MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 9, 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
Hon. R. Curtis Conover
Kenneth C. Crowley
Jennifer Gates
Hon. Timothy C. Gerking
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. David E. Leith
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling*
Hon. Douglas L. Tookey*
Hon. John A. Wolf
Deanna L. Wray

Members Absent:

Travis Eiva
Sharon A. Rudnick
Margurite Weeks

Guests:

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

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Moved to Publication Docket this Biennium	ORCP/Topics to be Reexamined Next Biennium
Discovery Fictitious Names ORCP 7 ORCP 15 ORCP 22 ORCP 55 ORCP 79	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 68 ORCP 71	ORCP 22 ORCP 43	

I. Call to Order

Mr. Keating called the meeting to order at 9:33 a.m. He apologized for only being able to attend the prior two Council meetings by telephone and thanked Ms. Gates for stepping in to fill the chair role at those meetings.

II. Administrative Matters

A. Welcome New Members

Mr. Keating welcomed two new members, both of whom had been previously introduced at earlier meetings: Margurite Weeks and Justice Lynn Nakamoto. Prof. Peterson explained that Ms. Weeks, the Council's new public member, had attended the November Council meeting as a guest but that she had not been formally appointed by the Supreme Court until shortly after that Council meeting. Ms. Nilsson stated that Ms. Weeks was unable to attend today's meeting due to the very recent birth of her son a few days prior. Prof. Peterson explained that Justice Nakamoto had also not been formally appointed until very recently, although Council staff was under the impression that she had been.

Mr. Bachofner stated that he had been contacted by a number of people who applied for a position on the Council who had not received any notification that they had not been chosen. Prof. Peterson replied that such replies would be a part of the Bar's appointment process and that the Council has never been responsible for that task in the past. Mr. Bachofner stated that he would check with the Bar's liaison to the appointment committee.

B. Election of Treasurer per ORS 1.730(2)(b)

Prof. Peterson stated that he had spoken to Ms. Weeks about the position of treasurer and that she had indicated via e-mail that, if nominated, she would run and, if elected, she would serve in that capacity. Judge Wolf nominated Ms. Weeks for the position of treasurer. Judge Gerking seconded the motion, which passed unanimously without abstention.

C. Approval of November 11, 2017, Minutes

Mr. Keating asked whether there were any suggestions or concerns regarding the November 11, 2017, minutes (Appendix A). Hearing none, he asked for a motion for approval of the minutes. Judge Gerking made a motion to approve the November 11, 2017, minutes. Mr. Anderson seconded the motion, which passed unanimously without abstention.

D. Committee Membership

Prof. Peterson referred the Council to the most current committee roster (Appendix B) and asked Council members to review it. He reminded the Council that the bulk of its work is done in committees and asked members who are on a committee who have not yet attended a meeting to reach out to the chair of the committee. He also asked members who would like to join a committee of which they are not yet a member to check with the chair.

E. Contacting Legislators

Prof. Peterson stated that he had sent a draft e-mail template that Council members could modify and send to the legislators whom they had agreed to contact. He asked any member who had not received it to contact him or Ms. Nilsson. He stated that the goal is to ensure that legislators on committees that are significant to the Council (e.g., Ways and Means, Judiciary) are kept up to speed on the Council's activities. There are two reasons for this contact: 1) blatant self-interest, in that the Legislature funds the Council; and 2) the Legislature has ceded the power to promulgate court rules to the Council and, when the Legislature receives the Council's transmittal letter and rule amendments at the beginning of a legislative session, it should not be a surprise to them. Prof. Peterson asked those members who have not yet signed up to contact a legislator to do so.

Justice Nakamoto stated that she had received a response from Rep. Greenlick, who expressed great interest in the Council's work and asked a question about whether some of the rule changes were related to the expense of discovery. Prof. Peterson stated that this is a great case in point for the importance of reaching out to legislators. He stated that he will be sure to emphasize in his future draft templates that the Council's meetings are open to the public and that legislators are always invited to attend.

III. Old Business

A. Committee Reports

1. Discovery Committee

Judge Bailey stated that the committee had met the previous week and had a lively discussion and debate, particularly around the issues of e-discovery and proportionality. He stated that Mr. Crowley and Ms. Rudnick had been working with members of the plaintiffs' bar to draft potential language that will satisfy all parties and that some good suggestions had been made but that there is no formal language to bring to the full Council yet. Judge Bailey reported that there had also been a lively discussion of the possibility of requiring, 10 days before trial,

discovery of the names and files of experts and the potential subject matter to which they may testify. There was also a good discussion about whether it is Oregon's God-given right to trial by surprise. Judge Bailey stated that he and Mr. Beattie would try to come up with some language to bring to the Council regarding expert discovery. He stated that the committee would be meeting again in early January.

Mr. Bachofner asked whether the committee had discussed the distinction between testifying experts and experts. Mr. Beattie stated that the amendment being considered would require disclosure of witnesses only so, if a party was not calling an expert as a witness, that expert would not be required to be disclosed. Mr. Bachofner stated that he is personally a fan of Oregon's unique trial by ambush, even though it is more difficult on defendants, but that he sees a benefit to identifying testifying experts by the first day of trial and making arrangements for the exchange of files for the purpose of expediting the trial itself. He stated that it would still preserve the privacy and privilege of the testifying expert. He stated that he feels that, if it is not a testifying expert, there is no obligation to disclose. He noted that, in Washington, only disclosure of testifying experts is required. Mr. Beattie noted that the goal is a very simple provision and that he and Judge Bailey would circulate it to the committee for evaluation before bringing it to the Council.

Mr. Anderson agreed that there should be disclosure at the beginning of trial, but stated that requiring it 10 days before is just another deadline to worry about. He argued that it just adds to the expense of trial, but at the beginning of a trial when the parties have to disclose their witnesses anyway is a good time. Ms. Payne recalled that someone had brought up that it might be a Uniform Trial Court Rules (UTCR) issue and she wondered whether the UTCR address it. Mr. Beattie stated that they do not. Judge Gerking explained that Jackson County has a custom of the court requiring disclosure of witnesses prior to voir dire so that potential jurors can be asked whether they know any of the witnesses. Mr. Keating recalled that Multnomah County Judge Robert Jones promulgated his own rule about 20 years ago that any expert witnesses who lived or practiced within the tri-county area had to be disclosed and it bloomed from there. He stated that the first 20 years of his practice was 100% trial by ambush and he liked that best. He pointed out that what devolved from disclosing experts on the day of trial was that the plaintiff would disclose the experts he or she was going to call in two hours, whereas the defendant would disclose the experts he or she was going to call in two weeks, when it came time for the defense's case, giving the plaintiff much more time to prepare. He also recalled that Judge Jones had prohibited lawyers from researching the experts who were disclosed under his rule, which was very unrealistic and to which no one seemed to adhere. He noted that requiring

disclosure 10 days ahead of trial at least puts everyone on the same playing field.

