MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, March 10, 2018, 9:30 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

ATTENDANCE

Members Present:

Jay Beattie
Kenneth C. Crowley
Jennifer Gates
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Derek D. Snelling
Hon. Douglas L. Tookey
Hon. John A. Wolf
Deanna L. Wray*

*Appeared by teleconference

Members Absent:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Hon. R. Curtis Conover
Travis Eiva
Hon. Timothy C. Gerking
Hon. David E. Leith
Shenoa L. Payne
Hon. Leslie Roberts
Sharon A. Rudnick
Margurite Weeks

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

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 ORCP 7 ORCP 15 ORCP 55	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 68 ORCP 71 ORCP 79	ORCP 22 ORCP 43	

I. Call to Order

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

II. Administrative Matters

A. Approval of February 10, 2018, Minutes

Judge Peterson suggested three changes to the draft February 20, 2018, minutes (Appendix A): 1) in the first paragraph on page 7, there is a typographical error, "just he way," that should read "just the way"; 2) in the first full paragraph on page 10, there is redundant language regarding Judge Wolf making a good point; and 3) in the second paragraph of page 14, there is a typographical error, "but that it not how," that should read "but that is not how."

Mr. Keating noted that there were not enough Council members present to constitute a quorum, and suggested carrying over approval of the February minutes to the April Council meeting.

III. Old Business

A. Committee Reports

1. Discovery Committee

Mr. Crowley reported that the committee had not met since the last Council meeting. Judge Peterson asked whether there had been any progress on drafting language that would be acceptable to both the plaintiffs' bar and the defense bar. Mr Crowley stated that there has not been much progress due to committee members being tied up with non-Council matters. He stated that his sense is that the committee will not be making any big proposals this biennium.

2. Fictitious Names Committee

Mr. Crowley reminded the Council that, at the February Council meeting, there was a lot of discussion about whether there is constitutional authority to deal with fictitious names in the Oregon Rules of Civil Procedure (ORCP). He stated that the committee was going to focus particularly on that question. One of the channels the committee pursued was to look for briefing for a particular appellate case [*M.K.F. v. Miramontes*, 236 Or App. 381, 236 P3d 782 (2010), 352 Or 401 (2012)] where fictitious names were used. Ms. Holley discovered that, in that case, the Court followed a Chief Justice Order (CJO) from 2010 by former Chief Justice Paul

DeMuniz (Appendix B).

Ms. Holley explained that the CJO is pretty consistent with other state laws and federal law that she has found regarding the use of fictitious names in court cases. It provides factors for when a party can proceed anonymously. The first part of the CJO lists specific types of cases for which a fictitious name may be used, while section E is more generic and specifies when fictitious names may be used for any type of case. Section E 3 states that the court can consider whether "the context in which the person is mentioned reasonably causes the person to fear for the person's safety or reasonably may result in significant negative implications relating to the person's ability to transact business, gain employment, obtain housing, or the like." Ms. Holley stated that the committee's sense is that, if the Supreme Court is implementing such a rule, it is very likely not a violation of the open courts clause of the Oregon Constitution, which is consistent with the research she found earlier.

Mr. Beattie observed that the only section of this order that seems to be analogous to the circuit court would be the section regarding "all case types." He noted that the order does not really give any guidance for figuring out what cases are appropriately captioned with initials. Judge Norby explained that the committee has felt somewhat hindered because of the concern about the constitutionality of a potential rule, but that the CJO seems to resolve the constitutionality issue in favor of trying to create a rule regarding the use of fictitious names. She stated that the CJO would not be a model that the committee would follow when creating a rule. However, the CJO implies that the issue can be dealt with by rule and that it can be constitutional if done correctly. She wondered whether the Council agreed that the CJO resolves those questions.

Mr. Keating pointed out that the CJO specifically applies to Court of Appeals and Supreme Court decisions that are published. Judge Wolf noted that the CJO only applies to opinions that are published and that someone could easily go back to the circuit court and find the original case and the names. Ms. Holley stated that there are a number of cases where the parties have proceeded anonymously at the trial court level and the Supreme Court has continued the practice. The only conclusion the committee drew is that it appears that the Supreme Court does not believe that filing under a fictitious name is unconstitutional. Judge Hill expressed skepticism about that. He stated that it does not appear that the constitutionality question was ever addressed by the CJO. He stated that he was reluctant to infer that, just because the Supreme Court did it, it is constitutional. Mr. Keating wondered why the CJO is limited to appellate decisions that are published when the Supreme Court could have solved the whole issue by stating that the use of pseudonyms in litigation in the State of Oregon is appropriate under certain

circumstances. That would have solved the whole issue. He questioned whether the Supreme Court drafted the CJO narrowly because it had concerns about the issue of constitutionality.

Justice Nakamoto stated that she did not believe that the issue of constitutionality was fully raised at the time. Her understanding is that the CJO was a way to address the federal requirements of protecting, for example, women covered by the Violence Against Women Act. She posited that, if there were opposition or a challenge to the rule, the Supreme Court would not say that it had decided the constitutionality by virtue of having the rule. Judge Norby wondered whether it is fair to infer that appellate courts would be unlikely to act in a manner that violates the open courts provision of the constitution. She stated that she understands that the issue has not been fully vetted, but that the CJO seems to give the Council a reason to begin work on the issue. She suggested that, if the Council chooses to look at the appellate courts' decisions about how they conduct their own business and say that the Council cannot draw any inferences from that, the Council should probably just disband its committee.

