MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 14, 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
Jennifer Gates
Hon. Timothy C. Gerking*
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. David E. Leith
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne*
Hon. Leslie Roberts
Hon. Douglas L. Tookey
Margurite Weeks*
Hon. John A. Wolf

Members Absent:

Travis Eiva
Sharon A. Rudnick
Derek D. Snelling
Deanna L. Wray

Guests:

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
Fictitious Names ORCP 7 ORCP 15 ORCP 23 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 9:32 a.m.

II. Administrative Matters

A. Approval of February 10, 2018, Minutes

Mr. Keating reminded the Council that the Council did not have a quorum at the March 10, 2018, meeting and was therefore unable to vote to approve the February 10, 2018, draft meeting minutes (Appendix A). Judge Bailey made a motion to approve the February 10, 2018, draft meeting minutes with the corrections previously noted by Judge Peterson. Mr. Andersen seconded the motion, which was approved unanimously without abstention.

B. Approval of March 10, 2018, Minutes

Mr. Keating asked whether anyone had corrections or additions to the draft March 10, 2018, meeting minutes (Appendix B). Justice Nakamoto made a motion to approve those minutes. The motion was seconded by Judge Norby, and was approved unanimously without abstention.

III. Old Business

A. Committee Reports

1. Discovery Committee

Judge Bailey explained that e-mail discussion among committee members has indicated no need for any rule changes. He stated that, at the beginning of the biennium, he was optimistic that the committee would have suggestions for changes regarding expert discovery, but that he is not as optimistic now. He stated that the committee will meet again prior to the next Council meeting to see whether any suggestions arise to present to the Council.

Mr. Crowley pointed out that the Discovery Committee worked very hard last biennium and suggested that, since the Council has so much going on this cycle, it might be good to take a break and revisit discovery next biennium.

Judge Peterson stated that, if there is a committee member with a proposal that they would like to have the committee look at, they can send it to Ms. Nilsson to put into proper legislative drafting format. He explained that Ms. Nilsson can turn

a proposal into something that looks worthy of discussion, even if that is not clearly evident, and that this can help further committee discussion.

2. Fictitious Names Committee

Mr. Crowley reported that the committee had met the previous day (Appendix C). He noted that the committee has been pretty active and that the Council had a thorough discussion about the constitutional authority for the use of fictitious names in trial court proceedings at the last Council meeting. He stated that the committee had identified appellate court proceedings where the practice has not been rejected, as well as a Chief Justice Order (CJO) (Appendix C) that outlines how fictitious names can be used in appellate proceedings. Based on those findings, the committee believes that there is reason to believe that it can go forward with trying to find a narrow way of addressing the issue.

Mr. Crowley stated that the committee had also looked at two rules, ORCP 16 and ORCP 26. He noted that ORCP 16 concerns captions and names of parties and stated that the committee had discussed a very small change to section A to read: "In the complaint the title of the action shall include the name of all the parties **except as otherwise specifically allowed by statute, rule, or court order**." He explained that this language would open up the door for using fictitious names, which addresses Judge James Hargreaves' concern that the ORCP do not allow the use of fictitious names. He stated that the question is whether this would be too broad. Ms. Holley added that another question is whether the change is even necessary. Mr. Crowley explained that the committee wanted to get the Council's input on this suggestion.

Mr. Crowley stated that the committee's suggested change to Rule 26 A regarding real parties in interest is very similar, to read: "in the name of the real party in interest, **except as otherwise specifically allowed by statute, rule, or court order**." Mr. Keating wondered whether the committee is interested in exploring any conditions. He stated that he has seen plaintiffs' lawyers go to the court before they file anything and get permission to file pleadings under fictitious names and asked whether the committee is going to discuss any criteria that would justify being an exception to the general rule that the real party in interest must be identified in the pleadings. Mr. Crowley stated that the committee has discussed whether the Council is the appropriate body to identify those standards. Judge Norby explained that the authority for filing under fictitious names is located in statutes in so many states so it is their legislatures that are creating the criteria, which seems appropriate. She stated that the committee had also discussed the place of the Council v. the Legislature and the UTCR Committee. She stated that

the committee had also talked about the possibility of crafting a more detailed suggestion to offer to the Legislature.

Judge Peterson stated that it seems that the use of fictitious names is not substantive but, rather, is procedural. He stated that the rule might be a good place to put down what the court might consider. He proposed a procedure where, before a party files a complaint, that party would go to ex parte and get permission from the judge to file under a fictitious name, with the opportunity for the other side to contest it. He stated that it would be helpful to have some sort of criteria for the judge to weigh in the discretionary decision on whether or not to allow the case to be filed in that manner. Ms. Holley stated that concern of the Oregon Trial Lawyers' Association (OTLA), and her concern also, is that it implicates substantive issues like whether a party will even go forward with a case. She noted that no one is proposing a broad rule where anyone can file under a fictitious name. Judge Norby noted that statutes create burdens to meet in order to allow it, and the Council cannot create burdens. Judge Leith opined that it is still worthwhile to create the procedure where a party has to file a motion seeking leave, and suggested that the Council could make a reference such as, "for good cause shown and to the extent permissible under the Constitution."

Mr. Crowley noted that the UTCR have all sorts of detailed rules about information that is confidential in court actions, and he wondered whether it might be more appropriately be placed in the UTCR. Mr. Andersen agreed with the comment that there are some people for whom this is a watershed as to whether they will go forward with an action. He noted that the issue may be substantive, but stated that he likes the idea of procedurally adding a clause in Rule 26. He pointed out that there is a large number of national, famous cases that were prosecuted under pseudonyms and that it is an essential part of access to justice. Judge Hill stated that a pseudonym does not change the real party in interest and that it is not an exception, but, rather, it is just how the party is named. He expressed concern about combining those issues. Ms. Holley stated that the committee had a conversation about whether the potential draft language is needed. Mr. Andersen noted that the current language states that the case shall be prosecuted in the name of the real party in interest.

Judge Norby stated that the committee had also looked at Rule 20 H, which is the rule that mentions the phrase "fictitious parties." She stated that this section of the rule does not talk about fictitious parties but, rather, unknown parties. The committee wondered whether that language should be changed to avoid confusion. Mr. Keating noted that a "Doe" designation is a fictitious party. Judge Hill stated that a fictitious name is used because the true name is unknown. Judge Bailey explained that such a name is not fictitious in the true sense, because a

fictitious name is something like "Bugs Bunny" that is completely made up, as opposed to an unknown name. Ms. Holley stated that, if the committee did make a more substantive change, it did not want to derail the whole discussion into a battle over what the substantive change would be. She observed that a small change could be more effective. The committee discussed whether a change to Rule 20 H would be an appropriate place for a substantive change, but Judge Conover pointed out that it is a different issue if you do not know who somebody is versus if you know who someone is. Mr. Beattie stated that a “Doe” designation was historically a placeholder for a later amendment, whereas a fictitious name was a substituted name. He stated that this issue always begs the question for him about whether defendants also have the right to use a fictitious name. Ms. Holley noted that any change would apply to defendants as well. Mr. Beattie stated that there is a lot of California case law about fictitious name pleadings being used as a means of extortion where horrible things are alleged about named defendants by unnamed plaintiffs.

Judge Norby explained that the committee was not thinking that these limited suggestions would end its work but, rather, that they might be the step that the Council is prepared to take that might be acceptable to people and would not compromise integrity in either direction. Ms. Holley suggested replacing the word "except" with "or" in the committee’s potential draft amendments to Rule 16 and Rule 26.

Judge Bailey stated that he has a real issue with idea of filing under fictitious names. He noted that he has no problem with Judge Leith's idea of setting up a rule that allows parties to file a request asking to go forward using initials or something of that nature that could apply equally to a plaintiff or to a defendant, and then turning the issue over to the UTCR Committee to develop the rules of how the parties would then go about it. But the rule itself should allow for the parties to do that, with the court’s permission.

Mr. Keating stated that he has had an experience where he did not find out that a case was filed under a fictitious name until the complaint was served along with a court order authorizing the case to proceed under a pseudonym. He explained that his client was never served with a motion asking permission to proceed in that manner. Judge Bailey pointed out that there is nothing that says that a party cannot come back once they have been served and file a motion to not let the case go forward under the fictitious name. Ms. Holley stated that she has filed a few cases under pseudonyms in different counties and that some counties have no rule about it, so all you can do is file the complaint because that is how you open the case in the Odyssey filing system. Judge Hill agreed that, with the Odyssey electronic filing system, a party must file a complaint to get a case number. Ms.

Holley stated that she was uncomfortable doing this and would rather have the conversation first. Mr. Keating observed that a complaint is a public record, names a defendant specifically, and can make salacious claims, so it is a little late once the information is in the newspapers.

Judge Norby asked whether any Council members had objections to the committee's suggestions for limited changes to the two rules. Judge Hill asked whether this is really a good thing. He noted that there are frequent news reports about contracts with fake names being used to cover up nefarious dealings. He stated that he understands why it may be difficult for people to proceed under their own name but, at the end of the day, we have a public court system. He expressed concern that it is not good public policy to say that we will allow privacy for difficult situations. Judge Norby asked whether Judge Hill had an objection to the limited changes proposed. Judge Hill stated that the limited changes could be seen as the Council endorsing the fact that parties ought to be able to go forward in these cases under pseudonyms. Ms. Holley stated that she sees it as allowing the judge to consider it at all.

Judge Norby opined that a change by the Council would be an acknowledgment that it is currently happening. Mr. Crowley agreed. Judge Wolf stated that there is not really a rule that says it is acceptable, except perhaps some court's Supplemental Local Rule, but it would be problematic for the Council to amend a rule to say that the court can do it without any guidance about what we should be looking at or any kind of procedure. Mr. Crowley stated that the CJO identifies a list of reasons that fictitious names can be used in appellate cases and, if the committee moves forward with this idea, that would be a good framework to start with. Judge Roberts noted that the Council is not considering sealing the names of the parties or prohibiting anyone from discovering them but, rather, just changing the name in the caption on the case. She stated that there is some value in signaling that a party cannot just file a case under a fictitious name, but that the party must go the court first. She pointed out that the court can always say no.

Judge Peterson asked whether, since attorneys are required to file cases in the Odyssey system, in terms of the mechanics it would be appropriate for a plaintiff to go in at ex parte and ask a judge for permission first. He noted that a judge could set a hearing where a defendant could object or ask to also be designated by a fictitious name. He agreed that a party should not just be able to file under a fictitious name with no permission. Judge Hill stated that the committee seemed to be making an assumption that this is a private resolution of a dispute, but he noted that this is not arbitration but, rather, a public forum to have a case decided. He stated that the idea of these changes makes him really uncomfortable. He pointed out that juvenile cases are different because the entire record is sealed,

and that fictitious names are only used in the published opinions in appellate cases. He expressed concern that the Council may be going down a road that may be popular, but that it may later regret. Mr. Andersen noted that the Federalist Papers were written anonymously and that there is a long tradition of anonymity in lawsuits. He quoted Justice John Paul Stevens in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995):

> Anonymity is a shield from the tyranny of the majority. . .It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation-and their ideas from suppression-at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.

Judge Norby stated that, at some level, even though all lawyers have concerns about how justice is managed within the system and how judges do their work, when a court order is required, there must be some level of trust that judges are going to do their jobs lawfully and constitutionally and with adequate and reasonable consideration. Mr. Beattie stated that the court order provision would capture Judge Norby's ideas. He noted that the Council cannot make a per se rule that a party must sue under his or her own name because that is a legislative or constitutional issue, but suggested that it is appropriate for the Council to say that, if a party is going to sue under a fictitious name, there has to be a procedure and the court has to analyze it in the context of a given case. He pointed out that a particular judge could come to the conclusion that there is no constitutional basis to file under a fictitious name. Judge Hill noted that Judge Hargreaves' point is that there is no place that says it is allowed so, until someone substantively gives the Council that threshold, there is no reason to create a procedure that is not supported by some other organic statute or case law.

Judge Bailey stated that the ORCP are that legislative adoption of a rule that allows for it to happen. Judge Norby asked whether Judge Hill was saying that, until the Council has a full procedure, there should be no mention of filing under fictitious names in the rules. Judge Hill stated that, until the threshold question of whether it is a proper practice is addressed, he could not support a procedure for it. He opined that putting it in a procedural rule constitutes an endorsement by the Council. Ms. Holley asked whether Judge Hill feels if the examples the committee collected are enough. Judge Hill stated that they were not. Judge Leith asked whether the CJO authorizing the use of fictitious names in certain cases establishes

a precedent that it is lawful in certain cases. Judge Hill responded that the CJO is limited to those cases. Judge Bailey noted that fictitious names have been allowed on criminal complaints for 50-60 years in sensitive cases. Judge Hill pointed out that fictitious names in that context are used for victims, not for parties.

Judge Peterson asked about the impact of the Violence Against Women Act and other federal laws. He stated that he does not know if it's a good idea or not, but that there is a lot of indication that filing under fictitious names is already going on. As a Council, we should either say it is not allowed or make a procedure. Judge Hill reiterated that the Council cannot avoid the threshold question of whether it can be authorized substantively. He explained that it is not appropriate to say that the Council is not taking a position on whether or not it is right but that the Council is nonetheless creating a procedure on how to do it. Judge Norby stated that it is backwards either way, because the rules are both being cited as a prohibition to filing under a pseudonym as well as not a prohibition to filing under a pseudonym, so the Council is effectively taking a stand by not taking a stand. Mr. Beattie stated that he believes that filing under a fictitious name should be allowed, subject to court supervision. Judge Leith agreed that the Council can provide a procedure for filing under fictitious names within applicable constitutional limitations and subject to the court's discretion to review for good cause.

