MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 12, 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.
Troy S. Bundy*
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer Gates
Hon. Timothy C. Gerking
Hon. Norman R. Hill
Meredith Holley
Robert Keating
Hon. David E. Leith*
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Derek D. Snelling*
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf
Deanna L. Wray

Members Absent:

Jay Beattie
Sharon A. Rudnick

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
Discovery Fictitious Names ORCP 15 ORCP 22 ORCP 23/34 ORCP 55 ORS 12.190	Probate/Protective Proceedings ORCP 9 ORCP 21 ORCP 25 ORCP 32 ORCP 45 ORCP 47 ORCP 68 ORCP 71 ORCP 79	ORCP 15 ORCP 22 ORCP 43	Discovery ORCP 15

I. Call to Order

Mr. Keating called the meeting to order at 9:30 a.m.

II. Administrative Matters

A. Approval of April 14, 2018, Minutes

Mr. Keating asked whether anyone had changes or corrections to the draft April 14, 2018, minutes (Appendix A). Hearing none, he asked for a motion to approve the minutes. Judge Roberts made a motion, seconded by Judge Wolf, and that motion to approve the minutes was approved unanimously with no abstentions.

B. Contacting Legislators

Judge Peterson explained that the Council has not had a lot of communication with legislators this biennium. He stated that he was in the process of drafting an e-mail for Council members to share but that a fuller picture will be available after this meeting. He stated that the goal is to let legislators know what the Council is working on so that they are not surprised when they receive the transmittal letter with the Council's promulgated amendments and to demonstrate the value of funding the Council.

III. Old Business

A. Committee Reports

1. Discovery Committee

Judge Bailey stated that the committee had another meeting to discuss whether any action is possible this biennium. He explained that the committee had started pursuing the idea of making language changes to clarify the rule regarding e-discovery. Mr. Crowley and Ms. Payne met to try to craft language that both the plaintiffs' and defense bar could agree on, but there has not been enough time to complete this task. Judge Bailey stated that his frustration as a judge is that everyone on the Council says that judges have authority to control discovery, but lawyers come in to court and argue as if they do not. He stated that the committee feels that it should disband at this time, but that the committee should be re-formed next biennium. The Council agreed.

Mr. Keating thanked all committee members for their efforts.

2. Fictitious Names Committee

Mr. Crowley distributed a report from the committee (Appendix B) that included a suggested draft amendment to Rule 16. He explained that the committee had met the previous week in addition to exchanging ideas via e-mail. He reminded the Council of its lengthy discussion at the last Council meeting and stated that the committee came away from that meeting with the thought that it was now in a position to make a suggestion for a rule change; the proposed draft is the result. The draft includes a new section that speaks to the issue of fictitious names:

> B Pseudonyms. Each party must be identified by the party's legal name, except that a party may seek a court order to permit use of a pseudonym instead. A request to substitute a pseudonym must include a description of good cause, and must cite the statute, rule or legal authority that supports use of a pseudonym under the circumstances. Mere citation to this Rule is not sufficient legal authority to secure a court order approving use of a pseudonym.

Mr. Crowley noted that, at the last Council meeting, there was much discussion about not creating a new substantive right but, rather, creating an opportunity for those who believe that they need to use a pseudonym to bring that issue to the court's attention. At the beginning of the biennium, there was a question as to whether the ORCP even provided the opportunity, but the committee believes that the proposed change can provide that opportunity. Mr. Crowley pointed out that there is only so far that the Council can go in terms of spelling that out, and it may be that each of the different counties can spell out the process for how it may work in a Supplemental Local Rule (SLR), or it may be something that should be provided for in the Uniform Trial Court Rules (UTCR).

Ms. Payne asked why the committee chose to include the requirement of a description of good cause in addition to a statute, rule, or legal authority. For example, if a federal statute permits the use of a pseudonym, why would a party additionally have to show good cause? She stated that it seems like the "good cause" language adds a substantive standard in addition to the citation to legal authority that would permit use of a pseudonym. Ms. Holley stated that the committee originally talked about good cause being the factual reasoning behind it, so the facts would have to apply to the law, and asked whether there were suggestions on how to better phrase this language. Ms. Payne stated that the statute would provide the requirements in and of itself and it seems like the proposed amendment is adding some sort of substantive layer or requirement that maybe a statute is not requiring. She expressed concern that a court would see the good cause language as some sort of additional requirement, but she was not

certain. Judge Roberts wondered whether there is there any such statute that allows for the use of a pseudonym. Ms. Payne stated that the Violence Against Women Act (VAWA) allows it. Ms. Holley stated that some statutes also allow it in juvenile cases. Judge Roberts pointed out that, even in those examples, good cause would be that it is a case filed under VAWA or the juvenile statute. She stated that not only is the statutory citation required but, further, a party must state that the statute is applicable.

Ms. Payne stated that the use of the word "and" makes her think that citing the statute is a different requirement than good cause. Judge Roberts explained that a party must say both: 1) this is the statute; and 2) this is why it applies here. Ms. Wray stated that, as lawyers, we cite statutes and, by definition, we are saying that the statutes apply. Judge Roberts stated that this is not necessarily true. Ms. Wray stated that she is making this representation to the court when she cites a statute and it seems like this is asking for more than that. Ms. Payne explained that, because of the use of the word "and," there appears to be an additional good cause requirement. Judge Bailey stated that, according to the Supreme Court, the word "and" means "or" in Oregon. Ms. Holley asked whether it would be more clear if the language stated, "a description of good cause citing the statute." Judge Gerking suggested substituting the word "or" for "and." Justice Nakamoto suggested striking the whole description of good cause and the word "must," because the sentence ends with "under the circumstances." Judge Tookey recommended simply stating that a party must cite the statute, rule, or other legal authority. Mr. Eiva wondered whether the last sentence in the new section was superfluous. Ms. Holley agreed that it might be superfluous, but recalled the Council's long conversation about not wanting to create a substantive right. Justice Nakamoto stated that she felt that the last sentence makes it nicely clear that this is not the Council's intention.