Justice Nakamoto stated that the committee is safer in drawing that tentative conclusion, but the fact that there is a rule does not insulate against a well-considered challenge under the Constitution. Mr. Beattie opined that the Council should proceed with crafting a rule because, to the extent that a rule is unconstitutional, it may be as applied in a particular situation or as applied in part. He stated that, if the Council believes that there should be a rule, it should make its best effort to comply with the Constitution and not decide to not pass a rule because it may not be constitutional. Judge Hill wondered whether the existence of the CJO actually indicates that a CJO is a better way to deal with the issue. He suggested asking the Chief Justice to expand the existing CJO to cover trial courts. Mr. Beattie wondered if it would be more appropriate to create a Uniform Trial Court Rule (UTCR). Judge Peterson noted that Judge James Hargreaves, who initially raised the issue, was troubled by the fact that filing under fictitious names is inconsistent with some of the ORCP. If the ORCP say that filing under a fictitious name is not allowed and a UTCR says that it is, in his mind the ORCP would be the final word.

Judge Norby suggested that, if the Council is going to make any effort, it might be better to have two different entities create rules. She explained that, if she were a Supreme Court justice and someone asked her to expand the CJO now, she would be hesitant not just because it was limited when it was created in 2010 and it is easier to continue something that is limited, but also because there is a lot of debate right now and the debate itself might inhibit the court's inclination to expand the CJO. She posited that, if the Council or the UTCR Committee or both

were to make a rule, the Supreme Court would have the ability to better review those rules objectively. She suggested that the Supreme Court might prefer to review rules from a different entity because it is harder to debate, discuss, and review its own rules. Judge Norby stated that the Council can look to the Supreme Court for the guidance and then craft an ORCP amendment that the Supreme Court can look at and examine. Judge Tookey asked whether the UTCR Committee has considered this issue. Ms. Holley stated that she had spoken with Ben Cox, a committee member, and he stated that they would consider it. She has not spoken to him since but would be willing to do so again.

Judge Peterson noted that, as a bunch of lawyers, Council members are caught up on published decisions, but in Illinois there are also unpublished decisions. Judge Tookey agreed that some Oregon appellate court orders take the form of the substance of an opinion, and that there are also decisions that are affirmed without opinion that are not published. Justice Nakamoto observed that sometimes the appellate court decision that goes to the parties includes the full caption, but the website uses initials. Mr. Beattie asked whether the official reporter includes the name. Justice Nakamoto stated that, even in the reporter, initials are used except on the rare occasion when errors are made. She recalled a case where the issue was unemployment insurance benefits but, in the opinion, it was apparent that the claimant was a victim of stalking and sought a protective order against a co-worker. If the statutes were applied, her name should have been protected. The version of the opinion on the website was correct and used initials, but the published decision in the bound volume used her name. Judge Tookey noted that such errors are usually caught by the time they reach the bound volume.

Judge Wolf again pointed out that, even if initials are used, someone could still look up the circuit case number to find the party names. Mr. Beattie agreed that this is true, assuming that the case was not originally filed using initials. Ms. Holley agreed, but noted that the purpose of allowing a party to file under a fictitious name is not to create a complete mystery so that nobody ever knows who the parties are, because the parties would need to testify under their real names in open court.

Mr. Crowley stated that, from his perspective, the CJO uses a very no-nonsense approach similar to what the committee is trying to accomplish, which suggests that, if the Council were to pursue a similar narrow approach, it would pass constitutional muster. He opined that the Council has an opportunity to pursue something similar for the trial court level. Mr. Beattie suggested using an identifier other than initials, like the last four digits of a social security number or a date of birth, to allow for cross-referencing without placing someone's name in the public

domain. Judge Norby stated that she does not know if anyone has ever made a rule that requires that parties involved in subsequent litigation must use the same pseudonym. She wondered if there would be something more unique than three initials that could be required to be used in successive litigation. She stated that she has not yet come across this in any statute or rule. Judge Hill stated that he would be much more nervous to have the last four digits of his social security number in the public record than his initials.

Judge Peterson noted that the Council had received two e-mails from lawyers regarding the fictitious names issue and that he wondered why the issue had come to their attention; then he saw that Judge Hargreaves had written a letter to the editor of the Oregon State Bar Bulletin discussing the issue. He observed that one of the letters to the Council opined that a rule is needed to address the problem and that the writer expressed concern about the need to know if a particular plaintiff has filed previous cases under pseudonyms. He stated that this is a fair concern.

Ms. Holley wondered what the procedure for working with the UTCR Committee would be. Judge Wolf stated that there would probably be the need for some clarification to the UTCR regarding pleadings and captions. Judge Norby stated that it would be necessary to figure out exactly what the pseudonyms would be. Mr. Crowley suggested raising the issue with the UTCR Committee to put it on their radar. Judge Peterson observed that, if there is a UTCR that is inconsistent with any ORCP change, that should be the starting point. The UTCR Committee may want to refine their rules if the Council creates a more broad authority.

Judge Norby observed that Judge Hargreaves may be unaware of the existence of the CJO and that he may be interested in reading it.