Judge Bailey stated that he had asked members of the committee to try to explain Oregon's unique system because, as a judge, he strives for transparency and openness and he struggles to understand the benefits of "expert by ambush." He stated that he understands the costs of litigation and Judge Hill's worry that requiring disclosure could be a slippery slope leading to deposing experts. He appreciates that and he agrees with Judge Hill that there should not be deposition of expert witnesses, only fact witnesses. However, he asked any Council members if they could help further explain why the issue is so important. Judge Gerking stated that he feels that it has a lot to do with experienced trial lawyers feeling pride that they are capable of thinking on their feet and dealing with sudden changes in the trial process, and this includes dealing with unknown expert witnesses, a lot better than colleagues who practice in other states. Mr. Keating reported that colleagues from other jurisdictions are appalled by this Oregon practice, and their first question usually involves how lawyers get ready to try cases. His answer is that it forces counsel to understand the merits of their cases and to examine the witness on the facts of the case instead of what he or she may have said 15 years ago.

Mr. Beattie agreed that knowing the merits of the case is important, but he stated that knowing who the adversary's witnesses are increases the effectiveness of invaluable cross-examination, which in turn increases the accuracy of the outcome of the case. He noted that the process works in other states and in the federal system, and that Oregon is the only state that he knows of that does not have expert discovery. He stated that he is proposing a very a very simple change to make it easier for judges, and pointed out that some judges are already requiring disclosure, Oregon Evidence Code (OEC) Rule 104 hearings, and production of files prior to trial. Mr. Beattie pointed out that *State ex rel Union Pacific Railroad v. Crookham* [295 Or 66, 68-69, 663 P2d 763 (1983)] held that the judge was not allowed to require the disclosure of fact witnesses, but that begs the question of whether judges can permissively do what they are currently doing. He stated that it would be valuable to have a rule that spells it out and that such a rule would speed things up, increase accuracy, and not increase a burden on either plaintiffs or defendants. He opined that, 10 days before trial, all parties should know who their witnesses are.

Judge Hill stated that making such a change to the rule could raise questions about how to define what an expert is. He posited a situation where an attorney calls a traffic officer as a fact witness to talk about what happened in an auto accident case, but asks questions that rely on the officer's experience and training. He wondered, if that witness was not disclosed 10 days before trial, whether that

non-fact-based evidence would be stricken. Mr. Beattie replied that this is an issue that the committee needs to discuss further. He stated that his proposal was disclosure of all witnesses 10 days before trial, both expert and non-expert, and a short statement as to the subject matter of their testimony. Judge Hill stated that, if such an amendment were made, an attorney might feel an obligation to seek a continuance once the disclosure of experts has been made because he or she did not expect that expert and feels that they need more time to prepare. Judge Roberts replied that, if the disclosure is not for the purpose of discovery, and it is not, this could be handled by stipulation. Judge Gerking wondered what the purpose of disclosure is, if not discovery. Judge Roberts replied that, with respect to expert witnesses, the issue of OEC Rule 104 hearings is pretty important because, when a party requests hearings for each witness on the day of trial, it disrupts the trial schedule. Mr. Beattie noted that, if the desire is to address just experts, the committee can do that and include a working definition of what an expert is. Judge Roberts stated that, if there is concern about a slippery slope, any amendment can explicitly state that there will be no depositions of expert witnesses. Judge Leith stated that the rule could also say that there will be no continuances granted based on the disclosures. Mr. Keating observed that the rationale that has always been articulated for disclosing experts is for the purposes of voir dire, and that was the reason for the tri-county rule when Judge Jones started it, but that it quickly ballooned beyond that.

Mr. Anderson stated that he had recently spoken with attorneys who practice in both Idaho and Oregon. He pointed out that Idaho has expert discovery and that these particular attorneys hate it when compared to Oregon. Mr. Anderson opined that, if an attorney knows the case thoroughly, there is no need to depose an expert. In the case of medical experts, he pointed out that the medical profession is already annoyed at how attorneys interrupt their lives, so the possibility of depositions of medical doctors ahead of trial in addition to testifying at trial could be problematic. He worried that this is a slippery slope and agreed with Mr. Keating's concern that it gives an advantage to the plaintiff. Mr. Anderson suggested that the better way to solve the problem is to ratchet it the other way with no disclosure at all for either side. Judge Roberts pointed out that this is not feasible and that there is a need for disclosure of the names of expert witnesses for the purposes of jury selection. She stated that, when she asks potential jury members about whether they know any of the people named as possible witnesses, the hands that go up are always regarding the expert witnesses. Judge Bailey reported that there was a recent mistrial in Washington County for that reason – a new expert was presented after trial began and two jurors knew the expert. The judge ultimately felt it would have been a miscarriage of justice to have barred the expert from testifying, so he declared a mistrial. Unfortunately, that wasted two days of time on the tight Washington County docket. Judge Norby

stated that she has had cases where potential jurors were professionals who had studied under expert witnesses in other states, so it is not just a local question. Mr. Beattie reiterated that the intent was not to allow depositions or expert discovery except for names and the general area of testimony. He raised another area of concern for the committee to address: that experts may, in some cases, be disclosing privileged information about the patient pretrial, which is impermissible without a waiver.

Mr. Bundy stated that another issue is whether there will have to be a second disclosure ultimately, because he will disclose his people and the opposing party will see an expert that he or she was not expecting and feel that he or she needs to get an expert in that area as well. He stated that sometimes there is no way of anticipating what the evidence is going to be and what the trial plan is going to be, so there cannot be one 10-day notice where all witnesses are disclosed. In his experience he really, really gets to know a case about two weeks before trial, once he determines whether the case will really be going to trial, rather than settling. He expressed concern that there is more to it than just a 10-day notice, especially in complex cases. Judge Roberts agreed that Mr. Bundy made a good point, but she stated that there is no reason that the amendment could not have some built in flexibility to allow for such circumstances.