Mr. Eiva asked whether the draft is saying that a judge has no inherent discretion to allow the use of a pseudonym. Ms. Holley stated that she has always cited a law when making this request. Mr. Eiva opined that the language in the draft appears to very much say that the judge has no inherent discretion. Judge Roberts explained that, if the judge is bound by having good cause, that is the basic stricture. She stated that inherent authority does not mean arbitrary authority. Judge Hill expressed concern that, by changing this language, the implication is that judges do not have discretion to allow it unless they are pointed to a specific statute. Ms. Payne pointed out that the language suggested is "statute, rule, or other legal authority." She observed that this could be other authority within the ORCP or inherent authority.

Ms. Gates stated that, if the court finds the circumstances are warranted, the

court has the discretion to allow it, so she was not certain that "legal authority" was the best term. Mr. Eiva stated that good cause is not a discretionary standard but, rather, a legal standard. He explained that he was just raising a question, not a challenge: does a judge not have discretion to allow a pseudonym? He asked whether this is the Council's consensus. Ms. Holley stated that it is not. Judge Peterson pointed out Judge Hill's strongly stated point at the last Council meeting was that Oregon has an open court system and that a party had better bring some authority. He stated that he believes that the new language is a distillation of a long discussion at the Council's last meeting. Mr. Crowley agreed that this was the committee's intent.

Judge Peterson asked the committee how the term "fictitious names" became "pseudonyms." Judge Norby noted that the word "fictitious" is loaded and that people react to it negatively before they think about what the content is. She stated that the committee had also discussed how "fictitious" usually refers to fictitious characters such as Bugs Bunny, and a name that is not a person's real name is not "fictitious" but, rather, is a pseudonym. She also pointed out that it is not good to refer to anything in court to be "fiction" as part of Oregon's commitment to open courts. Judge Bailey stated that "pseudonym" is more of an umbrella term that could include initials, which do not count as a "fictitious name." Judge Conover noted that the term "fictitious names" could also be confused with Rule 20 H that refers to cases where the identity of the individual is not known. Judge Peterson suggested using the phrase "motion to substitute" rather than "request to substitute" because the requesting party is asking for an order.

Judge Leith returned the conversation to the topic of inherent authority and stated that he thought that he heard a consensus from the Council that judges do not have the inherent authority to allow parties to file under a pseudonym. He stated that he does not agree with that. Ms. Holley stated that she did not believe that the Council had agreed on that, and that this was not the intention. Mr. Eiva expressed concern that this amendment creates that assumption. Judge Hill explained that he does not believe that the new language creates that assumption. He stated that he had real concerns with the Council saying that a judge can decide to allow a party to file under a pseudonym simply because a case is sensitive but, the way the new language is crafted, the Council is not taking a position one way or the other. He stated that, by using the language "other legal authority," it is an open question that the court can resolve and neither argument is foreclosed. Mr. Crowley agreed. He stated that it is his hope that this rule change will not open the floodgates but, rather, will create a cautious rule that allows a process. Judge Wolf observed that the original concern was that the ORCP do not allow parties to file under a pseudonyms and, with this amendment, now

the rules do if a party is otherwise allowed to. The rules have gotten out of the way of the argument. Judge Tookey agreed that this is a good way to explain it.

Judge Peterson summarized the discussion by stating that the rule change does not create inherent authority to file a case under a pseudonym but, rather, it creates a mechanism so that, if a party has authority from any source, including a judge, that party may ask for permission to do so.

Mr. Eiva asked whether the language should read "statute, rule, or legal or judicial authority, to the extent any exists." He stated that, if he were a judge and saw the language "legal authority," he would assume case law, ORCP, or statute, not necessarily thinking that someone would cite inherent judicial discretion. Judge Bailey asked where that authority comes from. Mr. Eiva stated that judges have authority that is not completely defined about ways they can manage their courtroom and their cases. Judge Bailey stated that the authority must come from somewhere; otherwise, judges are just legislators. Judge Roberts noted that judges do not have a divine right. Ms. Holley stated that a judge's inherent authority here is akin to ORCP 36 C and the court's discretion to limit and extend discovery. Judge Hill opined that simply using the term "other legal authority" is elegant and it works. It encompasses all of those other things and gives parties the space to make whatever argument they want to make. Ms. Gates asked whether, if factual circumstances are cited but no case law or rule is given, that means that the judge cannot grant the order. Justice Nakamoto disagreed and stated that this would limit the universe of legal authority, and that is not what this rule says. Ms. Gates wondered whether requiring a citation to "legal authority" could be problematic. Ms. Payne suggested removing the word "legal" and using the language "other authority."

Judge Leith stated that he was satisfied with the discussion that the intention is not to preclude an argument that a judge has inherent authority. He stated that, if the staff comments reflect that the Council is not foreclosing or endorsing any arguments for the existence of any source of authority, including inherent authority, then the language suffices. His initial concern was that the Council was creating the opposite history but, as long as that is not the case, he is satisfied. Mr. Andersen agreed. Ms. Payne stated that the goal is to not take a position at all on the substantive right. She agreed that, if the Council makes that clear in the staff comments, that goal would be met.

Judge Peterson stated that there is adequate information to make that clear but that the ultimate goal is not having to explain a rule, just to make the rule clear on its face. He opined that the draft creates a process, not an authority, and does not restrict any existing authority that exists. He wondered about the words "to

substitute" and stated that the most effective way for a party to proceed would be to go to ex parte before filing the case, with notice to the other side so that the other side would have the opportunity to be heard. He noted that defendants should also have the right to be heard about whether they should be allowed to use a pseudonym. The word "substitute" implies that it would occur after the case had been filed. Judge Norby stated that the committee had begun discussing timing but that they were not certain how the Council would feel about their proposal so they had held off. She explained that her thought was that the process should be timeless: a party can try to do it before the case is filed, during the case, or right before an appeal. She stated that she had made an effort to not be specific about the timing and that the committee had not gone into a lot of detail about timing.