Mr. Keating stated that it sounds as though the consensus is for the committee to continue its work. Judge Norby stated that the committee will work on actually trying to put a rule together, which it has not done so far.

3. ORCP 7 Committee

Judge Norby reported that the committee had welcomed Aaron Crowe of Nationwide Process Service to its last committee meeting (Appendix C) to share his thoughts on e-mail and social media service. She stated that Mr. Crowe had provided a wealth of information and that his presentation had changed the committee's recommendation to the Council. Judge Norby summarized Mr. Crowe's presentation, stating that he had gone over the different forms of social media and e-mail service possibilities and explained how he had used each one of

them in accomplishing service. He gave detailed information to illustrate how difficult accomplishing service by these means can be, and how hard it would have been to create a rule in the last 15-20 years to allow for effective social media service. Mr. Crowe explained that he had mastered the intricacies of service by Facebook and was able to use that process for a time, until Facebook revised all of the available options in such a way that he was unable to use it for service any more. Mr. Crowe noted that social media service is intricate and that one must have a lot of knowledge of what is available through a particular system and how to be in contact with the system administrators to get confirmations and receipts. He emphasized that, over time, social media is becoming more and more of a friend-to-friend system that has security to keep non-friends out and to keep account holders from even seeing communications from non-friends. Judge Norby stated that Mr. Andersen and Judge Wolf had raised the possibility of using a friend or friend of a friend as a "doorway" to serve someone but that is not always possible.

Judge Norby explained that Mr. Crowe had persuaded the committee about the complexity, intricacy, and ever-changing nature of social media service. She expressed concern that, by the time the Council changed and promulgated a rule, the procedures for social media service could have changed. She suggested that it could be dangerous to invite people to tinker with things that they do not understand by trying to create a rule that implies that they can accomplish something that they probably cannot. She noted that Mr. Crowe also expressed concern about requiring documents to be sent in Portable Document Format (PDF), because many platforms do not accept PDF documents in the way that was previously assumed. He suggested that photographs of documents might be a better option.

Judge Peterson explained that he may be the most nervous person at the table regarding accepting the unsettling notion of service by social media. However, he noted that the Council faced a similar technology problem with Rule 9 and fax service but made its best effort and made necessary changes two biennia later when technology changed. He reminded the Council that the type of service being discussed is alternative service, when a party cannot be served in any other way. He stated that, if a rule is written generically enough, it is possible. The key questions are whether the document that is sent is uncorrupted and whether there is some way to identify that the recipient opened the document.

Judge Hill expanded on Judge Peterson’s point and suggested writing a rule that, in the alternative, simply puts the burden on the person seeking the approval of the alternative service to prove to the court that the person received it. He suggested that this would solve the problem. Judge Wolf stated that he believes that the

burden to prove that the document was reasonably calculated to get there already exists, and the amendment that Judge Peterson has drafted indicates that there needs to be some documentation of receipt.

Judge Norby explained that there was a conversation about service by text as well, because apparently text has been used successfully at times. She noted that some text messaging services show moving dots to indicate that someone is reading a text, but that is not always reliable because a person would have to be watching at the time the recipient read the message. Judge Wolf stated that most platforms will actually indicate when a message is delivered, opened, and received, and those indications will stay until there has been further conversation. Barring those indications, service by social media would not work.

Judge Hill pointed out that the Council does not necessarily have to care about those details. For the purposes of the rule, the Council is trying to provide guidance that says that a party can use social media but will have to meet a higher burden to show that the party being served has actually received the document. He noted that it is not actual service because it is in electronic form and, if a party is going to use this ambiguous platform, the serving party will have to give some evidence in the affidavit that the party being served received the document before the court signs off on it. He opined that crafting such a rule could solve the problem.

Judge Norby stated that, since paper documents are not being sent, it might be important to include in the declaration the form in which the document was relayed (e.g., JPG or PDF) and why the sender believes that form could be transmitted successfully in the selected platform.

Judge Wolf asked whether Judge Peterson's draft amendment stated that the text of the summons needed to be in the body of the message so that, even if the recipient could not open the attachment, the message itself would let the party being served know they were being sued. Judge Peterson agreed that this is important so that, even if the party does not explore any further, at least they would know they had been sued, much like when a party being served is handed a summons. Judge Hill observed that he understands analytically why the Council would want to craft a rule to say, "if you do these things then we will deem service to have occurred," but he wondered whether this was the best approach. He again suggested a rule that allows a party can serve electronically but, if they do, requiring them to satisfy the court in an affidavit of certain benchmarks. This would allow the court to determine whether service had occurred, so that the Council would not have to revisit the rule forever as technology evolves. Judge Wolf noted that this is the avenue that the committee has talked about – a

guidance or structure as opposed to a technical procedure.

Judge Hill suggested just a few benchmarks such as: have you used a format that can readily be opened; and can you verify that the party being served has received or opened the document? That way, the court can determine whether service has occurred in each individual circumstance. Judge Peterson asked about Judge Hill's suggestion of an additional declaration or affidavit to say how a document was opened. Judge Hill stated that it would almost be like a follow-up mailing – in order to effectuate service, the serving party would follow up with a further affidavit stating what documents were received. Judge Wolf noted that this could be included in the proof of service. Judge Norby asked whether the essence of the change would be that normally the rule says "most reasonably calculated" but the burden would be increased for purposes of the use of electronic means. Judge Hill agreed that it would.

