**MINUTES OF MEETING**
**COUNCIL ON COURT PROCEDURES**
Saturday, February 10, 2018, 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
Travis Eiva*
Hon. Timothy C. Gerking
Hon. Norman R. Hill
Robert Keating
Hon. David E. Leith
Hon. Susie L. Norby
Hon. Leslie Roberts
Sharon A. Rudnick*
Derek D. Snelling*
Hon. Douglas L. Tookey*
Margurite Weeks*
Hon. John A. Wolf
Deanna L. Wray*

Members Absent:

Jennifer Gates
Meredith Holley
Hon. Lynn R. Nakamoto
Shenoa L. Payne

Guests:

John Bachofner, Jordan Ramis
Matt Shields, Oregon State Bar

Council Staff:

Shari C. Nilsson, Executive Assistant
Hon. 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 7<br>ORCP 15<br>ORCP 21 A(8) and A(9)<br>UTCR 5.010 | Probate/Protective Proceedings<br>ORCP 9<br>ORCP 21<br>ORCP 25<br>ORCP 32<br>ORCP 45<br>ORCP 47<br>ORCP 68<br>ORCP 71<br>ORCP 79 | ORCP 22<br>ORCP 43 | |

I. Call to Order

Mr. Keating called the meeting to order at 9:33 a.m.

II. Administrative Matters

A. Approval of January 13, 2018, Minutes

Mr. Keating asked whether any Council members had corrections or suggestions for changes to the draft January 13, 2018, minutes (Appendix A). Hearing none, he called for a motion to approve the minutes. Judge Roberts made a motion that was seconded by Mr. Crowley. The motion was approved with no objections or abstentions.

B. Expense Reimbursement

Judge Peterson reminded Council members to submit expense reports for their travel to and from Council meetings. He stated that Council staff attempts to dutifully process them as quickly as possible, but that we are unable to track progress once we send them to the Oregon State Bar (OSB). He asked that members keep track and let staff know if they do not get paid.

C. Committee Work

Judge Peterson stated that there are just four more meetings before the summer break. He noted that it is not statutory that the Council does not meet in July and August, but that it is tradition and that no one cares to meet in those summer months. He asked committee members to focus on getting their work done in the next few months so that any rule changes are ready to be voted on at the September meeting. Judge Peterson explained that, last biennium, the Council ended up making changes on the fly to Rule 9 at the September meeting, and that is not the most considered way to amend rules because there is a risk of error. He asked that Council members re-read any draft amendments that have already been put on the publication docket for September to ensure that they are in the best possible form for voting.

III. Old Business

A. Committee Reports

1. Discovery Committee

Judge Bailey reported that the committee had not met since the last Council meeting but that it would be scheduling a meeting soon.

2. Fictitious Names Committee

Mr. Crowley stated that the committee had not met since the last Council meeting but that a meeting was scheduled for February 23. He encouraged members of the committee to carefully read the minutes from the January Council meeting because there is a very thorough discussion of the committee's mission and particularly the issue of constitutionality. He stated that this issue will be emphasized at the next committee meeting.

3. ORCP 7 Committee

Judge Norby reported that the committee met on January 25 (Appendix B). She stated that the committee had again discussed attorney Jay Bodzin's proposal that encourages embracing e-mail as a viable method of alternative service and creating a particularized process that guards against pitfalls in its use and ensures that it is reasonably calculated to result in actual notice. Judge Norby noted that the committee has been spending most of its time on this proposal. She had hoped that the latest committee meeting would be spent synthesizing ideas about e-mail and that the committee would have collated some information from around the country about the use of e-mail in other states, but the committee ended up focusing more on social media than on e-mail because most of the court opinion summaries the committee found related to social media. She expressed concern that some of the committee's conversation assumed that social media and e-mail were the same, but she stated that she is not sure that this is true. Judge Norby observed that e-mail is not only something that more experienced attorneys and judges are more comfortable with because they have been using it longer but, unlike social media, it also already interfaces with e-court. The committee's discussion included what types of social media would allow sending a a document saved in Portable Document Format (PDF) because committee members felt fairly confident that a PDF document would be needed to give an exact picture of the documents that needed to be served.

Judge Norby stated that, subsequent to the committee's meeting, she was contacted by Aaron Crowe of Nationwide Process Service. She stated that Mr. Crowe has expertise in e-mail service and possibly service by social media as well. He asked Judge Norby if he could attend the February Council meeting to offer his opinion on this topic, and Judge Norby asked him to speak to the committee first. Judge Norby stated that her interpretation is that Mr. Crowe is opposed to service by social media, but not necessarily for the same reason that some Council members may be. She stated that Mr. Crowe does not believe that using PDF documents is a good idea due to technological reasons, and that the committee might find his input on this matter helpful. Mr. Bachofner explained that Mr.

Crowe, as a process server, has been very interested in Rule 7. Judge Norby stated that it is clear that he has a great deal of expertise as well as some strong opinions.

Judge Norby explained that the committee had a lot more conversation but did not get very far in the end other than that it is now fully discussing service by e-mail and social media, not just service by e-mail. She noted that Judge Peterson had drafted a very quick second draft of a Rule 7 amendment that added service by social media, in the hope that it could be brought to the full Council today, but that she had decided to wait for Mr. Crowe's input and a little more committee work before presenting it to the Council.

Mr. Bachofner asked whether the committee's focus is to allow service by social media to qualify as a primary service method, if there is actual notice, or to make it an alternate method like publishing. Judge Norby stated that this question is part of the committee's ongoing conversation and that her only response to Mr. Crowe so far was to tell him that the committee and the Council have thoroughly discussed that this rule does not require actual notice but, rather, a likelihood of actual notice. Judge Wolf noted that Judge Peterson's current committee draft regarding service by social media does require some indication that the party actually saw it. Judge Norby pointed out that this is the only way that other courts have been allowing service by social media. Judge Roberts wondered whether there is a way to ensure that a particular social media site is opened by the person one is trying to serve. Judge Norby stated that there are ways to be very sure, but not completely certain. She stated that courts have allowed service by social media based on those "very sure" ways. Judge Norby noted that Mr. Andersen is very social media savvy and that, between his experience and Mr. Crowe's expertise, the committee will be well served in seeking answers in this area. Judge Peterson explained that Judge Wolf had made a suggestion for a tweak to his recent draft that can be included in the next committee draft. Judge Norby agreed that this would be a good idea and stated that the committee will meet again before the next Council meeting.

Mr. Bachofner stated that he has great concerns about actual notice. He explained that he does not check his social media accounts very often but that he personally had a situation where someone created a Facebook account under his name and started communicating with his contacts. He stated that this is a concern. Judge Norby remarked that this is pretty widely recognized in the cases that the committee has been looking at. Judge Bailey pointed out that allowing the court to set aside a judgment is what Rule 71 is all about. Judge Leith stated that a circumstance where he would be inclined to allow service by social media is where a diligent effort had been made to serve in the usual ways and, in a motion for alternative service, instead of just ordering service by publication he would order

service by both publication and sending to reasonably vetted social media accounts and e-mail accounts. He wondered if the proposal would suggest that a judge is limited to accepting e-mail or social media as service if there is actual notice. Judge Norby replied that the committee's focus is simply to give guidelines because so many people in recent history have been getting permission for alternative service without any guidelines to make it a reliable method.

Judge Leith wondered why courts would allow service by social media at all unless there had been a diligent attempt at traditional service. Judge Wolf replied that courts would not allow it otherwise, as it is an alternative service method. Judge Bailey stated that he does not know if judges are doing it haphazardly, but he has allowed it as an alternative service method with evidence that the social media accounts and e-mail addresses in question are legitimate because it was likely a better form of notice than publication. Judge Gerking stated that, with respect to Rules 69 and 71, if a party is trying to claim alternative service through Facebook, he believes that it is a relatively low bar for setting aside a judgment if the defaulting party makes some showing that they did not see it.

