**MINUTES OF MEETING**
**COUNCIL ON COURT PROCEDURES**
Saturday, September 14, 2019, 9:00 a.m.
Oregon State Bar, 16037 SW Upper Boones Ferry Rd., Tigard, Oregon

## ATTENDANCE

Members Present:

Kelly L. Andersen*
Troy S. Bundy
Kenneth C. Crowley*
Jennifer Gates
Barry J. Goehler
Hon. Norman R. Hill
Hon. David E. Leith
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Hon. Leslie Roberts
Tina Stupasky
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. R. Curtis Conover
Travis Eiva
Meredith Holley
Hon. Thomas A. McHill
Scott O'Donnell
(1 vacant position)

Guest:

Robert Keating, Outgoing Council Chair
Amy Zubko, 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 Promulgated this Biennium | ORCP/Topics to be Reexamined Next Biennium |
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| ORCP 7<br>ORCP 9<br>ORCP 10<br>ORCP 15<br>ORCP 17<br>ORCP 23/34<br>ORCP 36<br>ORCP 39<br>ORCP 43<br>Discovery | | | |

I. Call to Order

Mr. Keating called the meeting to order at 9:36 a.m.

II. Introductions

All present and on the telephone introduced themselves. A roster (Appendix A) was distributed that includes all current Council members. Judge Peterson asked for members to provide any corrections to Ms. Nilsson.

III. Approval of December 8, 2018, Minutes

Mr. Keating asked whether any Council members had any amendments to the draft December 8, 2018, minutes (Appendix B). Hearing none, he called for a motion to approve the minutes. Judge Norby made a motion to approve the December 8, 2018, minutes. Judge Wolf seconded the motion, which was approved unanimously by voice vote.

IV. Annual election of officers per ORS 1.730(2)(b)

Mr. Keating asked Council members to nominate members as chair, vice chair, and treasurer. Ms. Payne made a motion to nominate Ms. Gates as chair. Ms. Stupasky seconded the motion. Mr. Keating made a motion to nominate Mr. Crowley as vice chair. Mr. Bundy seconded the motion. Ms. Gates made a motion to nominate Ms. Weeks as treasurer. Mr. Bundy seconded the motion. All motions passed unanimously by voice vote.

Mr. Keating noted that, while he was not always successful in convincing the Council to vote to promulgate amendments that he felt strongly about, he appreciated the great collegiality and conversations he had during his time on the Council. Ms. Gates thanked him for his time on the Council, and particularly for his calm and steady presence as chair during these past two years. The Council presented Mr. Keating with a plaque in appreciation for his service. Mr. Keating thanked the Council and left the meeting.

V. Council Rules of Procedure per ORS 1.730(2)(b)

A. Review

Judge Peterson explained that the Council has Rules of Procedure (Appendix C) that were created pursuant to Oregon Revised Statute 1.730(2)(b), and that Council members might want to review them. The rules were revised a few years ago because they were out of date.

B. Council Timeline

Judge Peterson stated that the Council timeline (Appendix D) is the work of Ms. Nilsson. It is a helpful tool to know where we are in the biennium. The only thing that may change is that the monthly meetings are currently scheduled for the second Saturday of each month. If the Council decides to meet on the first Saturday of the month, the timeline would need to be updated.

VI. Reports Regarding Last Biennium

A. Promulgated Rules

Judge Peterson explained that the Council had sent its promulgated rules to the Legislature, which did not hold any hearings nor contact the Council with any questions. Therefore, the promulgated rules will go into effect on January 1, 2020. He noted that this is fairly typical. Judge Peterson explained that the amendments to Rule 7, Rule 16, and Rule 55 involved a substantial amount of work. Regarding Rule 22, only the non-controversial amendments passed.

B. Staff Comments

Judge Peterson stated that he would appreciate the input of Council members about the draft staff comments to the promulgated rules from the 2017-2019 biennium. He noted that, as usual, there will be a caveat at the beginning of the comments noting they are staff comments and they have not been voted on by the Council. However, feedback from the Council regarding any errors or omissions would be appreciated before the October Council meeting. The staff comments are helpful to practitioners and often save them from having to wade through the minutes in attempting to determine the reason that the Council made a change to a rule. Judge Peterson reminded members that the Council decided to resume drafting staff comments in the 2013-2015 biennium after a previous break from issuing them.

C. 79th and 80th Legislative Assembly's ORCP Amendments Outside of Council Amendments and other Legislation Regarding the Rules

1. Rules Amended - ORCP 69

Judge Peterson explained that the Legislature made one change to the ORCP: a change in the citation to the Servicemembers Civil Relief Act in Rule 69 C on default judgments. This was done in a so-called "revisor's bill" that is typically used to fix minor errors in the Oregon Revised Statutes (ORS) and Oregon Rules of Civil Procedure (ORCP).

2. New Statutory Mention of Rules

Judge Peterson stated that he had looked at all of the bills that mention the ORCP (Appendix E), as it is useful to see when the Legislature puts references to the rules into the statutes. The Legislature did not do anything substantive with regard to the ORCP.

VII. Administrative Matters

A. Set Meeting Dates for Biennium

Ms. Gates asked whether any Council member had any problem with setting the meeting dates for the second Saturday of each month. No member expressed a problem with that schedule. Ms. Gates explained that the Council does attempt to have a meeting or two outside of the Portland congressional districts, and asked anyone outside of the Portland area who would like to volunteer to host a meeting to please let her know. She observed that it is good for the public outside of the metro area, as well as members who live outside of the metro area, to have the opportunity to attend meetings elsewhere.

Judge Peterson explained that the Council's authorizing statute once said that the Council should endeavor to meet in all congressional districts, but that it no longer does. However, he agreed with Ms. Gates that it is a good practice. Judge Tookey suggested a meeting in Salem, at Willamette University or at the courthouse. Judge Leith stated that there is a meeting room on the fifth floor of the Marion County Courthouse that would accommodate the Council, but wondered whether that is it far enough away from Portland to make sense. Ms. Nilsson noted that Salem is in a different congressional district than Portland.

Ms. Gates stated that she would work with Council staff to propose a few dates and reach out to members to see who can host outside of Portland.

B. Funding

Judge Peterson explained that the Council receives general funds from the Oregon Legislature, plus travel funds of $4,000 per year from the Oregon State Bar (OSB). Those travel funds typically get used to reimburse the Council's public member and judge members. Many of the lawyer members of the Council live in the metro area and most meetings are held there so, while the Council will try to accommodate lawyer requests for travel reimbursement, the priority is to take care of the public member and judges.