Mr. Beattie noted that, with other forms of imaginary service like posting at the courthouse and publishing in public newspapers, there is no return receipt. Ms. Gates expressed concern that the Council is not paying attention to other existing ways of service that are not remotely calculated to achieve service. Judge Norby stated that there is a difference because those service methods involve physical places that exist where, if people wanted to check, a posted document would be there. On the other hand, the Internet is an imaginary place. Ms. Gates disagreed with that assessment. Judge Wolf posited a situation where he sued Mr. Shields in Wasco County and did not know where Mr. Shields lived or worked, but was Facebook friends with him. He stated that, if he were to post documents in the Wasco County Courthouse, Mr. Shields would never see them, but on Facebook he would. Judge Norby noted that this would work if they were Facebook friends but not otherwise. Mr. Shields observed that messages to non-friends on Facebook get filtered into an "other" folder and that he theoretically could go find them there as well. Judge Norby stated that "other" folders are becoming non-existent and that Facebook security is putting such messages in other places where they are not easily found. Mr. Shields observed that there would be a zero percent chance that he would see a summons if it were published.

Judge Hill agreed that there is no doubt that Mr. Beattie and Ms. Gates had expressed a valid criticism of the current publication rule, but that it begs the question of why the Council would then extend that criticism to this new form of service. Ms. Gates expressed concern about putting a higher bar on a method that is more likely to achieve service. Judge Norby reminded the Council that Mr. Crowe's opinion is that service through social media is not more likely to be successful unless you are a friend.

Judge Wolf noted that some of the original concerns regarding this issue came from Holly Rudolph of the Oregon Judicial Department (OJD), who was looking for ways for people who are attempting to get divorced from people with whom they have not had contact in a long time to serve those absent spouses. He pointed out that the current alternative is publication, which can cost up to $800 and is an impossible burden for someone who is flat broke, whereas they might have a mutual friend who can serve the defendant through Facebook for free. Mr. Shields agreed that the default position that the rules are pushing people into is one where they have to spend more money for service, and that is problematic. He observed that the courts have no control over how much newspapers charge. Ms. Holley noted that it is also a method that is not likely to accomplish service. Judge Norby stated that, in situations where people have direct access to people they need to serve and it is demonstrable that they can meet a revised rule that has a slightly higher standard, they could accomplish service for free. Mr. Shields opined that social media and text are far more effective means of service than anything published on any piece of paper anywhere.

Ms. Holley brought up the issue of service by text and noted that, if she were to receive a text message from someone with a preview that indicates that she had been served, she could choose not to open and read the text to avoid service. Judge Norby noted that saying to anyone, “You've been served” is not sufficient service and that, if someone ultimately wanted to set aside the judgment because they did not open a text, it would be easily set aside because those three words have never been enough.

Judge Peterson referred to the term of art “drop service,” in which the server tries to hand the person being served the documents but the person drops them and runs. He noted that the goal is to make contact and have the party being served hear “You’ve been served,” even though the paper is on the ground. He wondered how that is different from a text message that says, “You've been served.” Judge Hill replied that it is different because, with drop service, there is an affidavit from an officer or other serving party who states the actions that he or she took. With a text message, the only person who can testify is the defendant. Judge Hill explained that, in order to make electronic service effective, it is appropriate to allow the service but to put the burden on the plaintiff to demonstrate that the defendant actually received it.

Mr. Beattie asked whether e-mail to an active account would be treated differently than social media. Judge Norby stated that Mr. Crowe had focused more on social media, but her recollection is that his opinion was that e-mail can be even worse due to spam filters. Judge Wolf pointed out that Mr. Crowe works for a third-party service professional and does not know the people he is serving

and will likely get filtered out often, whereas people who know each other may not have this problem.

Mr. Keating pointed out that the fact that defendants are asking judges for motions to set aside because they "never received anything," indicates that there are circumstances where defendants are being deemed to have been served without hard proof that service occurred. Ms. Gates observed that this is similar to what happens with publication. Judge Wolf stated that, from his perspective, publication is a bit of a challenge, but he noted that there is an exception in the rule that provides that, if the defendant shows up with any good cause at any point up to a year after entry of judgment by default, they will get to defend their case.

Judge Norby noted that these discussions are somewhat philosophical, whereas the committee is tasked with the practical question of whether a rule should be amended. She stated that, faced with the choice of trying to broaden all service methods because of this current problem with publication or trying to be diligent in crafting a service rule that looks toward the future, she would vote for being diligent today. She stated that she believes that Judge Hill's idea is a responsible way to try to manage the problem today in a way that will be useful and effective for people in the future.

Mr. Beattie noted that a judge can decide to allow service in any way he or she determines is constitutionally sufficient, so the Council may be crafting a rule that is more or less guidance for the court. Judge Wolf agreed and stated that this is the goal. Mr. Beattie stated that our rule can act as skepticism of these electronic forms of service and that can act as guidance for the court. Judge Peterson observed that these are alternative means of service, and stated that the rule is quite clear that the judge can order service by several methods. The goal is to find the means that is most reasonably calculated, so in the case of two people who will soon be divorced who may still be communicating by social media or e-mail that may be the best way to get actual notice to someone. It puts an additional tool in the toolkit for the court.

Judge Norby stated that she feels like the committee has suggestions it can work with and that she hopes to have language for the Council at the next meeting.