Judge Hill conceded that it is sometimes difficult to articulate, but that one of the things that makes him proud to be an Oregon lawyer is that things are different here. He stated that there is a tradition of civility and appropriate conduct that does not exist in other jurisdictions. He opined that it is not merely a function of size, but that it is cultural. Judge Hill noted that one of the things that makes Oregon unique is a system whereby everyone actually tries their cases. He stated that, when he started practicing in the mid-1970s, it was relatively inexpensive and cases actually went to trial. There has been an evolution, for completely logical reasons, but the new standard is that civil trials are three to four days instead of one day, there are expert witnesses, and trials are more expensive. He expressed concern that the change proposed by Mr. Beattie would be an even further cultural change and stated that it is an important demarcation.

Judge Bailey noted that the proposal is not anything new, that Judge Jones did it years ago, and that different jurisdictions and different judges are currently doing it in different ways. He stated that the goal of the committee is to attempt to create some consistency and that 10 days was just a suggestion that can be adjusted or changed. He asked the Council to let the committee attempt to draft some language, and stated that the committee would not even bring language to the Council if the committee could not agree among itself. The Council agreed that this was a good way to proceed.

2. Fictitious Names Committee

Mr. Crowley reported that the committee had not met but that members were doing research and would meet again in the beginning of January. Judge Norby stated that Mr. Crowley had circulated to committee members an article (Appendix C) about the transparency of the courts that had traced the history of fictitious names in lawsuits back to Britain where landlords had to adopt a fictitious name to evict tenants. She stated that the article then segued into the practice in America and explored whether cases can be filed under fictitious names consistent with a transparent, legitimate court system. Mr. Crowley stated that Ms. Rudnick had found the article, and stated that he would share it with the entire Council.

3. ORCP 7 Committee

Judge Norby stated that the committee met on November 21 (Appendix D). She stated that the committee first discussed the proposal by attorney Jay Bodzin about embracing e-mail as a viable method of alternative service, creating a particularized process that guards against pitfalls in its use, and ensuring that it is reasonably calculated to result in actual notice. At the beginning of the committee's discussion she wanted to determine whether the only problem was ensuring that a defendant actually gets notice or trying to create a process in a rule that the committee would propose to the Council that would be best calculated to ensure that actual service would occur. Prof. Peterson had reminded the committee that Judge Roberts had expressed concern about the issue raised in *Pennoyer v. Neff*, 95 US 714 (1878): the risk that a court would take personal jurisdiction over a party who does not have even a transitory presence in the state. The committee talked about the fact that publication is not necessarily in the jurisdiction and that follow-up mailings are not required to be within the jurisdiction, and the committee asked Mr. Snelling to do some research on the matter.

Mr. Snelling stated that he was a little bit cautious to say that he completely understands the issue, but he did look for articles and cases related to it. He noted that it is sometimes called "tag jurisdiction," and pointed out that jurisdiction under ORCP 4 A(1) is only established by the fact that the defendant was present in the state at the time he or she was served. He did not find any research that he thought was particularly helpful, and pointed out that the same problem exists with publication and service by mail; in all of those cases there is not really an actual requirement that the defendant receive service. While that may be the intent, there is no way to actually verify receipt unless someone is personally served. He stated that the committee did not think this was something that should

prevent e-mail as a method of alternative service.

Judge Norby stated that the only other problem the committee could think of was the more obvious problem of trying to find measures that would come as close as possible to assuring actual receipt. She stated that the committee had briefly discussed the idea of service by Facebook or other social media. Judge Norby stated that the committee had asked Ms. Wray to look into research with other states and jurisdictions about rulings on the use of e-mail and social media for service and the development of rules on that. Ms. Wray noted that, surprisingly, Oregon is a little behind the curve on the social media and e-mail service issue and that there is much to learn from other jurisdictions. She stated that she found articles indicating that the courts are allowing it and that it makes a lot of sense to take a hard look at the issue. Ms. Wray stated that she would be doing further research, including examination of two particular cases she found. Ms. Payne asked whether other states' rules are like publication, where a court order is required to serve by e-mail or social media. Ms. Wray stated that this is the case. Judge Norby noted that, in one of the cases Ms. Wray presented to the committee, the court found that e-mail service did not provide an assurance of receipt and was therefore invalid, but the other case found that it did provide assurance of receipt. Curiously, in the case where e-mail service was not allowed, the reason that service by e-mail was sought was because the lawsuit was against an internet educational organization with no geographic offices. However, the court still found that there was not enough assurance of receipt by e-mail. Judge Norby stated that the committee is still doing research and working with Prof. Peterson's initial language and that it will keep the Council posted.

The committee also discussed the proposal from Holly Rudolph of the Oregon Judicial Department (OJD) to update the presumptive alternative method of publication. Judge Norby reminded the Council that, at the last Council meeting, she had proposed the idea of using a website rather than publication in a newspaper. She and other newer Council members were informed that this idea was proposed in the Legislature a few years ago as a less expensive and more efficient service method than publication, but there was objection from publishers that make their living from publishing these notices. Judge Norby stated that, after that Council meeting, she and Prof. Peterson had spoken privately as well as with the committee to see if there was some compromise that could be reached. She noted that, when publication was accepted as the presumptive alternative service method, litigation through attorneys was the rule and not the exception and most parties who filed lawsuits had the means to afford service by publication. However, because times have changed enough for the OJD to have created a committee that looks out for the interests of self-represented litigants, it is clear that there are now a lot of parties who do not have the means to afford service by

publication. Judge Norby expressed concern that this is, in some cases, preclusive of litigation at all and that people are being denied a remedy simply because of their lack of means.

Judge Norby proposed modifying ORCP 7 by adapting it to meet the needs of low-income litigants who are precluded from pursuing relief by their lack of means. She explained that carving out an exception for those litigants would not diminish the returns for the small business owners who publish notices, because these litigants would not have the means to publish anyway. Judge Norby stated that Prof. Peterson had suggested that the Oregon State Bar could perhaps create and manage a sort of hybrid website to be used as a sometimes-alternative method to publication for low-income litigants and a sometimes-adjunct method for litigants who can afford publication costs. She suggested that this could be a good step in the right direction and a real boon to justice for low-income people. Judge Norby acknowledged that Mr. Snelling had expressed concern that no other ORCP is tailored to a particular socioeconomic group. However, she pointed out that no other ORCP of which she is aware creates a financial obstacle to litigation like ORCP 7's requirement to publish a summons.