With regard to the general funds from the Legislature, the Council was just appropriated about $52,000 for the 2019-2021 biennium. Judge Peterson stated that this amount is a

little frustrating because he had asked for an increase in the Council's budget this year, but instead the amount was decreased. He explained that Ms. Nilsson is the highest paid hourly employee at Lewis and Clark College, as is appropriate, but that when his stipend is broken down into an hourly wage, he is paid less per hour than Ms. Nilsson. He noted that, at some point, he will leave the role of Executive Director, and he does not believe that another candidate would be willing to take on the role for just $1,000 per month. He stated that he would like to work on an increase in funding with the Council's liaisons from the Oregon State Bar (OSB). While the Council has enough funds for now, this amount is not ideal for the future.

Ms. Stupasky asked whether the Council can pay the Executive Director more in years where there is a budget surplus. Judge Peterson stated that the Council does not lose any budget surplus; there is a restricted fund at Lewis and Clark College where the money resides. He noted that the Council has a small surplus that has accumulated over the past few years, and that some of that money was used to upgrade the website. Ms. Stupasky asked whether the Council can vote to give the Executive Director a bonus if there are extra funds left over at the end of biennium. Judge Peterson stated that he is not comfortable with that. Ms. Gates stated that she did not see anything in the Council's rules that would prohibit that. She asked whether there is usually money left over each biennium. Judge Peterson stated that the Council usually does spend the money it is allocated each year.

C. Council Website

Ms. Nilsson explained that the Council had recently had its website converted to a Wordpress platform. She gave a brief visual demonstration of the new site and showed some of the new features, including improved navigation. She stated that the new platform will allow for faster and easier editing, which will save time for her and for future Council staff.

D. Results of Survey of Bench and Bar: Generally

Judge Peterson informed Council members that, during a time when the Council was under the umbrella of Legislative Counsel for purposes of funding, the Legislature required the Council to meet key performance measures and, as part of that process, to find out from its stakeholders where improvements could be made. Although that is no longer a requirement, the Council has found a biennial survey to be a helpful practice and a good source of information about what rules are not working correctly and efficiently.

Last biennium, Council staff changed the survey with help from our former public member, a person with experience with surveys and data analysis. The changes made the survey more specific. The results of this biennium's survey (Appendix F, Appendix G)

appear to show that, In terms of the rules promoting the just determination of every action, the Council is not doing a bad job. In terms of promoting the speedy determination of every action, it does not appear to be doing as well. And, in terms of facilitating the inexpensive determination of every action, it appears to be doing even less well. Judge Peterson remarked that all Council members should pay attention to whether any potential rule changes will make the disposition of cases more prompt and less expensive in order to serve the public good. He noted that it is lawyers and judges who were polled and are saying that the rules are not doing the best job they could be doing.

Judge Peterson noted that, in terms of familiarity with the composition of the Council, it appears that the bench and bar are not familiar. In terms of rating the quality of the Council's work, many respondents said "fair," although he himself believes that the Council does a good job. In terms of responsiveness to the needs of litigants, more respondents agreed that the rules work to the favor of litigants than to the favor of lawyers. The lawyers and judges who did respond seem to think that the Council is doing a good job for them. About two thirds of the respondents had never visited the Council's website, and those who had were not completely pleased with it in terms of usefulness, which is frustrating.

Ms. Nilsson noted that part of the comments about the website may be a function of the Internet age, where users are accustomed to having everything readily at their fingertips. She pointed out that some comments spoke about the need for the website to be easier to search and for documents to be easier to find. One respondent even suggested that the Council should "get with the 21st century" and get an app. Ms. Nilsson agreed that this would be a worthwhile goal for some time in the future but noted that, at present, the Council has two very part-time staff members without those skills, and not a lot of extra funding to hire someone to create such an app. She stated that she is continually trying to improve the searchability of the website; however, the Council's history is based on old paper documents that must be saved and stored on the website in PDF format. There are certain built-in limitations when dealing with documents in this format.

Ms. Payne asked whether there has been any thought to the fact that the survey's data may not be statistically significant because of the small number of responses. Judge Peterson stated that this is absolutely a fair point, as some people took the survey, but many ignored it. He posited that it may be those who feel strongly about certain issues, perhaps in a negative way, who have a greater interest in responding. He stated that he is not sure how the Council can encourage a broader response but that he is open to hearing ideas. Judge Norby noted that she was a bit concerned when she read a comment that stated that the Council should have practitioners working on the rules. It gave her pause that someone with no idea about the composition of the Council was commenting on its composition.

Judge Peterson observed that many of the respondents specifically asked for staff comments, which were done away with before his tenure on the Council, partly because of *Portland General Electric Co. v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), but which have been back since 2013. Judge Peterson noted that a few of the survey comments are outside of the Council's purview, including one suggesting continuing legal education seminars for judges. Judge Hill pointed out that judges would actually find it very helpful to have trained, effective advocates who could teach the court the rule they would like to be applied. He stated that it is always surprising to him when attorneys complain about a judge's knowledge about an issue, since it is an attorney's job to teach the judge about that issue. Judge Wolf agreed, and noted that it would be even better if these advocates could cite the applicable rule.

Ms. Gates asked whether it would be indicated in the survey data if the same person made comments about different topic headings. She specifically wondered whether the different comments regarding family law had been made by the same person, and stated that it would be nice to have a member of the family law bar on the Council. Judge Peterson observed that the attorney Council members appointed by the OSB are supposed to be evenly split between the plaintiffs' bar and the defense bar, so family law practitioners do not really have a spot, and the Council relies on the expertise of the judge members in that area.

Judge Norby wondered whether it would make sense to distribute the survey differently. Since there are so many organized bodies with different areas of specialty, she asked whether the Council should distribute the survey to the leaders of those organizations, perhaps to have them review the survey at one of their meetings to give the Council better feedback. Judge Hill stated that this is an interesting idea, because it would allow the Council to track responses based on practice areas. For example, the OSB's section on Real Estate and Land Use might have a different perspective than the Family Law or Litigation sections. Ms. Payne suggested allowing five minutes at a convention or annual meeting for every member to fill out a survey.

Judge Roberts observed that the bar is composed of lawyers with varying degrees of involvement and experience in litigation. If a survey respondent says that the rules are difficult to understand but has only been in court once, she does not see that as a significant comment that would require the Council to make a change.

Ms. Gates asked Council members if they wanted to ask the staff to work on a new way of distributing the survey. Judge Norby asked whether the OSB keeps a list of leadership positions in different sections. Ms. Zubko stated that it does, and that she or Matt Shields, the Council's OSB liaison, could assist the Council. Ms. Payne suggested that the Oregon Trial Lawyers Association (OTLA) and the Oregon Association of Defense Counsel (OADC) could encourage members on each side to fill out the survey. Ms. Weeks suggested that

having a Council member personally attend a section's annual meeting and discuss what the Council does and the importance of the survey could potentially have a greater impact. She stated that she was not aware that the Council existed until she attended a CLE with Judge Peterson as a presenter. Discussing the work of the Council in person might increase the buy-in, especially with younger generations of lawyers. Having the impetus presented where it cannot be ignored makes it easier for someone to follow through. She stated that it might be worth the extra work to get better comments and feedback over time.