4. ORCP 15 Committee

Judge Peterson stated that he and Judge Gerking and Ms. Payne had met to discuss Judge Gerking's recent committee draft of section D of Rule 15. Other committee members were unavailable. After that meeting, Ms. Payne made some slight changes to Judge Gerking's language and Judge Peterson then made additional changes to Ms. Payne's language. Judge Peterson explained that this process led to a question on his part regarding the existing language in section D: "The court may, in its discretion, and upon such terms as may be just, allow an answer or reply to be made, or allow any other pleading or motion after the time limited *by the procedural rules*..." He pointed out that Rule 15 deals with very specific things, but general "procedural rules" would include Rule 7 and Rule 47 on summary judgments, as well as Rule 63 and Rule 64 on post-judgment motions, which have pretty hard-and-fast 10-day deadlines. He observed that Rule 15 covers responding to pleadings within a narrow context. He suggested changing the language to "this rule."

Ms. Gates stated that Rule 15 addresses the time for filing pleadings and motions generally, so she wondered why it would not apply to summary judgments or some of the other cases Judge Peterson mentioned. Judge Peterson pointed out that Rule 47 has its own timing and provisions for changing timing, as does Rule 68 as currently amended. Rule 63 and Rule 64 have hard timelines. Mr. Beattie noted that rules such as Rule 34, that deals with personal representatives, were created from the old probate code, i.e., they were statutes. Those old statutes had inherent hard-and-fast timelines so, for example, there was a one-year deadline under the probate code to substitute someone in as a personal representative for the estate of a dead party. He stated that there is still case law out there that says that is the statute of limitations. He questioned whether Rule 15 extends a statute of limitations via one procedural rule as to another procedural rule that started as a statute but then became a rule. Mr. Beattie stated that he believes that the language of ORCP 15 should be very specific that it just refers to pleadings.

Ms. Gates disagreed. She observed that the rule regarding summary judgment motions states that a judge has the discretion to modify deadlines for those motions, whereas Rule 15 allows a party to ask for relief if that party missed a deadline, which is different than asking for a longer period before the deadline has expired. Judge Peterson pointed out that ORCP 15 D also includes language allowing a party to ask to enlarge the time before that party has missed a deadline. Ms. Gates opined that the two rules do not contradict each other because their language allows for the same procedures and relief. She noted that Rule 15 also clearly lets parties know that it is the rule to seek when a deadline has been missed. Mr. Beattie stated that the 10 days permitted in Rules 63 and 64 is

jurisdictional. Ms. Gates stated that she is not saying that the Council should always ignore the stated timelines in other rules in favor of those in Rule 15.

Ms. Holley stated that the Council cannot take out motions as a whole. Mr. Beattie pointed out that there is nothing inherent in Rule 63 or Rule 64 that says that this is drop dead; it is just that the way those rules have been interpreted over a period of years is inconsistent with the plain language of rule 15. Ms. Gates agreed that there are definitely problems the Council should examine, but it should not remove motions as a whole. Judge Norby asked whether the case law addressed Rule 15. Mr. Beattie stated that he did not know but, if you file a post-trial motion more than 10 days after the court enters final judgment, you are done. You can move for an extension prior to entry of judgment but, 10 days after, you are done. Judge Hill observed that there are good policy reasons to have that finality. Ms. Gates stated that, if you fail to admit requests for admission on time, they are deemed to be admitted on the day they were due, and it seems inappropriate to go to this rule and say that you want them "unadmitted." Mr. Beattie noted that Rule 45 has an exception built into it where the court can excuse the lateness. Judge Peterson stated that, where the timeline is flexible, the rule has language in the rule that advises you of that discretion but, where the timeline is apparently not flexible, such as in post-trial motions, Rule 15 seems to say that all of these timelines are subject to the court's discretion. He noted that he was surprised by this.

Judge Hill acknowledged Mr. Beattie's comments and agreed that there are some timelines that are hard and fast, but stated that he has always appreciated that the ORCP are flexible so that justice can be properly administered. He noted that, if your argument is "gotcha," you are going to lose. We do not try to catch the unwary in a trap but, rather, we use common sense. He stated that there must be a way to craft language so that we do not completely neuter Rule 15 but also deal with Mr. Beattie's concerns.

Judge Peterson asked if anyone had suggestions. He stated that a number of rules have flexibility built into them and, when a rule does not, such as the 10 days for a motion for judgment notwithstanding the verdict, it is likely a hard deadline. Likewise, with Rule 68 and statements of attorney fees, until the Council's recent amendment, a statement filed on the 15th day was too late, even if it represented thousands of dollars worth of fees. Judge Norby wondered whether anyone has made a chart cross-referencing timelines. Judge Wolf suggested that the Professional Liability Fund probably has such a chart. Judge Peterson explained that he had looked at the original language of Rule 15 and that this language has been there since the beginning. He stated that he could check through the other rules to categorize them into hard-and-fast deadlines v. deadlines with more

forgiveness. His thought was that Rule 15 should be more directed. Mr. Snelling stated that his understanding of the rule is more like Ms. Gates, that it is a more general enlargement of time that has always existed in the rules. Judge Peterson asked whether Mr. Snelling believes that Rule 15 can be used to enlarge time for all purposes. Mr. Snelling agreed that this is his understanding. Judge Norby stated that it is hard to assess that without having a broad picture. Without a chart she does not know if she can take a position on it.