Mr. Crowley stated that the committee's mission may need to be ongoing because he was not certain that the issue could be adequately addressed this biennium. Judge Bailey suggested taking a vote now to answer the threshold question of whether the Council will allow pseudonyms under some circumstances. He stated that, if the majority does not want that to take place, he could not imagine the Council voting for a process for it. He stated that this would give the committee an idea of whether to proceed or to not waste any more time on the issue. Judge Roberts stated that having the "gate" type of rule that simply says that a party has to ask the court first if that party wishes to file under a pseudonym is not necessarily telling the party anything about whether the request is going to be granted or not, whereas having a right to do it subject to certain limitations is a different type of rule because that suggests a position on it. Judge Bailey agreed that, if the Council does not like the idea of pseudonyms, period, there is no point in coming up with a process.

Ms. Payne disagreed with the idea that the Council needs to take that vote now, because some courts are substantively permitting the use of fictitious names and some are not. She stated that it is not the Council's role to decide whether it should be substantively allowed. It is the Council's role to have a uniform procedure to bring the issue before the court for the court to decide. She gave the example of the UTCR regarding sealed pleadings that have a procedure on how to

go to the court to ask for the pleading to be sealed, but that basically provide that a party has to cite substantive authority to the court. Ms. Payne suggested that a rule change by the Council could provide a uniform procedure but state that a party must cite the rule or statute that allows the pseudonym designation to go forward. She pointed out that the party would still have to justify it to the court. Mr. Beattie stated that the Council could craft a rule that says that, where a party has the substantive right to proceed under a fictitious name, that party shall first obtain permission from a court. Judge Hill stated that Ms. Payne's and Mr. Beattie's suggestions resolve his concern. He stated that, if all the Council did was to create a procedure, the Council would implicitly be saying that parties may file under fictitious names. However, if the Council states that there may be circumstances where a party may do it but that party must provide a substantive basis for the court to do it, there is no implication of a substantive right.

Judge Bailey wondered why the Council would make the change at all in that case. Judge Hill replied that he had just heard of several situations where filing under fictitious names was allowed. Judge Bailey pointed out that some courts are allowing it and may think they have a legal basis for allowing it. Judge Hill noted that there are three ways to proceed: 1) do nothing; 2) state that filing under fictitious names is allowed and list the criteria for doing so; or 3) state that there may be some substantive authority for filing under a fictitious name and, depending on the circumstances of the case, when that exists and has already been promulgated by someone else, here is the procedure for getting it before the court. Judge Wolf pointed out that the Council has no substantive authority to say "yea" or "nay" and observed that this is the problem. He expressed concern that the Council would be creating a rule that there would be no way to use. Ms. Holley stated that there is substantive authority, but that it is just not directly from Oregon. She stated that some Oregon cases address the issue. Judge Leith stated that parties would have to brief why the court has the inherent authority to allow it. Judge Bailey expressed concern that, since the Legislature signs off on the Council's promulgated rules, the rules may be considered statutes and that the Council may been seen to have created an inherent authority to file under fictitious names. His fear was that, even if the Council did not necessarily agree with the concept of whether it is constitutional, it would have lent authority to the concept. Judge Norby opined that it is not the Council's job to look so far into the future and anticipate all of the arguments that all lawyers could potentially make. Judge Hill stated that, as long as there is a limitation saying that this does not create a substantive right to proceed fictitiously, but just allows a party to present other authority to the court, that is different from creating a framework within the ORCP.

Ms. Holley asked Judge Hill for clarification of a particular scenario of where there

would be a substantive versus a non-substantive right to proceed under a fictitious name. Judge Hill explained that certain Council members had made the argument that filing under fictitious names is already being done and that there are federal laws that allow it. He stated that, if there is a federal law that allows it, that is one thing, but he does not believe it is enough to argue that a case involves really uncomfortable facts that will embarrass a party. Mr. Beattie stated that the motion to seal is probably the closest analogy because there is a basis for filing the motion but the argument has nothing to do with the rule; rather, it has to do with open courts. Ms. Holley summarized Judge Hill's concept by stating that there does not have to be a statute that allows for filing under a pseudonym, but that there must exist somewhere a substantive right to file under a pseudonym. Judge Hill agreed.

Judge Roberts stated that an important and excellent point is that, if the Council creates a rule that says that a party can do this if the party has authority to do so, it does not provide a procedure for something that is impossible. She stated that she does not want to foreclose either the granting of or the denying of permission because of sensitive situations such as a juvenile who wants to assert damages for sexual assault and to proceed under a pseudonym. She noted that she does not want to foreclose herself in deciding whether or not to allow the case to go forward under a pseudonym. She would prefer to tell a party that, if they want to do it, they need to show their authority to the court before they file.

Judge Bailey asked why the Council would develop a rule if there was not a substantive right in the first place. He expressed concern that, by developing a rule, the Council would be saying that there is a right. He agreed that there should be a process because there have been times when filing under a pseudonym has been warranted. However, if most of the Council disagrees with the right to use a pseudonym, there is no point in proceeding.

Judge Norby stated that the question was whether the committee should be putting forward the limited suggestions for two amendments that it thought could be more immediately dealt with, or not. Mr. Keating pointed out that, even with the committee's limited suggestions, there had been an opinion voiced today that the words "or upon court order" imply that there is a substantive right to proceed under a pseudonym. He agreed with Judge Bailey's suggestion to take a vote on whether the Council wants to take a position not to make a statement in the rules that could be interpreted as a statement of a substantive right to proceed under a pseudonym. Judge Bailey stated that, in the end, he feels that it is appropriate for the Council to do so. However, if the majority of the group felt that, by creating a rule, the Council would be inherently creating an authority or a substantive right, and that this is inappropriate, there would be no point in proceeding.

Ms. Holley stated that the only substantive right the Council would be creating would be the substantive right to apply to the court for permission. Mr. Keating pointed out that implicit in that argument is that, if a party is applying to the court for permission to do so, the law obviously would allow the party to do it. Judge Norby remarked that anyone can apply for anything. Mr. Keating stated that a lawyer can now argue that there is no substantive right to proceed under a pseudonym under the current rules, but that a change the Council might make would allow for the argument that there must be a substantive right under some circumstance. Ms. Holley agreed that the Council would effectively be saying that it is not a "never" situation by enacting such a change.

Mr. Crowley stated that the committee felt that the issue was worth exploring further, but not if the rest of Council does not agree. Judge Hill stated that he would like to resolve whether there is a consensus among the Council to say that any rule will acknowledge that there is substantive right to proceed under a pseudonym. He stated that is the threshold question before the Council can contemplate a procedural process. He made a motion that the committee agree to work on a rule that expressly states that, under certain circumstances, a party may proceed with a pseudonym. Mr. Andersen seconded the motion.

The Council passed the motion on a voice vote with 14 ayes and no abstentions. The committee will proceed with its work as directed.

3. ORCP 7 Committee

Judge Norby stated that the committee had not met since the last Council meeting. She explained that, in light of the conversation at the last Council meeting, she thought that it was the Council's consensus not to go into a whole lot of detail about what should go into an affidavit or declaration regarding electronic service as an alternative service method but, rather, just raise the burden if a party is using an electronic means because it is highly unlikely that someone will receive an e-mail or social media post from a non-friend due to security controls. She stated that she drafted a very short summary that raises the burden only for electronic service in an attempt to crystallize what she believed the Council suggested. She then had a miscommunication with Judge Peterson and, subsequently, Judge Peterson and Ms. Nilsson did a thorough job of drafting a version that expanded into more detail. It was her understanding that the intention of the Council at the last meeting was to move away from the more detailed version, but she included both versions for the Council's review (Appendix D).

Judge Leith stated that he did not understand why we would require success in

this form of alternative service, because we do not expect success in other forms of alternative service. He explained that, when he orders publication in a small newspaper, he does not expect that actual notice of the lawsuit will result. Judge Bailey pointed out that it is giving the opportunity for these parties to receive the information; otherwise there would be no need for alternative service at all. He noted that it is always subject to a Rule 71 review for setting aside a default judgment. Judge Norby pointed out that part of what the committee heard from Aaron Crowe of Nationwide Process Service is that there are ways to serve electronically, such as communication through a friend of the party being served who is connected with them on social media, where you can in effect get past security measures through a back door and receive proof of actual notice. She stated, however, that when a party just sends documents electronically, the chances of actual notice are so small as to be non-existent, so there is not a real possibility or reasonable potential for success. She noted that she realizes that this is also the case with publication but, with publication, there is at least a shot.

Judge Bailey pointed out that, with publication, the party is not required to prove that the party being served is known to read a certain publication and that the publication is therefore appropriate. Judge Norby noted that, with publication, there is no obstacle other than a person not buying the paper; it is available for anyone to read, whereas there are flat-out obstacles with social media.

Judge Peterson pointed out that the issue at hand is alternative service. He noted that the original suggestion came to the Council from Holly Rudolph of the Oregon Judicial Department, who was concerned about parties to family law cases being able to serve each other. Those parties might be more likely to still be in electronic communication with each other. He noted that allowing this type of alternative service puts one more tool in the toolkit of the court and the parties. A party would need to make a showing that electronic service is appropriate, show what steps had been taken in the certificate of service, and amend the certificate of service if it comes to light later that someone other than the intended recipient had received the document. He observed that Rule 69 and Rule 71 are available to provide relief to defendants who did not receive notice. Judge Peterson explained that he wanted to get a long version before the Council to review because there are only two meetings left before the publication vote. He explained that the attempt was to give litigants, who may think they are savvy in electronic communications, and judges, who may not be, some guidance in what is expected in allowing alternative service.

Mr. Beattie stated that, with electronic service methods, there are strings attached that are not attached to the other faith-based methods of service like publication or posting notice at a courthouse. He observed that this is a choice the Council can

make. Judge Leith pointed out that the draft does not provide new tools but, rather, makes limitations on existing tools. He stated that he can currently order anything he thinks is best calculated to achieve actual notice, even though it may not achieve actual notice. However, the draft language does not allow electronic alternative service methods unless certain levels of success are met. Judge Hill observed that a judge can currently order service by US mail without a return receipt as the most reasonable way for documents to get to a person, putting a form of alternative service on par with regular mail service. He stated that it may not be making things better to think of electronic service as alternative service and that it perhaps might be appropriate to treat electronic methods like mail service. Mr. Beattie observed that this is a policy decision that the Council could make.

Judge Leith stated that mail service is sometimes authorized as primary service in certain instances, but he was not talking about using electronic service as primary service. Judge Hill stated that his suggestion is to treat electronic service as a form of primary service. Judge Norby stated that her greatest takeaway from the committee's conversations is that there is no comparison between electronic service and non-electronic service. She described electronic service as not a tool to add to the toolkit but, rather, a whole separate kit. She observed that, with all of the other methods traditionally used, people understand how they work, they work simply, there are no obstacles to their working, and people have access that is not blocked. However, access is often blocked in these electronic forms of communication, we will never understand their complexities, and they change on a daily basis. She stated that she is concerned about the Council making a tool available to people that they think is viable, because the blocks are bigger than the tool.

Mr. Andersen disagreed entirely. He stated that the idea that these blocks to electronic service are insurmountable is a false assumption. Judge Norby stated that her understanding is that there are blocks for strangers or process servers. Mr. Andersen stated that he agrees that electronic service should be part of a toolkit, not like mail, but part of another toolkit reasonably calculated to effect service. He noted that, with Facebook Messenger, it is possible to see when someone has opened a message. With e-mail, depending on who you are, it may go to a spam filter, but all of the other ways of effecting service have similar hurdles. Judge Wolf pointed out that it is not that there are not blocks in regular service but, rather, that they are better known and present different blocks. Mr. Beattie stated that this all comes back to Judge Leith's point: judges can currently find that this is a constitutionally sufficient means to serve documents and order electronic service. The Council has come up with a rule that is a limitation, and it can make a policy decision about whether a party can serve an opposing party via Facebook or Twitter or another electronic means. He stated that the question is

whether the Council wants a rule that says that this is not permitted unless the serving party can produce some other sort of indicia of actual receipt. Judge Bailey stated that there may currently be some judges who have more information about how electronic methods work who would say that certain methods are not going to be sufficient, and there may be other judges who do not know. He pointed out that, currently, it can happen either way, and restated Mr. Beattie's point that the Council needs to decide whether to change the rule and include certain certifications, or just stay silent and assume that it is already in the toolkit.

Judge Leith stated that, if the Council changes the rule to require that alternative service has to be successful if it is electronic, it is likely that every time a judge decides that the most likely way to achieve actual service is through electronic means, in addition to ordering the electronic service that judge will also order publication. Even though neither one is likely to achieve successful notice, the electronic service will be seen as inadequate because a party will be unable to prove its success, but it will not matter because the publication, even though it will definitely be unsuccessful, is sufficient.

Judge Peterson stated that he was under impression that the Council wanted a higher bar on electronic service but, if electronic service is an alternative method, it still may be useful to give parties and judges some sort of standards as to what will likely be effective. Judge Hill pointed out that Judge Norby's position is that it is impossible, given how fast technology moves, to make those definitions, and that the Council is trying to avoid that problem. Ms. Nilsson suggested that, with the very broad guidelines that she and Judge Peterson had crafted in the draft before the Council, questions regarding specific technologies do not need to be addressed. The problem of changing technology can be addressed by using more universal, non-technical guidelines, such as the need to transmit in the initial communication that the person is being served along with the case caption, as well as simply requiring the use of a platform capable of transmitting an exact copy of whatever document is being served. The specifics of the format of that exact copy do not need to be outlined. She stated that the guidelines that she and Judge Peterson had crafted basically say that a party has to send the document and has to let the party being served know that they are being served.