Judge Peterson stated that he happened to be invited to the consumer law section's meeting with the Attorney General and he announced the upcoming survey there, but he was not sure if it made a difference. He stated that it would probably not be too difficult to distribute the survey a bit differently. He observed that most Council members are probably members of some of the most appropriate organizations and could discuss the survey with members of those organizations. He asked that any Council members with polling and survey interest or expertise contact staff before the next survey in two years.

Ms. Gates asked whether Council members are allowed to ask the OSB for contact lists for sections and annual meeting information. Ms. Zubko stated that annual meetings happen mostly in the fall. She stated that she can provide a list of section chairs, which is also available on the OSB's website. In terms of scheduling, section meetings are public meetings and the OSB can get that information to the Council as well. Judge Norby suggested that this might be a project for the Council during the slower part of the odd-numbered year of the biennium. Ms. Zubko pointed out that the section chairs switch every year, and that some sections are litigation-focused and some not. She noted that she and Mr. Shields are happy to help the Council determine which sections to contact. Judge Peterson noted that the Council has been sending the survey to selected sections, including Litigation, Business Litigation, Family Law, and Probate. He stated that the goal has been to target section members that might walk into a courtroom once in a while, plus all judges. He stated that this might be a mistake, although he thinks that the number of uninformed comments will not be improved if the survey is sent to sections whose members virtually never go to court.

Mr. Andersen stated that, by his calculations, just .02% of the entire bar had responded to the survey. He noted that many respondents skipped question 12 regarding the website, as well as questions eight and nine on responsiveness. Mr. Andersen pointed out that a survey is not of any value unless the participants approach a fairly weighty number. He does not believe that the Council should adjust its practices as a result of this survey, because participation was so small and so many questions were skipped.

Judge Peterson stated that the cost of the survey to the Council is virtually $0, as the OSB assists with design and helps with distribution at no cost, while Council staff assembles

and tabulates the results. He noted that the survey does provide the Council with suggestions for rule changes, many of which are valuable. And he also mentioned that, as one former Council chair wisely pointed out, one of the most important functions of the Council is to take bad suggestions and make sure they never come to light. Judge Roberts stated that, if the chief value of the survey is to solicit suggestions, it might be better to simply periodically send to the bar an explanation of what the Council does and request that bar members contact the Council with suggestions for improvement.

Judge Peterson also suggested that the percentage of responses may not be as bad as it appears because the survey did not go out to the whole bar, but only selected sections whose members typically use the ORCP. He agreed with the suggestion that it could be helpful to prepare the bench and bar for upcoming surveys and offered Council staff assistance with that process. Ms. Gates stated that she would talk more to staff about trying to set up a timeline on contacting OSB sections. She also asked Council members who want to join in that conversation to let her know.

VIII. Old Business

A. ORCP/Topics to be Reexamined Next Biennium

1. ORCP 7

Judge Peterson stated that the Council had received a suggestion (Appendix H) regarding Rule 7 from Holly Rudolph, who drafts forms for the Oregon Judicial Department (OJD). He explained that she is the person who creates forms for self-represented litigants in the court's Odyssey online case management system. She was happy that the Council modernized alternative service, but she believes that a plaintiff or petitioner should be able to complete substitute or office service by handling the follow-up mailing. Judge Peterson stated that he has explained to Ms. Rudolph that this is not what the rule says, but he told her that the Council did change the rule last biennium to make it clear that an attorney may complete substitute or office service by mailing and also service to a mail tenant.

Judge Peterson stated that Ms. Rudolph also had a concern about whether limitations in Rule 7 E impact alternative service. He observed that Ms. Rudolph made the good point that, in cases of where a plaintiff attempts to serve by social media or text message, the respondent may block an unknown number. However, he explained that the change to Rule 7 D(6) states that alternative service is under the direction of a judge, so the plaintiff needs to tell the judge why he or she believes it will be effective if service is from the plaintiff, and the judge will decide on a case-by-case basis. He stated that he believes that the Council solved this aspect of Rule 7 last biennium, unless other issues arise.

Ms. Gates asked whether there were any other issues regarding Rule 7 that need to be addressed. Ms. Nilsson pointed out that some additional suggestions regarding Rule 7 had come in on the survey. Because suggestions for amendment of different rules were received by the Council from various sources and were listed by source on the agenda rather than grouped by rule, she suggested that the Council examine all suggestions for amendment of a specific a rule, regardless of source, as soon as the first reference to that rule comes up on the agenda.

Ms. Weeks stated that, in the practice where she works, lawyers and staff often have longstanding relationships with opposing counsel and request that they accept service. Rule 9 partially governs that, but there are no specifications as to when service is deemed completed unless or until an acceptance of service is received. In effect, opposing counsel can control the date of acceptance. She stated that legal staff would love to see a clarification specifically relating to acceptances. She stated that it does not necessarily relate to extending or shortening timelines on service, but it would be nice to have an authority that can be cited regarding when service was effective. Judge Peterson asked whether she was referring to an acceptance of summons. Ms. Weeks stated that she was. Judge Peterson observed that this is similar to the last suggestion from the survey regarding Rule 7, "adopt waiver of service rules similar to FRCP 4 D." He stated that he believes that this already exists in Rule 7 F(3), but noted that the federal rule is longer. Judge Leith asked whether the federal rule also includes a provision about shifting the costs if the request for a waiver is unreasonably withheld. Judge Peterson stated that it does.

Judge Roberts observed that the Council just made some very significant changes in parts of Rule 7, and it would be nice to have some time go by to see how the bench and bar react to those changes. She stated that service is not easy and it takes a while for the bar to learn what is there and to apply it well. She opined that to keep tinkering and requiring everyone to go back to school every two years on service is not beneficial. Mr. Crowley agreed with Judge Roberts that the Council made some pretty big changes last biennium. While he likes the federal rule, he wondered whether Oregon really needs to adopt something similar at this time.

Judge Peterson noted that there were several suggestions regarding Rule 7 from the survey and asked that Council members review them. He pointed out that a few had already been resolved by the Council's amendments to Rule 7 last biennium. Judge Leith felt that the suggestion regarding adding a waiver of service provision like the federal rule is worth discussing. Ms. Payne stated that she thought that it would be helpful to form a committee on Rule 7. Ms. Weeks, Justice Nakamoto, Judge Leith, Judge Wolf, Mr. Young, and Ms. Stupasky agreed to

join the committee. Ms. Weeks agreed to chair the committee.

