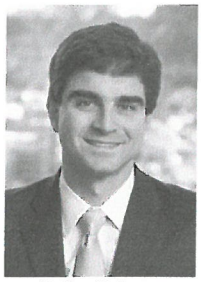
Next, the conversation turned to a discussion about our guest's experiences with Rule 79. Assistant Attorney General Sarah Weston is a member of DOJ's Special Litigation Unit, which handles a number of TRO/preliminary injunction matters for the state. She detailed a couple of experiences with Rule 79, in which TROs where granted, and then there had been delay, beyond what the rules seem to allow before the preliminary injunction hearing, and further delay until the decision was made, which raises client concerns, as well as due process issues. The committee discussed whether there could be practical changes that would improve compliance with the rules.

There was also discussion about a recent article in an OSB publication about the difference between state and federal rules about TROs and Preliminary Injunctions. That article is attached.

After the meeting Judge Leith circulated emails he received from John Dunbar and Greg Chaimov, practitioners experienced with Rule 79. Their input and more will be discussed by the Workgroup at our next meeting.

Buy Local: Rely on Oregon Law, Not Federal Precedent, When Seeking a TRO or PI in State Court

By Dallas DeLuca[1]
Markowitz Herbold PC


Dallas DeLuca

When moving for a preliminary injunction or temporary restraining order under ORCP 79 A(1), evidence that a party is likely to succeed on the merits should be irrelevant. Federal Rule of Civil Procedure 65's requirement that the movant must make such a showing is not part of Oregon law.

Here is ORCP 79 A(1), which sets forth the standards a court must use to determine whether to issue a PI or a TRO:

> Subject to the requirements of Rule 82 A(1), a temporary restraining order or preliminary injunction may be allowed under this rule:
>
> (a) When it appears that a party is entitled to relief demanded in a pleading, and such relief, or any part thereof, consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief; or
>
> (b) When it appears that the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual. This paragraph shall not apply when the provisions of Rule 83 E, F(4) and H(2) are applicable, whether or not provisional relief is ordered under those provisions.

In contrast, FRCP 65(a) has no similar text and provides only that "[t]he court may issue a preliminary injunction only on notice to the adverse party."

Although there are other parts of ORCP 79 and FRCP 65 that are parallel and substantively similar,[2] the Oregon Rule setting forth the criteria to decide whether to grant a PI or TRO has no parallel in that federal rule.

Instead, ORCP 79 A is substantively similar to pre-ORCP Oregon statutes stretching back to the Deady Code. Section 407 of Title III of the Organic and Other General Laws of Oregon (1874) is the progenitor of ORCP 79 A(1). Section 407 provides as follows:

> When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in retraining the commission or continuance of some act, the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of plaintiff's rights, concerning the subject of the suit, and tending to render the decree ineffectual[.]

The overlap between ORCP 79 A(1) and Section 407 is not a coincidence. The Council on Court Procedures commentary to ORCP 79 (1979-1981 biennium) states that "The grounds spelled out in subsection A.(1) are identical to [former] ORS 32.040" with one exception not relevant here.[3] And *former* ORS 30.040 was nearly identical (with a comma or two omitted) to Section 407. To the extent that there are slight differences between ORCP 79 A(1) and *former* ORS 32.040, we should presume that those are not substantive, because the Commentary states that the "grounds * * * are identical[.]"

ORCP 79 A(1) has its own case law stretching back to the 19th century, decades before Federal Rule 65 was promulgated in the 1930s. And "those [Oregon] cases remain good law." *Or. Educ. Ass'n v. Or. Taxpayers United PAC*, 227 Or App 37, 45-46 n4, 204 P3d 855 (2009); *also* Or. Civ. Pleading and Prac. § 34.6 (same, citing *Or. Educ. Ass'n*).

The case law for ORCP 79 A(1) differs substantially from the familiar four-part balancing test from federal case law. Most significantly, ORCP 79 A(1) does not require a mini-trial to determine who is most likely to succeed on the merits at a later trial. *Compare with Winter v. NRDC, Inc.*, 555 US 7, 20 (2008) (under FRCP 65, the movant must establish that she "is likely to succeed on the merits"). A motion under ORCP 79 A(1) is not a mini-trial on the merits; instead, courts determine whether the complaint entitles the plaintiff to the relief sought.

The Oregon Supreme Court in an early case stated that when deciding whether to grant a preliminary injunction, the trial courts should do so without making any determination on the ultimate merits.

> A preliminary injunction is only a provisional remedy, the sole object of which is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the further perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. In granting or refusing temporary relief by preliminary injunction, courts of equity should in no manner anticipate the ultimate determination of the question of right involved.

Helms v. Gilroy, 20 Or 517, 520, 26 P 85 (1891) (citation omitted). *Helms* states explicitly that a preliminary injunction can issue before "a hearing upon the merits[.]" *Id.* *Helms*'s interpretation of Section 407 is supported by the text and the margin notes for the statute. Section 407 used the phrase "When it appears *by the complaint* that the plaintiff is entitled to the relief demanded[.]" (Emphasis added.) The margin notes cite *Woodruff v. Fisher*, 17 Barb. 224 (Sup. Ct. NY 1853). *Woodruff* states that to obtain an injunction the plaintiff needs only a verified complaint (one not on information and belief) and, if the plaintiff has that, it does need a separate affidavit before obtaining a preliminary injunction. *Id.* at 225.