Judge Roberts suggested perhaps using the word "use" instead of "substitute" because it would not have a timing implication. Ms. Payne agreed and stated that it seems like a party could not file a complaint with a pseudonym unless that party had a court order. Ms. Holley agreed that this is an easier process and that this is how it is done in Multnomah County. When she tried to file a case with a pseudonym in Lane County she had to file the complaint under the pseudonym with no argument, and she would rather have the argument prior to filing the case. Ms. Payne stated that, logistically, sometimes a court will not let a party file a motion until that party has a complaint and case number. Judge Bailey explained that this is where ex parte applies, because a party can come to ex parte and make that request. Judge Wolf noted that going to ex parte assumes a court that has a regularly scheduled ex parte docket, and not all counties do. Judge Bailey stated that there could be statute of limitations issues if a party does not have time to get in to ex parte. Judge Norby opined that the Council is not the right place to solve these problems. Judge Wolf stated that local rules can be helpful here. Judge Tookey agreed that this is a problem best addressed by SLR. Judge Hill noted that the process may be very different from county to county and stated that it is important to build that flexibility into the rule.

Ms. Payne suggested the following language change, "A motion to use a pseudonym must cite the statute, rule, or other legal authority..." Judge Roberts objected to that deletion because a bare citation without any explanation of how it applies to the particular case would be poor practice and does not guide the circumstances at all. Judge Norby asked whether Judge Roberts wants the rule to tell practitioners everything they must include in the motion. Judge Hill noted that the language "under the circumstances" is present. Judge Roberts pointed out that, as the draft is written, the phrase "under the circumstances" only modifies "other legal authority that supports the use of a pseudonym," and does not modify "the statute." Judge Peterson noted that this is true because the draft uses the

word "or." Ms. Holley suggested the following language: “a motion to use a pseudonym under the circumstances of the case must cite...” Judge Norby suggested adding “and explain how it applies” to the end of the sentence. Judge Roberts noted that it is unfortunately possible for a lawyer to file a motion asking to use a pseudonym and cite a statute without saying how that statute applies. Ms. Payne suggested adding a comma after the word “authority.” Judge Hill suggested using the following language: “a motion to use a pseudonym must include a factual basis for the request and must cite the statute, rule, or legal authority that supports the use of the pseudonym under the circumstances.”

Judge Bailey made a motion to use the language suggested by Judge Hill. Judge Roberts seconded the motion, which was approved unanimously.

Judge Peterson asked the committee to clarify whether the change to Rule 16 negates the need to make a change to Rule 26 regarding the real party in interest that was discussed at the last Council meeting. The committee and Council agreed that a change to Rule 26 is not needed.

Ms. Payne asked whether it is appropriate to vote to move the draft of Rule 16 to the September publication docket. Judge Peterson suggested that, because several changes had been made during the meeting, Ms. Nilsson should put the new language into legislative drafting format and circulate it to the Council for review before the June meeting. He stated that he is uncomfortable doing this kind of amendment at the publication meeting and that he would feel more comfortable if the Council had more time to review the language. Ms. Nilsson stated that she would circulate the new language before the next meeting. Mr. Crowley thanked the Council for its assistance.

3. ORCP 7 Committee

Judge Norby explained that, after the last Council meeting, it was her understanding that the Council wanted the committee to use the language drafted by Judge Peterson and Ms. Nilsson but to condense it to avoid repetition. She directed the Council to Appendix C and its rewrite of subsection D(6) and asked whether the Council had any comments or concerns. She stated that the primary notable change is that the committee removed the specific size limitation for e-mail and replaced it with generic language that applies to all forms of electronic service.

Judge Peterson thanked Judge Norby for her efforts and stated that the rewrite captures the idea of making the subsection shorter and gets it right by using generic terms. He agreed that the e-mail limitation that was originally suggested

could become obsolete and appreciated the new universal parameters that will not need to be tinkered with every two years as technology changes.

Judge Roberts asked for clarification of what is being proposed. Judge Norby explained that all of the bolded language is new. Judge Roberts stated that it was her understanding at the end of the last Council meeting that electronic service would always have to be accompanied by non-electronic service, like mailing, as well. Judge Norby stated that this was not her understanding. Ms. Gates asked whether the language "most reasonably calculated" in subsection D(6) means that electronic service is supposed to be more reasonable than other reasonably calculated methods. Judge Norby explained that she thought that this was the language that is always used for alternative service. Judge Wolf stated that the language is taken from the current rule. He emphasized that electronic service is just a backup alternative service similar to publication.

Judge Peterson agreed that "most reasonably" is language in the existing subsection D(6). With reference to Judge Roberts' question, he noted that paragraph D(6)(a) says that alternative service can be a combination of measures. He stated that he would expect that a party would have to tell the judge if the party has absolutely no address for mailing; the affidavit or declaration would say that the best way for contact is via e-mail or Facebook, particularly for domestic relations cases where people are still communicating. He stated that this may be a way to get adequate service on an opposing party without having to pay for publication.

Ms. Gates noted that she was not objecting to the words but, rather, just asking for education. She raised a second question about referring specifically to a social media account and whether the committee has considered broader language. She pointed out that some services that are universally agreed upon as social media among the general public may not be considered by the companies that offer them as social media. She wondered whether we are opening a door to the argument that some forms of online participation that allow others to send information are not social media. Judge Norby replied that she did not believe that requests to serve by electronic service encounter a lot of argument in court. She stated that she has never seen one contested. Once a judicial order is in place, it would be difficult for someone to argue later that it was not a social media account.

Judge Roberts again raised the question of other means of service in addition to electronic service. With respect to publication, she stated that paragraph D(6)(d) does provide that, if the court orders service by publication and the plaintiff knows or can ascertain the defendant's address, the plaintiff shall also mail the

documents. She noted that this is limited to publication, but wondered why there should not be a similar, parallel requirement for service by social media. Judge Leith stated that this would make it most likely to achieve actual notice and make it the form of alternative service for that case. Judge Roberts suggested that it is a good idea to have this backup. Judge Norby asked whether Judge Roberts was suggesting language up front in subsection D(6) that states that electronic service should always be accompanied by actual mailing. Judge Hill stated that it would be treating electronic service the same way as publication. Judge Wolf agreed that this change might be appropriate but noted that the language regarding what a party needs to show to obtain court permission for electronic service would also need to be changed, because it currently requires that a party cannot find a current mailing address to qualify to use electronic service. Judge Norby agreed that paragraph D(6)(b) states that a party must assert that the mailing address cannot be ascertained, but she stated that this language could be removed.