2. ORCP 15

Judge Peterson explained that, last biennium, there was an unresolved question regarding what Rule 15 covers. He stated that he believes that it covers responses to pleadings, but noted that there are many motions throughout the ORCP and that Rule 15 D clearly does not relate to all of those motions, like a motion for a new trial or a judgment notwithstanding the verdict. He stated that a party cannot move to extend those timelines but, in terms of responding to a complaint with an answer or motion, a party can move to extend those timelines. Many hard timelines exist in the rules that are not obvious, and there are some that are movable.

Ms. Payne pointed out that Rule 15 does apply to attorney fee statements. Judge Peterson noted that this is now spelled out specifically in Rule 68. Ms. Payne brought up the Oregon Court of Appeals case, *Ornduff v. Hobbs*, 273 Or App 169, 359 P3d 331 (2015), that ruled that Rule 15 does apply to attorney fee statements. Judge Peterson opined that this opinion was perhaps not very well considered, and that the Council's 2013-2015 biennium amendment had remedied the absolute inflexibility of Rule 68's time limits, but he agreed that Ms. Payne had a point. He stated that his concern is that a party may move to extend some timelines but not others, but Rule 15 D seems to say that a party may ask to extend any timeline. He explained that, last biennium, he had compiled a list of hard v. not hard timelines in the ORCP. Some rules, like Rule 63 or Rule 64, do not specify that their timelines are fixed. A few rules indicate that their timelines are flexible. However, in many rules that include a deadline within the rule, flexibility or the lack thereof is not specified. He stated that it would be a challenge to rework Rule 15 to cover them all.

Mr. Goehler posited that such situations would be covered in Rule 15 D, which allows any other motion after the time limited by the procedural rules. He stated that he would think that the inflexible times are not procedural. He asked whether Judge Peterson's issue is already covered if it is parsed that way. Judge Peterson stated that Mr. Goehler may be right. He did express concern that, for those who are not learned in the law, like self-represented litigants, this issue could be problematic. A self-represented litigant could simply rely on Rule 15 D and move for an extension of time, and it would be unlikely for them to be able to figure out if it is procedural or substantive. Ms. Payne pointed out that there is frequently case law and that people have to educate themselves on what the case law is. She did not believe that the language needs to be inserted right into Rule 15 and expressed concern about changing it. She stated that, if a committee is formed,

she would like to be a member. Judge Leith stated that he was also disinclined to make such a change. Mr. Goehler stated that he would also volunteer to join the committee.

Judge Roberts asked what rules are being referred to. She noted that ORCP 68 involves the time for an attorney fee statement, which is governed entirely within the scope of that rule. She stated that there are statutory jurisdictional limitations, and that those are not in the scope of the rules. She wondered what instances exist where there is an invisible inflexibility. Judge Peterson stated that, in terms of Rule 63 and Rule 64 with new trials and judgments notwithstanding the verdict, the case law is pretty clear that they are inflexible timelines. Judge Roberts stated that those limits are statutory. Judge Peterson wondered whether they are based in statute, because they are now stated in the rule. Judge Roberts stated that she believes that they come from the statute. Judge Peterson also reminded the Council that former member Jay Beattie had raised the issue last biennium of a statute containing a statute of limitations that was repealed but incorporated into one of the ORCP and, therefore, that rule's timeline would probably not be flexible.

Judge Wolf asked about the survey suggestion regarding Rule 15. He stated that the suggestion seems to conflate Rule 15's 10 days to respond to a pleading with the Uniform Trial Court Rule (UTCR 5.030) allowing 14 days to respond to a motion, which are technically different things although people use them interchangeably. Judge Peterson agreed, but explained that the Council had resolved the apparent concern raised in the suggestion last biennium when it amended Rule 15 A regarding cross-claims. In reworking section A, the Council found the last sentence to be confusing. The Council examined the history of the rule, and, before 1994, it appeared that a reply to a counterclaim was due within 10 days. In 1994, the Council amended section A, specifying 30 days in which to rely to a counterclaim; however, the last sentence in section A retained the same 10 day language. The only thing the last sentence could refer to was a reply to an affirmative defense, when appropriate. The Council came to a consensus that replies to any pleading should be due within 30 days.

Ms. Payne stated that she knows that the Council amended Rule 68 to address the timeline issue, but she again pointed out that the *Ornduff* case states that a statement for attorney fees is a pleading because it is a written statement by the parties of the facts constituting their respective claims and defenses, and that is why it falls under ORCP 15 D. Judge Peterson agreed that there is existing case law that widens the scope of Rule 15 and that there are surprises buried in there for those who think that they can extend some timelines.

Judge Hill asked Ms. Payne why she felt that this is not something that needs to be clarified. Ms. Payne stated that she does not know whether it needs to be clarified. Judge Hill pointed out that the plain wording of Rule 15 D refers to pleadings and motions, and stated that the distinction between a pleading, a motion, and a petition would be lost on most practitioners. Until 30 seconds ago, he himself would not have thought to parse it that carefully. In fact, he would have assumed he could have extended any timeline if he could show good cause, which is in the spirit of Oregon's rules generally: in Oregon, we do not play "gotcha." He opined that the bench and bar would be served by making the rule explicit and clear.

Judge Peterson suggested that, if the Council could determine what the inflexible deadlines are, it could add a section to Rule 15 to say that the deadlines in certain rules cannot be extended. Ms. Payne stated that she believes that it is a bad idea to enumerate other rules within the ORCP because it is easy to leave some out. Plus, they are generally statutory, so the Legislature has control over it, not the Council. Judge Peterson pointed out that the rules are the purview of the Council. Judge Roberts agreed that the rules are the purview of the Council, but noted that they cannot conflict with the statutes. Judge Hill wondered what ORCP 15 even means, then. Judge Roberts stated that pleadings are defined. Judge Hill asked why the Council does not reference that in that rule. Judge Wolf stated that Rule 15 D refers to both pleadings and motions, whereas Rule 15 A only deals with pleadings, so there is a difference. He stated that he sees what Judge Hill is saying, that it looks like a party can extend the deadline for any pleading or motion. He agreed that there are apparently traps, although one such trap has been unsprung by the Council's changes to Rule 68.

Judge Hill stated that he would be happy to serve on a Rule 15 committee. He did not necessarily agree that there is a clear definition of pleadings. Rule 13 states that pleadings are "the written statements by the parties of the facts constituting their respective claims and defenses." He noted that this is clearly a complaint and answer, but wondered why it does not include a statement for attorney fees. Judge Wolf stated that section B does enumerate other documents, such as third-party complaints and cross-claims, but not statements for attorney fees. Ms. Payne observed that, according to the Court of Appeals, a statement for attorney fees is a pleading.