Judge Peterson stated that the committee will revisit the issue but, in the meantime, he asked anyone who has particular rules they would like to be covered by Rule to 15 to please send them to him. He stated that decisional law on Rules 63 and 64 indicates that, if you did not file your motion timely, you lost. Mr. Snelling suggested that those rules would trump Rule 15 and that the court has to look at that. Ms. Gates agreed that they would have to cite case law. Judge Peterson stated that one could certainly say that Rule 15 only applies to rules that have flexibility within them, but those rules already have that flexibility.

Justice Nakamoto asked whether the committee is considering an exception, like, "except for in Rules ___ ___ ___," to put the unwary on notice that certain procedures are going to be strictly time limited with no grace period if you screw it up. Judge Peterson stated that all of Rule 15 really has to do with filing pleadings or motions responsive to pleadings, but section D seems to indicate that for anything at all you can file it later. He wondered whether that broad discretion belongs there or should be sprinkled among the rules.

Judge Norby remarked that she likes discretion. Ms. Holley stated that she likes having the catch-all. Mr. Snelling stated that he thought that was the rule. Ms. Gates stated that having the language there prevents someone from prevailing in a way that is fundamentally unfair because of a lawyer's mistake, and a court can always say that the case law is clear where flexibility is not in the rule. Mr. Crowley stated that he does not view it as a "get out of jail free card," and noted that a party had still better have his or her ducks in a row if he or she intends to file that motion. Judge Peterson noted that the Council had made a change in Rule 68 to give a little flexibility to judges on the 14 day rule.

Judge Hill stated that he knows of at least one case with a Rule 68 issue where the prevailing party was entitled to attorney fees but did not file a statement, the time for appeal ran, and then the party filed the statement and took the position that they were busy and did not have time to get to it sooner. The trial court allowed it. Judge Hill observed that this is the other side of the issue, and that there may be some nuances the Council does not always think about when it creates those grace periods.

Ms. Gates pointed out that Rule 12 B is also a similar catch all – a disregard of error where one might make exactly the same arguments or cite exactly the same reasons as to why one is entitled to rectify one's mistake. Judge Peterson stated that he would rather rely on Rule 15 D the way it is currently written than on Rule 12 B, because Rule 15 D gives specific grace.

Judge Peterson thanked the Council for its feedback and stated that the committee would have a new draft available at the March Council meeting.

5. ORCP 23 C/34 Committee

Ms. Wray reported that the committee has a meeting scheduled and plans to definitively decide whether it will try to make a proposal to the Council. She reminded Council members that Mr. Anderson felt strongly that the issue should continue to be examined to see if a solution could be found. Ms. Wray stated that Ms. Payne is helping to coordinate a meeting and that Mr. Andersen is working on language for a proposal for a procedural solution to the problem of accidentally suing a defendant who a plaintiff did not realize had died. She noted that Judge Leith and Judge Roberts had expressed concern that the problem could only be solved by a substantive (i.e., statutory) change. Judge Peterson stated that the Council could make a recommendation for a statutory change to the Legislature. He pointed out that the issue is a malpractice trap if a party does not realize on the day that a case is filed that the defendant had just died. It is not justice but, rather, a PLF issue.

6. ORCP 55 Committee

Mr. Keating reported that the committee had not met since the last Council meeting. Judge Norby noted that there is a committee meeting scheduled for March 21.

Mr. Beattie presented a new issue to the Rule 55 committee. He stated that he has been seeing posts on the Oregon Association of Defense Counsel listserv regarding defendants subpoenaing medical records directly from providers based on the strength of ORCP 44 C, which says a party can get chart notes about a current condition from a plaintiff who has filed a personal injury lawsuit. Mr. Beattie stated that it seems that the practice is to get the records directly under Rule 55 H, but Rule 44 E talks about subpoenas under Rule 55 and what is obtainable, and it says you can get those documents/records you can get under Rule 36, which does not include privileged material. So, theoretically, under Rule 55 a defendant could not get privileged medical records absent a release or some other authorization

from the plaintiff.

Mr. Beattie summarized by stating that it seems like defendants are using Rule 55 to get Rule 44 C records directly from the source rather than from plaintiff's counsel. He wondered whether the Council could make a change to Rule 55 indicating that, if records are available under Rule 44 C, they are available under Rule 55 directly. Judge Norby stated that the committee was hoping to first reorganize Rule 55 to the Council's satisfaction and then touch on any substantive changes as necessary. She stated that it is unlikely that an initial rewrite will include substantive changes but that such a change might be included in round two.

Judge Peterson encouraged all committees to try to get any proposals in writing by the next Council meeting so that the Council has adequate time to deliberate on the proposals and ample opportunity to retool any proposals as needed.

IV. New Business

Judge Peterson stated that he had recently received an e-mail from Holly Rudolph with a question about forcible entry and detainer (FED) cases. Ms. Rudolph noted that it appears to be common in FED cases to sue tenants "and all others," and she wondered why the practice was being used and whether it was appropriate. She did not know whether it was being allowed in all counties. Judge Peterson explained that the reason for including the language is that, without it, when a sheriff goes to execute on the judgment of restitution, only the named defendants will be evicted and anyone else there will be allowed to stay. He noted that Multnomah County clerks will specifically tell plaintiffs to add "and all others" and the notice is served by personal service as well as posted on the door. Judge Norby stated that Clackamas County allows "and all others" language and agreed that the language is, in fact, required in order to evict anyone who is present with the named defendants. Ms. Holley stated that it is the same in Lane County. Judge Wolf stated that it is the same in Wasco County and Hood River County.