Ms. Payne wondered how a website would give notice like publication does. Judge Norby replied that it would be similar to posting in a courthouse, but that people would need to learn that the website exists. Judge Roberts expressed skepticism that people would look at a website once a day to see if they had been sued. Judge Bailey pointed out that people do not come to the courthouse every day to see if they have been sued either. Judge Roberts observed that the purpose of service is to bring notice and that, whatever form it takes, there has to be some realistic hope of it doing so. Judge Hill noted that the website idea would be of value all of the time. He stated that, if the website were created, it might be a good idea to require that everyone use it under Rule 7. Judge Bailey wondered why the Council would make such a rule when the goal is to choose the method with the best potential to provide notice. He expressed doubt that very many people are currently looking at publications such as the Business Journal but that it is apparent that the Legislature's policy decision was to be more worried about the publications' welfare than getting notice to people who are litigating cases. Judge Norby stated that there are many people who care about litigants getting notice, but they are not necessarily the same people who are making money from publishing legal notices. She pointed out that a proposal that was completely well-intended had evaporated because of business interests. She stated that the Council has to acknowledge and recognize that there are other people involved in making these laws who have political constraints and requirements that they have to deal with to stay in their jobs. However, the Council needs to find a way to move closer to better justice in a way that is feasible to the Legislature.

Mr Beattie observed that most publication of summonses involves property and probate issues and wondered how often the courts order publication in connection with the service of a summons and complaint in other civil cases. Judge Hill stated that he orders publication quite frequently. Judge Leith stated that he orders publication when there is a demonstrated difficulty or impossibility of serving an actual named defendant. Judge Gerking explained that it happens often in domestic relations cases. Judge Leith observed that the rule, as currently written, allows judges to require a diligent search and, if the plaintiff has not demonstrated that they have looked for electronic contact information, he will deny the motion for alternative service. If the plaintiff has an alternative electronic contact for the defendant, Judge Leith will require that the plaintiff use it as opposed to just publishing or posting the summons. Judge Hill wondered whether a judge needs some standards to determine what is effective service once he or she has allowed a plaintiff to serve electronically. Ms. Holley noted that this is a function of e-court. Judge Leith observed that his goal is to find a better fit to potentially achieve better service, but that it does not necessarily mean that it will succeed. However, it is a better calculated effort than publication. Judge Hill summarized that, for e-mail service as with publication, a plaintiff would have to have some showing of why they think it is the most likely method to succeed.

Judge Bailey suggested that the way to promote the rule would be to say that the website is carving out something in addition and that publication is not going away. He noted that the whole idea is to give the best possible chance of getting notice to someone, and the website is just another, more realistic, modern-day opportunity to get notice. He pointed out that people are on their media devices all of the time and that judges are actually starting to take defendants' social media account information in order to send them notices. Judge Norby asked whether Judge Bailey was proposing promoting a website as an adjunct in all cases instead of a necessity in some cases and an adjunct in others. She observed that this could be a first step toward potentially using the website as a sole means of providing notice that might have an appeal for legislators and their constituents. Judge Bailey stated that he thought it would just be one of the alternative ways in which service could be done. Prof. Peterson suggested that a website could be similar to the one currently run by the Bureau of State Lands for unclaimed property. He explained that he has actually received calls from people who have seen his name on that website and that the idea of the service website would be similar.

With regard to electronic service, Prof. Peterson stated that he drafted language in a potential amendment, but that service by e-mail or social media scares him a bit. He stated that he and Ms. Nilsson had looked into various social media and found that some social media apps allow for PDF files to be sent but some do not, so that

may be a limiting factor as to which apps would be useful in terms of service.

Judge Norby explained that the committee had not discussed the issue of follow-up mailing after substituted or office service again because there was not enough time. The committee will take up that issue again at a later time. She invited Mr. Anderson to join the committee due to his experience with social media. Mr. Anderson agreed.

Mr. Keating observed that the committee has much to discuss and that nothing would be resolved today, but that the Council looks forward to the committee's next report.

4. ORCP 15 Committee

Judge Gerking stated that the committee had met on November 28 and discussed section D of the rule. He reminded the Council that, at the October meeting, the Council had agreed on the committee's suggested modifications to section A but had agreed that section D is very confusing and needs work. Judge Gerking stated that Prof. Peterson had determined that the language in section D was borrowed from the repealed statute, ORS 16.050. The rule appears to address the need to file a motion to enlarge the time to file a pleading or a motion or to do some other act both when the deadline has not yet passed and when the deadline has passed. Judge Gerking stated that one question the committed discussed was whether this rule would require a late pleader, after the 30 days has run for filing the answer, to file a motion with the court to allow the answer to be filed after the 30 days have run and before default has been entered. He stated that this seems nonsensical and would create more problems than it would solve. Prof. Peterson drafted options for the committee to look at, but nobody was very happy with any of them. Judge Gerking stated that he had come up with a different option and nobody liked it either, but that discussions are ongoing. He included the options that the committee is thinking about (Appendix E) just for the Council's information. He stated that the committee will meet again and report back to the Council in January.

Ms. Payne stated that she and Mr. Bundy believe that the rule works the way it is. She observed that counsel will agree to move the deadline and, if the rule was changed to require a motion, an attorney would have to file a motion every time the parties agree to move a deadline, if it does not impact the hearing date. As it is worded now, it says that the court may allow it, but there is no mention of any motion being required to do it. Prof. Peterson agreed that, the way it appears to work now, it is up to the plaintiff to move to strike if a party files something late. He stated that the existing language seems to say that the court *may allow*, which

would imply that the late filer would ask the court to allow it. He stated that he is not a fan of adding more motion practice and that the Council may wish to change this. Judge Gerking stated that it is somewhat redundant because there are other rules that include a motion to enlarge, including Rule 47 and Rule 68.

Mr. Bundy pointed out that, the way it is interpreted now, the rule allows a lawyer to look at the other lawyer and say "you know the judge is going to allow me to do this, right?" and avoids the whole issue of having to bring the court into something where one side knows the other side is going to lose on the issue of the late filing. Prof. Peterson stated that he has received calls from former students or from lawyers using the Bar's lawyer-to-lawyer referral service who say,"I just realized I'm in default, but the other side hasn't taken a motion for default. What should I do?" He stated that the language of the rule says "the court may allow," so he tells them, "You need to file something, get off the phone!" Prof. Peterson stated that it is not 100% clear whether one needs to ask permission or forgiveness. Judge Roberts observed that it is always easier to ask for forgiveness. Prof. Peterson agreed that his has been his advice but he was uncertain as to whether it was correct.