Judge Peterson noted that this raises a question: is the bar for using electronic service too high? For example, if a party has a mailing address, even though that party is pretty sure it will not be good, does that mean that the party does not qualify for an order allowing electronic service? He suggested changing the language to "cannot be reliably obtained." Ms. Payne raised the example of a party who has a reliable address but the person on whom service is being attempted is evading service. Judge Norby suggested “cannot reliably accomplish service at the defendant's residence address or place of employment.” Judge Wolf observed that, at the end of the same paragraph, it states the certificate of service must state facts that indicate the intended recipient actually personally received the electronic transmission. He pointed out that this raises the bar to actual service, and stated that he was not sure if this was the Council’s intention. Judge Peterson stated that this question was left open at the last Council meeting, but agreed that this almost rises to Judge Hill’s suggestion of calling this kind of electronic service actual service. He stated that he does like the idea expressed in the last sentence that requires that, if a party discovers after the fact that someone other than the intended recipient received the electronically served document, the serving party should have to amend the certificate to clarify that. He observed that, if there is an affidavit or declaration requirement that gets the plaintiff into the ballpark in terms of getting to use electronic service, we want to have a method that sends a true copy where it can somehow be determined that the opposing party could have received it, but he wondered if we want to go as far as actual service.

Judge Hill suggested changing the word “actual” to “likely.” Judge Norby agreed with this idea and stated that the word “personally” helps address the concern about a child or someone else receiving a message and deleting it. Judge Wolf stated that he likes the concept of “likely personally received” because makes it

more likely that it was received.

Judge Leith reiterated his disagreement with the requirement that electronic service must be likely to be successful, because success is not generally expected with alternative service. He stated that he thinks that subparagraph D(b)(6)(i) through subparagraph D(b)(6)(iii) help with the details of how to technologically accomplish getting a true copy to the defendant, but that he would want to delete everything in the primary paragraph D(6)(b) after the first sentence. He stated that the description of the declaration seems like unnecessary micromanagement of what the court should consider and what the plaintiff should present and he disagreed completely with the certificate requirement to demonstrate some success. Judge Hill stated that the flip side to that is that electronic service is different for the simple reason that the Council cannot foresee what format it will take in the future. He pointed out that it is different from every other form of service that now exists. Because it is different, it is more fair to require that a party at least must show in the certificate of service what system was used and that there is likelihood that the other party received it. Judge Leith opined that judges can figure out what is most likely to be successful in a given case. Judge Roberts pointed out that the requirement of proof is not unique to electronic service; with service by certified mail with return receipt requested a party must show that the document was actually received. With regard to micromanaging, she pointed out that electronic service is absolutely new and, if the Council just allows it and sees what happens, there will be results all over the map. She stated that the Council should be cautious and, if a pattern eventually emerges, it would be acceptable to leave it completely to the court's discretion. However, since we really do not know how meticulous anyone is going to be in receiving motions and acting on them or acting to get service, it might be necessary to exert a little more control here.

Justice Nakamoto suggested taking what has been described as the "back end" certificate after service and instead placing those requirements in the "front end," in the application for alternative service by electronic means. She stated that the application might not need to include all of the details currently included in the draft amendment but, if such details are required up front, the certificate of service can be like any other one, where a party attests that they did what they said they were going to do. Ms. Payne stated that she liked this approach and, if a party has to prove that the defendant actually received service, it is shifting a burden, whereas right now the rules provide a defendant an opportunity to challenge service if they contend that they were not served. To provide a showing up front that someone is likely to receive service and that this is an adequate way to achieve service is a good idea.

Judge Norby stated that the committee had discussed this issue but, because

Judge Peterson was not at the meeting, they used his suggestion to separate it in this way. Judge Peterson explained that he used the language in the draft because he thought that it represented one of two strong views of the Council. He stated that he likes the idea of having to amend the certificate for this kind of service if a party finds that what they did was not correct. He agreed with Judge Roberts' assertion that a party must show that the person being served received a certified letter and stated that, in some forms, it will be difficult to show that electronic service was received so he does not want to make that a requirement. He agreed with Justice Nakamoto that loading up a little more on the affidavit or declaration supporting the motion for alternative service is good. He stated that it might warrant a certificate to say that you did it but you need to amend the certificate if you find it was ineffective in achieving actual service, like a misnomer with a certified letter. Ms. Holley stated that you can have the same problem with a certified letter where a son signs for it and throws it away.

Judge Hill suggested modifying the second to last sentence and to say: "the declaration must state facts indicating that the intended recipient will likely receive the electronic transmission." Judge Norby stated that the change may not be made in that place, but it will be made. She asked whether, with those changes, the Council would like to move forward at the next meeting. Judge Peterson stated that he would like to make sure that the rule is in proper legislative drafting format and that everyone on the Council has an early opportunity to review the rule.

Judge Roberts asked Judge Norby to restate the concept being considered. Judge Norby stated that the idea is to modify subsection D(6) to allow for a formalization of a party's ability to seek alternative service through electronic means and to help, in the most minimalist way, guide judges who may receive such requests. Judge Roberts stated that she opposes the most minimalist way because she does not want to see electronic service turned loose with no supervision. Judge Norby stated that there are specific things that have to be in a declaration for a judge to consider before allowing it. Judge Leith stated that the components being proposed in the rule are: 1) formal recognition of the availability of alternative electronic service; 2) a description of the minimum requirements for the declaration; 3) a proposal for substantive requirements for electronic service; and 4) a requirement for proof of likely success.

Ms. Weeks stated that she did not completely understand the point of the suggested change to the language regarding the declaration. She pointed out that asking a party to state that service is reasonably believed to have occurred because the receiving party uses a social media platform or an e-mail address seems duplicative since the language in subparagraph D(6)(b)(2) already says that. Judge Hill noted that it is not a restatement, because the mere fact that a party

has a social media account or e-mail address does not tell a judge that it is likely that the party will receive a document. He stated that it is important to have something, even if it is prospective, that explains why a party believes that the intended recipient is likely to get the document. Ms. Weeks then suggested that the language regarding an account that has been used within the past year should be removed. Judge Norby agreed and stated that she would like to add language about the likelihood of service and remove the language that refers to a time frame. No one on the Council objected.