Judge Peterson stated that he was pushing ahead to get a draft done because of the Council's biennial schedule, and that e-mail, social media, or both can be included as alternative service methods if the Council believes it is a good idea. However, as he has indicated to the committee, the idea of service by social media makes him extremely wary. It is an alternative method of service, so the plaintiff will have to show that they have tried all of the "regular" methods of service, and it may be that service by publication will be supplemented by service via social media so that there are more tools at the court's disposal in attempting to achieve actual notice of a pending action.

Judge Norby stated that the next topic that the committee discussed was the proposals made by Holly Rudolph of the Oregon Judicial Department. She explained that the committee had reached a consensus that attorneys should be allowed to do follow up mailings and Rule 7 should be amended to clarify that option. Judge Norby recalled that the Council's prior discussion on this topic was animated and that it was uncertain as to whether attorneys were able to do follow-up mailings under the rule's existing current language; however, the committee's intent is to make it clear that the practice is allowed.

Judge Norby reported that the committee had also had a lengthy and robust discussion about the possibility of a website being created as an adjunct alternative service method. She stated that the most important factors are cost and viability. Judge Norby explained that she and Judge Peterson would discuss the issue with the OSB lobbyist to try to get answers about cost and viability and

might present those questions to the Department of State Lands and Department of Justice to determine whether it is cost effective or viable for anyone. If not, there is no point in going forward.

Judge Norby explained that Ms. Rudolph had also inquired about clarifying the phrase "newspaper of general circulation" so that it is more understandable for self-represented litigants. She stated that Judge Wolf had found the definition in ORS 193.010(2) and that he had also found information from the Oregon Newspaper Publishers Association (http://www.orenews.com/legal-notice-statement) that includes a list of newspapers that meet the statutory definition. Judge Norby stated that the committee was struck by the fact that the definition may be outdated now that newspapers are available online, and wondered whether the statute should perhaps be altered to represent the modern age, whether the rule should be changed, or whether the rule should refer to the statute.

Mr. Shields stated that the OSB had done some work on the statute a number of years ago in connection with a proposal to create a website for publishing notices. He agreed that the statute is outdated, particularly with regard to "bona fide subscribers," because most publications today are either exclusively or additionally available online and, thus, available to non-subscribers. Mr. Shields stated that it is a ridiculous standard that, regardless of how many people read the publication, if it is not subscription based, it does not count under the statute. He reminded the Council that there was a proposal about six years ago to put together a site like Judge Norby is suggesting with the goal of generating some revenue that would also be used to fund legal aid. A lot of people supported it, but there was a lot of pushback from the Oregon Newspaper Publishers Association. Judge Norby pointed out that the reason the committee is continuing to consider the idea is that it would be presented as an adjunct, not an alternative like the previous proposal, and that it could make some other forms of alternative service more meaningful in tandem. Mr Shields stated that the OSB would be happy to work with the committee but that he is not sure what the response will be.

Judge Hill stated that the rule already says that, if methods to achieve actual service are exhausted, a party may use alternative service, but the rule does not specify what the alternative service has to be. He noted that the language in the rule says that it must be in a manner reasonably calculated to give the defendant actual notice. He stated that the rule has a safe harbor that allows publication, and that the Council plans to deem that publication satisfies due process, but pointed out that there is nothing that prevents a party from going to a judge and asking to serve by Facebook. Judge Norby stated that the perceived problem is that people who are attempting to use service by social media do not know what they are doing or how to accomplish service, nor do the judges sometimes. She stated that, if the Council

can create guidelines that are helpful for litigants, lawyers, and judges, we all can be a little more confident that the goal of adequate service would truly be accomplished and that would be a helpful service. Judge Roberts agreed that if judges had a form to go to they would be more likely to say, “do it according to that.” Judge Hill wondered whether it is the proper role of the ORCP to correct for people's lack of understanding of the practice of law. Judge Norby stated that she sees it as providing a service to members of the bar, who range from those who just got out of law school to those who have been practicing for years; it is a guide for people to follow to accomplish what they need to accomplish.

Judge Roberts pointed out that it is also a safeguard to the public to provide such a definition, just the way that publication in newspapers is defined in the statute. She noted that it gives a regularity and stated that, if the rule allows service by Facebook but gives no guidance on how to accomplish it, one judge may state that it is enough to send it to an account with a similar name but another judge may take the time to say you must verify. She opined that it would work better with one procedure for everyone. Judge Hill stated that it seems like the Council would be creating a second safe harbor. Judge Norby replied that the idea would not be to create a form or an extremely long, detailed rule that explains how social media works but, rather, to simplify the process into a few guideposts that a person would have to meet. Judge Peterson stated that the committee, and even the Council, have had some discussions about what minimum standards should be imposed. He stated that the assumption should be that there are some judges and litigants who struggle with e-mail and social media. He explained that the committee has discussed whether the document would be required to be in PDF format and whether the sender should be able to identify whether the recipient has opened the document, and those are good discussions to have. He clarified again that e-mail and social media would be forms of alternative service and that the thought is to provide the judge ordering it with guidelines to go by. Judge Gerking suggested that they should be general guidelines, not particularized procedures, because a party could argue that service was invalid because the server did not follow specific procedures in the rule.

Judge Peterson observed that, if it is really close and there is a technical violation of the rule, there is Rule 7 G. Judge Gerking asked if Rule 7 G has ever been cited by any court. Judge Peterson stated that he would guess that there are no appellate decisions on it. Mr. Bachofner stated that, to the extent that there is any interest in trying to change ORS 193.090, the deadline for proposals to the Public Affairs Committee of the OSB is coming up in May.

Judge Peterson observed that the committee's robust discussion about newspapers of general circulation was perhaps overkill. He noted that a plaintiff is going to come before a judge, and that it is not the Council's business to legislatively decide what a newspaper of general circulation is. If a plaintiff wants to publish in the Nickel Ads, his guess is that the judge would say no, and at least there is a list to which a judge can refer. Judge Bailey stated that he is not even certain that a judge needs to know that because, if a plaintiff uses a newspaper that does not qualify and someone files a Rule 71 motion saying that the newspaper does not qualify, setting aside the default judgment is the appropriate remedy. He noted that the onus is still on the person making the request for alternative service. He stated that he feels that social media is still in line too, because the burden is on the person requesting the alternative service and at some point that person may have to justify the use of social media for service if a Rule 71 motion is filed. Judge Norby pointed out that there is no cross reference to the statute defining a newspaper of general circulation, and suggested that it should perhaps be added to Rule 7.

Judge Roberts observed that it would be better to craft the rule carefully to assure more valid judgments than to leave it haphazard and rely on parties to invalidate the invalid judgments that might get entered. Judge Bailey noted the rule does not necessarily have to offer that assurance because there is a remedy for it. Judge Roberts noted that it is better to not have the problem in the first place. Judge Hill stated that the flip side is that this is presumptive service, so there will be parties who did not receive actual notice and who have no ability to come back in and inform the court that the presumptive service was not good enough. He expressed concern that this will have the opposite effect of closing the courthouse door to these parties. Mr. Bundy agreed and observed that, ultimately, the purpose of the rule is to say that a party cannot avoid a lawsuit if the party knows it is going on. The purpose is not to punish people who honesty did not know that they were being sued. He opined that, the more we allow service by social media, the less reasonable or fair it becomes. His preference would be to say that it depends on the circumstances and to require the plaintiff to explain all of the circumstances and ask for authority to serve by social media if all else has failed.