Judge Norby noted that many Council members have issues with the fact that publication is currently the standard for alternative service, but she would like to stop using that as a fallback excuse for everything that is not reasonably calculated to provide service. She suggested that perhaps the Council should stop making that excuse and have more integrity with the concept of service in general and giving more meaning to the notion that we are reasonably calculating to provide actual service. Mr. Beattie observed that, whether the serving party gets a

confirmation or not, ultimately whether service is s constitutionally sufficient will be in the hands of other people.

Judge Peterson noted that there are parties who know the person they are trying to serve, and those parties will be able to do it cleanly and inexpensively with electronic service, but there is not currently much direction or guidance in the rule. Judge Leith stated that he does not have any disagreement with some of the details of the long form draft and stated that they make good sense and could be helpful. He did not, however, understand why the Council would create the raised burden for alterative service that is not necessarily going to be effective. He observed that, if the Council had been able to change from publication in newspapers to an Oregon State Bar website, that would not have been very likely to achieve service either. He stated that current alternative service is an attempt at what might have a chance of working, and that it is the same for electronic alternative service. Judge Peterson asked whether Judge Leith was suggesting removing the requirement for including confirmation of receipt in the certificate of service. Judge Leith pointed out that success is not required in any other form of alternative service.

Mr. Beattie noted the case of *Korgen v. Gantenbein* [74 Or App 154, 158-159, 702 P2d 427 (1985)] where there was no follow-up mail service and the court said that there was constitutionally sufficient service because the person actually received it; however, it was not ruled sufficient for a default order. He stated that there can be situations where we put up blocks to defaults but it is otherwise a constitutionally sufficient service where the statute of limitations is triggered and the person has to respond, but you cannot take default.

Ms. Holley wondered whether it would make sense to consolidate all of the different criteria for the different methods of electronic service into one paragraph that summarizes the requirements for all electronic methods, in case new electronic methods arise in the future. Judge Norby stated that the committee would meet and review the more detailed draft, taking the Council's suggestions into consideration.

4. ORCP 15 Committee

Judge Gerking reminded the Council that the Rule 15 committee has struggled with ORCP 15 D but that the committee is presenting two proposals to the Council (Appendix E). He explained that the second proposal is the committee's most recent revision and that he believes that it is clear. It includes a clause at the beginning that deals with those rules that have hard timelines, that in certain instances are jurisdictional, and that are not modifiable. The new language reads:

"Unless prohibited by any other rule, the court, pursuant to a motion or an agreement of the parties, may in its discretion and upon any terms as may be just, permit the filing of a pleading, motion, or a response to a motion after the time limited by any rule has passed." Judge Gerking stated that the committee is assuming that a motion to enlarge time is a motion that is filed before the time limit has passed; otherwise it would be redundant with the rest of the sentence.

Judge Peterson stated that, for a relatively small rule change, there has been a lot of committee discussion. He stated that the most recent of the two proposals is the broad, expansive view that says that Rule 15, which otherwise is pretty much dealing with pleadings and motions responsive to pleadings, makes section D an omnibus catchall in this version. He noted that the committee had earlier changed the word "allow" to "permit" because "allow" sounds like a motion must be involved, whereas "permit" is intended allow for instances where a party files something late, there is nothing defective about the filing, and the other party does not object to the filing. These instances do not seem to require the other side to assent to the late filing.

Judge Gerking suggested another modification of the language, to add the words "or otherwise" after, "pursuant to a motion or an agreement of the parties," which would take into account situations where a party files something without the approval of the court or the other party. Judge Peterson stated that he believes that this is in keeping with the committee's discussion to avoid needless fights over whether a pleading or a motion can be filed or not. He noted that, unless it is truly prejudicial to someone's client, most lawyers will not say anything about a late filing and would not object to a motion to enlarge time. He stated that the committee's proposal makes the rule more clear for self-represented litigants and gives them less of an argument that the system is rigged, while allowing the discretion that he heard pretty much everyone on the Council say that they wanted. Judge Peterson stated that the committee's most recent suggestion is even more expansive and includes responses to a motion.

Ms. Payne pointed out that the language allowing responses to motions appears in the first clause but not the second clause, and suggested adding it. Judge Norby asked whether Ms. Payne was suggesting making the two strings of text parallel. Ms. Payne agreed that this was her suggestion.

Judge Leith stated that he was concerned that the draft was still ambiguous about what will count within the exception. He gave the example of ORCP 64 F for new trials that has a 10-day timeline. He wondered whether this is a rule that prohibits the use of ORCP 15 D. Judge Gerking stated that this is a legal issue that the Council does not need to address. He stated that, under Rule 71, a party has one

year to move to set aside a judgment for excusable neglect, which is also a legal issue. His stated that his position is that this is a hard timeline that is not modifiable by the court under Rule 15 or otherwise, but noted that this is arguable. He explained that the Council is not trying to change the law but, rather, trying to make the rules clear in terms of when this can and cannot be done.

Judge Peterson explained that the committee had a rather robust discussion at its last meeting about whether ORCP 15 D was applicable beyond pleadings and motions responsive to pleadings. He stated that he determined that the phrase "these procedural rules," that has been in the rule since it was drafted, was probably more expansive than the rest of the rule. He stated that the change proposed by the committee is making 15 D a "get out of jail free" card if someone is late with a motion, pleading, or even a response to a pleading, which is more like Rule 12. He stated that he has concerns about such a change because most of the rules that have timelines state within the specific rule whether any discretion is included. He stated that the case law is clear in Rule 63 and Rule 64 that there is not any discretion. He still questioned whether Rule 15 should include this omnibus discretion when the rules that have discretion within them have discretion that is well considered as it applies to that particular situation. He explained that this goes to Judge Leith's concern about whether the Council is creating an ambiguity by making Rule 15 more expansive than it was before the Council started tinkering with it.

Judge Roberts stated that perhaps the distinction is those timelines that have been construed as jurisdictional as opposed to those that have not. She suggested that this perhaps is a point that in some way could be expressed within the rule, where the law otherwise provides that a timeline is jurisdictional this is not intended to change that. Judge Hill wondered why the committee could not simply go through the rules and catalog those rules that have their internal time frames and grace periods and exclude them expressly from this. Judge Norby explained that, moving forward, the Council would always have to remember to update them. Judge Peterson stated that this is possible. Judge Hill pointed out that there is a finite number of them in the rules. Judge Gerking agreed that there are probably no more than a dozen in the rules. Judge Roberts agreed that this seemed like a workable solution.

Mr. Andersen expressed concern that the committee is working on a solution in search of a problem. He wondered how often the issue arises and asked for clarification on what inspired a change to section D. Judge Leith explained that self-represented litigants do ask judges why they allowed represented parties to file an answer late. Judge Peterson stated that he has had former students call him for advice after realizing they were in default, and his advice has been to file a

response rather than a motion to enlarge, because it is perhaps better to ask for forgiveness than for permission, but he noted that the rule is not clear on that. He stated that the word "allow" implies that one must ask for permission, and he stated that it seems like it would be better, particularly with self-represented litigants, to add some clarity so they do not think that the legal system is a club where you get unequal treatment if you are not a member. Judge Roberts stated that it may not always be the Council's goal to draft rules for self-represented litigants but this is certainly a case in which those litigants feel that lawyers know which timelines are real and which are flexible but they do not, which is frustrating for them. Judge Norby pointed out a recent appellate decision in a landlord tenant case, *Wong v. Gittings*, [276 Or App 249, 367 P3d 531 (2016)] where the court ruled that a party now has all the way up to the time of trial to file an answer unless the other party seeks default, despite the existence of a statute requiring an answer to be filed on the same day as the first appearance. She stated that it appears that the appellate position has been that those deadlines are flexible, even if they are statutory.

Judge Hill pointed out that, with the exception of the first part of the April 11 committee draft where it says “unless prohibited by any other rule,” the new language seems to be just a different way of saying the exact same thing. He stated that he agrees that there is an issue in that Rule 15 seems to be an omnibus rule, but other rules seem to contradict it. He opined that there is a need to have some symmetry. Justice Nakamoto stated that the other draft appears to very much narrow the scope of section D to responses to pleadings or motions regarding a pleading, so it cuts off using Rule 15 as an omnibus extension motion, except for the well-known prohibited other rules. Judge Peterson stated that he always thought that section D related to pleadings and motions responsive to pleadings and included that draft to reflect that viewpoint. Judge Gerking explained that the current 15 D is ambiguous as to scope and that the committee's current thought is to attempt to truly create an omnibus rule with that initial clause serving as a limitation. The idea is to create a directive to the trial court to take a liberal view toward extensions except those that impact a rule that prohibits them.

Judge Norby wondered whether the language, "may, in its discretion and upon any terms as may be just," is superfluous. Judge Gerking stated that it is similar to language in Rule 23. Judge Peterson explained that it is consistent with the language that is being replaced and that similar language is used throughout the ORCP. Judge Gerking noted that, if there is a motion for an extension or to enlarge and it creates a hardship, the court can take that into consideration. Judge Tookey stated that it is meant to be broad and make it clear that the trial court judge has a lot of discretion in a lot of situations. Judge Norby stated that she thought that was

the standard. Mr. Beattie noted that the discretion is binary, that it can be granted or denied within the court's discretion, but this just allows the court to condition it. Judge Hill agreed with Mr. Beattie that it allows the court to allow, disallow, condition an extension, or allow pieces of it.

Judge Roberts expressed concern about the phrase, "unless prohibited by any other rule." She stated that most of the other rules to which we understand this potential amendment would not allow a change, for instance a motion to set aside a default judgment, do not expressly say that there is a hard limitation – not beyond a year. She stated that she does not know what rules prohibit an enlargement. Judge Gerking explained that a motion for a new trial or a motion for a judgment not withstanding the verdict or the 55 days the trial court has to rule on those motions are jurisdictional because they impact the timeline for filing a notice of appeal. Judge Roberts noted that lawyers know it is jurisdictional because it has been ruled jurisdictional, but pointed out that there is nothing within the context of the rule itself that states that motions after this time are prohibited. She stated that the rule merely says that "this is the time," just as it says this is the time to answer a complaint. However, the new language says "unless it is prohibited by the rule." Mr. Beattie stated that this would require a statutory interpretation or case law evaluation of every rule to determine whether it was a drop-dead timeline or not. Judge Roberts stated that this is not very helpful and that a cross-index would be more helpful.

Judge Peterson stated that cross indexing is definitely on the table. He suggested that the committee create a draft with that list so litigants and self-represented litigants do not have to look at case law. Judge Leith agreed that such a draft should be created, if the Council decides to treat Rule 15 as if it applies to all motions. He also agreed with Judge Peterson that the rule, as currently written, is limited to the actual complaint, answer, and reply and motions against those pleadings. He stated that the thinks that this is a rule about the pleadings in the narrower sense, not in the larger sense, of any motion that is filed. He explained that he does not know if the Council would be doing something odd in expanding section D to include enlargement of time for any motions. Judge Hill stated that the rule permits the filing of a pleading – which is an answer, complaint, or reply – or a motion or a response to a motion. He suggested that this pretty much encompasses any request for the court to do something that one can think of. Mr. Beattie noted that it does not encompass a fee petition, which is a statement.

Mr. Bundy expressed concern about trying to fix something that is not broken. He opined that section D should not apply to a complaint, as the court cannot permit a complaint to be filed after the statute of limitations. He observed that the beginning of the rule does not talk about a complaint, other than to say a motion

or answer to a complaint or a third-party complaint, and an original complaint is not mentioned. He stated that he understands the issue of permit versus allow, but that it has never been a problem for anyone he has worked with. He expressed concern that the Council is working awfully hard to create a rule that could be interpreted as a change in the way things are done. Mr. Andersen shared that concern.

Judge Peterson noted that section D is currently as clear as mud and that it does raise an issue for self-represented litigants, who may see it as unfair that the court allows lawyers to file documents late in apparent contradiction to the deadlines in the rules. Judge Gerking observed that the current section D does make reference to motion practice. He stated that it perhaps was intended only to apply to those motions that attack a pleading, but it does not say that, so it is ambiguous. He stated that this is the problem that the committee is trying to fix. As a trial lawyer and judge, he never had a problem with section D, but the committee believes that it is not clear.

Judge Roberts noted that section A establishes the 30 day time period to respond to a complaint by an answer or motion and, if section D is limited to the timelines established in Rule 15, then that would limit the whole scope to just those pleadings and motions against the complaint and other pleadings that are mentioned. Judge Leith stated that, to the extent that the rule is limited to responding to pleadings, whether by pleading or by motion, we could eliminate that ambiguity by adding the qualifier after the word motion on line 26, "allow any other pleading or motion responsive to a pleading after the time limited by the procedural rules." He stated that this would also help self-represented parties with their feeling of injustice by explaining that the motion may sometimes be allowed to be filed either before or after the period within which it was originally supposed to be filed. He opined that we do not need to add the language that implies a broader application of Rule 15 to every motion. Judge Roberts agreed.

Judge Hill wondered whether that language is intended to limit these to motions attacking the pleadings or defending them. Judge Leith stated that this is the intention. Judge Hill asked whether it should be about that. He noted that there are other places in the rules where we specifically say "these are jurisdictional" and we have other safe harbors. He stated that he has always seen section D as a catch all. He stated that the beauty of the ORCP is that "gotcha" is rarely the answer and he opined that it is better to give judges discretion because we cannot possibly envision all of the circumstances that can happen. He stated that he sees this as an opportunity to say that, other than those places where, for policy reasons, there are limits on a party's ability to enlarge time, it is up to trial judges to say what they think is appropriate in the circumstances at hand for the whole

pantheon of potential motions that come before the court. He opined that there is some value to the catch all to avoid a malpractice trap.