Judge Peterson called attention to paragraph D(6)(f) of the current rule that talks about defending after judgment and it is now limited to a defendant against whom publication was the method of service ordered. He changed that to "service pursuant to this subsection." He stated that it seems to him that, whether service occurs by letter or posting, a defendant should be on the same footing to come in and say that they did not get notice. He asked Council members to be sure to look at the next draft to make sure that today's discussion is accurately reflected. He also called the Council's attention to section E, where the language has been amended to make it clear that an attorney can do the follow-up mailing, and asked that Council members also review that language carefully.

Judge Leith asked whether the Council has confirmed consensus to proceed with the changes discussed today. Mr. Keating asked whether the Council would like the committee to go ahead with these changes. Judge Roberts and Judge Leith stated that they did not agree with certain changes such as proof of success. The rest of the Council agreed that the committee should proceed in drafting the changes discussed today.

4. ORCP 15 Committee

Judge Gerking explained that the committee's attempt to come up with alternative language in section D has been a very frustrating process. He stated that the committee has met several times but has not been able to reach consensus on language. The committee is currently leaning toward leaving the existing language as is, and this is clearly Mr. Bundy's and Ms. Payne's preference. Judge Gerking stated that the committee has provided some alternatives for the Council's perusal (Appendix D). The final alternative is to leave the existing language in Section D as is. He stated that the committee has struggled with various aspects of the section, including whether enlarging time or permitting expanded time relates only to this rule (the restrictive interpretation) or whether it applies to all rules (the omnibus interpretation). Judge Gerking explained that Judge Peterson's proposal, the first one, is the more restrictive interpretation that states that the section only applies to pleadings and motions defined in Rule 15 A. He noted that all committee

members, with the exception of Judge Peterson, are leaning toward leaving section D in its current format.

Judge Peterson stated that he shared Judge Gerking's frustration. He pointed out that the final draft before the Council, while leaving section D as it is currently, does incorporate all of the prior suggestions recommended by the committee. He stated that it is clear to him that the rule, as currently written, does not read clearly, and this is borne out by the discussion in the minutes from the last three Council meetings. The committee's Draft 5B(1) and Draft 5B(2) (identical except for the phrase "prohibited by" versus "provided in" in section D) represent the worst of all possibilities, because they say that section D applies to any late filing of a motion, even though it seems obvious to him that section D does not apply to every motion. In his opinion, it would be better to do nothing than to do something that looks like it materially changes section D.

Judge Gerking stated that one committee member mentioned in the last meeting that there really was no concern raised by a bar member regarding section D. He wondered, if there is no problem being reported, whether it is wise for the Council to create one. Judge Peterson agreed that there is a concern that we may be searching for a problem, but stated that he has also heard from judges that this is a rule that causes self-represented litigants to question the fairness of court procedures. He also related a recent case before him where an attorney filed a response (that should have been labeled a motion to strike) to a reply that was filed well after 10 days following service of the counterclaim. A lawyer with 40 years experience had not filed a reply on time and, under Rule 19 C, the counterclaiming attorney was asking to treat all allegations of the counterclaim as admitted. The judge who handled that aspect of the case did not say anything and let it go on.

Judge Peterson explained that he had gone through Rule 1 through Rule 55 in an attempt to identify those rules with timelines specified within them that have discretion versus those that do not have discretion (Appendix D). He stated that, at the last Council meeting, there was discussion as to whether Rule 15 D could specify those rules to which it does apply. It seemed clear that Rule 63, Rule 64, and Rule 71 have hard deadlines but, for those rules that do not provide judicial discretion within the language of the rule, you cannot see a dime's worth of difference between hard deadlines and discretionary deadlines. It is regrettable that the Council would choose to say "these are the rules and, if you want to know what they mean, you should read the Court of Appeals and Supreme Court decisions because the rules are not clear and we do not intend to make them clear." However, he agreed that it would be impossible to make a list of those rules that are not covered by Rule 15 because the Council would have to make a

lot of substantive choices about whether numerous rules contain hard deadlines or not. Last biennium, the Council changed the electronic discovery rules to state that, on the court's order or if any party requests, parties have to meet regarding electronically stored information within 21 days. He wondered whether that would be considered a hard deadline. Judge Peterson stated that he understood that some members of the Council were in agreement that it is important keep Rule 15 flexible to remedy mistakes attorneys might make. Examples members had used included summary judgment and requests to admit, but he noted that those rules have discretion built right into them and, if a party is citing Rule 15, that party is not citing the best authority. If a party needs to file a motion for summary judgment close to the trial, that party may ask the court for permission. He noted that the Council is proposing a change to Rule 22 D so that section will no longer require all parties and the judge to agree for a third-party complaint to be filed after 90 days after service of the original summons and complaint. If that amendment goes through, it will become completely discretionary with the judge. He opined that section D is still problematic.

Mr. Keating stated that it appears that the consensus is that this complex problem cannot be solved this biennium. Judge Peterson agreed that this unfortunately appears to be the case. He suggested putting the last proposed version of Rule 15 (Appendix D, Draft 5C) that leaves section D in its current form on the September publication docket. He noted that it fixes the problem in section A that the Procedure and Practice Committee sent to the Council, as well as other small issues.

Judge Peterson reminded Council members that there is another small change to section A proposed by the committee. At one time, Rule 15 A allowed just 10 days to respond to counterclaims. A vestige remains in the last sentence, as there is still a 10 day response time for a reply to an affirmative defense. The last sentence is just a trap for the unwary. The committee's proposal is to change that to 30 days to be consistent with the other deadlines in the section.