Judge Norby asked whether Mr. Bundy was suggesting a preface to the clause that allows social media that says "if all else fails." Judge Wolf noted that this language is already there. Judge Norby wondered about doubling up on it, stating that a party must have tried all other forms of alternative service first. Mr. Bundy stated that there is no need for such language, but that the judge needs to be satisfied that reasonable attempts have been made to get the individual served. He suggested that allowing service by social media will require the Council to

define its parameters, down to such specific details like whether cutting and pasting text into a messenger is allowed, which could be difficult. Judge Bailey noted that this information typically is included in the default part of the notice of service that is given to the court.

Judge Peterson stated that Ms. Rudolph had suggested that perhaps newspaper service should be eliminated, but he noted that the Council agrees that it does serve a real purpose in certain cases like foreclosure. Even though it is a presumptive method of alternative service, subparagraph 7 D(6)(f) gives a defendant the right to come in and defend after the fact where presumptive newspaper publication has occurred. Judge Peterson stated that he had made a change to the committee draft to allow defendants the right to come in and defend after the fact for any of the alternative service methods. Each one of the alternative service methods is presumptive and, if there is a judgment, the defendant will have to rebut the presumption, but that right is available and defendants are thus able to come to court to join in the litigation or to seek relief from a judgment.

Judge Wolf noted that the committee still has a lot to talk about.

4. ORCP 15 Committee

Judge Gerking stated that he believes that the Council had previously approved the committee's suggested changes to Rule 15 A, B, and C . He reported that the committee has been focusing on section D and that it has more or less reached a consensus on changes (Appendix C). He explained that the committee believes that these modest changes to section D improve the overall clarity of the section. One change is to remove the words "or do other act" from the title, because there are no other acts that the Council wants to encourage. Judge Gerking stated that Judge Peterson had the great idea to remove the word "allow" from the current version and replace it with the word "permit." He pointed out that "allow" suggests that it is incumbent on the pleader to file a motion to allow a late filing, whereas "permit" would allow a circumstance where, if the pleader filed late and that pleading was attacked by a motion to strike, the court would retain discretion to permit the late filing.

Judge Hill stated that he believes that there is an appellate court case that says that, if a pleading is filed without leave of court when leave is required, the pleading is a nullity because of the lack of an order. He wondered how the change to section D would impact that case. Judge Peterson stated that the Council had discussed this issue at an earlier Council meeting but that it should perhaps be revisited. He noted that he has received calls from former students asking what to

do when a filing deadline has been missed, and he stated that his advice has been that one could file a motion to ask to file the pleading late but, in the meantime, the other party is liable to file a motion for default, so just go ahead and file the responsive pleading and see what happens. Judge Hill stated that he believes that is good advice, but his recollection is that there is a case that states that, if a party is required under the rules to have leave to file a pleading, and the party does not obtain an order allowing that pleading to be filed, the pleading thus filed is a nullity. He observed that this is a malpractice trap because, on appeal, it could be ruled that no answer had been filed. He expressed concern that the suggested change might run afoul of that.

Judge Wolf noted that the change to section D would not apply to an amended pleading, because there is no timeline to file an amended pleading. He observed that sections B and C of Rule 7 deal with the need to file an amended pleading, whereas section D just deals with what happens when a party already has an obligation to file something, but files it late. Judge Gerking agreed that Judge Wolf made a good point and noted that section D is entitled "Enlarging time to plead." Judge Wolf stated that there is already an obligation to file something, but the deadline was missed, so the court can say that it does not matter. Judge Roberts noted that this can happen on an answer or complaint, where a Rule 21 motion has been granted and a party has 10 days to plead over but does not get around to it for a month and nobody remarks on it. Judge Gerking stated that he does not think that a pleading thus filed is a nullity.

Judge Hill stated that the case that he was referring to relates to where a party is required to have leave to file an amended pleading, so that is covered in sections B and C. He wondered, however, whether a problem is created in the proposed amendment to section D when it is unknown whether the court has acted. The language states that the court can permit it but, if a party just files a late pleading and the court never takes any action, is there concern about the state of the record when it is unknown whether the court has actually permitted it? Judge Peterson explained that questions like this are why the committee brings drafts to the full Council for vetting. Mr. Keating asked the committee address this question and asked Judge Hill to provide the case citation to Judge Gerking.

Judge Hill explained that he could envision an appellate court saying that a party did not have an order indicating whether the court permitted or did not permit a late pleading. Judge Gerking noted an ORCP 21 circumstance where the rule allows 10 days to plead further and, if a party does not comply with that deadline and files late, it is up to the opposing party to file a motion to strike. He pointed out that this is a different scenario. Mr. Bachofner stated that his recollection of the Court of Appeals case to which Judge Hill referred is that a party filed a Rule

21 motion and, while that motion was pending, the party filed a new complaint or answer to replace the pleading that was filed against. Judge Hill explained that he is confident that the proposed change to section D does not implicate that court case. His question is whether court action is needed, and perhaps it is not. Judge Peterson stated that, right now, the rule says "allow." Judge Roberts observed that trouble will arise only if the other party cares at some later point, and of course the assumption is that, if there is no objection, it is like a stipulation and the case continues. However, she stated that Judge Hill's question has made her a bit uncomfortable. Judge Hill admitted that it may be a solution in search of a problem but felt that he should raise it.

Mr Bundy suggested adding language such as, "under a motion to strike, the court may permit," thus adding the words of concern at the beginning of the sentence and implying that a party needs to file an objection or motion to strike if that party does not like the fact that the pleading was filed late. Judge Gerking stated that Mr. Bundy's idea might work. Judge Gerking and Judge Peterson concurred that the committee should revise the draft amendment further and bring it back to the Council. Judge Hill observed that the existing language in the rule is "or by an order enlarge such time," so that language seems to have contemplated having an order. Judge Peterson noted that, under the existing language, if a party is not late but anticipates being late, that party may proactively file a motion, but the language is unclear about whether a motion is required if the deadline has already been missed. The word"allow" implies that the court can allow it with a motion. He explained that, when the Council imported similar language when amending Rule 68 a few biennia ago, Council members were confused about what the language meant, so it was apparent that the language needed to be clarified. Judge Gerking stated that he believes that the committee is close to having acceptable language.

Judge Peterson pointed out that the committee had made an additional change to section A since the last time a draft was before the Council to include a reply to an answer that is contemplated in Rule 13. He state that the OSB's Practice and Procedure Committee (PPC) had previously asked the Council to make an amendment to reflect this. The new draft language in section A reads, "A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer." The last sentence that is stricken in the new draft ("Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.") seemed to be a carryover from before the Council made the last change requested by the PPC and referred to a reply to an affirmative defense so, under the existing language,

it appears that any other pleading has a timeline of 30 days but that particular reply (a reply to an affirmative defense) has a timeline of 10 days. Judge Peterson stated that the committee had a fairly lively discussion but ultimately thought that the timelines should be the same for all pleadings. He asked that all Council members look carefully at this language so that it can be reconsidered at the next Council meeting.

Mr. Eiva raised a concern about motions that are not responsive to the complaint. He explained that he once filed a complaint in a case and the defendant filed a motion to change venue in response. He explained that he could not get the defendant to file a responsive pleading to the complaint and that the motion to change venue took about 10 months to resolve. The defendant kept telling him that the motion to change venue acted as a stay on the time within which he was going to be able to file a Rule 21 motion once venue was dealt with. Mr. Eiva stated that he made a motion to deem that his complaint was admitted since the defendant had not filed an answer in 30 days, but he never received a ruling from the court, likely because the rule is not very clear as to what a motion to change venue does. However, he does not believe that a motion to change venue is a motion responsive to the pleading, nor is it a motion for a protective order. Mr. Eiva stated that it would be nice if there was some kind of language as to what kind of motion satisfies the requirement to stop the clock on Rule 15.