Judge Peterson stated that he would respond to Ms. Rudolph with this information.

V. Adjournment

Mr. Keating adjourned the meeting at 10:49 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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 ORCP 15 ORCP 21 A(8) and A(9) UTCR 5.010	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 68 ORCP 71 ORCP 79	ORCP 22 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 he 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." He agreed that Judge Wolf made a good point. 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 it 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

IN THE SUPREME COURT OF THE STATE OF OREGON
IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of Adoption of Criteria for Redaction of Names of Parties, Witnesses, Victims, and Others from Published Opinions	))))	Chief Justice Order 10-060 Chief Judge Order 10-06

ORDER ADOPTING CRITERIA FOR REDACTION OF NAMES OF PERSONS FROM PUBLISHED APPELLATE COURT DECISIONS

By this order, the Supreme Court and Court of Appeals set out criteria that the courts may use to determine whether the names of parties to cases, witnesses who have testified in proceedings, victims of criminal conduct, and other persons mentioned by name in a published decision of either court should be redacted from the title of the case, the body of the opinion, or both in the version of the court's decision as published on the Oregon Judicial Department's website. The court may make a redaction determination in response to the motion of a party, on the court's own motion, or on a request from a person whose name appears in a published opinion but is not a party to the case, such as a witness or victim.

See ORAP 2.25(4). This order applies only to decisions of the Supreme Court and Court of Appeals as published on the Oregon Judicial Department (OJD) website.

This order is effective the date the order is signed by both the Chief Justice and the Chief Judge.

A. Definitions. As used in this policy statement:

1. "Court" means the court that rendered the decision in which redaction is sought.

2. "Initiating party" refers to the party who initiated a case in the Supreme Court or Court of Appeals, including, but not necessarily limited to, an appellant on appeal, a petitioner on judicial review of a state agency decision, a petitioner on review of a Court of Appeals decision, and, with respect to the original proceedings in the Supreme Court, a relator in a mandamus proceeding and a plaintiff in a habeas corpus proceeding.

3. "Redaction" of a person's name means replacement of that person's name with initials, a pseudonym, or use of any other convention that conceals the identity of the person.

B. Adoption, Juvenile, and Civil Commitment Cases

Council on Court Procedures
March 10, 2018, Meeting
Appendix B-1

Pursuant to statute (ORS 7.211 for adoption cases, ORS 419A.255 and ORS 419.256 for juvenile court cases, and ORS 426.160 and ORS 427.293 for civil commitment cases), the court record in adoption, juvenile, and civil commitment cases is confidential. Any natural person whose name appears in a published decision, including a witness or any other person mentioned by name, may request that his or her name be redacted from the version of the court's decision published on the OJD website.

C. FAPA, EPDAPPA, and SPO Cases

In a Family Abuse Prevention Act (FAPA), ORS 107.700 to 107.735, Elderly Persons and Persons With Disabilities Abuse (EPDAPPA), ORS 124.005 to 124.040, stalking protective order (SPO), ORS 30.866 or ORS 163.738, or dissolution of marriage, ORS 107.005 to 107.500, case, or in any other case in which the trial court has entered a protective order within the meaning of the Violence Against Women Act (WAVA), 18 USC section 2265(d)(3), the court may consider:

1. Whether the person seeking redaction is the person against whom relief was sought and the final determination on appeal is that a protective order should not have issued.

2. Whether the person seeking redaction is the person seeking the protective order and the final determination on appeal is that a protective order should have issued.

D. Criminal Cases

In a criminal case, the court may consider:

1. Whether the person seeking redaction is a victim of the crime at issue in the case.

2. Whether the person seeking redaction is the defendant and the final determination in the appellate court is in favor of the defendant.

E. All Case Types

In determining whether to redact a person's name from the version of a decision of the Supreme Court or Court of Appeals published on the OJD website, the court may consider:

1. As to a party to the case:

a. Whether the case in the appellate court is resolved in favor of that party.

b. Whether the party (1) was the initiating party in the Supreme Court or Court of Appeals; (2) should have been aware that the case could result in a published opinion; and (3) took steps, such as filing a redacted brief under ORAP 5.95, relating to briefs containing confidential information, to protect against public disclosure of the person's name or information about the person.

2. Whether the court's decision contains information about the person requesting redaction that is either protectable or previously has been protected under UTCR 2.100, UTCR 2.110, or UTCR 2.130, the Public Records Law (ORS chapter 192), or other provision of federal or state law. The person's request for redaction should identify the law that the person believes protects the information against public disclosure.

3. Whether the person, other than a public figure or a public official identified in the court's decision in the person's official capacity, is a witness in the case, the victim of criminal conduct mentioned in the decision, or a person otherwise mentioned in a published decision of the court, and the context in which the person is mentioned reasonably causes the person to fear for the person's safety or reasonably may result in significant negative implications relating to the person's ability to transact business, gain employment, obtain housing, or the like.

The criteria identified in this order are not exclusive, and the court may consider any factor that the court or the party considers important.