Judge Roberts noted that the current rule provides that an answer to a cross-claim should be also responded to within the time required by Rule 7 C(2) to appear and defend but, in the revision, the reference to the cross-claim as governed by Rule 7 C (2) is dropped. She explained that there is a continuing issue in foreclosure claims, where a great many residential foreclosures happen by default. The plaintiff will file for residential foreclosure and there are a number of junior leinors, many of whom have a right to a money judgment as well as foreclosure. The junior leinor will file a cross-claim but, if the original defendant was served and has already defaulted, the defendant need not receive actual service of that cross-claim by any method because, under Rule 9, a party only has to serve those who

have appeared. It looks like a plaintiff can get a money judgment against a defendant who has never been served with any form of complaint for that money judgment. She stated that she has struggled with this issue, and has sometimes refused to grant a default judgment on a cross-claim unless the cross-claim has actually been served on the defendant, in an effort to preserve the defendant's basic constitutional rights. She stated that, if the case goes to trial, the plaintiff will get a judgment on a cross-claim that has never been served, and that is deeply wrong. She expressed concern that the revision of ORCP 15 A would drop the reference to Rule 7 C(2) and it just goes back to service of the cross-claim as required by Rule 9, which is service on parties who are not in default.

Judge Peterson stated that he is not on the foreclosure panel and asked Judge Roberts for clarification of the issue that is causing her concern. He noted that Rule 9 says that a party does not have to serve a document on someone who is in default unless that party is alleging an additional claim. Judge Roberts noted that a cross-claim is, by definition, something that is not in the original claim. Judge Hill recited part of Rule 9 A: "No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served on them in the manner provided for service of summons in Rule 7." Judge Roberts stated that she supposes that one could say that this includes a cross-claim. Judge Peterson stated that he typically thinks of a cross-claim as being a pleading filed against a party who is already in the litigation, so the proposed change to Rule 15 A makes sense.

Judge Roberts localized her concern to ORCP 22 B(3), which states that an answer containing a cross-claim shall be served on the parties who have appeared. Judge Peterson noted that an amendment to Rule 22 had already been moved to the September publication docket and suggested that Judge Roberts propose a change to subsection B(3), even though it is a bit late in the biennium. Judge Wolf agreed that the language is inconsistent and needs to be fixed. Judge Hill observed that the language not necessarily inconsistent, since the rules are doing two different things. He noted that Rule 22 says that an answer containing a cross-claim should be served on all of the parties who have appeared, but that does not necessarily mean it is going to be effective under Rule 9 if the cross-claim asserts a different claim and the person against whom that claim is asserted has not been personally served. Judge Roberts pointed out that this is a very subtle nuance. Judge Hill posited a situation where there are five defendants but the cross-claim only affects one defendant. Under the rule, everyone must be served, other than defendants who have been defaulted and from whom relief is not being sought. But, to the extent that the cross-claim is seeking affirmative relief from this one party, that is different from what is in the plaintiff's complaint, then Rule 9 says that the person must be personally served. He stated that he thinks that Rule 9

and Rule 23 B(3) can be interpreted together.

Judge Roberts stated that she would likely suggest changing “shall be served on the parties who have appeared,” to read, “shall be served on parties against whom relief is sought and other parties who have appeared." Judge Wolf stated that this makes perfect sense. Judge Peterson asked Judge Roberts to send draft language to Ms. Nilsson so that she can put it into proper legislative format and circulate it to the Council well in advance of the June meeting to make sure there are no unintended consequences.

5. ORCP 23 C/34 Committee

Ms. Payne stated that she was not at the April Council meeting but that it was her understanding that the Council’s consensus was that any change regarding the problem at issue needs to be statutory, perhaps a change to ORS chapter 12 that could be suggested to the Legislature. She stated that she and Mr. Andersen have been working on a draft amendment to the language in ORS 12.190 and that they hope to bring something for discussion at the June Council meeting. She stated that her suggestion would be to add language regarding the date of the discovery of the death of the proposed defendant, and that Mr. Andersen is considering other language. Mr. Andersen stated that Judge Leith has also made another suggestion and that the committee hoped to come up with compromise language when they next meet.

6. ORCP 55 Committee

Mr. Keating reminded the Council that the purpose of the ORCP 55 committee is not to make any substantive changes but, rather, to organize the rule so that it is much more user friendly than the existing rule. He stated that Judge Norby did amazing work in putting together the drafts, and that the latest draft before the Council (Appendix E) had been fully discussed by the committee in a number of meetings.

Judge Gerking noted that the irony has not escaped him that, as the chair of the ORCP 15 committee, he was incapable of marshaling consensus for a change to a one-paragraph section, but that the Rule 55 committee was able to reach consensus on reorganization of a nine-page rule. He congratulated Judge Norby on the time she spent reorganizing and restructuring Rule 55 from an eight-section rule to a four-section rule. He explained that current section H had become section D, and that the other current sections are combined in new sections A through C. He stated that titles and wording had been changed but that the goal was not to change any substantive aspect; if this occurred, it was inadvertent. He noted that

the committee has no recommendations as to how the Council should tackle the proposed revision except to suggest that, if most Council members have not really studied the proposed amendment in a comprehensive way and compared the amendment with the original text, comprehensive discussion today would be pointless. He suggested that all Council members should take on this individual responsibility of a thorough comparison and be prepared to discuss the rule at the June meeting.

Judge Norby stated that, at the last Council meeting, there was discussion regarding a couple of isolated points with which the committee believes it has now dealt. One was the "tender" question, and she tried to crystallize the Council's consensus. There was also some concern about the fact that section D used to use the phrase "protected health information" and that is now "confidential health information" which is defined to include both protected information as defined by statute and also individually identifiable health information. She noted that the committee meeting on section D was actually shorter than the meetings on sections A through C, even though the section consists of half of the rule. She was particularly excited about that, because Judge Gerking was on the committee that handled section H originally and he did not express that much concern. She explained that the committee has now gone through the entire rule line by line and made several adjustments. Judge Gerking stated that he is not convinced that the draft is perfect in its current form. Judge Norby agreed and reminded the Council that the goal is not perfection but, rather, dramatic improvement and making the rule user friendly by getting rid of a lot of duplication and grouping together items that belong together.

Ms. Payne asked whether a cross-reference chart to the existing rule was available. Judge Norby stated that she had previously sent one to the Council but that so many changes had been made since that version that it is no longer accurate. She stated that she could try to make a new one if she has time, but that it might not be that difficult to identify where things are located. Judge Gerking stated that a cross-reference chart would be helpful. Judge Tookey stated that he had looked back at his notes from the September meeting and the original catalyst to take a look at this rule, and he wondered whether the Council's survey respondent, Mr. Skillman, had identified any specific problems. Judge Norby stated that the committee originally read the suggestion and kind of brushed it off because it was not specific, but she took it up after further review because she was stunned at how poorly constructed Rule 55 was.