Mr. Keating stated that he had experienced a similar situation representing the defendant and that he was completely confident that, once the plaintiff's challenges to his motion for a change of venue and discovery were completed, the motion for a change of venue would be granted. He therefore argued to the court that it was appropriate for the trial court that would actually handle the litigation to make rulings on early motions and that is what happened. Whoever ultimately ends up being the trial judge should not be stuck with the previous rulings of a judge in the wrong venue, so Mr. Keating does not understand how justice is delayed in any way.

Judge Hill stated that, as a practical matter, it would be a good idea to get an agreement from the plaintiff that you will not file a responsive pleading until the venue matter is settled. Mr. Eiva agreed that Judge Hill's solution is practical. He stated that he is not going to push hard on a change regarding this matter, but that he just thought that a motion to change venue is not a motion responsive to a pleading. Mr. Bachofner stated that it is about as clear as mud. He observed that, any time by statute or rule a motion has to be made in the first instance or be waived, such as a statute of limitations motion to dismiss, that motion is clearly challenging the claim, but his practice is to err on the side of having a pleading: that is, preparing an answer and serving a draft on opposing counsel.

The problem is, one has to raise the statute of limitations or else waive it. Judge Wolf noted that Mr. Bachofner's example is a motion directed against a complaint, whereas a motion to change venue may not be. Mr. Bachofner noted that the motion to change venue must be made as the initial pleading.

Judge Gerking pointed out that one solution to Mr. Eiva's situation is to request a scheduling conference with the court to resolve the issues. Mr. Eiva agreed that this is always a good practice. Judge Peterson stated that, if a party is going to file a motion to dismiss based on the statute of limitations, that party may simultaneously file a motion to change venue to protect oneself in case there is a ruling against the change of venue so that the statute of limitations defense is not lost. Judge Gerking wondered whether there is there an argument that a motion for a change of venue is a waiver of the statute of limitations. Judge Peterson stated that you could argue it in the alternative.

5. ORCP 23 C/34 Committee

Ms. Wray stated that the entire committee had not met but that she had e-mail exchanges with Mr. Andersen and Ms. Payne. She explained that committee members are going to strive to craft non-substantive language to get to the Council, but that there is no proposal as of yet.

6. ORCP 55 Committee

Judge Gerking stated that the committee has not met but has an upcoming telephone conference. He noted that it is a substantial time commitment to go through the changes that Judge Norby had drafted.

B. ORCP 27 - Potential Conflict with HB 2673

Judge Peterson reported that Ms. Rudolph had not replied to his last e-mail. He stated that Judge Wolf had forwarded an e-mail (Appendix D) from Bryan Marsh, Family Law Program Analyst with the Juvenile and Family Court Programs Division of the OJD, to presiding judges that affirms the necessity of appointing a guardian ad litem in cases of name or sex changes for minors and informing the courts that the OJD has requested creation of a statewide form. Judge Wolf confirmed that the OJD will be adding the guardian ad litem forms to the form packet. Judge Peterson stated that, barring any further concerns from Ms. Rudolph, this issue appears to be resolved.

IV. New Business

Mr. Bundy asked whether he should raise an issue regarding the Uniform Trial Court Rules (UTCR) with the Council before bringing it to the UTCR Committee. Judge Norby asked whether it connects to the ORCP. Mr. Bundy stated that it does relate to Rule 21 A(8) and A(9) and why UTCR 5.010 does not require parties to confer on motions made under those subsections. Judge Peterson stated that he has always assumed that it is because they are objective. Mr. Bundy observed that they should be, but sometimes they are not. Judge Peterson stated that there is interplay between the ORCP and the UTCR so it is sometimes appropriate to raise UTCR issues with the Council to see if there are also ORCP that need to be amended. In this situation, he suggested that Mr. Bundy approach the UTCR Committee directly. Mr. Bachofner noted that, when the Council was looking at the issue of electronic service, it had someone from the UTCR Committee attend Council meetings and vice versa to coordinate some of the changes.

Mr. Bundy explained that he was representing a plaintiff physician and he filed a complaint to which the defendant filed a motion and did not ask to confer. Mr. Bundy thought that it was a waste of time to go into court to talk about issues in his complaint that could have been resolved by an amendment. The defense's argument was that he did not want to produce any discovery now because the court might grant his motion. Mr. Bundy's position was that it was odd that there was no conferral on an ORCP 21 motion just because it was filed under subsection A(8) or A(9). He interprets the rule the same way as Judge Peterson, that it must be a black and white thing, but that is not how a lot of defense counsel are looking at that rule. They are just using it as a tool to apply pressure.

Mr. Bachofner stated that, for what it is worth, he confers on just about any motion he makes. He stated that he has no opposition to changing the UTCR but he did not know how the UTCR Committee would feel about such a change. Judge Leith stated that, just because the defendant did not confer before they filed the motion, it does not mean that the plaintiff could not seek to confer afterward. Judge Wolf noted that the court would be happy to have the issue resolved before the amended complaint is filed. Mr. Bundy stated that he asked for an additional opportunity to amend if the judge believed that he had not pled appropriate claims, but he believed that he had.

Judge Gerking informed Mr. Bundy that Bruce Miller is the current chair of the UTCR Committee and that he is certain that he would be interested in Mr. Bundy's feedback.

V. Adjournment

Mr. Keating adjourned the meeting at 10:39 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

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**COUNCIL ON COURT PROCEDURES**
Saturday, January 13, 2018, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

**ATTENDANCE**

Members Present:

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Hon. Timothy C. Gerking*
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. David E. Leith
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Sharon A. Rudnick
Derek D. Snelling
Hon. Douglas L. Tookey*
Hon. John A. Wolf
Deanna L. Wray

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. Lynn R. Nakamoto
Margurite Weeks

Guests:

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 |
|---|---|---|---|
| Fictitious Names<br>ORCP 23<br>ORCP 27<br>ORCP 34<br>ORCP 55<br>ORCP 79 | Probate/Protective Proceedings<br>ORCP 9<br>ORCP 21<br>ORCP 25<br>ORCP 32<br>ORCP 45<br>ORCP 47<br>ORCP 68<br>ORCP 71<br>ORCP 79 | ORCP 22<br>ORCP 43 | |

I. Call to Order

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

II. Administrative Matters

A. Approval of December 9, 2017, Minutes

Mr. Keating asked whether any Council members had comments or concerns about the draft December 9, 2017, minutes (Appendix A). Hearing none, he asked for a motion to approve those minutes. Judge Roberts made a motion to approve the December 9, 2017, minutes. Mr. Crowley seconded the motion, which was approved unanimously with no abstentions.

III. Old Business

A. Committee Reports

1. Discovery Committee

Mr. Beattie reported that he and Justice Nakamoto had made suggestions regarding expert discovery and that the committee will review those proposals and decide whether to present them to the entire Council. Mr. Crowley noted that the committee has been most productive with regard to the subject of expert discovery, but he stated that there is still a lot of work to do regarding electronic discovery. He explained that a small group of lawyers from the committee, with members representing both the plaintiffs' bar and the defense bar, will be meeting to attempt to craft language that is neutral and agreeable to both sides. That language will then be presented to the committee.

2. Fictitious Names Committee

Mr. Crowley reported that the committee had met on January 8 and that committee members have been moving along with research and sorting out what is going on around the bar and in other jurisdictions. He stated that the committee had received more input from Judge James Hargreaves (Appendix B) that it will also need to examine.