Prof. Peterson noted that section D's lead line includes the phrase "to plead or do other act," language that was carried over from ORS 16.050. He wondered whether there are any "other acts" allowed under section D. His sense is that the language had to do with the timing of filing pleadings and motions and that the language got carried over for reasons he does not know. He suggested that this language could be eliminated from the lead line. Judge Norby observed that, with self-represented litigants, it can be difficult to ascertain pleadings from other actions. Judge Hill wryly noted that self-represented litigants are usually asking him to do an impossible act.

5. ORCP 22 Committee

Mr. Beattie reported that the committee had not met again but, rather, that he had circulated a proposal via e-mail that he then presented to the Council (Appendix F). He explained that he had used Judge Hill's recommendation for simplicity in subsection C(1) and eliminated the language requiring agreement of the parties to file a third-party complaint after 90 days. Prof. Peterson reminded the Council that an alternative discussed by the Council was agreement of the parties or leave of court. He stated that this is the only rule where the parties or the court can exercise a veto. He explained that the logic of using "or" was that sometimes the lawyers in a case have a better feel for what is going on than the judge does and, if the lawyers agree that it would be better to add a party now, rather than to have ancillary litigation, it may be appropriate to allow them to

make that decision. Mr. Beattie stated that this was his initial proposal but that Judge Hill had made the point that allowing the parties to make that decision would be expanding the docket of the court without the permission of the court. Judge Hill stated that, most of the time, if all of the parties agree the court will allow it, but he is uncomfortable creating a unique situation where the parties can control the court's docket.

Mr. Beattie made a motion to put the amendment to ORCP 22 on the publication docket for the September Council meeting. Judge Roberts seconded the motion, which passed by majority vote with one dissenting vote (Ms. Payne).

6. ORCP 23 C/34 Committee (Ms. Wray)

Ms. Wray stated that the committee had not yet met but that a meeting was scheduled for the following week.

7. ORCP 55 Committee (Judge Gerking)

Judge Gerking stated that the committee has been examining Rule 55 to see if there are ways to make it more clear. The committee met in late November and agreed that the following would be helpful: reorganization; improving lead lines; breaking apart some sections because they address more than one subject; and eliminating redundancies. He explained that this is a longer-term project and that he anticipates having a draft for the Council in February. He pointed out that the mission of the committee is not to change anything but, rather, just to make the rule read more clearly.

8. ORCP 79 Workgroup (Mr. Crowley)

Mr. Crowley reported that the committee had a telephone conference set up but that only he, Judge Roberts, and Judge Wolf were able to attend so not very much of substance was accomplished. He stated that the committee would meet again before coming back to Council with any recommendations. Mr. Crowley noted that Prof. Peterson is still waiting to get input from the OSB's Consumer Law Section but that the committee had received decent input from lawyers who deal with temporary restraining orders and preliminary injunctions. He stated that an article on that subject has also been circulated to the committee that suggests that the Oregon rule is different from Rule 65 of the Federal Rules of Civil Procedure. Mr. Crowley observed that, at this point, there does not seem to be a groundswell to make big changes to this rule, and stated that the committee will also discuss that at its next meeting.

IV. New Business (Mr. Keating)

No new business was raised.

V. Adjournment (Mr. Keating)

Mr. Keating adjourned the meeting at 10:50 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

DRAFT 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

Oregon Council on Court Procedures
2017-2019 Biennium
Committee List
12/1/17

Discovery Committee

Hon. Charles Bailey - CHAIR
Jay Beattie
Troy Bundy
Hon. Curtis Conover
Ken Crowley
Travis Eiva
Hon. Norman Hill
Hon. Lynn Nakamoto
Shenoa Payne
Sharon Rudnick
Derek Snelling

Fictitious Names Committee

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

ORCP 7 Committee

Kelly Anderson
Hon. Susie Norby - CHAIR
Prof. Mark Peterson
Derek Snelling
Margurite Weeks
Hon. John Wolf
Deanna Wray

ORCP 15 Committee

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

ORCP 22 Committee

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

Rule 23 C / 34 Committee

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

Rule 55 Committee

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

ORCP 68 Committee

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

Rule 79 Workgroup

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

Comes Now the Plaintiff, JOHN DOE

by Isham M. Reavis

Falsehood puts on a mask.

—Leonardo da Vinci[1]

©istock/letty17

It would seem concealed identities have no place in the courthouse. It's a public institution: "Justice in all cases shall be administered openly," proclaims article I, section 10, of the state constitution. The title of a case? The parties' names, required in the complaint under Civil Rule 10(a)(1). The first question asked of a witness? "State your name for the record." But justice wears a blindfold, after all, and even if you can't wear a hat into the courtroom, you can wear a mask: John Doe.

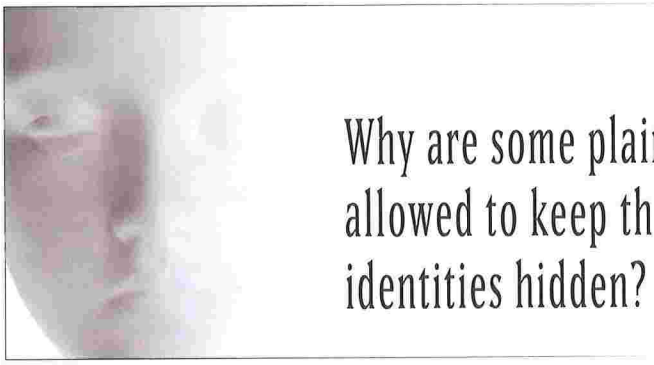
Or Jane or Mary Doe, various Roes, and other generic placeholders. The customary declension is John Doe; Richard Roe; John Stiles; Richard Miles.[3] The various Stiles and Miles are less commonly encountered; Doe and Roe remain current.

Messrs. Doe and Roe are curios inherited from English property law. The time was that the only route to asserting title to land was through a costly and complex real property action, requiring procedural inconveniences such as "essoins, vouchers, and possible trial by battle...."[4] A simpler ejection action was available, but only for lessees. What was a displaced landowner, perhaps unprepared to essay trial by combat, to do?

Enter Doe. The plaintiff hoping to claim title would establish a fictitious lease to John Doe, and then sue claiming Doe had been ejected by the equally fictitious Richard Roe. Because establishing the validity of the plaintiff's title claim would be a necessary element of proving Doe's ejection action, the charade lease dispute would resolve the actual

property claim. And the play-acting lawsuit would go forward because in order to avoid a default judgment, the actual defendant would have to step forward, acknowledge the fictitious lease, and defend it in Roe's stead.[5] Lord Chief Justice Rolle pioneered this elaborate legal dodge to English law during the reign of Edward III (1327–1377),[6] and Lord Blackstone's commentaries brought John Doe and company to American shores. Here, the illusory litigants have prospered, even after their originating cause, the action of ejectment, has joined trial by combat and Latin pleadings in the graveyard of legal procedures.