Mr. Keating asked why it is appropriate to include it in Rule 15. Judge Peterson pointed out that Rule 12, which is not quite as directly related to motion practice, already gives trial courts discretion to read documents in a manner that does not thwart justice. Mr. Andersen stated that, if the Council changes section D, it attracts potential litigation from people who think there is deep meaning to the change. He stated that he does not think that the section needs fixing, and noted that it would be a very enlightened self-represented litigant who would turn to Rule 15. Judge Leith stated that it does happen. Mr. Beattie noted that there are various procedural rules regarding probate and estate issues that were taken from the former Chapters 13-16 of the Oregon Revised Statutes that were substantive. These were swept into the ORCP and include hard deadlines that are equivalent to statutes of limitation. He observed that this type of rule is still interpreted to have those hard deadlines, but a lawyer could look at Rule 15 and say, "skip that." He opined that the only way to get around the problem and keep those hard-and-fast deadlines is to identify those exceptions within Rule 15.

Judge Peterson synthesized the issue to two choices: saying that Rule 15 applies to pleadings and motions responsive to pleadings, which was his interpretation of the rule; or saying that there is discretion except as provided in a list of rules enumerated therein. He stated that, frankly, he believes that the rule as written is broken. The evidence of this is that Council members cannot agree among themselves. He noted that it was only about the fourth committee draft where he saw the phrase “these procedural rules” and wondered whether it meant that the section applied to everything. Judge Hill stated that he has thought for 20+ years that the rule covered everything. Justice Nakamoto asked what other rule a lawyer would cite when filing an extension for time for filing a summary judgment motion, and noted that it can only be Rule 15. She observed that the proposed revision seems to narrow the scope to pleading-related motions, which she does not believe that the Council wishes to do unless it creates another provision that allows for extensions of time on motions generally. Mr. Beattie stated that, as a practical matter, when a party moves to extend the time to do something, that party usually refers to the rule under which they are filing the motion. He observed that lawyers typically rely on Rule 15 when they run into trouble, typically where the other rule seems to create a hard deadline, or because of *Averill v. Red Lion* [118 Or App 298, 846 P2d 1203 (1993)] where the court said that a motion for a new trial or a motion for judgment notwithstanding the verdict is jurisdictional. He stated that there are rule-by-rule, drop-dead, hard deadlines that are not clearly stated as such in the rules themselves and that only lawyers realize are not flexible. Judge Leith observed that Rule 47 actually does have its own

timelines and discretion built in. He wondered whether that is the case for most timelines where the court is intended to have discretion to modify specifically for that timeline. Mr. Beattie noted that it is the same with Rule 23.

Judge Bailey stated that he appreciates that others may think that the rule as currently written is supposed to be broader than Rule 15, but noted that the question for the Council is whether that was the original intent. If so, the Council should modify the rule to create a better understanding of that intent. He noted that some on the Council thought that section D was specific to the pleadings within Rule 15 and, if that is the consensus, the Council needs to make that clear.

Ms. Payne stated that she had just looked up some cases citing ORCP 15 to see whether courts have been limiting the current language to motions or pleadings or whether it has been broadly applied. She observed that it was not applied to ORCP 68 attorney fee statements for years because the Court of Appeals was interpreting the language "motion or pleading" as being limiting, and attorney fee statements were not motions or pleadings as that language is currently stated within the rule. The Council fixed that problem a few biennia ago by adding language to Rule 68 to permit late filings because lawyers could not rely on ORCP 15, not necessarily because it was jurisdictional, but because the court had interpreted the language “motion or pleading” to not apply to other sorts of items like attorney fee statements. She stated that the question is whether it is a poorly drafted rule as it stands such that it is being limited more than the original intention and whether the Council wants to make it clear that it applies to other sorts of filings, like declarations. She observed that many lawyers have been relying on ORCP 15 D, but pointed out that the language does not extend to responses to motions, since it only says motions. She stated that, even if some Council members believe that it is a catch-all rule, it is not necessarily being interpreted that way by the courts. Justice Nakamoto pointed out that *Johnson v. Best Overhead Door, LLC* [238 Or App 559, 563 n 2, 242 P3d 740 (2010)] seems to read section D broadly.

Mr. Keating observed that the discussion has been very illuminating and that it is clear that the committee needs to meet again and make the decision of whether Rule 15 is limited to pleadings or is a catch all. He noted that deciding which rules are jurisdictional and need to be included in an exhaustive list could eat up a lot of committee time and that the amendment to section D may not move forward.

5. ORCP 23 C/34 Committee

Mr. Andersen reminded the Council that the problem in question is a malpractice trap in Rule 23 where a plaintiff may not realize that the defendant they intend to sue has died until the process server goes to serve the papers. He stated that he does not see a solution to the problem other than filing six months ahead of the statute of limitations, which may not always be possible.

Mr. Andersen made a suggestion to the committee, but there was not agreement among all committee members that it was the right solution (Appendix F). His suggestion is to amend ORCP 23 C by adding 8 words as follows:

> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment **or, in the case of a personal representative**, the additional time allowed by ORS 12.020(2). . . .

Mr. Andersen explained that ORS 12.020(2) is the 60 day service period that relates back to the date of filing. He stated that this would allow a party to amend the filing to name the personal representative when the process server discovers that the defendant has died, and the claim against the personal representative would thereby relate back to the date that the complaint was filed. Mr. Andersen stated that this is a problem that has to be solved because right now there is no protection against it. He noted that it falls back on the Professional Liability Fund to defend the cases, but one could make a case that there is no malpractice because, if no attorney knows how to defend against it (not realizing that the defendant has died), the dismissal may not fall short of the standard of care required of attorneys. Therefore the problem falls back on the innocent plaintiff, and this is a problem crying out for redress. He stated that the question is whether the Council can address the problem or whether the Legislature needs to make a statutory change.

Judge Leith agreed with Mr. Andersen that there is a problem and a trap. He stated that Mr. Andersen's solution is clever, practical, and fair and that it is a good idea in terms of policy. However, Judge Leith noted that there is a substantive statute of limitations in each case, as well as an additional one-year extension of the statute of limitations under ORS 12.090 if the defendant dies, in which to file against the personal representative, plus the grace period statute, ORS 12.020(2), that gives another 60 days after a case is filed against someone in which to serve them, and then that relates back. He expressed concern that, by using the relation back provision in ORCP 23 C to extend the reach of that statute, ORS 12.020, to the

personal representative, the Council would be essentially saying that, even though the personal representative was not named in a timely fashion, the statute of limitations can be revived against the person by serving the personal representative within the grace period. He stated that it seems to him that this would be tantamount to amending the statute by referencing the statute in the rule.

Mr. Keating observed that no one was originally served because the defendant had died before service had occurred. Mr. Beattie posited that there might be a way to file a pleading to address the situation without the need for a rule change. He suggested filing a complaint against "John Doe or, in the event that he is dead, his personal representative," attempting to serve that complaint against John Doe and, when one learns that John Doe is dead, serving the personal representative instead.

Mr. Keating observed that everyone on the Council agrees that statutes of limitation are substantive and that the Council cannot make substantive law changes. Judge Leith stated that making such a change would create a substantive trap, because plaintiffs' attorneys will look at the change and think they are allowed to do it, but only years later will the Supreme Court rule that the amendment was not within the Council's charge. Mr. Beattie pointed out that all relation back is an amendment to the statute of limitations because any time the wrong party is served, but the right party knew it should have been served, that relates back. He wondered why the same argument could not be made here. Mr. Andersen agreed. Mr. Beattie noted that ORCP 23 C says that a party may amend a pleading to change a party and it will relate back under certain circumstances, typically if the wrong party is named but the right party received actual notice, and that is where this will run into trouble. He stated that the Council has already come up with a relation back rule that one could argue it is extending the statute of limitations. However, we have just done it within the context of where a person actually received notice within the given statute of limitation period. Judge Hill stated that he did not necessarily agree that this change is substantive because, if relation back that is not substantive is allowed, how does adding the personal representative make it more substantive?

Mr. Anderson also wondered how having it relate back to a personal representative is any different than having it relate back to a party that was incorrectly named in the first place. Judge Roberts pointed out that there may have been previous case law about the relation back to a party that actually knew about a case, so the Council would not just be expanding substantive law that it created. Judge Leith stated that the Court of Appeals, in *Worthington v. Estate of Davis*, 250 Or App 755, 282 P3d 895 (2012), has said that Rule 23 did not apply in

that circumstance because a personal representative is a different party. Judge Bailey noted that there is a statute of limitations generic to the cause of action statute of limitations, whereas there is a specific statute for the procedure when somebody dies. He stated that, to him, the suggested change would be a change to a direct statute where the Legislature has said that, if someone dies, there is an extra year for statute of limitations purposes, because it would add 60 days on top of that. Judge Hill pointed out that it has always been the case that when someone sues Corporation A but meant to sue Corporation B, but Corporation B was closely held and they knew the case filed against Corporation A was meant for them, relation back is allowed. Judge Leith pointed out that this is a case of misnomer. Judge Hill noted that it is still two different people. Judge Leith stated that there is a long section in the *Worthington* case where the court makes a distinction about misnomer. Judge Roberts stated that it is the knowledge of the suit that is relevant, and that there is a difference between simple misnomer and a situation where a party did not know who it wanted to sue and sued the wrong person. She noted that there is no remedy for that.

Judge Peterson pointed out that it is an artificial construct that the estate of a deceased person has nothing to do with the deceased person, as it is literally the same bag of money. Judge Leith suggested that the Council should be careful and perhaps make a recommendation to the Legislature instead. Mr. Keating asked whether the Legislature had already addressed this issue by allowing an extra year if a party dies. Mr. Andersen pointed out that this is a year from the date of death. Judge Leith stated that, in the *Worthington* case, the defendant died in month 9 and then, by the time the two year statute of limitations had elapsed, the additional year had also elapsed.

Judge Peterson stated that it seems that everyone at the table agrees that this is a problem. He suggested that the committee draft an amendment to a statute that the Council can forward to the Legislature with its transmittal letter pointing out the problem and suggesting that the current law is bad public policy that needs to be addressed.

6. ORCP 55 Committee

Judge Gerking reported that the committee has had three meetings of substance regarding a rewrite of ORCP 55. At the first meeting, Judge Norby walked the committee through her draft, after which the committee decided to examine the proposal section by section. He explained that Judge Norby's reorganization of the rule (Appendix G) has four sections instead of the current seven. So far, the committee has reviewed the new sections B and C and will meet again before the May Council meeting to review sections A and D.

Judge Gerking stated that he could speak for committee in saying that they will be in a position to present a proposal for a general revision of ORCP 55 at the May 12 Council meeting. He stated that he has gone from an attitude of guarded pessimism to being optimistic that the committee will produce a revised rule that the Council will support. He noted that the rule is significantly better organized, eliminates redundancy and antiquated phraseology, and enhances clarity. He explained that a party generally unfamiliar with subpoenas will be able to find the answers more quickly. Judge Gerking pointed out that the Council should keep in mind that this revision contemplates no substantive revisions but, rather, is just an effort to make the rule more readable and clear. Mr. Keating endorsed Judge Norby's reorganization and stated that her extensive effort to put the parts in an order that makes sense is great. He stated that the committee has been focused on the real purpose of the rule and eliminating archaic language to make it read better. He felt that people will be satisfied that there is not any change to the rule but that the organization is clearer. Mr. Andersen agreed.

Judge Leith agreed that the current Rule 55 is a nightmare and that this reorganization seems like a really good clarification of it. He expressed concern about making changes to a big and long-established rule like this is the broad fear of unintended consequences. He noted that this concern can be largely addressed if the Council stays true to the idea that it is not changing the substance of the rule. Mr. Beattie stated that this can be clarified in staff comments. Judge Norby stated that she had prepared a cross-reference chart to identify parts of the current rule and where they had ended up in the rewritten rule. She did not include it in the meeting packet because she understood that the committee would only be sharing sections B and C, not the entire rule. She stated that she would e-mail that chart to the whole Council. Judge Peterson agreed that this is a good idea so that all members can assist in cross-referencing and cross-checking. He also agreed with Mr. Beattie that staff comments can help make it clear that the new Rule 55 is identical to the old except that now it is better organized. Mr. Beattie suggested having two paralegals read the rule as well. Ms. Weeks stated that she would be willing to do so. Judge Wolf stated that he has already turned to the draft from time to time for quick reference during cases and that it has been very helpful.

Ms. Nilsson explained that, once the Council has agreed that the rule has been reorganized to its satisfaction and contains the same information as the current rule, the draft will need to be put into proper format so as to conform to the rest of the rules. She stated that, unfortunately, the rule cannot simply be presented in outline form without lead lines. Judge Norby expressed concern about this because she stated that she feels that the current formatting is part of the reason that the current rule is so awkward. Ms. Nilsson agreed but stated that she and

Judge Peterson would work with Judge Norby to maintain the new structure as much as possible. Judge Peterson stated that the goal is to make the new rule look like the other rules but to read like the new draft.

Judge Leith pointed out that the language that states that an offer of the witness fee is sufficient that is present in the current rule seems to have disappeared in new paragraph B(1)(a) and paragraph B(1)(b). He stated that he thinks this language is important, as we do not want to lose the compulsion to testify just because the witness declined the fee. He stated that he does not think a party necessarily has to tender the fee if the witness declined it. Judge Hill agreed that there may be a witness who says that a party does not have to pay them, but the new rule would seem to indicate that the subpoena is not valid because the fee was not tendered. Judge Gerking stated that he does not recall that language being included anywhere in the new draft. Judge Peterson made a note so that, if the language is there, the committee will find it and, if it is not there, the committee will be sure to add it.