Ms. Payne asked if the committee's research had revealed whether other jurisdictions have been dealing with this issue through procedural rules or by enacting statutes. Ms. Holley replied that most of her research indicates that the issue is dealt with through statutes or is addressed by common law. Judge Norby

stated that it is interesting is that statutes started appearing around 2003 in other states and that those were some of the most succinct and clear. Ms. Payne asked whether, based on the fact that other jurisdictions are using statutes, the Council might ultimately decide that the issue is substantive and needs to be handled by the Legislature. Mr. Crowley agreed that this is a legitimate question, particularly with the new material from Judge Hargreaves, and added that the committee has not looked at that in great detail yet. He stated that Ms. Holley had drafted a research memo about this issue (Appendix C).

Judge Norby pointed out that the rules promulgated by the Council effectively become statutes, so she was not sure that deferring the question to the Legislature would be the best way to handle it. Mr. Eiva stated that he was not so sure that the rules become statutes, but observed that this is a debate for another time. He expressed concern about making a rule that might potentially prevent victims from keeping their names from the public record without allowing lobbying groups a chance to provide their input about the impact on certain constituencies of people, including rape victims and child sex abuse victims.

Mr. Keating observed that the problem that brought the issue to the surface in the first place is that there is no existing statute or rule that says that filing under a fictitious name is allowed and there is Oregon's constitutional open courts provision to contend with. He stated that he has been involved in different circumstances where the court has relied on that constitutional provision to prevent the sealing of a record with regard to the amount provided for in a settlement agreement. He agreed that the Council clearly does not have authority to amend the constitution, but opined that it can at least obtain a little feedback from the bar whose clients are affected by the use of fictitious names in order to help clarify the issue. Mr. Keating stated that he believes that such cases will begin to be challenged. He stated that he has defended cases prosecuted under a fictitious name and, while he was always sure to identify the true identity of the plaintiff, he has honored that confidentiality. He is not aware of anyone who has challenged the right of a plaintiff to employ the use of a pseudonym, but expressed the opinion that someone may well do that some day.

Ms. Rudnick stated that, to her, the first question is the constitutional question. She pointed out that other jurisdictions with rules that allow filing under fictitious names will not matter if their constitutions allow it but Oregon's does not. She stated that federal laws allow it subject to a showing of good cause, but the federal constitution does not have that open courts provision. She stated that she has done a lot of work in this area and she is pretty convinced that the Oregon Constitution does not allow it. She stated that she does not disagree with the policy underlying it, but observed that the committee might waste a lot of time

and energy if it ultimately decides filing under a fictitious name is unconstitutional.

Judge Norby agreed and stated that the committee has been discussing that very question. Ms. Holley explained that her memo addresses this question. She stated that her reading of the law is that the open courts clause applies to adjudications which are pretty clearly defined in the case law. Judge Norby explained that the committee did not reach a conclusion, other than that it would like to continue its research. She stated that there are states with open court provisions in their constitutions that have also enacted statutes allowing for filing cases under fictitious names, and those options might be helpful to the Council. She stated that several state statutes use a process where a litigant has to fill out a form to apply for the ability to use a pseudonym, and those applications are kept in a place where they can be accessed but it is a little more difficult.

Ms. Holley agreed that the Council may ultimately decide that a rule change may tend to impact a substantive right. Judge Roberts pointed out that there is a distinction between whether it is procedural or substantive. She stated that she would be very cautious of paying undue attention to whether another state has a similar open court provision in its constitution because Oregon's constitution is very much a living constitution that the Supreme Court has applied separately and with vigor, which is not true in most states. Judge Norby stated that the counter argument to that is that Oregon's constitution has a victim's rights section written into it because the public voted for it. Judge Roberts pointed out that the topic under discussion does not fall under the victims' rights provision. Judge Norby observed that, with a living and breathing constitution, different provisions frequently cause interactions with other provisions.

Judge Hill noted that there is already a statutory procedure in juvenile cases where the courtroom is open but the records are sealed, and he wondered how that fits with the open courts provision. Ms. Holley explained that the thought is that there is no difference between juvenile and adult courts, so the courtroom is open if someone is giving testimony but other procedures are not. Mr. Eiva asked whether juvenile cases use pseudonyms. Judge Hill stated that this only happens in juvenile appellate cases, with the rationale apparently being that the written documentation is sealed. He wondered if the Oregon Supreme Court has ruled about the constitutionality of keeping documents sealed. Ms. Holley stated that the court did not rule on that issue, just on the issue of keeping a newspaper out of a hearing in juvenile court, which it ruled was unconstitutional. She explained that the court had also examined the issue in adult cases and decided that the court had the discretion to seal records. Judge Roberts pointed out that this discretion must be exercised under very limited conditions and that it is not the

general rule. Ms. Payne asked whether the court has ruled that it does not violate the open courts provision to seal documents under limited circumstances. Ms. Holley stated that it has made that ruling and, in those cases, there was good cause shown.

Judge Leith asked whether Ms. Rudnick's conclusion was that there were no circumstances where the use of initials or pseudonyms would be appropriate. Ms. Rudnick stated that she had not looked at that particular issue. She noted that she was not suggesting shutting down the committee but, rather, that the constitutionality is the threshold question. If the committee determines that filing under a fictitious name is permissible under Oregon's constitution, it can then attempt to define what it believes are the parameters. She stated that she suspects that those parameters would be very narrow. Judge Leith wondered whether the Council only needs to come to terms with the question of whether it is ever constitutionally permissible to use a pseudonym. If so, the rule would not be speaking to the constitutionality of it but, rather, speaking to the procedure to be used in the cases where it is permissible. Ms. Rudnick suggested that the Council could delineate the parameters by which the court could decide. She stated that the rule could define the burden that would need to be met. Judge Leith posited a structure similar to the "long arm" provision of Rule 4 where the rule not only lists items to consider but also states that the constitutional minimum must be met. Ms. Rudnick stated that she felt that, if the Council decides that it is able to write a rule that is constitutional, it would not be necessary to include in the rule that the constitutional minimum must be met. She noted that the Council's legislative history will be helpful to practitioners.

Judge Leith observed that one reason the Council is examining the issue now is that there is currently no uniformity as to how the process happens. Ms. Rudnick agreed that there is currently a void. Judge Hill asked whether Ms. Rudnick's concern is that she does not want to vote on an amendment unless she is convinced it is constitutional. Ms. Rudnick agreed. Judge Hill stated that he feels the same way and that it would be helpful for the committee to really focus its efforts on this question. Mr. Crowley stated that the challenge is that there is so little actual constitutional case law that addresses this point. He stated that there is some law in Oregon that allows for pseudonyms in limited cases, such as children in foster abuse cases. He observed that, in practice, the procedure is being handled in different ways in different counties. Multnomah County and Clackamas County each have supplemental court rules, with Multnomah County using its rule fairly regularly and Clackamas County not using its rule at all. Mr. Crowley stated that practitioners are coming to court in other counties and asking to file under a fictitious name, with some courts allowing the practice and some not allowing it. He stated that privacy concerns are very sensitive, but that it

would be helpful for the state to have uniform practices.