The Does are not strangers to Washington state courts. A search of the Administrative Office of the Courts' website reveals 996 cases naming John or Jane Doe.[7] (This figure is doubtless over- and under-inclusive at the same time: It misses variations on the name such as John Doe A, John Doe B, etc.; and includes cases such as King County District Court Case No. TEST01000, which probably isn't a live dispute.) Nearly all these Washington Does are pseudonymous defendants or respondents—placeholders in the case caption, due to be unmasked and identified, or dismissed as nonexistent, in some future amended complaint. But some small number are plaintiffs or petitioners. Like the ejectment plaintiffs of yore, they assert their claims from behind a mask.



Why are some plaintiffs allowed to keep their identities hidden?

Why are some plaintiffs allowed to keep their identities hidden?

The question was recently taken up by Division I of the Court of Appeals, in *John Doe G v. Department of Corrections*.[8] The case involved a class of current and former level I sex offenders sentenced under special sex offender sentencing alternative (or SSOSA) evaluations, who sought to enjoin the Department of Corrections from disclosing their evaluations in response to a Public Records Act request. They filed suit as John Does and won a summary judgment. Both defendants appealed the judgment, and the pro se records requester also claimed that the trial court had improperly sealed a court record by allowing the Does to proceed under pseudonyms. The Court of Appeals affirmed. The case is still developing—the Supreme Court has granted review—so the governing analysis may change. But for now, the Court of Appeals has the final word.

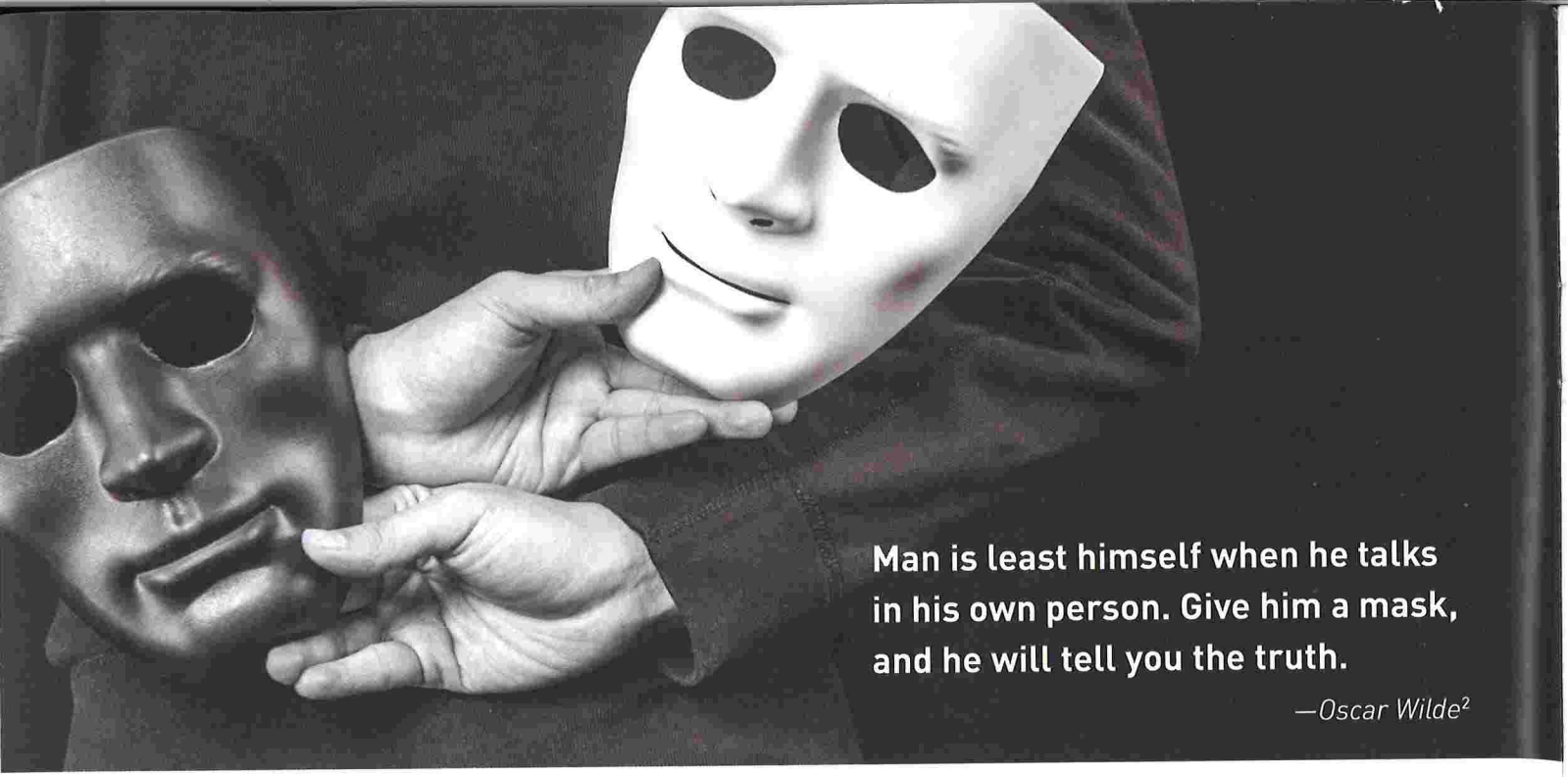
In affirming the plaintiffs' collective donning of the John Doe mask, the Court of Appeals noted that the use of pseudonyms had not yet been analyzed by Washington courts, because the "longstanding and previously uncontroversial practice" had been unchallenged.[9]

The court collected cases where plaintiffs had proceeded as Does because forcing them to reveal their true identities would confound their ability to obtain relief. *Jane Doe v. Dunning* was one, a case in which the Supreme Court adopted a substitute name to protect the identity of an unwed mother and child when the mother sought a conventional birth certificate.[10] The suit had been filed because of an unwritten policy at the time (the 1970s) that "illegitimate" children bearing their mother's name were issued birth registration cards rather than a conventional birth certificate. Forcing the plaintiff to use her real name would have subjected her to the stigma at the root of this unwritten policy.