The Council agreed to form a committee on Rule 15. Ms. Payne, Mr. Goehler, Judge Hill, Judge Roberts, and Judge Peterson agreed to serve on the committee. Ms. Payne agreed to chair the committee.

3. ORCP 17

Ms. Gates explained that former Council chair Brooks Cooper raised a concern with regard to Rule 17 D(3) (Appendix I). He notes that there is that there is a time period during which a party can withdraw language from an allegation or pleading they filed and avoid sanctions, but the subsection applies only to a party and not to an attorney. However, the language regarding sanctions in the remainder of Rule 17 applies to both parties and attorneys. The question is whether the rule can be changed to allow attorneys the same opportunity to withdraw allegations or pleadings and avoid sanctions. Judge Peterson stated that he had looked at other parts of Rule 17 and he could not determine whether it was intentional to leave off attorneys in Rule 17 D(3) or not, because most other parts of the rule say "party or attorney."

Ms. Gates read the relevant language from the rule: "Notwithstanding any other provision of this section, the court may not impose sanctions against a party if, within 21 days after the motion is served on the party, the party amends or otherwise withdraws the pleading, motion, document or argument in a manner that corrects the false certification specified in the motion." She noted that this does not create the same 21-day opportunity to withdraw and correct for an attorney certification as is allowed for a party's statement.

Judge Peterson stated that it seems to him that, if a party is represented and they withdraw the document or allegation that provoked the Rule 17 motion, then the attorney would be absolved also, but the attorney cannot do it without the party's permission. However, he stated that he did notice that Rule 17 D(2) and Rule 17 D(4) use the term "party or attorney," so he is not sure if the difference was intentional or an oversight. Ms. Gates stated that she could see it being intentional out of concern about allowing an attorney to make a false certification and then just pull it back. Judge Hill agreed that it appears that the rule creates a safe harbor for a client or self-represented litigant, but keeps attorneys on the hook. He stated that he had never thought of it that way before.

Ms. Nilsson suggested that she and Judge Peterson look at the history of Rule 17 to try to determine whether the difference in language was intentional or not. They will report their findings at the next Council meeting.

Mr. Bundy posed a question about Rule 17 D(3). He stated that he deals with it from time to time when lawyers file lawsuits against physicians or other professionals. As he reads the rule, if he were to file a motion challenging an allegation and the plaintiff does not withdraw that allegation within 21 days after he serves the motion, and he loses, he pays fees. However, if he wins, he does not

get fees. He stated that he does not understand why that would be. Ms. Gates suggested that it may be to discourage filing motions for sanctions except those motions that are most likely to succeed. Ms. Payne asked whether Mr. Bundy would get fees if he succeeded on his motion for sanctions, because Rule 17 D(4) includes reasonable attorney fees for sanctions. Mr. Bundy stated that perhaps Ms. Payne is correct, that it goes a little bit farther. Ms. Payne pointed out that, according to Rule 17 D(4), sanctions must be limited to amounts sufficient to reimburse the moving party for attorney fees and other expenses incurred by reason of the false certification, so it seems that the rule contemplates that fees would be awarded if a party is successful. Judge Wolf noted that this is an additional amount; a party can be awarded reasonable attorney fees for the motion and for whatever the false certification cost them and, if the party can show wanton misconduct, the party gets an additional amount sufficient to deter that conduct in the future.

Judge Hill stated that it makes sense in the first scenario that a party would have to pay fees because that party created a new motion and there will be evidentiary hearings, and that party has nothing to lose. He stated that it makes sense to build in a penalty. Mr. Bundy stated that this satisfies his concern.

Mr. Bundy explained that another issue that comes up from time to time involves experts. He stated that the assumption in the practice of professional negligence is that there must be an appropriate expert who is certifying that the allegations in the complaint are accurate, and he is not so sure that everyone sees it that way. He stated that there are occasions where, if a party does not have an expert at that point in time, they can certify under Rule 17 C(4) that they do not, and then they have an additional period of time in which to obtain an expert opinion. He stated that he does not know if that is the consensus, and that he has had rulings in the other direction. He wondered what the consensus of the Council is: does Rule 17 C(4) require an attorney who files a claim that requires an expert's opinion to file a statement that they do not have an expert along with the complaint, as that party would under Rule 47 E if he were to file a summary judgment motion?

Judge Hill stated that the substantive statute requires an attorney to put the certification in the complaint. And, if it is not true because the attorney does not have the expert, it seems to him that it now falls within this rule. If they do not have an expert, the safe harbor gives them the opportunity to say that they will get one and avoid the sanction. Whether that makes the pleading subject to another motion for failure to state ultimate facts is another question, but it seems to him that it would take it out of that subsection.

Mr. Andersen stated that, when representing plaintiffs in medical malpractice cases, the test is ORCP 47. If the defense feels that the plaintiff does not have an expert or feels that there are grounds for summary judgment, the defense can move for summary judgment and the plaintiff must certify that the plaintiff has an expert. He stated that there is no other requirement anywhere in any of the ORCP that requires the plaintiff to certify that they have an expert. On the plaintiff's side, that has been resisted for years because plaintiffs do not want to disclose who the expert is for fear of discouraging experts from testifying. He opined that Mr. Bundy may be trying to read more into Rule 17 than exists. Mr. Bundy explained that there is some belief in the plaintiff's bar that expertise is required in order to even support a specific allegation of negligence such as the failure to use a medical device appropriately. If a plaintiff is going to make those allegations, they need to have that expert opinion at the time they file the pleading.

Judge Hill pointed out that this is a different question. He stated that he is not well versed in medical malpractice cases, but noted that construction defect design professionals and realtors have lobbied for specific statutes that say that, before a party files a case, they need to have an expert and state in the complaint that they have an expert. Ms. Stupasky pointed out that there is no specific statute for medical malpractice that says that. Judge Hill noted that the existence of that statutory requirement puts Rule 17 in play. In the absence of such a statutory requirement, Rule 17 does not necessarily come into play unless the statement is not factually accurate. Judge Hill observed that Mr. Bundy's question seems to be whether it is enough that the statement is true or whether the plaintiff is required to have evidence that they are prepared to put on before the case is filed. Mr. Bundy agreed that this is the question, and stated that he believes that Rule 17 C(4) requires a factual assertion that a party is making in a pleading and, if the party does not have the evidence to support it, he believes that the party has to say that or say that they do not have an expert but will get one.