Prof. Peterson acknowledged that the ORCP are not statues. He stated that a former Council Executive Director, Fred Merrill, had written a law review article [*The Oregon Rules of Civil Procedure–History and Background, Application, and the "Merger" of Law and Equity*, 65 OR. L. REV. 527, 582-88 (1986)] with some history of Oregon's establishment of procedural rules. The Legislature either had that power or usurped that power and enacted statutes, but then delegated that power to the Council. Prof. Peterson stated that the ORCP are published in the Oregon Revised Statutes and that a fair reading is that the last amendment to a rule, whether made by the Council or by the Legislature, is what is currently in effect. He then addressed the issue of substance versus procedure and stated that this can sometimes be a gray area. *See, Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). To his mind, a rule that allows fictitious names in pleadings, or forbids the practice, does not mean that the rule is barring someone from a remedy; rather, it just means that there is a procedure to allow a party to file or defend a case with a pseudonym and some kind of regularized procedure for it. Prof. Peterson acknowledged that there is still the constitutional issue to address. He stated that, if the Council decides that allowing the procedure would require a statute or a constitutional amendment, Oregon's constitution is subject to being amended and the Council can give the benefit of its thought to the Legislature in the transmittal letter that accompanies the promulgated rules at the end of the biennium. He noted that there is precedent for this.

Ms. Holley stated that other statutes the committee has examined include the balancing the that the court is required to engage in and what the considerations are, so they may impact substantive rights. Judge Norby stated that there are already instances where pseudonyms are allowed that are covered in the ORCP that were created by this Council, so interplay between rules and statutes on the question exists already.

Mr. Bundy asked whether there was a consensus in the committee about whether a rule change regarding this issue would be substantive or procedural. Judge Norby stated that there was not. Ms. Rudnick stated that it would be interesting to look at the legislative history of statutes that allow for pseudonyms in a juvenile context to see if the legislature addressed the constitutional issue. She noted that there may be something there that gives the Council some comfort that there is a window to make such a change. She stated that such history might be found in Legislative Counsel opinions. Judge Norby asked Ms. Rudnick to send the committee an e-mail outlining her suggestion.

Mr. Crowley stated that the committee will continue its work, proceeding with caution. Mr. Shields stated that, if the ultimate conclusion is that some sort of legislative remedy is needed, the Council can talk to the Bar to see if some assistance can be provided.

3. ORCP 7 Committee

Judge Norby reported that the committee had not met since the last Council meeting but did have a meeting scheduled soon.

4. ORCP 15 Committee

Judge Gerking stated that the committee met on January 9 and successfully drafted suggested amendments to the remaining portions of the rule. However, there was not enough time to get it on the docket for today's meeting. He stated that the committee's plan is to re-circulate the language one more time among committee members before the February Council meeting and to bring the draft amendment to the Council at that time.

5. ORCP 23 C/34 Committee

Ms. Wray reported that she and Judge Leith had met but that other committee members were unable to join in. She reminded the Council that the issue concerned whether the Council should do anything about a problem arising from a Court of Appeals case [*Worthington v. Estate of Davis*, 250 Or App 755, 282 P3d 895 (2012)] where a plaintiff waited until the last day to file a personal injury case and sued a defendant without knowing that the person had passed away. She stated that the Court of Appeals held that, in such instances, it is an issue of misidentification rather than misnomer and, therefore, the plaintiff had missed the statute of limitations and the case did not relate back under ORCP 23 C. The Council was asked to examine whether a rule change would be appropriate.

Ms. Wray stated that Judge Leith and she are convinced that this would be a substantive change and they do not see any way that the Council could make such a change. Judge Hill stated that he did not understand the distinction, as the issue the court was construing in *Worthington* was a rule of civil procedure. Mr. Eiva noted that the defendant's right to the statute of limitations is substantive. Mr. Keating pointed out that Rule 23 C is the relation back of amendments provision. Ms. Wray agreed that *Worthington* is case law interpreting an ORCP, but wondered whether it is really in the purview of this Council to address a Court of Appeals case under a long line of precedents. Ms. Payne stated that the issue in *Worthington* was the application of a particular rule to circumstances presented

therein. She stated that the ruling was that the estate is not the same person as the dead person. In *Worthington*, the court held that when the plaintiff served the dead person's wife with the claim, the estate did not get notice of the claim and, therefore, the ability to amend the complaint under Rule 23 C to add a new party, the estate, was not available. The case's result was that the new party had not received notice of the claim within the time provided in the statute of limitations, so it could not relate back. She stated that the committee could not think of a way to amend Rule 23 without adding some sort of substantive provision to apply to the *Worthington* circumstances because it would require changing the substantive right of the defendant to enjoy the statute of limitations.

Ms. Payne stated that Rule 34 relates to the substitution of a party where, if the party dies during the litigation, the estate can be substituted within a certain amount of time. She noted that this happens if the case is filed before the defendant passes away, and the personal representative or successor must provide notice, so these circumstances are inapplicable to the *Worthington* case. Ms. Payne observed that the *Worthington* case presented rather unique circumstances and she is not sure how often this happens. Mr. Eiva stated that the plaintiffs' bar sees this situation as a known trap and discusses it a lot. He stated that plaintiffs' lawyers frequently ask staff to check on whether an estate has been opened before filing a suit. He explained that he would appreciate an amendment to avoid the result in *Worthington*, but he agreed that such a change would be substantive. Ms. Wray noted that the Oregon Trial Lawyers Association (OTLA) did not file an amicus brief on the case in question. Ms Payne explained that the fact that OTLA did not file an amicus brief does not necessarily mean anything as there is no mechanism by which OTLA is placed on notice of appeals of general interest to its members. She again emphasized that she does not necessarily see a procedural fix to the rule for this fact pattern.

Mr. Beattie wondered how ORCP 34 became part of the committee's charge. That rule provides that actions continue either in favor of a plaintiff or against a defendant who dies after the filing of a claim, and the *Worthington* situation involves death before the filing of the claim. Ms. Payne explained that the rule did not come up in this particular case, but that the committee was going to examine the rule to see if any changes needed to be made, and that the committee did not find anything to change there either.

Mr. Beattie observed that the Council finds itself in somewhat of a conundrum, since the rules, as originally promulgated, were a collection of statutes taken from the Oregon Revised Statutes, which were written by a Legislature that did not care about procedure versus substance. He noted that the result is a collection of rules that clearly involve substance, coupled with a restriction on the Council's ability to

modify substance. Whatever Rule 23 provides now, Mr. Beattie stated that he does not believe the Council can expand or contract that to the extent that it will affect the application of the statute of limitations.

Mr. Andersen stated that this is a problem that comes up for plaintiffs more frequently than many would realize and that it is a trap for the Professional Liability Fund. He stated that there is no easy way to avoid the problem – the only way to be absolutely sure to not get caught in this trap is to do periodic searches of every county in the state to see if a defendant has died. He stated that he feels that the problem deserves further study and that he believes that there is a way to modify the ORCP to address it. Mr. Andersen suggested keeping the committee active for full debate and disclosure. Ms. Wray agreed that it is a problem, but stated that the question is whether it is a problem that only the Legislature can fix. Mr. Eiva suggested that the committee could discuss the possibility of sending a suggestion to the Legislature. Mr. Beattie stated that this issue involves ORS chapters 30 and 109 and issues like probate, survival of actions, and claims against dead defendants, which are beyond the scope of what the Council can address. Judge Roberts noted that the problem could be easily solved by an extension of the statute of limitations in certain cases, which is clearly beyond the Council's purview. She stated that the critical question is whether the estate is the same person as the dead person, and the fix seems to her to be legislative.

Mr. Andersen opined that the problem could be solved by changing the rule to the effect that the statute of limitations is met by establishing notice. He stated that, if the plaintiff named the wrong party, the plaintiff should be able to amend to insert the proper party if the proper party knew of the action before the statute had expired, even if service on the proper party was not complete. He again stated that he would like the opportunity to examine the issue more carefully to see if there is a procedural rather than a substantive fix. Mr. Eiva noted that, even if the committee decides that it is a substantive fix, the Council would likely have to do a procedural fix to accommodate it, so there is a reason to have a conversation with the Legislature about it. Ms. Rudnick stated that it seems to her that the core problem is that the Court of Appeals said that the dead person and the estate are not the same person. She stated that the Legislature could fix this by saying that the estate is the same party as the dead person.