Judge Peterson stated that he had noticed at the last meeting that the word "substantive" had been used a lot, and of course the Council does not make substantive changes to the law. Judge Norby clarified that the committee had tried

not to make the value and meaning of the content different. Judge Peterson stated that, if the Council agrees generally that we should go forward with these four sections replacing the existing rule, he and Ms. Nilsson will need a little time to put that into legislative drafting format. He asked Judge Norby if she could try to create a new cross-reference chart to ensure that this new cleaner, clearly more intelligible rule does not miss anything. He noted that the Council does not want to create any ambiguity. Judge Norby stated that she would probably not be able to attempt a cross-reference chart for at least two weeks.

Judge Gerking asked Council members to let the committee know right away if they notice any problems with Rule 55 so that it can be dealt with quickly and a new draft can be created as soon as possible.

IV. New Business

Mr. Keating reminded the Council that the June meeting will be important and that the purpose is to decide what amendments the Council wants to publish. He suggested starting the June meeting at 9:00 a.m. instead of 9:30 a.m. The Council agreed.

Judge Peterson asked Council members to carefully look at all drafts that are sent to them, and stated that staff will try to get drafts to them as early as possible. He reminded the Council that the preference is not to edit on the fly during the September publication meeting.

No other new business was raised.

V. Adjournment

Mr. Keating adjourned the meeting at 11:09 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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 really broad and make it really 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

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.

Rule 7 - Alternative Service Proposed Amendments

D(6) 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 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 ORCP 7C(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 declaration filed with a motion for electronic alternative service must include: (1) confirmation that, after diligent inquiry, the defendant's residence address, mailing address, and place of employment cannot be ascertained; and (2) the reason(s) for plaintiff's belief that the defendant has sent and received transmissions from the specific e-mail address or telephone / facsimile number within the past year, or maintains an active social media account on the social media platform through which service is sought. The certificate of service must state the facts that indicate the intended recipient actually personally received the electronic transmission. An amended certificate of service must be filed if it later becomes evident that the intended recipient did not personally receive the electronic transmission.

D(6)(b)(i) Content of Electronic Transmissions. If the court allows service by a specific electronic method, the case name, case number, and the name of the court in which the action is pending must be prominently positioned where it is most likely to be read first. For e-mail service, those details must appear in the subject line. For text message service, they must appear in the first line of the first text. For facsimile service, they must appear at the top of the first page. For posting to a social media account, they must appear in the top lines of the posting.

D(6)(b)(ii) Format of Electronic Transmissions. If the court allows alternative service by an electronic method, the summons, complaint, and any other documents must be attached in a file format that is capable of showing a true copy of the original document. When an electronic method is incapable of transferring transmissions that exceed a certain size, the plaintiff must not exceed those express size limitations. If the size of the attachments exceeds the limitations of any electronic method allowed, then multiple sequential transmissions may be sent immediately after the initial transmission to complete service.

D(6)(b)(iii) "Facsimile" defined. As used in this rule, "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.

ORCP Timelines

Timelines with No Discretion Specified in the Rule		Timelines with Discretion Provided in the Rule	
7	summons	*But see 69 F, 71 B*	
17 D(3)	motions for sanction	**17 E**	not applicable to motions, pleadings, conduct subject to sanction under Rule 46
21 D **21 E**	motion to make more definite & certain motion to strike		
22 C(1) *(current rule)*	third-party practice	**22 C(1)** *(if Council's 2018 amendment passes)*	third-party practice
23 C	relation back of amendments	**23 A** **23 E**	amendments supplemental pleadings
		26 A	real party in interest dismissals
27 F(2)	statement objecting to appointment of guardian ad litem	**27 E, E(1)** **27 H**	notice of motion seeking appointment of guardian ad litem waiver or modification of notice
32 H(1)	class action notice and demand	**32 J** **32 M(2)**	equitable class action relief and amendment of complaints for equitable relief class action filing of statements regarding fees
33 D	procedure for responsive pleadings after motion to intervene	**33 B** **33 C**	intervention of right; permissive intervention
34 B(1), 34 B(2) **34 C**	motion to continue upon death of a party motion to continue upon disability of a party	**34 F**	death or separation from office of a public officer

Timelines with No Discretion Specified in the Rule		Timelines with Discretion Provided in the Rule	
		36 B(2)(b)	procedure for disclosure of insurance agreements or policies
		39 A **39 C(2)** **39 C(3)** **39 C(6)** **39 F(2)** **39 I(4)**	depositions special notice with no leave of court court may enlarge or shorten time for taking deposition deposition of organization statement of reason for changes by witness perpetuation depositions
		40 A	serving depositions upon written questions
41 C(3)	objections to the form of written questions in depositions		
43 B(1) **43 E(2)**	request for production of documents and things meetings to resolve issues regarding ESI	**43 B(2)**	response to request for production of documents and things
		45 B	response to request for admission
47 A	filing summary judgment motions	**47 C** **47 D** **47 E**	summary judgment mechanics amending/supplementing affidavits affidavits unavailable
54 A	voluntary dismissal	**54 B(3)**	involuntary dismissal

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. [*A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim shall*] **An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, 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.

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[***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.*]

D Enlarging time to plead. Within those times specified in this rule, a party may file a motion to enlarge the time for filing any pleading, motion responsive to a pleading, or response to such a motion provided for in this rule. Pursuant to a motion, agreement of the parties, or otherwise, the court may in its discretion and upon any terms that are just permit the filing of a pleading, a motion responsive to a pleading, or a response to such a motion after the time limited by this rule has passed.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. [*A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim shall*] **An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, 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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[***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.*]

D Enlarging time to plead. Unless otherwise prohibited by these rules, the court may, pursuant to a motion, agreement of the parties, or the court's own initiative, and upon any terms that are just, enlarge the time for the filing of, or permit the filing of, after the time limited by these rules has passed, any pleading, motion, or response or reply to a motion.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. [*A motion or answer to the complaint or third party complaint and the reply to a counterclaim or answer to a cross-claim shall*] **An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, 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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[***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.*]

D Enlarging time to plead. Unless otherwise provided in these rules, the court may, pursuant to a motion, agreement of the parties, or the court's own initiative, and upon any terms that are just, enlarge the time for the filing of, or permit the filing of, after the time limited by these rules has passed, any pleading, motion, or response or reply to a motion.