Justice Nakamoto suggested spelling out "subpoena for production of documents or things other than protected health information" in the text of the rule in section C rather than just in the lead line. Judge Norby asked whether Justice Nakamoto was suggesting that this phrase should be used every single time throughout section C, since section C is only about those kinds of production. Justice Nakamoto explained that, since the phrase is only stated in the lead line and not in the text, it could be building in unnecessary ambiguity. She suggested defining it in subsection C(1) to make it clear. Mr. Beattie observed that section C was significant because the old rule did not allow a party to subpoena only documents but, rather, required one to subpoena a person to come with documents. He noted that older lawyers will likely be looking for the explanation that they can subpoena just documents, which is inherent in new section C, but there is no longer a lead line that specifies this.

Mr. Beattie pointed out that, at the end of the day, the Council can say whatever it wants about medical records and it will make no difference because the medical facilities being subpoenaed will say they will do whatever the Health Insurance Portability and Accountability Act of 1996 (HIPAA) requires regardless of what the subpoena says. He stated that getting a subpoena rule to agree with HIPAA is almost impossible unless one uses the language, “subpoena will comply with HIPAA.” Judge Hill pointed out that equivalent language is used in Judge Norby’s draft.

Mr. Beattie noted that ORCP 44 C allows a party to obtain documents related to the conditions in question through plaintiff's counsel, but it is his understanding

that there is a practice of using a subpoena to get such information directly from third parties that one could otherwise get under Rule 44 C. He asked Mr. Andersen what his experience has been with requests for third-party discovery being sent directly to a medical provider under Rule 55 when they are subject to production under Rule 44 C. Mr. Andersen stated that his view, which he is not certain is shared by all plaintiffs' counsel, is that a client has not waived all medical privileges for any condition ever, and he prefers the procedure under Rule 44 because he likes to get those records, review them for possible privilege or to see whether they have nothing to do with the lawsuit, then produce and indicate what he is not producing without disclosing the nature of any confidential matters that are not a part of the case. Mr. Beattie asked whether there would be any reason to change Rule 55 to allow directly obtaining such documents. Judge Leith pointed out that such a change would undermine the purpose of not making substantive changes to the rule at this time.

Judge Norby returned to the question of tender and asked whether "tendering" means physically presenting payment or verbally offering it. Ms. Gates stated that she believes that tendering means presenting payment along with the subpoena. Judge Leith stated that he thinks it may be possible to make an offer that does not quite rise to the level of a tender. Judge Norby observed that the current rule says that payment has to be presented with the subpoena, but that does not mean that a check has to be cashed or that it cannot be returned. Judge Roberts pointed out that there is a statutory definition of tender, which is a written offer to pay coupled with the ability to make good on it. Judge Leith noted that witness fees are very often unwritten offers of payment to a witness one may think is cooperating and friendly, but whom one still wants to be able to compel to testify. He suggested simply carrying forward the language that is currently in the rule. Judge Wolf agreed that there is discord between the draft reorganized version of the rule, which says that a party must deliver the subpoena along with the fees, whether those fees are ultimately refused or not, and the current rule, which says that one can make an offer of fees if the witness would like them. Judge Norby asked for confirmation of whether it could be an oral offer of the money, even if the money is not present at the time the subpoena is served. Judge Leith stated that, if a witness states that he or she wants the witness fee, the subpoenaing party must provide it; if the witness says that he or she does not want it, then having offered it is enough. Judge Wolf pointed out that the language in the current rule does not use the word "tender." Judge Bailey suggested using the same language from the current rule in the revised rule. Judge Peterson stated that adding similar language regarding witness fees from the current rule to the reorganized rule does not add a lot of verbiage. Judge Norby agreed that the committee should be able to fix the issue.

Mr. Bundy stated that he did not realize that there was a problem with witness fees. He noted that, when representing hospitals, he sometimes has self-represented litigants send subpoenas without money, and the idea that they will pay seems unlikely. He suggested that he perhaps needs to tell them they need to pay the money up front and that an offer is not good enough for him. Judge Hill suggested language that states that the subpoena must be presented with the witness fee unless the witness has previously waived the fee. Judge Norby pointed out that the goal of the committee is not to change substantive content at this point. Judge Hill stated that he does not know that this would be a change but, rather, just a clarification or a cleaner way of saying offer. Judge Wolf agreed. Judge Hill stated that a factual question about whether the witness waived the fee or not would be created, but pointed out that this factual question currently exists. He noted that not presenting the witness fee is done at a party's own peril. He explained that his suggested language aligns the risk with the party that has the best ability to prevent it.

Mr. Andersen expressed concern that this language could cause problems if a subpoenaed witness did not show up at trial, because it might be uncertain whether or not the witness fee had been waived. He stated that he likes bright lines. Judge Hill and Judge Wolf pointed out that the bright line is giving a witness the fee. Everyone on the Council agreed that it is best practice to give the witness fees with the subpoena. Judge Wolf stated that he thinks that the current rule says that presenting the witness fee is not required, but he believes that it is a huge risk not to do so. Judge Norby noted that the goal of the committee is to make the rule clearer, not to make substantive changes that were not implicit in the current rule. She stated that, if the Council feels that the current rule is trying to leave to leave possibilities for informalities, perhaps it should be left that way. Judge Hill stated that the current rule, by its express terms, only requires an offer. He posited that it was designed to prevent a witness who refused the witness fee from later claiming the subpoena was invalid because they did not receive the witness fee. He stated that, if one simply reads the rule to say there must be payment of the fee or an express waiver, it is not a change but, rather, it is making explicit what was implicit in the rule before. Judge Leith stated that he believes that this satisfies carrying forward the meaning of the prior rule. Judge Gerking asked whether the word "waiver" is appropriate because it has a specific legal definition of intentional relinquishment of a known right. Judge Norby noted that the word "waiver" has not been agreed upon, but stated that the committee will discuss the wordsmithery at its next meeting.

Judge Conover raised a concern about section D of the reorganized draft that also exists in the corresponding section H of the current rule. He stated that he did not know if it was a problem in any other county, but in Lane County there is a

problem in terms of how to raise an objection or a motion to quash under the current section H. While there is a provision for a party to object to the production of protected health information, there is no specific provision to bring that objection before the court. Judge Wolf asked whether Judge Conover was referring to the person whose information is subject to the request or the hospital? Judge Conover stated that it could be either one but, in the case of plaintiff's protected health information, if the plaintiff objects, there is no procedure for the defense to bring the issue before the court. He noted that Rule 46 talks about "to a party." He noted that there is a procedure set out very specifically in section C of the reorganized draft where the recipient of the subpoena has the opportunity to object, and stated that this places the burden on the recipient to file a motion to quash or to modify. He suggested using similar language in section D of the reorganized rule regarding protected health information.

Judge Wolf stated that, as he understands the current rule in section H, if a proposed subpoena is sent to patient, if the patient objects and the parties cannot work out the objection, there is no definitive procedure to proceed in the rule, although he has always assumed a motion to compel would work. Mr. Keating stated that this is the practical procedure. He noted that the Council has in the past debated the issue of who should have the burden–should the objecting party file the motion to quash or should the burden be on person serving the subpoena to serve a motion to compel? Judge Wolf observed that the current rule puts the burden on the person requesting the documents because, once the objection Is made, the subpoena cannot be served with the appropriate declaration and the person requesting the documents is stuck. Mr. Keating stated that he was a strong proponent of requiring the plaintiff who is objecting to file a motion to quash, because that gets the matter it in front of the court immediately. Since courts work with narrow timelines between the time when the case is filed and the time when it goes to trial, access to those records is vital. Judge Wolf observed that Mr. Keating's concern was less about burden and more about timing. Judge Peterson recalled that it was also an issue that the person making the objection should articulate the reasons for it. Mr. Keating explained that this did make it into the last promulgation of Rule 55 H.

Judge Wolf suggested that the committee determine whether it can address half of the concern that Judge Conover has raised, i.e., the recipient's ability to file a motion to quash. He pointed out that this is not currently specifically outlined in section H, so the committee did not include it in section D of the reorganized draft. Mr. Keating suggested including it in Section A, because it would apply to all subpoenas. Judge Hill stated that this sounded like a good idea, unless there would be a procedural reason to treat the motion to quash differently for health records.

Mr. Keating stated that he could not think of a reason. Judge Norby stated that it could apply both to motions to quash for personal testimony as well as for production of anything. Judge Bailey expressed concern that this would be making a substantive change. Justice Nakamoto pointed out that this is currently in Rule 55 B. Judge Norby stated that, as she read it, that was only applying to production. She explained that she has had some trouble interpreting the rule as currently written and that she was hoping that the Council could assist her in finding clarity on certain portions she had to interpret to rewrite.

Judge Wolf stated that a motion to quash may be practically used more or less for all subpoenas. He agreed that it is not currently specified in the rule, but pointed out that there is case law that says that the court can quash burdensome subpoenas. He stated that he is not sure that the Council wants to address those issues because it might be a change to the rule. Judge Hill stated that this is part of the collective oral tradition that Oregon lawyers have all incorporated, and that he did not even realize that a motion to quash was not in the current rule. Judge Norby posited that perhaps it is not a change in the rule, since people are interpreting the rule in different ways and part of the reason for the rewrite is to bring clarity. She noted that some things may look like rewrites when they are, in fact, clarifications.

Judge Bailey expressed concern that medical records are, in and of themselves, by being specifically excluded from the other sections in Rule 55 and having their own operative procedures, different. He stated that section B of the draft reorganization would seem to suggest that both parties have ways to object – filing a motion to compel or filing a motion to quash – and it is a broad spectrum. The question is, when section H was created specifically for medical records, was it intended to have its own stand-alone procedures or were the procedures in section B broad enough to include medical records? When the Council created a separate section for medical records, was the intention to create different procedures for objection? He wondered whether the Council might be making a substantive change by including medical records in section B. Judge Norby stated that there is a different objection system that relates to protected health information and that there are different components because of the health records piece, but there is limited discussion of the mechanics by which objections are brought to the court. She stated that she likes the idea of including the suggested language in section A of the draft reorganized rule, but noted that it may have to be altered a bit to see if it fits into the separate objection system regarding protected health information.

Judge Bailey stated that he thinks that Judge Conover is correct that it would be better if it were clear that either party could, either by a motion to compel or a

motion to quash, object to the release of medical records. He stated that he is not sure whether it would be a clarification or a substantive change in the rule itself, and noted that HIPAA may specifically allow motions to quash that must be available in Oregon's courts. Judge Norby stated that the reason the Council must make a distinction between alteration and clarification is because we do not want to have to compromise on clarifying the rule in total because of potential complaints from the bench and bar about minor changes to substance. She noted, however, that if a change is not something that the Council anticipates would be controversial because the rule is already so confusing that people are searching for clarity to begin with, that change would probably fall into the category of clarification rather than alteration.

Judge Hill asked about the procedure outlined in current ORCP 55 H(2)(d) (draft reorganization paragraph D(5)(b)) regarding delivering the records for a deposition in a separate envelope sealed inside another envelope not to the court but, rather, to the person administering the deposition. Judge Wolf agreed that this is what the current rule requires. Mr. Keating stated that he has never had records subpoenaed to a deposition. Judge Hill opined that the process of asking someone to send records to a court reporter seems outdated and odd. Mr. Andersen explained that the double envelope requirement is an antiquated rule going back to the days of scriveners when you had to have a mysterious envelope delivered so that nobody could have possibly touched it. Mr. Beattie noted that the requirement for a sealed envelope inside of another envelope may have arisen from the change from subpoenas duces tecum to merely subpoenaing documents – with no "keeper of the documents" there was a greater need for them to be protected. Judge Bailey pointed out that requiring the double envelope does make sense from a court perspective, since there are staff people who open envelopes without knowing what is inside and it is an additional protection for sensitive documents. Judge Hill agreed with that completely, but stated that he has never once seen the Department of Justice do that. Judge Bailey stated that he has seen it happen. Judge Hill noted that his concern is not regarding the double wrapper but, rather, the handing over of sensitive records to a court reporter. Judge Peterson noted that the court reporter is a neutral party, and the records are protected if they are in the wrapper.

Judge Leith stated that another broad thing to keep in mind regarding Rule 55, especially for lawyers with civil practices and judges from a civil background, is that certain sections are adopted into the criminal code. He noted that we must also look at the rule from a criminal law perspective. Judge Bailey observed that the section regarding medical records is often applied more in criminal cases than in civil cases, particularly in cases where the Department of Human Services or Child Abuse Response and Evaluation Services is involved.

Judge Peterson reiterated that the intent of the committee has been not to make changes but to make the rule better; however, if the Council can vote by a super majority that the new rule says what the old rule meant to say, we will be in good shape. Having that super majority vote will make sure that everyone is on the same page. Judge Bailey asked whether the Council would be voting separately on the changes to the rule and the contents of the staff comment. Judge Peterson explained that the discussions at the Council meetings will help generate the staff comments. Judge Bailey stated that he could envision a situation where a Council member agreed with the changes to a rule and thought that the rule was better, but believed that some of the changes were substantive and may not have agreed with the staff comment that says that there were no substantive changes. Judge Peterson noted that the comments are generated by staff after the promulgation votes occur, but are based on the Council's work and discussion throughout the biennium. Ms. Nilsson explained that the Council does not formally vote to adopt the staff comments but, rather, the staff circulates the draft comments for input before publishing them on the website.

Judge Gerking stated that the Council should be prepared for considerable discussion when the committee presents the full rule to the Council in May.

IV. New Business

No new business was raised.