Another case was *John Doe v. Group Health Cooperative of Puget Sound, Inc.*,[11] where the plaintiff sued for unauthorized disclosure of his health care information. Associating his real name with the case, in which the improperly disclosed health care information would unavoidably come up, would have injured the privacy the plaintiff sought to vindicate. The SSOSA-recipient Does before the Court of Appeals could be added to this list. They sued to protect their privacy; publically identifying them in the case title would have given away the game.

In other cases, plaintiffs used pseudonyms not because it was logically necessary, but because the sensitive nature of the case would have chilled any attempt to seek relief if a true name were made the price of entry. For example, in *John Doe v. Department of Transportation*, where a ferry worker sued his employer for sexual harassment, the court used a pseudonym "because of the nature of the allegations in th[e] case."[12] Or *John Doe v. Gonzaga University*,[13] where a student was allowed to sue pseudonymously over the school's investigation of sexual assault claims against him. In this category would fall (Jane) *Roe v. Wade*[14] and its companion case *Mary Doe v. Bolton*.[15] And for a more recent example, a since-unmasked plaintiff sued former Seattle Mayor Ed Murray using only the initials D.H., claiming Murray had sexually victimized him as a child.[16]

Federal courts have also allowed pseudonyms, generally after balancing the plaintiff's privacy interest against countervailing interests. The 11th, 10th, and 5th circuits compare a Doe plaintiff's substantial privacy right against the "customary and constitutionally-embedded presumption of openness in judicial proceedings."[17] The 9th and 2nd circuits weigh the plaintiff's need for anonymity against prejudice to the opposing party and the public's interest in the truth of his or her identity.[18]



Man is least himself when he talks in his own person. Give him a mask, and he will tell you the truth.

—Oscar Wilde[2]

In cases like these—despite our state's presumption of open trial-court proceedings, and despite the requirement in the civil rules that the title of a complaint contain the names of all the parties—the *Doe G v. Department of Corrections* court held that logic and experience show that Article I, Section 10, of the Washington State Constitution does not apply where the public's interest in the plaintiff's name is minimal, and use of that name would chill the plaintiff's ability to seek relief.[19] This means there is no need for a court to apply the test usually required by the Constitution before closing a public proceeding—the five factors from *Seattle Times Co. v. Ishikawa*[20]—before allowing a plaintiff to file suit as John or Jane Doe.

As noted, the Supreme Court has taken up *Doe G v. Department of Corrections*. It may reverse the Court of Appeals, or affirm on different grounds. Perhaps the Supreme Court saw an opportunity to clarify the rules in this relatively unexamined corner of the law, or solicit more comprehensive briefing than supplied by the pro se appellant below. And while it seems unlikely that the Supreme Court will require some sort of on-the-record balancing before allowing a plaintiff to file suit anonymously (how would that even work, if suit has not yet been filed?), perhaps it will elaborate some mechanism for the opposing party to challenge a pseudonym, or set out a procedure for the trial court to confirm whether the requisite privacy interests are at play. Time will tell.

But for now, would-be John and Jane Does, as they step into the courtroom, may don the mask at will. NWL

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NOTES

1. Leonardo da Vinci Notebook 245 (Thereza Wells, Ed., Oxford University Press, 1952).
2. The Critic as Artist, Intentions185 (Brentano's, New York 1905).
3. *See, e.g.*, William Safire, Magazine, *On Language, New York Times*, Dec. 19, 1982, available at http://www.nytimes.com/1982/12/19/magazine/on-language.html.
4. Frederic William Maitland, Equity, Also The Forms of Action at Common Law: Two Courses of Lectures 351 (Cambridge University Press 1910); Note, "Who Is the Real John Doe?," *Names, a Journal of Onomastics*, 297, 297 (1972).
5. Maitland at 351–53.
6. *Id.* at 353; "Who Is the Real John Doe?" at 297.
7. Name Search, Wash. Courts,. Courts, dw.courts.wa.gov/index.cfm?fa=home.namesearch&terms=accept&flashform=0 (search performed July 25, 2017, using the names John Doe (498 results), Jane Doe (498 results)).
8. 197 Wn. App. 609, 391 P.3d 496 (2017), *review granted*, 188 Wn.2d 1008 (2017).
9. *Id.* at 625–26 & nn.53, 54 (collecting cases).
10. 87 Wn.2d 50, 50 n.1, 549 P.2d 1 (1976).
11. 85 Wn. App. 213, 932 P.2d 178 (1997), *overruled on other grounds, Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998).
12. 85 Wn. App. 143, 143 n.1 (1997).
13. 143 Wn.2d 687 (2001), *rev'd on other grounds, Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed 309 (2002).
14. 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973).
15. 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973).
16. *D.H. v. Murray*, No. 17-2-09152-9 SEA (King Cty. Super. Ct. filed Apr. 6, 2017).
17. *Doe v. Dep't of Corrections*, 197 Wn. App. at 627 (quoting *Jane Roe II v. Aware Women Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir. 2001)).
18. *Id.* (citing *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir. 2008); *Does I through XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000)).
19. 197 Wn. App. at 628.
20. 97 Wn.2d 30, 640 P.2d 716 (1982).

CCP Summary – Rule 7 Committee Mtg
November 21, 2017

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

Absent: Judge Wolf

Summary:

The Committee continued review of proposals from Jay Bodzin and Holly Rudolph.

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

Committee Discussion –
The Committee reviewed Mark's preliminary draft language offered as a modification of Jay Bodzin's proposed amendment. Mark expressed concern about whether an amendment can reasonably assure actual notice of a summons.

Susie complimented Mark's draft, which crystallizes the gist of Jay's proposal and deftly streamlines elusive details. Susie asked whether the only challenge in creating a proposed amendment is the "assurance of receipt" issue. Mark said that Judge Roberts expressed another concern about email having no specific geographical nexus. Mark believes her concern relates to Pennoyer v. Neff, 95 US 714 (1878), and the risk that a court will take personal jurisdiction over a party who does not have even a transitory presence in the state. No other notable concerns were raised.

Discussion ensued about whether the absence of an identifiable geographic location of service is problematic. Deanna noted that follow-up mailings can be sent anywhere, without geographic limitation, and Mark said that publication can also happen anywhere as long as it is a distributed in a place most likely to accomplish actual notice.

Derek agreed to do basic research on the question of whether the situs of service of summons is critical, and to write a recommendation about whether geographic inscrutability would irreparably undermine the effectiveness of email for summons service.

Susie asked how our Committee could determine the best way to address the "assurance of receipt" issue. She suggested that we research whether other states already adopted rules that could inform our resolution of that issue. Deanna accepted the assignment of doing online research, and listserve inquiries, to find out if other states have created a useful blueprint. (Deanna noted that she begins a trial next week, and may delegate this to others in her firm.)