Judge Conover stated that, if the issue is considered further, the Council will need to look at the other ramifications of saying that the estate is the same person as the dead person. He explained that he has a before him case now that involves the termination of a business entity and the beginning of a new business entity, and stated that rules about dead people and estates might be analogized to dissolved business entities and new business entities. He expressed concern that

any rule change by the Council would need to be narrowly tailored so as not to affect this type of case or it could have some unintended consequences.

Mr. Keating stated that it sounds like there are things the committee should continue to discuss. Mr. Andersen agreed to join the committee.

6. ORCP 55 Committee

Judge Gerking stated that the committee had met on January 10 to discuss Judge Norby's complete re-draft of ORCP 55. At that meeting, the committee members reviewed her work and were extremely impressed. Judge Gerking explained that the draft is a clear improvement in terms of clarity and organization but stated that the committee did not have adequate time to review the draft carefully. The committee will meet again on February 12 to carefully examine the changes provision by provision, but that may take more than one meeting. He stated that it is possible the committee may have something to share with the Council by March, but it may not happen until the April meeting. Judge Gerking stated that he was optimistic that the committee would have something to present, and he would not have said that two or three months ago.

Judge Norby stated that the committee's goal was to retain all of the content of the rule without substantive change – to reorganize and rewrite the rule so that it is more understandable and cohesive. She stated hat her draft is divided into four sections: 1) general definitions and description; 2) subpoenas to testify, whether at deposition or trial or hearing; 3) subpoenas for production that do not have to do with protected health information; and 4) subpoenas that have to do with protected health information. She noted that, as she went through the rule, there were sections that even she could not understand, so she will be relying on the committee for help during its review. She mentioned that she did her best to keep similar material together so that practitioners would not have to jump around in the rule to find what they need.

Both Mr. Keating and Judge Wolf agreed that the draft is impressive. Mr. Eiva asked whether non-committee Council members can look at a copy of the draft. Judge Gerking stated that he would prefer not to circulate the draft until the committee has had a chance to further study and discuss the draft within the committee.

7. ORCP 79 Workgroup

Mr. Crowley stated that the committee had met by telephone the previous Thursday and had come to the conclusion that the group should wind down. He explained that the workgroup's initial mission was to look at Rule 79 regarding temporary restraining orders (TRO) and preliminary injunctions because a question had been raised in the Council's survey about the clarity of the rule and standardization. He noted that the Council had not looked at the rule in some time. Mr. Crowley stated that the committee began with the idea that it wanted to get input from practitioners as to whether the rule needed to be modified. However, the committee had some difficulty getting input from practitioners.

The committee is aware that attorneys sometimes tend to rely on the federal rule, which is not the same as the state rule. Mr. Crowley noted that a recent article by Dallas DeLuca of Markowitz Herbold PC (Appendix D) addresses this problem. He stated, however, that he is not sure whether problems with the rule arise often in the courts. The committee heard from an attorney in the Special Litigation Unit of the Department of Justice who provided concerns that, when TRO are entered, it is sometimes difficult for courts to meet the deadlines for setting and holding preliminary injunction hearings and there are sometimes delays in receiving a decision. Mr. Crowley stated that perhaps this is more of a practical issue for the courts to address with training or a change in scheduling procedures rather than something for the Council to address, because the rule itself is fairly clear about the timelines.

Mr. Crowley stated that the workgroup feels that it should disband and, if more concerns are raised in the future, it can be re-formed. The Council agreed.

IV. New Business

Prof. Peterson stated that Holly Rudolph of the Oregon Judicial Department (OJD) had raised a potential issue regarding Rule 27 (Appendix E). She expressed concern that House Bill 2673 that passed last session regarding name and gender changes may conflict with the guardian ad litem requirements of Rule 27. Prof. Peterson stated that his e-mail exchange with Ms. Rudolph seemed to indicate that she believes that a guardian ad litem is more like a guardianship and would be intrusive on the decision making of the minor. He noted that a guardian ad litem frequently is a parent, but that the Council had made changes to Rule 27 because there was a problem with the rule being abused by individuals taking advantage of their relatives. Prof. Peterson wondered if anyone on the Council with more experience in this area thought that there is a problem. He stated that there seems to be two paths to the remedy the minor is seeking: getting a court order or completing a process with the State Registrar of the Center for Health Statistics. He asked Council members to take a closer look at his correspondence with Ms.

Rudolph and the House Bill and to let him know if they have any further insights. He stated that he would circulate any further correspondence with Ms. Rudolph.

Judge Wolf stated that the concern seems to be whether a guardian ad litem needs to be appointed on name and gender changes that are going to court. He explained that the packet that the OJD provides used to include forms to appoint a guardian ad litem, under the assumption that one needed to be appointed. Apparently some courts found that the statutes do not require that it be the child that applies for the name change but, rather, that the parent can apply, in which case the parent is the party and no guardian ad litem is required. The OJD therefore removed the guardian ad litem forms from the packets. Judge Wolf stated that courts that interpreted the statute differently then complained because the form was no longer included. Judge Wolf noted that the new forms even use the language"I, parent/guardian, am applying for the name change," which leaves the child out of the litigation.

Prof. Peterson stated that, according to the Council's last change to Rule 27, it seems clear that a minor as a party needs a guardian ad litem appointed. Judge Wolf agreed that this is the practice in a civil case where a child is suing someone, but in a name change the statute is fairly brief and he does not see that the statute requires the child to be the party that applies. If the child is not the party, there is no need for a guardian ad litem. However, if the child is the party, a guardian ad litem is needed. He stated that, from his perspective, no rule change is necessary. However, if a change were needed, he felt that it would be a legislative fix that makes it clear that a parent can apply for a name change on behalf of a child.

Mr. Keating stated that the Council would wait to hear further from Ms. Rudolph on the subject.

V. Adjournment

Mr. Keating adjourned the meeting at 10:35 a.m.

Respectfully submitted,

Mark A. Peterson
Executive Director

**CCP Summary – Rule 7 Committee Mtg**
**January 25, 2017**

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

**Absent**: Deanna Wray

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 – *Electronic Alternative Service*
The Committee reviewed a Memo provided by Deanna Wray that discussed various court opinions indicating that several jurisdictions across the country allow use of Social Media as an alternative service method, so long as certain guidelines are met. Kelly made a compelling case for Social Media as a reliable tool for communication, explaining many details about the capabilities of various Social Media tools. Susie expressed concern that the Committee and the Council should not leapfrog past email to create parameters for use of Social Media for alternative service. We should begin with email, which has existed longer and has capabilities that are more broadly understood, and then talk about Social Media as an adjunct possibility for service.

The Committee hoped to have a better understanding of whether other jurisdictions have created guidelines in rules or statutes to standardize use of emails as an alternative form of service, but that research is not yet done. Susie will conduct some research on that question before our next Committee meeting.

Kelly noted that "Electronic Service" is a single category that includes both email and Social Media platforms. Susie noted that eCourt does not interface with Social Media, but does propel use of emails and e-filing for a great deal of other court business.

Mark noted that use of Social Media for alternative service is forward-thinking, and could easily be added in to a proposed rule amendment. Mark offered to create a 2nd draft of the amendment language he created for the Committee's last meeting, which will incorporate concepts emphasized by the court decisions in the Wray Memo. Whether the alternative service method is email or Social Media, it must be a platform capable of sending a .pdf document that is an exact duplicate of the court filing, and it must be capable of some means for the sender to confirm that the recipient opened the message. Mark offered to work quickly so that the next draft proposed amendment can be distributed to the Council for the next meeting along with this Summary.