V. Adjournment

Mr. Keating adjourned the meeting at 12:41 p.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 the way that publication in newspapers is defined in the statute. She noted that it gives a regularity and stated that, if the rule allows service by Facebook but gives no guidance on how to accomplish it, one judge may state that it is enough to send it to an account with a similar name but another judge may take the time to say you must verify. She opined that it would work better with one procedure for everyone. Judge Hill stated that it seems like the Council would be creating a second safe harbor. Judge Norby replied that the idea would not be to create a form or an extremely long, detailed rule that explains how social media works but, rather, to simplify the process into a few guideposts that a person would have to meet. Judge Peterson stated that the committee, and even the Council, have had some discussions about what minimum standards should be imposed. He stated that the assumption should be that there are some judges and litigants who struggle with e-mail and social media. He explained that the committee has discussed whether the document would be required to be in PDF format and whether the sender should be able to identify whether the recipient has opened the document, and those are good discussions to have. He clarified again that e-mail and social media would be forms of alternative service and that the thought is to provide the judge ordering it with guidelines to go by. Judge Gerking suggested that they should be general guidelines, not particularized procedures, because a party could argue that service was invalid because the server did not follow specific procedures in the rule.

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

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

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

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

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

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

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

4. ORCP 15 Committee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. ORCP 23 C/34 Committee

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

6. ORCP 55 Committee

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

B. ORCP 27 - Potential Conflict with HB 2673

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

IV. New Business

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

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

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

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

V. Adjournment

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

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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

Oregon Council on Court Procedure

Fictitious Names Committee

April 13, 2017 – Meeting Report

Members Participating: Ken Crowley (Chair), Meredith Holley, Hon. Susie Norby, Hon. Curtis Conover. The meeting was held by phone conference, and began with a review of our progress and tasks ahead.

As reflected in the minutes for the last Council meeting, the committee has made progress addressing whether a rule change to allow use of fictitious names in pleadings could comply with Oregon's Constitutional open courts requirement. Not only are there Oregon appellate opinions allowing the practice, there is also a Supreme Court Chief Justice Order on point. Nevertheless, some Council members still had reservations about use of fictitious names, so the committee recognizes that any proposed rule change would need to be narrowly crafted.

The consensus of the committee seems to be that there is enough concern and uncertainty being expressed within the bar that we should continue our efforts to look for solutions. The Council is an appropriate body to provide direction on the issue, and Judge Hargreaves' correspondence seems to support that point, although he may not like where we end up. At yesterday's meeting, we talked primarily about making small changes to two ORCPs. Rule 16A and/or Rule 26A. We also noted Rule 20H.

DISCUSSION:

Rule 16A. Captions; names of parties. Second sentence: In the complaint the title of the action shall include the names of all the parties, ***except as otherwise specifically allowed by statute, rule, or court order. [B]***ut, in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

Rule 26A. Real party in interest. First sentence: Every action shall be prosecuted in the name of the real party in interest, ***except as otherwise specifically allowed by statute, rule, or court order***.

Rule 20H. Specific pleading rules. Fictitious parties. When a party is ignorant of the name of an opposing party and so alleges in a pleading, the opposing party may be designated by any name, and when such party's true name is discovered, the process and all pleadings and procedures in the action may be amended by substituting the true name.

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

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.

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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

Rule 7 - E-mail Alternative Service Language

D(6) Court order for service; service by publication.

D(6)(a) Court order for service by other method ("Alternative Service"). When it appears that service is not possible under any method otherwise specified in these rules or other rule or statute, then a motion and declaration may be filed to request a discretionary court order to allow alternative service. Alternative service may be requested by any method or combination of methods most reasonably calculated under all the circumstances to apprise the defendant of the existence and pendency of the action.

D(6)(a)(i) Non-Electronic Alternative Service. Non-electronic forms of alternative service may include, but are not limited to: publication of summons; mailing without publication to a specified post office address of the defendant by first class mail and any of the following: certified, registered, or express mail, return receipt requested; or posting at specified locations. The court may specify a response time in accordance with ORCP 7C(2).

D(6)(a)(ii) Electronic Alternative Service. Electronic forms of alternative service may include, but are not limited to: e-mail; text message; facsimile transmission; or posting to an online service. But, due to the proliferation of security protocols that cannot be controlled by a qualified server as defined in ORCP 7E, and the challenges of converting court documents into readily transmittable electronic formats, alternative service through electronic means shall not be deemed complete unless either: (A) supplemented by reliable evidence of actual receipt, or (B) combined with one or more reliable forms of non-electronic alternative service.

SUMMONS

RULE 7

A Definitions. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint.

B Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summonses under section E of this rule. A summons is issued when subscribed by plaintiff or an active member of the Oregon State Bar.

C Contents, time for response, and required notices

C(1) **Contents.** The summons shall contain:

C(1)(a) **Title.** The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C(1)(b) **Direction to defendant.** A direction to the defendant requiring defendant to appear and defend within the time required by subsection C(2) of this rule and a notification to defendant that, in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C(1)(c) **Subscription; post office address.** A subscription by the plaintiff or by an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

C(2) **Time for response.** If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subsection D(6) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

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C(3) **Notice to party served.**

C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph C(3)(b) or C(3)(c) of this rule, shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

_____

C(3)(b) **Service for counterclaim or cross-claim.** A summons to join a party to respond to a counterclaim or a cross-claim pursuant to Rule 22 D(1) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with

the court a legal document called a "motion," a "reply" to a counterclaim, or an "answer" to a cross-claim. The "motion," "reply," or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

_____

C(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees may be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in

finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

D Manner of service.

D(1) **Notice required.** Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of true copies of the summons and the complaint upon defendant or an agent of defendant authorized to receive process; substituted service by leaving true copies of the summons and the complaint at a person's dwelling house or usual place of abode; office service by leaving true copies of the summons and the complaint with a person who is apparently in charge of an office; service by mail; or service by publication.

D(2) **Service methods.**

D(2)(a) **Personal service.** Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) **Substituted service.** Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode,

together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon the mailing.

D(2)(c) **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at that office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or any other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon the mailing.

D(2)(d) **Service by mail.**

D(2)(d)(i) **Generally.** When service by mail is required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested. For purposes of this section, "first class mail" does not include certified, registered, or express mail, return receipt requested, or any other form of mail that may delay or hinder actual delivery of mail to the addressee.

D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant, or other person authorized by appointment or law, signs a receipt for the mailing, or three days after the mailing if mailed to an address within the state, or seven days after the mailing if mailed to an address outside the state, whichever first occurs.

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D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

D(3)(a)(i) **Generally.** Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to the defendant or other person authorized by appointment or law to receive service of summons on behalf of the defendant, by substituted service, or by office service. Service may also be made upon an individual defendant or other person authorized to receive service to whom neither subparagraph D(3)(a)(ii) nor D(3)(a)(iii) of this rule applies by a mailing made in accordance with paragraph D(2)(d) of this rule provided the defendant or other person authorized to receive service signs a receipt for the certified, registered, or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

D(3)(a)(ii) **Minors.** Upon a minor under 14 years of age, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the minor; and additionally upon the minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor, or with whom the minor resides, or in whose service the minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iii) **Incapacitated persons.** Upon a person who is incapacitated or is financially incapable, as both terms are defined by ORS 125.005, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the person and, also, upon the conservator of the person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iv) **Tenant of a mail agent.** Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646A.340, by delivering true copies of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

D(3)(a)(iv)(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

D(3)(a)(iv)(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint. **Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.**

[*Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.*]

D(3)(b) Corporations including, but not limited to, professional corporations and cooperatives. Upon a domestic or foreign corporation:

D(3)(b)(i) **Primary service method.** By personal service or office service upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) **Alternatives.** If a registered agent, officer, or director cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(b)(ii)(A) by substituted service upon the registered agent, officer, or director;

D(3)(b)(ii)(B) by personal service on any clerk or agent of the corporation who may be found in the county where the action is filed;

D(3)(b)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last

registered office of the corporation, if any, as shown by the records on file in the office of the Secretary of State; or, if the corporation is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(b)(ii)(D) upon the Secretary of State in the manner provided in ORS 60.121 or 60.731.

D(3)(c) **Limited liability companies.** Upon a limited liability company:

D(3)(c)(i) **Primary service method.** By personal service or office service upon a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(c)(ii) **Alternatives.** If a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(c)(ii)(A) by substituted service upon the registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

D(3)(c)(ii)(B) by personal service on any clerk or agent of the limited liability company who may be found in the county where the action is filed;

D(3)(c)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited liability company, as shown by the records on file in the office of the Secretary of State; or, if the limited liability company is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited liability company; and, in

any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(c)(ii)(D) upon the Secretary of State in the manner provided in ORS 63.121.

D(3)(d) **Limited partnerships.** Upon a domestic or foreign limited partnership:

D(3)(d)(i) **Primary service method.** By personal service or office service upon a registered agent or a general partner of a limited partnership; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(d)(ii) **Alternatives.** If a registered agent or a general partner of a limited partnership cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(d)(ii)(A) by substituted service upon the registered agent or general partner of a limited partnership;

D(3)(d)(ii)(B) by personal service on any clerk or agent of the limited partnership who may be found in the county where the action is filed;

D(3)(d)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited partnership, as shown by the records on file in the office of the Secretary of State; or, if the limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited partnership; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(d)(ii)(D) upon the Secretary of State in the manner provided in ORS 70.040 or 70.045.

D(3)(e) **General partnerships and limited liability partnerships.** Upon any general partnership or limited liability partnership by personal service upon a partner or any agent

authorized by appointment or law to receive service of summons for the partnership or limited liability partnership.

D(3)(f) **Other unincorporated associations subject to suit under a common name.** Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) **State.** Upon the state, by personal service upon the Attorney General or by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(h) **Public bodies.** Upon any county; incorporated city; school district; or other public corporation, commission, board, or agency by personal service or office service upon an officer, director, managing agent, or attorney thereof.

D(3)(i) **Vessel owners and charterers.** Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in the owner's or charterer's employment or any agent authorized by the owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D(4) **Particular actions involving motor vehicles**.

D(4)(a) **Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law of this state if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection D(3) of this rule except service by mail pursuant to subparagraph D(3)(a)(i) of this rule and, as shown by its

return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph D(2)(d) of this rule addressed to that defendant at:

D(4)(a)(i)(A) any residence address provided by that defendant at the scene of the accident;

D(4)(a)(i)(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

D(4)(a)(i)(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule that reasonably might result in actual notice to that defendant. **Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule is made. If the mailing required by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not know of any address other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.**

[*Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule is made. If*

the mailing required by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not know of any address other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.]

D(4)(a)(ii) Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph D(4)(a)(i) of this rule may be recovered as provided in Rule 68.

D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph D(4)(a)(i) of this rule are as provided in Rule 69 E.

D(4)(b) **Notification of change of address.** Any person who; while operating a motor vehicle upon the roads, highways, streets, or premises open to the public as defined by law of this state; is involved in any accident, collision, or other event giving rise to liability shall forthwith notify the Department of Transportation of any change of the person's address occurring within three years after the accident, collision, or event.

D(5) **Service in foreign country.** When service is to be effected upon a party in a foreign country, it is also sufficient if service of true copies of the summons and the complaint is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases service shall be reasonably calculated to give actual notice.

[*D(6)* ***Court order for service; service by publication.***

D(6)(a) ***Court order for service by other method.*** *On motion upon a showing by affidavit or declaration that service cannot be made by any method otherwise specified in these rules or other rule or statute, the court, at its discretion, may order service by any method or combination of methods that under the circumstances is most reasonably calculated to apprise the defendant of the existence and pendency of the action, including but not limited to: publication of summons; mailing without publication to a specified post office address of the*

defendant by first class mail and any of the following: certified, registered, or express mail, return receipt requested; or posting at specified locations. If service is ordered by any manner other than publication, the court may order a time for response.

D(6)(b) ***Contents of published summons****. In addition to the contents of a summons as described in section C of this rule, a published summons shall also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) of this rule shall state: "The <motion> or <answer> (or <reply>) must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons shall also contain the date of the first publication of the summons.*

D(6)(c) ***Where published.*** *An order for publication shall direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. The summons shall be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county in which the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff shall so state in the affidavit or declaration required by paragraph D(6)(a) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county in which the action is commenced.*

D(6)(d) ***Mailing summons and complaint****. If the court orders service by publication and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff shall mail true copies of the summons and the complaint to the defendant at that address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know and cannot ascertain upon diligent inquiry the current address of any defendant, true copies of the summons and the complaint shall be mailed by the methods specified above to the defendant at the defendant's last known address. If the*

plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.]

D(6) Court order for service by other method. When it appears that service is not possible under any method otherwise specified in these rules or other rule or statute, then a motion supported by affidavit or declaration may be filed to request a discretionary court order to allow alternative service by any method or combination of methods that, under the circumstances, is most reasonably calculated to apprise the defendant of the existence and pendency of the action.

D(6)(a) Non-Electronic Alternative Service. Non-electronic forms of alternative service may include, but are not limited to: publication of summons; mailing without publication to a specified post office address of the defendant by first class mail and any of the following: certified, registered, or express mail, return receipt requested; or posting at specified locations. The court may specify a response time in accordance with paragraph 7 C(2) of this rule.

D(6)(a)(i) Alternative service by publication. In addition to the contents of a summons as described in section C of this rule, a published summons must also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) of this rule must state: "The motion or answer or reply must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons must also contain the date of the first publication of the summons.

D(6)(a)(i)(A) Where published. An order for publication must direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. The summons must be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county in which

the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff must so state in the affidavit or declaration required by paragraph D(6) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county in which the action is commenced.