DATED this 1st day of November 2010.

Paul J. De Muniz, Chief Justice

DATED this 18th day of November, 2010.

David V. Brewer, Chief Judge

CCP Summary – Rule 7 Committee Mtg
February 21, 2018 @ 5:15 PM

Members Attending: Judge Norby, Judge Wolf, Deanna Wray, Kelly Andersen

Guest Attending: Aaron Crowe

Absent: Derek Snelling, Prof. Mark Peterson

Summary:

The Committee met to hear a presentation from Aaron Crowe about his experience and expertise on electronic service methodologies. Suffice it to say, he persuaded all present that that area of inquiry is a multi-layered morass.

Presentation Summary

Mr. Crowe established his impressive credentials. He believes he was the 1st in Oregon to use email to serve process in the mid-1990s, and the 1st in Oregon to use Facebook to serve process in the mid-2000s. He reminisced about a family law case in which the "Father" was impossible to serve by any traditional method, but was on Facebook daily. Mr. Crowe photographed each page of the court documents to create .jpg versions and transmitted those photos, seven at a time. Back then, after seven photos were transmitted by a stranger, no more would be accepted by that Facebook page until 24 hours passed. It took a week for him to finish transmitting the sets of seven photos and complete the service of process.

Mr. Crowe advised that what started as Facebook Chat had evolved into Facebook Messenger by 2010, which allowed transmission of a .pdf. Shortly thereafter, Facebook added an "Other" box for transmissions from non-friends. All miscellaneous transmissions from strangers, including transmissions of .pdf versions of documents, went into the "Other" box, which the Facebook member was highly unlikely to ever open. At that time, if a person knew how to bypass transmission to the "Other" box, there was a way to ensure a transmission would go to the "Inbox" by paying Facebook $1 per page (for an average Joe) or $75 per page (for a celebrity). There was also a way to get a receipt sent by Facebook that could be attached to an Affidavit of Service as evidence that the transmission was received by the intended recipient. But, around February 2017, Facebook did away with the option of bypassing to an "Inbox." Now the "Other" box has been removed entirely. Also, the functionality of Messenger will change dramatically in the next six months, in ways no one can predict.

Mr. Crowe emphasized that Social Media platforms are built for friend-to-friend communications, and have increasingly unassailable security mechanisms that ensure strangers cannot deliver messages to members. Circumventing the security mechanisms is the province of computer wizards, not ordinary people / lawyers. Further, security firewalls constantly change and evolve. Even if one could devise a way to circumvent them, the strategy would only work short-term – until the next incarnation of security is put in place.

Mr. Crowe advised that the only Social Media platform that allows stranger access readily is Linked In, but that you must also be a member of the LinkedIn network. All others are inaccessible for

transmissions from strangers. (Kelly Anderson, Judge Wolf and Mr. Crowe had a Q & A exchange which indicated that it is possible to access Social Media platforms in a meaningful way if a person uses an approved "friend's" computer to send the transmission, as if it were coming from the approved "friend." But that may be the only way to transmit through Social Media that is likely to result in actual notice.)

With regard to email, Mr. Crowe advised that even presently active email addresses are not reliable means of serving process. This is because the ability of various email servers to filter and screen out unwanted emails has become so sophisticated that reaching people that way is less and less likely. He reports that security is similarly sophisticated on all email applications. Any email account holder can set the Privacy Settings to screen out messages from unwanted sources.

Mr. Crowe advised that the only method for demonstrating that use of an email for service is reasonably calculated to provide actual notice is for the person doing the service to establish two-way communication with the other person by email before attempting service. Mr. Crowe actually sends a message to the other person to see if that person responds. If an email conversation is begun, then he deems the email option viable for service of process. Mr. Crowe emphasized that evidence an email address was active within the past year is far from compelling if we are focused on likelihood of actual notice. Only a presently active email address that has already been engaged in a conversation with the other person at the sending address meets that standard for alternative service.

Mr. Crowe also touched on the option of serving process by text message. He noted that the Adobe system can convert a .pdf to a .jpeg for texting purposes. Therefore it is theoretically possible to serve a person by text of sequential photos of court documents. However, evidence that the person received the text can be hard to secure. (Kelly Anderson, Judge Wolf and Mr. Crowe had another Q & A about how various texting programs may give evidence that a text is open or read, such as the "bubbles" that appear on the sender's phone when the receiver is reading the text. But there did not seem to be a definitive method for securing evidence of a completed transmission.)

Mr. Crowe's conclusion is that the nuances of electronic service are increasingly complicated to master, and the security systems that pose obstacles to effective service are ever-changing. Therefore, he believes it would be impossible to create guidelines in a Rule of Civil Procedure that could adequately encompass them or that could stay viable in ever-changing future scenarios. He believes that use of electronic service methods requires a level of expertise that cannot be captured in a simple formula. He recommends strongly against any Rule amendment that may encourage parties to use electronic methods for alternative service without having an expert in control of the process and outcome.

He acknowledged that Oregon's requirement is not for actual service, but for service most reasonably calculated to result in actual service. He also noted that use of the Daily Journal of Commerce creates a low bar for interpreting that standard, since it is cost-prohibitive to the general public to subscribe to that publication. But, he urged the Council to consider that "Actual notice of a summons can only be achieved through adequate means." He persuasively argued that electronic means are inadequate.