Judge Hill stated that Mr. Bundy is essentially asking what "supported by evidence" means: does it mean that there is a witness who is prepared to testify? Mr. Goehler observed that he has always looked at Rule 17 C(4) as requiring that a party plead what they have evidence of, and everything else is "upon information and belief," i.e., is based on inference or something that will eventually be supported. Mr. Bundy stated that "information and belief" is the key phrase, because you can have a belief in something but that does not mean that you are qualified to have an opinion on it. He posited that the plaintiffs' bar and defense bar just read Rule 17 C(4) differently. His argument has been that Rule 47 E spells out specifically what is needed. Why have Rule 47 E at all if an expert is not needed? Why is it up to the defense to file a Rule 47 motion demanding an affidavit to get rid of a case that should not have been filed in the first place if

there was not an expert to support it? He stated that there are many negligence cases that get filed without expert support, and doctors and nurses must report to their board, insurance company, and hospitals, and their credentialing comes into question. He stated that the filing of the lawsuit alone is an allegation that they have not met the standard of care and have behaved unprofessionally. Mr. Bundy argued that, when plaintiffs file cases without support and argue that they do not need to put in a Rule 17 C(4) certification attesting to the fact that they do not have an expert, it does not wash with ORCP 47 E.

Mr. Andersen opined that the answer to Mr. Bundy's concern is not for the Council to write into ORCP 17 a requirement that is not there. It is a up to the Oregon Medical Association to go to the Legislature and ask for a statute similar to what real estate agents have obtained in real estate transactions. He noted that there can be good faith reasons to file a case, such as someone who comes in on the eve of the statute of limitations or the rare case where expert testimony is not required. Mr. Andersen noted that the real test has always been ORCP 47. He stated that he has never encountered a request by any defense attorney to put in a certification under ORCP 17 C(4).

Mr. Bundy replied that the question is not whether you certify that you have an expert, but whether you use Rule 17 C(4) to say that you do not have one but that you expect to have one on information and belief. If there is a concern about filing up against the statute of limitations, this falls under Rule 17 D(3), which states that, if the complaint is filed within 60 days of the running of the statute of limitations, a plaintiff has 120 days to back up the case. He stated that he is not saying that the rule *should* require a certification that a plaintiff has an expert, but that the rule *already* says that: when you sign your name on a document you are attesting to the fact that you have an expert who has backed up the particulars of negligence alleged in your complaint. Mr. Andersen disagreed that Rule 17 C(4) says that; nowhere does it say that a plaintiff must have an expert to back up every detail of the case at the time the case is filed. He stated that reading the rule that way creates a different test or standard for professional negligence cases than for any other case, and Rule 17 C(4) applies to every case. He stated that he does not believe that the Council can read the rule to have a different requirement for medical malpractice cases than for other cases.

Justice Nakamoto asked whether the defense bar has ever litigated the application of Rule 17 C(4). Mr. Bundy replied that he has filed motions based on it and had a judge make a determination that he was incorrect about the rule and that the plaintiff did not need to have an expert at the time they filed. This surprised him because of the devastating consequences that it can cause when an attorney files a claim and does not have a reasonable belief that the claim can be proven. Justice

Nakamoto agreed that there seems to be a fundamental difference in the reading of the rule, and wondered why Mr. Bundy had not taken the issue up to the appellate courts.

Judge Roberts stated that it seems significant that the design professionals' lobbyist got busy and got a specific statute passed. If the Legislature wants that, they can take it up. It is not just doctors who are harmed by the filing of a lawsuit against them, and they do not need special protection. The rule requires that the allegations should be based on some factual background but does not require a particular kind of evidence. It does not even require that the evidence be admissible, just that there is a substance to it. If your family doctor says that they would never get involved in litigation or testify, but that the doctor they referred you to was negligent, there is nothing under Rule 17 that would suggest that filing a lawsuit based on this information is filing in bad faith. A defendant can file for summary judgment if that defendant does not think it is a worthy case.

Mr. Bundy observed that there is no lawyer in the world who would know if a Caesarian section was performed or ordered in a timely way. Judge Hill stated that he understands the expert distinction that Mr. Bundy is making, but suggested that it leads the Council astray. He agreed with Judge Roberts that the issue is larger than that. It turns on question of what the phrase "evidence" means in Rule 17 C(4): does it mean admissible evidence? He does not believe that the Council needs to clarify this issue because the Court of Appeals is going to deal with this in the appropriate case. Judge Hill suggested that it is better to leave Rule 17 alone in this aspect.

Judge Peterson noted that, if Mr. Bundy's concern is simply that the plaintiff does not include "on information and belief" at the beginning of the challenged allegation and should be sanctioned for that, that is one thing. But if the concern is that a plaintiff must have that evidence, that is not a procedural change; that is a substantive change. That means that there is a class of plaintiffs who might not have a case because of a rule change that the Council makes. Ms. Stupasky stated that, in her more than 30 years of practice in medical malpractice cases, she has never had a defense attorney argue that she must somehow include in her complaint a specific allegation that she has the experts that she needs. It is new to her that this is something that the defense bar needs. She agreed that this would clearly be a substantive change, and the Council cannot make substantive changes.

Judge Leith stated that it seems like the Council is trying to resolve the issue today; however, the question today is whether to create a committee. He pointed out that the Council will not resolve any of the issues on the agenda today. Ms. Gates thanked Judge Leith for helping the Council move along. The Council decided not

to form a committee to investigate Mr. Bundy's issue.

4. ORCP 23 C/34

Ms. Gates explained that there was both a comment from the survey regarding Rule 23 as well as a carry-over item from last biennium. Judge Peterson stated that the Council had determined last biennium that there was a problem with Rule 23 that needed to be addressed, but that it was not appropriate for a rule change because it was substantive. The issue involves defendants who die quietly before the statute of limitations passes, so a plaintiff unknowingly files a lawsuit against a deceased defendant rather than against the estate, and the statute of limitations runs before the error is discovered. It is a trap for the unwary and hard to defend from a public policy perspective. He stated that the Council felt like a recommendation needs to be made to the Legislature from the Council, perhaps in the Council's transmittal letter to the Legislature. However, the Council did not have time to complete this task last biennium.

Ms. Stupasky agreed that this is really a terrible trap for everyone. Mr. Goehler asked whether the change would basically be like a tolling statute to give time for an estate to be set up. Judge Roberts suggested that amending the case to substitute the personal representative for the defendant could relate back. Judge Leith noted that the Legislature prefers concepts, not draft language. Judge Tookey agreed and suggested that the Council describe the problem and propose a solution, but not specific language.

The Council formed a committee to draft a proposal to the Legislature. Mr. Andersen, Judge Roberts, and Mr. Crowley agreed to be on the committee. Mr. Andersen agreed to chair.