D(6)(a)(i)(B) Mailing summons and complaint may be required. If the court orders service by publication and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff must mail true copies of the summons and the complaint to the defendant at that address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know and cannot ascertain upon diligent inquiry the current address of any defendant, true copies of the summons and the complaint must be mailed by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and cannot ascertain upon diligent inquiry, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

D(6)(a)(ii) Alternative service by posting. The court may order service by posting true copies of the summons and complaint at a designated location in the courthouse where the action is commenced and at any other location that the affidavit or declaration required by subsection D(6) of this rule indicates that the posting might reasonably result in actual notice to the defendant.

D(6)(b) Electronic Alternative Service. Electronic forms of alternative service may include, but are not limited to: e-mail; text message; facsimile transmission; or posting to a social media account. The person serving the summons must include in the certificate of service evidence that the communication was accessed by the intended recipient. The person serving the summons must amend the certificate if a subsequent communication indicates that a person other than the intended recipient received the communication.

D(6)(b)(i) Alternative service by e-mail. The court may order service by e-mail if, in the affidavit or declaration required by subsection D(6) of this rule, the plaintiff states that, upon diligent inquiry, the defendant's residence address, mailing address, and place of employment cannot be ascertained but that plaintiff personally knows that defendant has sent and received e-mail from a specific e-mail address within the past year.

D(6)(b)(i)(A) If service by e-mail is allowed, the case name, case number, and the name of the court in which the action is pending must appear in the subject line of the e-mail.

D(6)(b)(i)(B) The summons, complaint, and any other documents served must be attached in a file format that is capable of showing a true copy of the original document.

D(6)(b)(i)(C) The total size of the e-mail, including all attachments, must not exceed 25 megabytes. If the size of the e-mail would exceed 25 megabytes, multiple e-mails may be sent, no one of which may exceed 25 megabytes.

D(6)(b)(ii) Alternative service by text message. The court may order service by text message if, in the affidavit or declaration required by subsection D(6) of this rule, the plaintiff states that, upon diligent inquiry, the defendant's residence address, mailing address, and place of employment cannot be ascertained but that plaintiff personally knows that defendant has sent and received text messages from a specific telephone number within the past year.

D(6)(b)(ii)(A) If service by text message is allowed, the case name, case number, and the name of the court in which the action is pending must appear in the text of the initial message that is sent.

D(6)(b)(ii)(B) The summons, complaint, and any other documents served must be attached in a file format that is capable of showing a true copy of the original document.

D(6)(b)(ii)(C) If the size of the attachments would exceed the limitation placed by the text messaging service, multiple attachments may be sent following the initial communication.

D(6)(b)(iii) Alternative service by facsimile. The court may order service by facsimile if, in the affidavit or declaration required by subsection D(6)of this rule, the plaintiff states that, upon diligent inquiry, the defendant's residence address, mailing address, and place of employment cannot be ascertained but that plaintiff personally knows that defendant has sent and received facsimiles from a specific facsimile service within the past year.

D(6)(b)(iii)(A) Alternative service by facsimile includes: a telephonic facsimile communication device; a facsimile server or other computerized system capable of receiving and storing incoming facsimile communications electronically and then routing them to users on paper or via e-mail; or an internet facsimile service that allows users to send and receive facsimiles from their personal computers using an existing e-mail account.

D(6)(b)(iv) Alternative service by social media platform. The court may order service via social media platform if, in the affidavit or declaration required by subsection D(6) of this rule, the plaintiff states that, upon diligent inquiry, the defendant's residence address, mailing address, and place of employment cannot be ascertained but that plaintiff personally knows that defendant maintains an active social media account on the social media platform through which service is sought.

D(6)(b)(iv)(A) If service by social media platform is allowed, the case name, case number, and the name of the court in which the action is pending must appear in a subject line of the communication. If a subject line is not available, this information must prominently appear in the text of the initial message that is sent.

D(6)(b)(iv)(B) The summons, complaint, and any other documents served must be attached in a file format that is capable of showing a true copy of the original document.

D(6)(b)(iv)(C) If the size of the attachments would exceed the limitation placed by the social media platform, multiple attachments may be sent following the initial communication.

[*D(6)(e)* ***Unknown heirs or persons.***] **D(6)(c) Unknown heirs or persons.** If service cannot

be made by another method described in this section because defendants are unknown heirs or persons as described in Rule 20 I and J, the action [*shall*] **will** proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of the commencement of the action, and who are served by publication, [*shall*] **will** be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action had been brought against those defendants by name.

[*D(6)(f)* ***Defending before or after judgment.***] **D(6)(d) Defending before or after judgment.** A defendant against whom [*publication*] **service pursuant to this subsection** is ordered or that defendant's representatives, on application and sufficient cause shown, at any time before judgment [*shall*] **will** be allowed to defend the action. A defendant against whom [*publication*] **service pursuant to this subsection** is ordered or that defendant's representatives may, upon good cause shown and upon any terms that may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on that judgment, to a purchaser in good faith, [*shall not be*] **will not be** affected thereby.

[*D(6)(g)* ***Defendant who cannot be served.***] **D(6)(e) Defendant who cannot be served.** Within the meaning of this subsection, a defendant cannot be served with summons by any method authorized by subsection D(3) of this rule if[*:*] service pursuant to subparagraph D(4)(a)(i) of this rule is not [*authorized*] **applicable**, [*and*] the plaintiff attempted service of summons by all of the methods authorized by subsection D(3) of this rule**,** and **the plaintiff** was unable to complete service; or if the plaintiff knew that service by these methods could not be accomplished.

E By whom served; compensation. A summons may be served by any competent person

18 years of age or older who is a resident of the state where service is made or of this state and [is not a party to the action nor, except as provided in ORS 180.260, an officer, director, or employee of, nor attorney for, any party, corporate or otherwise.] **is neither a party to the action, corporate or otherwise, nor any party's officer, director, employee, or attorney, except as provided in ORS 180.260.** However, service pursuant to subparagraph D(2)(d)(i)**, as well as the mailings specified in paragraphs D(2)(b), D(2)(c), and part D(3)(a)(iv)(B)** of this rule**,** may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F Return; proof of service.

F(1) **Return of summons.** The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by first class mail.

F(2) **Proof of service.** Proof of service of summons or mailing may be made as follows:

F(2)(a) **Service other than publication.** Service other than publication shall be proved by:

F(2)(a)(i) **Certificate of service when summons not served by sheriff or deputy.** If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: the specific documents that were served; the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom true copies of the summons and the complaint were left or describe in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate may be made by

the person completing the mailing or the attorney for any party and shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating: the specific documents that were served; the time, place, and manner of service; and, if defendant is not personally served, when, where, and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(b) **Publication.** Service by publication shall be proved by an affidavit or by a declaration.

F(2)(b)(i) A publication by affidavit shall be in substantially the following form:

_____

Affidavit of Publication

State of Oregon)
) ss.
County of)

I, _____, being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____ day of _____, 2_____.

_____
Notary Public for Oregon
My commission expires
____ day of _____, 2____

_____

F(2)(b)(ii) A publication by declaration shall be in substantially the following form:

_____

Declaration of Publication

State of Oregon)
) ss.
County of)

I, _____, say that I am the _____ (here set forth the title or job description of the person making the declaration), of the _____, a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

_____

____ day of _____, 2____

_____

F(2)(c) **Making and certifying affidavit.** The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting in that capacity by authority of the United States, or any state or territory of the United States, or

the District of Columbia, and the official seal, if any, of that person shall be affixed to the affidavit. The signature of the notary or other official, when so attested by the affixing of the official seal, if any, of that person, shall be prima facie evidence of authority to make and certify the affidavit.

F(2)(d) **Form of certificate, affidavit, or declaration.** A certificate, affidavit, or declaration containing proof of service may be made upon the summons or as a separate document attached to the summons.

F(3) **Written admission.** In any case proof may be made by written admission of the defendant.

F(4) **Failure to make proof; validity of service.** If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of a summons, issuance of a summons, or who may serve a summons shall not affect the validity of service of that summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, affidavit, declaration, or certificate of service of summons. The court shall disregard any error in the content of a summons that does not materially prejudice the substantive rights of the party against whom the summons was issued. If service is made in any manner complying with subsection D(1) of this rule, the court shall also disregard any error in the service of a summons that does not violate the due process rights of the party against whom the summons was issued.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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

B Pleading after motion.

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

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

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

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

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

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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

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

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

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prohibited by any other rule, the court, pursuant to a motion or an agreement of the parties, may in its discretion and upon any terms as may be just, permit the filing of a pleading, motion, or a response to a motion after the time limited by any rule has passed, or may grant a motion to enlarge the time for filing any pleading or motion.

Rule 23 and Rule 34 Committee Report

March 26, 2018
12:00 pm

Present: Kelly Andersen, Deanna Wray, Judge Leith, Shenoa Payne

The Committee was charged with addressing the issue raised by *Worthington v. Estate of Davis*, 250 Or App 755 (2012). There, the action was commenced one day before the statute of limitations ran and, unknown to plaintiff, the defendant was deceased. The defendant had died more than one year before the action was commenced, so the statute of limitations was not extended under ORS 12.190. The court held that the plaintiff should have sued the personal representative and that plaintiff's filing of an amended complaint naming the personal representative did not "relate back" under ORCP 23 C, because the personal representative is a different party than the deceased and did not properly have notice of the action within the statute of limitations.

Kelly Andersen explained this is a real trap for plaintiffs' attorneys. He explained a situation where he learned the day before the statute ran that the defendant had died. There are CLEs suggesting that plaintiffs' attorneys should do a records check for any county where the defendant may have died, but that is a significant layer of expense. It doesn't cover anyone who may have died out of state. Some cases don't get filed until near the statute of limitations, possibly because the plaintiff doesn't come in until near the statute of limitations.

Kelly Andersen is proposing an amendment to ORCP 23 so that the period of service in ORS 12.020 -- the 60 days for summons – should be included for the relation back period.

Judge Leith and Shenoa Payne wondered if there would be unintended consequences by removing the language completely in "provided by law for commencing the action against the party to be brought in by amendment" and wondered if it should be kept in.

Kelly Andersen thought there might be a redundancy or inconsistency between the two clauses.

Shenoa Payne pointed out that ORS 12.020 has nothing to do with the statute of limitations, it is a statute as to when the claim is deemed to be commenced. She isn't sure the proposed change really changes anything.

Judge Leith is wondering whether ORCP 23 C has been interpreted in conjunction with ORS 12.020. Kelly Andersen pointed out that it has, and that the period has been interpreted to be the period of the statute of limitations, not the additional 60-day period.

Kelly Andersen says the problem of the deceased defendant is generally discovered within that 60 days. So if you are permitted to related back during that 60 day period, then it should fix the problem.

Deanna Ray raised the question whether the addition of the language in ORS 12.020 was so broad as to make a change broader than the specific problem that the committee was commissioned to fix – the issue of when a defendant dies.

In response, Kelly Andersen suggested that we keep the previous phrase and add "or, in the case of personal representatives, before the language "allowed by ORS 12.020(2)."

Judge Leith raised concerns that this amendment may be intruding on the legislature's province in ORS 12, because the legislature has already dealt with this issue in ORS 12.190. ORS 12 states you have a period of time to file your action. ORS 12.020 states you have a period of time to serve your complaint. By using ORCP 23 C to extend the time to relate back, it seems like we may be trying to use ORCP 23 C to say a plaintiff need not timely file the action against the correct defendant, despite the statute of limitations, so long as the plaintiff serves the correct defendant within the further 60-day grace period.

Shenoa Payne agreed that, although this is a thorny problem, it may have to be dealt with through the legislature by extending the statute of limitations longer than the one-year extension in ORS 12.190.

Kelly Anderson disagreed and stated that by including the ORS 12.020 in the relation back period, we are not intruding on the legislature's province.

Neither Judge Leith nor Shenoa Payne determined that a change couldn't be made that wasn't substantive, and wanted to digest the issue longer.

The committee members decided that it would be best to float the language before the council and obtain feedback on the issue.

Rule 23. Amended and Supplemental Pleadings

- **A. AMENDMENTS** A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. Whenever an amended pleading is filed, it shall be served upon all parties who are not in default, but as to all parties who are in default or against whom a default previously has been entered, judgment may be rendered in accordance with the prayer of the original pleading served upon them; and neither the amended pleading nor the process thereon need be served upon such parties in default unless the amended pleading asks for additional relief against the parties in default.
- **B. AMENDMENTS TO CONFORM TO THE EVIDENCE** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice such party in maintaining an action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.
- **C. RELATION BACK OF AMENDMENTS** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party to be brought in by amendment **or in the case of a personal representative the additional time allowed by ORS 12.020 (2),** such party (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining any defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party brought in by amendment.
- **D. HOW AMENDMENT MADE** When any pleading is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended pleading, or by interlineation, deletion, or otherwise. Such amended pleading shall be complete in itself, without reference to the original or any preceding amended one.

- **E. SUPPLEMENTAL PLEADINGS** Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

12.020 When action deemed begun.

- **(1)** Except as provided in subsection (2) of this section, for the purpose of determining whether an action has been commenced within the time limited, an action shall be deemed commenced as to each defendant, when the complaint is filed, and the summons served on the defendant, or on a codefendant who is a joint contractor, or otherwise united in interest with the defendant.
- **(2)** If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction  shall be deemed to have been commenced upon the date on which the complaint in the action was filed.

12.190 Effect of death on limitations.

- **(1)** If a person entitled to bring an action dies before the expiration of the time limited for its commencement, an action may be commenced by the personal representative of the person after the expiration of that time, and within one year after the death of the person.
- **(2)** If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, an action may be commenced against the personal representative of the person after the expiration of that time, and within one year after the death of the person.