A half-century after *Helms*, the rule had not changed: "Hearing had on motion to show why preliminary injunction should not issue was not one on the merits." *Fleming v. Woodward*, 180 Or 486, 488, 177 P2d 428, 429 (1947) (citations omitted). "'[T]he essential conditions for granting such temporary injunctive relief are that the complaint allege facts which appear to be sufficient to constitute a cause of action for injunction[.]'" *State ex rel. Tidewater Shaver Barge Lines v. Dobson*, 195 Or 533, 580, 245 P2d 903, 924 (1952) (quoting 28 Am. Jur. Injunctions, 207, § 14).

The most recent appellate case to look at the question does not differ. In *Oregon Education Ass'n v. Oregon Taxpayers United PAC*, 227 Or App 37, 45, 204 P3d 855, 860 (2009) (Landau, J), the court stated in *dicta*, citing *Fleming*, that "a hearing on whether a preliminary injunction should issue is not a hearing on the merits, but is merely to determine whether the party seeking the injunction has made a sufficient showing to warrant the preservation of the status quo until the later hearing on the merits." (citations omitted). The moving party has to make a "sufficient showing" that without the PI or TRO the status quo is in jeopardy and that the status quo is worth preserving. "The office of a preliminary injunction is to preserve the status quo so that, upon the final hearing, full relief may be granted." *Id.* (internal quotation marks, alterations, and citation omitted).

Lawyers should not rely on federal precedent to contend that TRO and PI motions under ORCP 79 A(1) require a movant to show that it is likely to succeed on the merits. Practitioners may cite *Von Ohlen v. German Shorthaired Pointer Club of America, Inc.*, 179 Or App 703, 710–711 & n13, 41 P3d 449 (2002), for the proposition that federal decisions interpreting FRCP 65 are persuasive authority when interpreting ORCP 79 A.[4] *See State ex rel Eltrym Historic Theater LLC v. The City of Baker City*, 2006 WL 6204550, Baker Cty. Cir. Ct. (Aug. 15, 2006) (citing both federal and state precedent to decide a TRO, and citing to *Von Ohlen v. German Shorthaired Pointer Club* for basis to rely on federal cases); *see also* Or. Civ. Pleading and Prac. (2012 rev.), Chap. 34, Permanent Injunctions, Temporary Restraining Orders, and Preliminary Injunctions, §34.6-2 (stating parties may rely on federal precedent when arguing TRO and PI motions based on citation to *Von Ohlen*).

But *Von Ohlen* is irrelevant to ORCP 79 A(1). That case interpreted the provisions in ORCP 79 D, which addresses whether a non-party is bound by an injunction. In *Von Ohlen*, reliance on federal precedent was appropriate to interpret ORCP 79 D because it is substantively similar to FRCP 65(d)(2). In contrast to ORCP 79 D, ORCP 79 A(1), quoted above, does not have a counterpart in the federal rule.

Although courts should not look at evidence of the merits of the claim, courts must consider other factors in addition to the allegations in the complaint. "'[T]he essential conditions for granting such temporary injunctive relief'" include "'that on the entire showing from both sides it appear[s], in view of all the circumstances, that the injunction is reasonably necessary to protect the legal rights of the plaintiff pending the litigation * * *.'" *Tidewater Shaver Barge Lines*, 195 Or at 580-81 (quoting 28 Am. Jur. Injunctions, 207, § 14). Courts, in deciding whether to grant a preliminary injunction or a temporary restraining order, "exercise * * * discretion in balancing conveniences, in affording protection against needless injury, in preserving the subject matter of the suit, and not infrequently in preserving the status quo." *State ex rel. Pac. Tel. & Tel. Co. v. Duncan*, 191 Or 475, 500, 230 P2d 773, 784 (1951).

The precedent interpreting ORCP 79 A(1) does not include the "likely to succeed on the merits" prong from the four-part balancing test that federal courts must use when considering motions for a TRO or PI. That changes what should be argued in TRO and PI hearings. Evidence supporting which party is likely to succeed on the merits should be irrelevant and inadmissible at the PI and TRO hearings. All the plaintiff needs (in addition to showing irreparable harm or the need to preserve the status quo) is a pleading that can survive a motion to dismiss. That may make ORCP 79 A more plaintiff-friendly than FRCP 65, and the bench and bar should open a conversation about the costs and benefits of the Oregon standard and whether ORCP 79 A should be changed to expressly include the "likely to succeed on the merits" part of the federal balancing test.

(Endnotes)

1 Dallas DeLuca is a trial lawyer at Markowitz Herbold. He represents businesses, government entities, and individuals in commercial litigation. Dallas successfully resolves disputes for his clients in state and federal courts. His practice focuses on commercial litigation, including contract, intellectual property, shareholder, employment, and real estate disputes.

2 ORCP 79 B, concerning when to grant a TRO without notice to the adverse party, is substantively similar to FRCP 65(b). ORCP 79 D, concerning the form of the TRO and the PI and the parties bound by them, is similar to FRCP 65(d).

3 The commentary to ORCP 79 from the 1979-1981 biennium is available at http://www.counciloncourtprocedures.org/Content/1979-1981%20Biennium/ORCP%20Rules%201981/Rule%2079.pdf.

4 This article is not implying that all lawyers and judges are using federal precedent when considering ORCP 79 A(1) motions. Given the limited number of trial court decisions and briefs readily accessible, it is hard to determine the proportion of such motions where the parties contend that federal precedent applies.