Ms. Gates then addressed the survey suggestion, which requested that the Council amend ORCP 23 to require a defendant to seek leave from the court in order to add new defenses when responding to an amended complaint. Mr. Goehler stated that, as he understands the law, every new pleading erases any previous pleading. Even if the amendment to a pleading just changes a typographical error, his answer to the amended complaint is a new pleading and can assert new defenses. He also believes that this is a substantive issue. Ms. Gates stated that, as a plaintiff's lawyer, she definitely contemplates whether she should amend, and when, in order to avoid that issue. Mr. Bundy agreed with Ms. Gates' sentiment and opined that he does not have to wait for an amended complaint to allege a new defense. He stated that the plaintiff has the right to challenge whether he is raising the new defense at the correct time, and a judge will make that determination. Judge Hill and Judge Peterson pointed out that this is not the case

if the other side files an amended pleading; the defendant has an absolute right to respond.

Judge Leith asked whether the court has discretion to prevent the defendant from going beyond answering the new amendment. Ms. Payne stated that she believes this is the question. Ms. Gates observed that the plaintiff could make a motion. Judge Hill asked what the legal basis for such a motion would be. Ms. Gates replied that the basis could be that it is too late and that discovery has been closed. Judge Hill stated that he is not very sympathetic to a plaintiff in this case, because they amended the pleading right before trial. If the plaintiff is going to amend the complaint to include a new claim or change the claim, that opens the door to let the defendant do what they want. If a plaintiff does not want to take that risk, they should not amend their complaint. Judge Leith pointed out that, frequently, the amount of damages is not determined completely until the eve of trial and is addressed with a very simple amendment. Judge Hill noted that this can be done by interlineation. Judge Leith opined that the fact of that amendment does not create a no-holds-barred situation. Judge Hill stated that perhaps adding new defenses would not be allowed in this context because it is done by interlineation, merely to change the amount of damages. Ms. Stupasky observed that, if any amendment opens the door, even an amendment by interlineation to change the amount of damages would allow the defendant to now say, for example, that they are not liable for the crash. Judge Hill agreed, and stated that the plaintiff would then have to decide whether to ask for a continuance. He stated that he struggles with the notion that one side can change the terms of the discussion but the other side cannot.

Ms. Payne pointed out that the plaintiff has to ask for leave to amend the complaint, but the defendant is allowed to do so freely in any manner. She stated that this is where the injustice is felt, that the defense now has a free-for-all to add any claim or to change defenses because the plaintiff was allowed to amend with leave of court. Judge Hill stated that, to carry that even further, if the defense files an amendment and amends their affirmative defense or counterclaim, the plaintiff has an unlimited right to file a reply. Ms. Stupasky replied that the plaintiff only has the right to respond to that defense because that is what a reply is. Judge Hill posited the following scenario: the plaintiff files a claim, the defendant files a response, the plaintiff files a reply, the defendant amends the answer, and the plaintiff gets to file an amended reply that is not just limited just to the thing that was changed in the answer, but could be anything. Mr. Andersen pointed out that replies are rarely filed. He stated that this is like a situation where one out of a thousand people in a room has an infection, but we insist on giving antibiotics to everyone in the room. The commenter is that one person in a thousand and the Council does not need to change the whole process because one person has

encountered an abnormality.

Judge Roberts suggested that there is enough concern to form a committee. Ms. Gates, Mr. Bundy, Ms. Payne, and Judge Leith agreed to be on the committee. Ms. Gates agreed to chair.

5. Discovery

Ms. Gates explained that it has been a tradition of the Council to have a standing committee relating to discovery matters, and that there were also several suggestions made by survey respondents regarding discovery matters. The Council began to examine those suggestions.

The suggestions from the survey included several encouraging Oregon to adopt Interrogatories. Judge Peterson noted that there is a strong sentiment among Oregon practitioners that interrogatories increase cost. Mr. Goehler discouraged the Council from pursuing this suggestion. Council members agreed. Ms. Gates observed that there were also suggestions regarding expert discovery. She stated that Oregon practice versus federal practice has also been discussed many times and that there has been no strong sentiment for this. There was a general consensus among Council members that there is still not a strong sentiment for it.

Ms. Gates stated that she understood the suggestion with regard to the timing of receipt of the expert's file but, to her knowledge, there is not a single rule that would guide a practitioner. Judge Hill stated that this is left to the trial court's discretion, depending on the nature of the case. He opined that any rule that the Council would write would simply reiterate that it is up to the court. Mr. Goehler noted that it is more like a rule of evidence in practice.

Judge Peterson stated that there was a suggestion that organizational depositions under ORCP 39 C(6) need less draconian sanctions, but he was unable to determine what those sanctions are. Mr. Goehler stated that the rule requires a lawyer to have the person prepared to answer the specific topics. When they show up with a blank stare on their face because they have not done that preparation, sanctions are already built in as a standard discovery sanction. He stated that he does not think that there needs to be anything more added.

Ms. Gates observed that the subject of proportionality has been discussed extensively by the Council over the last two biennia, but she asked any new members who feel strongly that it needs to be taken up again to please let her know. No Council members appeared eager to revisit the issue. Mr. Goehler asked whether the topic of privilege logs has been addressed before. Judge Peterson

replied that the Council had examined the issue a while ago, but that it had gone nowhere. Ms. Gates stated that, with regard to objections to deposition questions, there appears to be an existing remedy in the Supplemental Local Rules of various counties.

Judge Peterson wondered whether this might be the first biennium that the Council will choose not to form a discovery committee. Mr. Goehler opined that discovery in Oregon is good. Sanctions are rare in Oregon, but are frequent in Washington, which increases the time and cost of litigation and decreases the civility between counsel. He suggested that a committee may not be necessary.

Mr. Crowley stated that he has been one of the strongest proponents of proportionality, but that it has not happened. He thinks that this does have a lot to do with why discovery in Oregon is becoming more and more expensive, and the Council has received comments about that from the bar. However, he does believe that, although the concept is not incorporated into the ORCP specifically, it has been incorporated in practice more and more over the last five or six years. He stated that he has been seeing state judges being more responsive to the concept in light of the increases in cost that e-discovery generates. In practice, it is something that is getting more respect and other progress is being made. It is his feeling that it is not necessary for the Council to have that discussion again right now. Ms. Gates stated that her position is to wait a few years to see how the federal rule change plays out and what Oregon judges might be doing in response to arguments pointing them to that rule.

Judge Peterson observed that it has become pretty clear over the last two biennia that, if there is a rule change that is perceived to benefit one side of the bar over the other, the side proposing the change needs to have unanimity within its six members, plus 80% of the judges and the public member to reach a super majority in order to promulgate a rule change. He suggested that the Council might need to behave a little more like a legislature and have a compromise where both sides can get a change that they want. He suggested that perhaps the Council should wait to take up discovery issues until such time as another issue can be offered by the other side as a compromise. Judge Peterson stated that, while the Council has had some really good discussions regarding discovery, no rule changes have came out of any of the more controversial aspects of it.