TIME FOR FILING PLEADINGS OR MOTIONS

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B Pleading after motion.

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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*] **any** terms as may be just, allow an answer or reply to be made, or allow any other

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pleading or motion after the time limited by the procedural rules, or by an order enlarge such time.

ORCP 55 - SUBPOENA

A. Generally – Form and Contents, Originating Court, Who May Issue, Who May Serve, Proof of Service. Provisions of this section apply to all subpoenas except as expressly indicated.

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) state the name of the court where the action is pending;

(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, trial, administrative or other out of court proceeding as provided in §B of this Rule;

(2) Produce, for inspection and copying, specified books, documents, electronically stored information, or tangible things in that person's possession, custody, or control other than Confidential health information defined in subsection D of this rule as provided in §C of this Rule; or

(3) Produce, for inspection and copying, records of confidential health information subject to subsection D of this rule as provided in §D of this Rule.

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 May Issue**.

(a) Attorney of record. An attorney of record for a party to the action may issue and sign a subpoena requiring a witness to appear on behalf of that party.

(b) Clerk of Court. The clerk of the court in which the matter is pending may issue a subpoena to a party upon request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to initiate a deposition may only issue if the requesting party either served a deposition notice as provided in Rules 39C and 40A, or served a notice of subpoena for production of books, documents, electronically stored information or tangible things, or certifies that a notice will be served contemporaneous with service of the subpoena.

(c) Clerk of Court for Foreign Depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38C(2) by the clerk of the circuit court in the county in which the witness is to be examined.

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(d) Judge, Justice or Other Authorized Officer.

(i) When there is no Clerk of the Court, a judge or justice of the court may issue a subpoena.

(ii) A judge, justice or other authorized officer presiding over an administrative or out of court proceeding may issue a subpoena to appear and testify in that proceeding.

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.

6. **Recipient Obligations.**

(a) Length of Witness 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.

(b) Witness Appearance Contingent on Fee Payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. A witness may demand payment of legal witness fees and mileage for the next day at the end of each day's attendance. If the fees and mileage are not paid on demand, then the witness is not obligated to return.

(c) Deposition Subpoena – Place to Attend or Produce.

(i) *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.

(ii) *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.

(d) 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 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.

7. **Recipient's Option to Object or Move to Quash or Modify Subpoena for Production.** A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of Confidential 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.

B. Subpoenas Requiring Appearance and Testimony by Individuals, Organizations, Law Enforcement Agencies or Officers, and Prisoners. All provisions of this section apply exclusively to subpoenas for appearance and testimony.

1. **Where Attendance May be Required.** A subpoena may require appearance in court or out of court, including:

   (a) Foreign Depositions. Any foreign deposition under Rule 38C presided over by any person authorized by Rule 38C to take witness testimony, or any officer empowered by the laws of the United States to take testimony.

   (b) Administrative and Other Proceedings. Any administrative or other proceeding presided over by a judge, justice, or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

2. **Service of Subpoenas to Appear and Testify on Individuals or Non-Party Organizations; Tendering Fees.** Unless otherwise provided in this rule, a copy must 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 unless the witness expressly declined payment, 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 unless the witness expressly declined payment.

(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 or expressly declined payment; 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).

3. **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 unless payment was expressly declined, 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 must 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 must 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.

4. **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 must be served upon the custodian of the prisoner.

C. Subpoenas Requiring Production of Documents or Things Other Than Confidential Health Information. All provisions of this section apply exclusively to subpoenas for production of documents or things other than confidential 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.

D. Subpoenas for Records of Confidential Heath Information. The provisions of this section apply exclusively to subpoenas for production of records of confidential health information.

1. "**Confidential Health Information" to Which this Section Applies.** This section creates protections for production of "confidential health information," which includes both "individually identifiable health information" described in ORS 192.556(8) and "protected health information" described in ORS 192.556 (11)(a). "Confidential health information" is defined 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, or

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

2. "**Qualified Protective Order" Limits Use of Confidential Health Information.** A "Qualified Protective Order" is defined as a court order that prohibits the parties from using or disclosing confidential health information for any purpose other than the litigation for which it is produced, and that requires the return of all confidential health information records to the original custodian, or the destruction of all Confidential health information records, including all copies made, at the end of the litigation.

3. **Subpoena Must Also Comply with State and Federal Law.** A subpoena to command production of confidential health information must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not fully comply, then the recipient is entitled to disregard it and withhold the confidential records it seeks.

4. **Service of Subpoena is Subject to the Following Conditions.**

   (a) Qualified Protective Order; Declaration or Affidavit; Contents. The attorney or party issuing a subpoena for confidential health information must serve the custodian or other record keeper with either a qualified protective order, or with a declaration or affidavit, together with 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;

      (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 written 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) Objections.
Within 14 days from the date of a notice requesting confidential health information, the individual or individual's attorney objecting to the subpoena must respond in writing to the party issuing the notice, stating the reasons for each objection.

(c) 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 must 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 must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must 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 other miscellaneous proceedings, 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 Confidential Health Information.**

(a) Service of a Copy of Subpoena to Patient and All Parties to the Litigation. If the subpoena directs delivery of confidential health records to the attorney or party who issued the subpoena, then a copy of the subpoena must 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 may request a complete copy of the records. Upon request, the records must be promptly provided by the party who issued the subpoena at the expense of the party who requested the inspection or copies.

7. **Inspection of Records Delivered to Court or Other Proceeding.** After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the records may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The records must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. Records that are not introduced in evidence or required as part of the record must be returned to the custodian who produced them.

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

(a) Mail or Delivery by a Non-Party, Along with Declaration. A custodian of confidential 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. Confidential health information records produced when no personal attendance of the custodian is required must 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.

(c) 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 must be specified in the declaration. The custodian must only send records within the declarant's custody.

(d) 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.

9. **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 D4(b) of this rule, the custodian must 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.

10. **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.