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) *Who May Do Follow-Up Mailing.*

The Committee reached consensus that attorneys should be allowed to do follow-up mailing, and Rule 7 should be amended to clarify that option. Mark offered to put pen to paper on this as well.

(2) (a) *Website Alternative Service*.

The Committee continued the ongoing discussion about the possibility of creating a centralized website for posting summonses, either through OSB or the DOJ or the DSL. Susie requested thoughts on whether it is more appropriate to explore the feasibility of creation and administration of such a website before any attempt to draft a proposed rule amendment, or whether the powers that be would likely require a mandate in a rule before seriously considering the feasibility of creating a website.

Kelly strongly expressed that a website for posting service documents is a bad idea destined to fail and unworthy of further consideration. Susie recalled that the Council members seemed to disagree at the December meeting. The Committee reviewed the minutes of the Council's December 9, 2017 meeting, pages 9-12, to get a sense of the Council's most recent reaction to the website idea. It seemed that many Council members favored the idea.

After a bit more debate on the merits of the idea, the Committee reached consensus that the costs of creating and administering such a website, and perhaps also of promoting its use, are an important factor to consider before reaching a conclusion about the feasibility of using such a platform for alternative service. Even though the disagreement about the idea's potential was strong, there appeared to be consensus that it makes sense to collect cost information before further debate on the idea's merits.

Mark advised that OSB is a quasi-public organization, and statutes spell out its functions. A statute may be necessary to enable OSB to create and administer such a website. He said that Matt is the liaison to the legislature and our Bar Dues cover lobbying. If outreach to the legislature is needed, Matt can assist with that. Matt could also reach out to other departments, possibly including the DOJ and the DSL to help collect information.

Susie offered to collaborate with Mark to identify the questions to ask Matt, including questions about the costs to put a website together, the costs to run and administer the site, and the

timeline to get one up and running. Once the questions are identified, Mark will relay them to Matt to begin information gathering that can inform future discussions.

(2) (b) "*Publication" Clarity Discussion*.
The Committee talked about whether to consider Ms. Rudolph's request that we review the alternative service method of publication to clarify how parties can select the appropriate form or location of the publication that can be used. We read the language in the rule that creates the presumption for use of publication in a "newspaper of general circulation." Susie asked what "general circulation" means, and said that phrase could be clearer. Disagreement ensued about whether that phrase could be clearer.

Judge Wolf found ORS 193.010(2) which defines a newspaper of general circulation as:
"a newspaper of general circulation, published in the English language for the dissemination of local or transmitted news or for the dissemination of legal news, made up of at least four pages of at least five columns each, with type matter of a depth of at least 14 inches, or, if smaller pages, then comprising an equivalent amount of type matter, which has bona fide subscribers representing more than half of the total distribution of copies circulated, or distribution verified by an independent circulation auditing firm, and which has been established and regularly and uninterruptedly published at least once a week during a period of at least 12 consecutive months immediately preceding the first publication of the public notice. Interrupted publication because of labor-management disputes, fire, flood or the elements for a period not to exceed 120 days, either before or after a newspaper is qualified for publication of public notices, shall not affect such qualification."

Judge Wolf also discovered that the Oregon Newspaper Publishers Association maintains a list of its members who satisfy the requirement of ORS 193.010 at:
http://www.orenews.com/legal-notice-statement#0.

Susie noted that the definition itself may be outdated, in the modern age when so many newspapers have a more prominent online presence than a printed paper presence. The next generation of young attorneys may have an even lesser grasp of what a "newspaper of general circulation" means, given that "circulation" once meant physical distribution of newsprint paper, but now means virtual accessibility. Susie offered to try to figure out a clearer description of what is required for the publication component of alternative service.

**TIME FOR FILING PLEADINGS OR MOTIONS**

**RULE 15**

**A Time for filing motions and pleadings.** A motion or answer to [*the*] **a** complaint or [*third party*] **a 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, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.** [*Any other motion or responsive pleading shall be filed not later than 10 days after service of the pleading moved against or to which the responsive pleading is directed.*]

**B Pleading after motion.**

B(1) If the court denies a motion, any responsive pleading required [*shall*] **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*



Council on Court Procedures
February 10, 2018, Meeting
Appendix C-1

*time.*] **permit any pleading or any motion responsive to a pleading to be filed after the time specified in these rules, or may grant a motion to enlarge the time for filing any pleading or responsive motion.**

Shari Nilsson <nilsson@lclark.edu>

# Re: Council of Court Procedure - Guardian ad Litems

**Mark Peterson** <mpeterso@lclark.edu> Mon, Jan 22, 2018 at 4:25 PM
To: John.Wolf@ojd.state.or.us
Cc: Shari Nilsson <nilsson@lclark.edu>

Thanks John. Maybe this is the reason that Holly Rudolph has not gotten back to me after our initial exchange. Providing simpler and less intrusive procedures for sensitive matters has merit but I do not know how we can assume in all cases that a parent or other person assisting a minor with a name or sex change clearly sees what is in the minor's best interest. If a judge is convinced that everyone is on board, or at least there is not a situation where one faction is trying to sneak something past another faction, the notice and accompanying time delays can be waived.

Mark

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On Mon, Jan 22, 2018 at 1:26 PM, <John.Wolf@ojd.state.or.us> wrote:

> Mark, OJD has updated its position on the guardian ad litem issue we discussed for minor name/sex changes we discussed at our last meeting. I have copied the email below for your review, if you are curious. I still don't think we need to take any steps as the council.
>
> Thanks.
>
> MEMORANDUM
>
> TO: Presiding Judges
>
> Trial Court Administrators
>
> FROM: Bryan Marsh, Family Law Program Analyst
> Juvenile and Family Court Programs Division
>
> RE: LEGISLATIVE ALERT on HB 2673 (Oregon Laws 2017, chapter 100)
>
> On December 21, 2017, the Oregon Judicial Department (OJD) sent a memo to the courts with updated forms for name and sex change cases. Since then we have received questions about the procedure for these cases, in particular whether or not a guardian ad litem should be appointed in cases involving minors. This memo is in response to those questions, and the prior email may be accessed here:
>
> OSCA Documents - 12/21/17 Memo from Lisa Norris-Lampe, Appellate Legal Counsel, Oregon Supreme Court, and Holly Rudolph, OJD Forms Manager, CECM
>
> HB 2673 sections 3 and 4 amend ORS 33.460 and .420 respectively with the intent of removing restrictions on the

name change and sex change processes. For courts it is important to know that the following changes were made:

· The requirement for posting name or sex change documents has been removed. ORS 44.420

· The requirement that sex change cases be filed in one's county of residence was removed (but not for name changes). ORS 33.460(1)

· Parents of minor children whose name or sex is to be changed are still required to be given notice, but there is no time period given for filing objections or responses. ORS 33.420(1)

· At the request of the petitioner, courts must seal sex change case files. ORS 33.420(4)

In the process of creating new forms, the forms for appointing a guardian ad litem in minor name/sex change cases were excluded.

The intent of this memo is to affirm the necessity of appointing a guardian ad litem in minor name/sex changes, and to inform the courts that we have requested creation of a statewide form. In the meantime, courts may continue to use local guardian ad litem forms as they did prior to the change.

Because one of the concerns about minor name/sex change cases is giving parents notice and time to object, courts should be aware that ORCP 27 (E) requires a 14-day waiting period in the guardian ad litem process, unless it is waived by the court. This could serve as the process which would allow parents to have meaningful notice and time to respond to petitions for their child's name/sex change.

If you have any questions, do not hesitate to contact me directly at bryan.b.marsh@ojd.state.or.us or via phone at 503-986-7079.

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