Mark reminded us that the notion of using Facebook for service of summons came up at a full Council meeting, when some Council members spoke persuasively about aspects of Facebook as a means of communication that may make it better suited to summons service than email.

Deanna offered to include an inquiry about Facebook along with the inquiry she or her colleagues will do about email service of summons rules and processes in other states. Susie recalled that she inquired of the full Council whether any members possess heightened facility with social networking technology, which may be helpful to the process of crafting any amendment that explores new uses for those technologies. Mark recalled that Kelly Anderson stepped forward as someone with that qualification. Susie said that our Committee may benefit if we expand to include Mr. Anderson in our efforts. Deanna said that she uses social networking and may be able to act as technological "advisor" on social networking mechanisms.

B. Holly Rudolph Proposals – (1) Clarify whether a qualified server must do follow-up mailing when alternative service is used, or whether anyone (including an unrepresented party) can do the follow-up mailing after a qualified server does the initial mailing. (2) Update the presumptive alternative service method of publication to either delete it, or to make it not presumptive, or to adjust how to select the appropriate form or location of the publication that can be used.

Committee Discussion –
(1) The Committee did not re-open the follow-up mailing discussion at this meeting.

(2) A discussion was deferred at the last meeting, on the Rudolph proposal to update the presumptive alternative service method of publication, was briefly re-opened. At the October full Council meeting, new members were educated about a past effort to update the service option for publication to reduce expense and increase likelihood of actual notice. The Council reported that a past effort to modify a rule that would have resulted in decreasing use of publication was soundly defeated by an outcry from small business publication houses that subsist on lawyers' service publication needs. The threat to the livelihoods of employees of those publications overcame the cost considerations for those who seek justice.

Susie asked for feedback on an idea she had after that Council meeting. Back when publication was accepted as the presumptive alternative service method for summons, litigation through attorneys was the rule, not the exception, and parties who filed lawsuits had the means to afford service by publication. Time have changed, and self-represented parties file more cases every day. Courts have developed methods to make justice more accessible for modest means litigants, though waivers and deferrals of court fees. Never-the-less, such litigants will not have the means to access justice in some cases if they can't afford to publish service of summons. Holly Rudolph is working to create forms for self-represented litigants, and her request for attention to this issue suggests that presumptive alternative publication is a potential obstacle for self-represented parties.

Susie suggested that a modification to the publication alternative service presumption should be tailored to low-income litigants who are stymied from pursuing relief by the necessity to fund publication. Carving an exception for these litigants would not diminish the returns for small business newspaper publications, and would serve the ends of expanding access to justice.

Mark noted that Susie floated the idea with him after the November Council meeting, and that it comports with the spirit of Boddie v. Conecticut, 401 US 371 (1971). Mark noted that a centralized website for posting summonses may be something that OSB could manage and maintain as a public service. Such a website could be implemented as an alternative method to publication for low income litigants, and as an adjunct to publication for litigants who do not qualify for accommodation in costs of service methods.

Derek noted concern that no other ORCP are tailored toward a particular socio-economic group of litigants. Susie noted that no other ORCP creates a financial obstacle to litigation like the need to publish summons does.

The discussion had to be tabled due to time constraints for the meeting participants, but the Council will be asked for feedback on the idea at the next full meeting.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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

B Pleading after motion.

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

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

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

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

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December 9, 2017, Meeting
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D(1) grant a motion to enlarge the time for filing any pleading or motion, if the motion to enlarge time is filed within the time specified in these rules; or

D(2) grant a motion allowing any pleading or motion to be filed, if the time for filing that pleading or motion has already expired.

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TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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

B Pleading after motion.

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

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

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

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

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TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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

B Pleading after motion.

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

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

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

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

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D(1) grant a motion to enlarge the time for filing any pleading or motion, if the motion to enlarge time is filed within the time specified in these rules; or

D(2) allow any pleading or motion to be filed, if the time for filing that pleading or motion has already expired.

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COUNTERCLAIMS, CROSS-CLAIMS,

AND THIRD-PARTY CLAIMS

RULE 22

A Counterclaims.

A(1) Each defendant may set forth as many counterclaims, both legal and equitable, as that defendant may have against a plaintiff.

A(2) A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

B Cross-claim against codefendant.

B(1) In any action where two or more parties are joined as defendants, any defendant may in that defendant's answer allege a cross-claim against any other defendant. A cross-claim asserted against a codefendant must be one existing in favor of the defendant asserting the cross-claim and against another defendant, between whom a separate judgment might be had in the action, and shall be one arising out of the occurrence or transaction set forth in the complaint or related to any property that is the subject matter of the action brought by plaintiff.

B(2) A cross-claim may include a claim that the defendant against whom it is asserted is liable, or may be liable, to the defendant asserting the cross-claim for all or part of the claim asserted by the plaintiff.

B(3) An answer containing a cross-claim shall be served on the parties who have appeared.

C Third-party practice.

C(1) After commencement of the action, a defending party, as a third-party plaintiff, may cause a summons and complaint to be served on a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the

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third-party plaintiff as a matter of right not later than 90 days after service of the plaintiff's summons and complaint on the defending party. Otherwise the third-party plaintiff must obtain [*agreement of parties who have appeared and*] leave of court. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall assert any defenses to the third-party plaintiff's claim as provided in Rule 21 and may assert counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in this rule. The third-party defendant may assert against the plaintiff any defenses that the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. Any party may assert any claim against a third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert the third-party defendant's defenses as provided in Rule 21 and may assert the third-party defendant's counterclaims and cross-claims as provided in this rule. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this section against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

C(2) A plaintiff against whom a counterclaim has been asserted may cause a third-party defendant to be brought in under circumstances that would entitle a defendant to do so under subsection C(1) of this section.

D Joinder of additional parties.

D(1) Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rule 28 and Rule 29.

D(2) A defendant may, in an action on a contract brought by an assignee of rights under that contract, join as parties to that action all or any persons liable for attorney fees under ORS

20.097. As used in this subsection "contract" includes any instrument or document evidencing a debt.

D(3) In any action against a party joined under this section of this rule, the party joined shall be treated as a defendant for purposes of service of summons and time to answer under Rule 7.

E Separate trial. On the motion of any party or on the court's own initiative, the court may order a separate trial of any counterclaim, cross-claim, or third-party claim so alleged if to do so would be more convenient, avoid prejudice, or be more economical and expedite the matter.

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