ORCP 55 - SUBPOENA

A. Generally – Form and Contents, Originating Court, Who May Issue, Who May Serve, Proof of Service.

1. **Form and Contents**.

(a) Requirements—In General. Every subpoena is a writ or order that must:

(i) originate in the court where the action is pending;

(ii) bear the name of the court where the action was filed;

(iii) state the title of the action and the case number;

(iv) command each person to whom it is directed to do one or more of the following things at a specified time and place:

(1) Appear and testify in a deposition, hearing or trial;
(2) Produce specified books, documents, electronically stored information, or tangible things in that person's possession, custody, or control other than protected health information defined in subsection D of this rule; or
(3) Produce records of protected health information subject to subsection D of this rule.

(b) Recipient Obligations.

(i) *Length of Attendance.* A command in a subpoena to appear and testify requires that the witness remain for as many hours or days are necessary to conclude the testimony unless discharged sooner by the party who obtained the subpoena.

(ii) *Appearance Contingent on Fee Payment*. At the end of each day's attendance, a witness may demand payment of legal witness fees for the next day. If the fees are not relinquished upon demand, then the witness is no longer obligated to appear.

(iii) *Deposition Subpoena – Place to Attend or Produce*.

(1) *Oregon Residents*. A resident of this state who is not a party to the action is required to attend or to produce things only in the county where the person resides, is employed or transacts business in person, or at another convenient place ordered by the court.

(2) *Non-Residents*. A non-resident of this state who is not a party to the action is required to attend or to produce things only in the county where the person is served with the subpoena, or at another convenient place ordered by the court.

(iv) *Obedience of Subpoena*. A witness is obligated to obey a subpoena. Disobedience or a refusal to be sworn or answer as a witness may be punished as contempt by a court or judge who issued the subpoena, or before whom the action is pending. At a hearing or trial, if a witness who

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is a party disobeys a subpoena or refuses to be sworn or answer as a witness, then that party's complaint, answer or reply may be stricken.

2. **Originating Court**. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38C, it may be issued by the circuit court in the county in which the witness is to be examined.

3. **Who Shall Issue**.

(a) Clerk of Originating Court. The clerk of the originating court may issue a subpoena, signed but otherwise blank, to a party who requests it, or who provides proof of service of a deposition notice as provided in Rules 39C and 40A. The requesting party must complete the blank subpoena before serving it.

(b) Judge, Justice or Other Court Officer. A judge, justice or other court officer authorized to administer oaths or take testimony in any matter under the laws of this state, may issue a subpoena for an action within that court's jurisdiction.

(c) Attorney of record. An attorney of record for a party to the action may issue and sign a subpoena for a witness required to appear by that attorney's client.

4. **Who May Serve.** Any subpoena may be served by:

(a) Any person who is at least 18 years old;

(b) The party, or party's attorney, who procured the subpoena.

5. **Proof of Service**. Proving service of a subpoena is done in the same way as proving service of a summons, except that the server need not disavow being a party, an attorney for a party, or an officer, director or employee of a party in the action.

B. Completing Service—Subpoenas Requiring Appearance and Testimony by Individuals, Organizations, Law Enforcement Agencies or Officers, and Prisoners.

1. **Service of Subpoenas to Appear and Testify on Individuals or Non-Party Organizations; Tendering Fees.** Unless otherwise provided in this rule, a copy shall be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place required.

(a) Service on Individual aged 14 or older – personally delivered to the witness, along with fees for 1 day's attendance and the mileage allowed by law, whether or not personal attendance is required.

(b) Service on Individual under age 14 – personally delivered to the witness's parent, guardian or guardian ad litem, along with fees for 1 day's attendance and the mileage allowed by law.

(c) Service on Individuals Waiving Personal Service -- mailed to the witness, but mail is only valid service if all of the following circumstances exist:

(i) *Willingness Communicated by Witness.* Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that during personal or telephonic contact, the witness communicated a willingness to appear and testify if subpoenaed; and

(ii) *Satisfactory Fee Arrangements Made.* The party's attorney or attorney's agent pre-arranged payment of fees and mileage satisfactory to the witness; and

(iii) *Signed Mail Delivery Receipt Obtained.* More than 10 days before the date to appear and testify, the subpoena was mailed in a manner that provided a signed receipt upon delivery, and the attorney received the receipt signed by the witness (or witness's parent, guardian or guardian ad litem) more than three days before the date to appear and testify.

(d) Deposition Subpoena to Non-Party Organization Pursuant to Rule 39C(6) – delivered in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), D(3)(c)(i), D(3)(d)(i), D(3)(e), D(3)(f), or D(3)(h).

2. **Service of Subpoena to Appear and Testify on Law Enforcement Agency or Officer.** If a peace officer's appearance is required in his professional capacity, then a subpoena may be served by:

(a) Personal Service -- Service of a copy, along with one day's attendance fee and mileage allowed by law, to the officer personally;

(b) Substitute Service -- Service of a copy, along with one day's attendance fee and mileage allowed by law, to an individual designated by the law enforcement agency that employs the officer, or if there is no designated individual available, then to the officer in charge, at least 10 days before the date the officer is required to attend, provided that the officer is currently employed by the agency and is present in the state at the time the agency is served.

(c) Law Enforcement Agency Obligations.
"Law Enforcement Agency" is defined for purposes of this subsection as the Oregon State Police, a county sheriff's department, or a municipal police department.

(i) *Designate a Representative.* All law enforcement agencies shall designate one or more individuals to be available during normal business hours to receive service of subpoenas.

(ii) *Ensure Actual Notice or Report Otherwise.* When a law enforcement officer is subpoenaed by substitute service under this subsection, the agency shall make a good faith effort to give the officer actual notice of the time, date and location identified in the subpoena for his appearance. If the agency is unable to notify the officer, then it will

promptly report its inability to the court. The court may postpone the matter to allow the officer to be personally served.

3. **Service of Subpoena to Appear and Testify on Prisoner.** All of the following must be done to secure a prisoner's appearance and testimony:

(a) Court Pre-Authorization – A subpoena may only be served on a prisoner with leave of the court, and the court may prescribe terms and conditions when compelling a prisoner's attendance.

(b) Court Determines Location – The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement.

(c) Who to Serve – The subpoena and court order shall be served upon the custodian of the prisoner.

C. Completing Service —Subpoenas Requiring Production of Documents or Things Other Than Protected Health Information.

1. **Combining Subpoena for Production with Command to Appear and Testify.** A subpoena for production may be joined with a command to appear and testify, or may be issued separately.

2. **When Mail Service Allowed.** A copy of a subpoena commanding production that does not contain a command to appear and testify may be served by mail.

3. **Subpoenas to Compel Inspection Prior to Deposition, Hearing or Trial.** A copy of a subpoena issued solely to command production for inspection prior to a deposition, hearing, or trial must:

(a) *Advance Notice to Parties*. Be served upon all parties to the action at least 7 days before service of the subpoena on the person or organization representative commanded to produce and permit inspection, unless the court orders less time;

(b) *Time Allowed for Production*. Allow at least 14 days for production of the required items, unless the court orders less time;

(c) *Originals or True Copies Specified*. Specify whether originals or true copies will satisfy the subpoena.

4. **Recipient's Opportunity to Object or Move to Quash or Modify.** A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things other than protected health information, may object or move to quash or modify the subpoena, as follows:

(a) Serve Written Objection Before Production Deadline but No Later than 14 Days After Receiving Subpoena. A written objection may be served on the party who initiated the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

(b) Objection May Be Partial or Total. The written objection may be to all or only part of the command to produce.

(c) Objection Suspends Obligation to Produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

(d) Motion to Quash or Modify. A motion to quash or modify the command for production may be filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if it is unreasonable and oppressive, or may require that the party who served the subpoena pay the reasonable costs of production.

D. Subpoenas for Records of Protected Heath Information.

1. "**Protected Health Information" to Which this Section Applies.** This section creates protections for production of "protected health information," which is defined in this Rule as information collected from a person by a health care entity, employer or insurance provider, that identifies the person or could be used to identify the person, and that includes records that:

(a) relate to the person's physical or mental health or condition, and

(b) relate to the cost or substance of any health care services ever provided to the person.

2. "**Qualified Protective Order" Limits Use of Protected Health Information.** A "Qualified Protective Order" is defined in this Rule as a court order that prohibits the parties from using or disclosing protected health information for any purpose other than the litigation for which it is produced, and that requires:

(a) return of all protected health information records to the original custodian; or

(b) destruction of all protected health information records, including all copies made, at the end of the litigation.

3. **Subpoena Shall Also Comply with State and Federal Law.** A subpoena to command production of protected health information shall comply with the requirements of this section, as well as with all restrictions or other limitations imposed by state or federal law.

4. **Pre-Conditions Required to Perfect Subpoena.**

(a) Declaration Required in the Absence of a Qualified Protective Order; Contents of Declaration.
The attorney or party issuing a subpoena for protected health information must serve the custodian or other record keeper with either a qualified protective order, or a declaration and attached supporting documentation that demonstrates:

(i) *Written Notice Given with 14 Days to Object.* The party made a good faith attempt to provide written notice to the patient or to the patient's attorney that allowed for 14 days after the date of the notice to object in writing, stating the reason for each objection;

(ii) *Sufficient Context Given to Enable Meaningful Objection.* The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the patient or attorney to meaningfully object;

(iii) *No Timely Objections Made, or Objections Resolved.* Either no objection was made within the 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

(iv) *Certification that Requests to Inspect and Copy Will Be Promptly Allowed.* The party certifies that the patient or the patient's representative will be permitted to inspect and copy any records received promptly upon request.

(b) Statement Required to Secure Personal Attendance of Records Custodian and Original Records.
The personal attendance of a custodian of records and the production of original records is required if the subpoena contains the following statement:

This subpoena requires a custodian of records to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D.7. is insufficient for this subpoena.

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5. **Mandatory Privacy Procedures for All Records Produced.**

(a) Enclosure in a Sealed Inner Envelope; Labelling. The copy of the records shall be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

(b) Enclosure in a Sealed Outer Envelope; Properly Addressed. The sealed envelope or wrapper shall be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper shall be addressed as follows:

(i) *Court.* If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

(ii) *Deposition or Similar Hearing.* If the subpoena directs attendance at a deposition or similar hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;

(iii) *Other Hearing or Miscellaneous Proceeding.* In other cases involving a hearing or miscellaneous other proceeding, to the officer or body conducting the hearing at the official place of business;

(iv) *In Advance of Hearing or Trial.* If no hearing is scheduled, to the attorney or party issuing the subpoena.

6. **Additional Responsibilities of Attorney or Party Receiving Delivery of Protected Health Information.**

(a) Service of a Copy of Subpoena to Patient and All Parties to the Litigation. If the subpoena directs delivery of protected health records to the attorney or party who issued the subpoena, then a copy of the subpoena shall be served on the patient whose records are sought, and on all other parties to the litigation, not less than 14 days prior to service of the subpoena on the custodian or keeper of the records.

(b) Parties' Right to Inspect or Obtain a Copy of the Records at Own Expense. Any party to the proceeding may inspect the records provided and/or request a complete copy of the records. Upon request, the records shall be promptly provided by the party who issued the subpoena at the expense of the party who requested the inspection or copies.

(c) Preserving Privacy Procedures While Facilitating Inspection of Records.

(i) *Notification of Time and Place of Inspection.* If any party requests inspection of subpoenaed protected health information records, then the attorney or party who subpoenaed the records shall designate the time and place of inspection and notify all parties when and where the records will be made available.

(ii) *Monitoring by Court Custodian While Records Are Unsealed.* The records produced may be inspected by any party or party's attorney of record, in the presence of the custodian of the court files. Otherwise the records shall remain sealed and shall be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or official conducting the proceeding.

(iii) *Unsealing at Trial; Return of Records Not Made Part of the Record.* At the trial, deposition, or hearing, the records shall be opened in the presence of all parties attending the proceeding. Records that are not introduced in evidence or accepted as part of the record shall be returned to their original custodian otherwise unopened.

7. **Compliance by Delivery Only When No Personal Attendance is Required.**

(a) Mail or Delivery by a Non-Party, Along with Declaration. A custodian of protected health information that is not a party to the litigation connected to the subpoena, and that is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct

copy of all records subpoenaed within 5 days after it is received, along with a declaration that complies with this subsection.

(b) Declaration of Custodian of Records When Records Produced. Protected Health Information records produced when no personal attendance of the custodian is required shall be accompanied by a declaration of the custodian, which certifies all of the following:

(i) *Authority of Declarant.* That the declarant is a duly authorized custodian of the records and has authority to certify records;

(ii) *True and Complete Copy.* That the copy produced is a true copy of all the records responsive to the subpoena; and

(iii) *Proper Preparation Practices.* That preparation of the copy of the records being produced was done:

(1) *Responsible Preparer*. By the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the Declarant;

(2) *Ordinary Course of Business*. In the ordinary course of the entity's or the person's business; and

(3) *Contemporaneous with Information Described.* At or near the time of the act, condition, or event described or referred to in the records.

(b) Declaration of Custodian of Records When Not All Records Produced. When no records, or fewer records than requested, are produced by the custodian, this circumstance shall be specified in the declaration. The custodian shall only send records within the declarant's custody.

(c) Multiple Declarations Allowed When Necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

8. **Designation of Responsible Party When Multiple Parties Subpoena Records; Tender and Payment of Fees.**

(a) Designation of Responsible Party When Multiple Subpoenas Served. If more than one party subpoenas a custodian of records to personally attend under paragraph D.4.(b) of this rule, the custodian shall be deemed to be the witness of the party who first served such a subpoena.

(b) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness and mileage fee or other charge unless there has been agreement to the contrary.

9. **Scope of discovery.** Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.