Ms. Gates asked if there was interest in pursuing the suggestion that ORCP 44 should allow discovery of a plaintiff's conversations with their treating providers in personal injury and medical malpractice cases. Ms. Payne observed that the Council has had many interesting, but ultimately unproductive, discussions regarding Rule 44. Mr. Young stated that the comment appeared to be in response

to the recent case of *Hodges v. Oak Tree Realtors*, *Inc.*, 414 P3d 410 (2018), where a plaintiff gave a deposition and talked about their physical condition and the court determined that this was not a waiver of the privilege. He explained that this is a big concern on the defense side because it hamstrings their ability to prepare their defense. He stated that he agreed with the comment that it is a concern, but opined that it seems to be something that needs to be litigated in the appellate courts or resolved by a legislative change. Ms. Payne noted that ORCP 44 was originally a statute and is fairly substantive in terms of the rights it involves. Justice Nakamoto stated that it probably should be a rule change. Judge Wolf noted that it is an issue of privilege, which is not an issue for the ORCP. Judge Roberts stated that, if it shifts the privilege, it is not the Council's bailiwick.

Ms. Stupasky asked when, in practice, has a plaintiff objected to those questions and told their client not to answer them? Mr. Young stated that he has not had this question come up before because most plaintiffs attorneys are aware that, if they do not waive the privilege by deposing his physician client about what thoughts and perceptions they might have had about treatment, then they are really rolling the dice as to what that physician is going to say when they take the stand at trial. However, his partners have been involved in cases where plaintiffs attorneys have elected not to waive the privilege as a strategic tactic. The *Oaktree* case bolsters their ability to do that. In those cases, the plaintiffs had to convene for a discovery deposition every night of trial, after hours, and then call that witness again the next day to give different testimony based on what was said in the discovery deposition. It was really cumbersome and costly.

Ms. Stupasky noted that this is a different issue: whether or not the plaintiff chooses to depose a medical provider and thereby waive the privilege and allow the defendant to depose the treating providers. The issue in the comment is about whether or not the plaintiff has a privilege to say, in a deposition, that they will not disclose what their treating provider said, which is a bigger context. She asked whether Mr. Young has ever had a plaintiff in a deposition not answer the questions about what the treating provider said. Mr. Young replied that he personally has not. Ms. Stupasky stated that, in her practice, defense attorneys always agree that the plaintiff is not waiving the privilege and she lets the plaintiffs answer those questions, so it has not been a problem.

Ms. Gates stated that she would like to think a little more about a committee on the production of documents question, since it comes up a lot. She suggested that the Council take up the discovery issue again at the October meeting.

6. Guardians Ad Litem

Judge Peterson explained that the Council received a suggestion (Appendix J) from Holly Rudolph that originally came from the Law and Policy Work Group of the Oregon Judicial Department. He was not aware that such a group existed. In any case, this group suggested eliminating the phrase "guardian ad litem" from the ORCP because it is complicated and confusing. He noted that he had replied to Ms. Rudolph that such a change could raise havoc. "Guardian ad litem" is a term that is ingrained. Judge Norby agreed that the term is used across the board, across the states. She suggested that, if the Council wanted to use the same acronym, another term could be derived using the same initials, but she wondered where it would be appropriate to use it. Judge Peterson stated the concern that the word "guardian" seems to be the problem.

Judge Hill posited that this is a solution in search of a problem. Judge Norby observed that the term can be a significant problem for self-represented litigants, but it would be difficult to fix. She stated that someone in the survey had also asked the Council to amend ORCP 27 to make it more clear that an unemancipated minor must always have a guardian ad litem, and referred to ORCP 27 B(1) through (4). Judge Peterson noted that the rule, as written, says "shall." Judge Wolf agreed that it is pretty clear. Judge Norby suggested perhaps including a definition in Rule 27 would make it more clear. Judge Hill stated that he sees us tripping over ourselves to make things easier for self-represented litigants, but wondered whether that creates more of an incentive to be a self-represented litigant. He explained that he is sensitive to addressing the needs of self-represented litigants but, at some point, we are making things more difficult. He suggested that perhaps the solution is to help those parties get access to legal services rather than to change the ORCP.

Judge Norby suggested not forming a committee, but maybe looking through the rules to see if there is a place to create some clarity. She stated that she could take a quick, independent look into it and, if she sees such a place, maybe a committee could be formed. Ms. Gates stated that this would be welcome.

IX. Adjournment

Ms. Gates stated that any items on today's agenda (Appendix K through Appendix O) that had not yet been addressed would be carried over to the next meeting. Ms. Gates asked whether there is a mechanism for notifying those who had made suggestions to the Council about the status of their recommendations. Ms. Nilsson stated that Council staff reaches out, generally by e-mail, to anyone who left their name with a comment. This is usually done after the committees are set during the first few Council meetings.

Ms. Gates stated that the next meeting will be held on October 12, 2019, at the OSB. She adjourned the meeting at 12 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

# Oregon Council on Court Procedures
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*2019-2021 Biennium*

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**DRAFT MINUTES OF MEETING**
**COUNCIL ON COURT PROCEDURES**
Saturday, December 8, 2018, 9:00 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
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
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:

Troy S. Bundy
Jennifer Gates
(1 vacant position)

Guest:

Brenda Tracy

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 Promulgated this Biennium | ORCP/Topics to be Reexamined Next Biennium |
|---|---|---|---|
| ORCP 7<br>ORCP 15<br>ORCP 16<br>ORCP 22<br>ORCP 23 C/34<br>ORCP 38<br>ORCP 44<br>ORCP 55<br>ORCP 65 | ORCP 23 C/34 | ORCP 7<br>ORCP 15<br>ORCP 16<br>ORCP 22 B<br>ORCP 38<br>ORCP 44<br>ORCP 55<br>ORCP 65 | Discovery<br>Guardians Ad Litem<br>ORCP 7<br>ORCP 15<br>ORCP 17<br>ORCP 23 C/34 |

I. Call to Order

Mr. Keating called the meeting to order at 9:37 a.m.

II. Administrative Matters

A. Approval of September 8, 2018, Minutes

Mr. Keating asked whether any Council members had any amendments to the draft September 8, 2018, minutes (Appendix A). Judge Bailey and Mr. Eiva noted that they were absent from the meeting but that the minutes reflected that they were present. A motion was made and seconded to approve the September minutes as amended to reflect the appropriate attendance. The amended minutes were approved unanimously by voice vote.

Ms. Nilsson noted that Judge Tookey wished to make an amendment to the previously adopted June 8, 2018, minutes. Judge Tookey explained that he wished to change a sentence in the second paragraph on page 24 for clarification. He stated that he would prefer the sentence in question to read, "Judge Tookey suggested that the Council should be careful with lead lines, as lawyers will sometimes rely on them for guidance when they also need to read the text of the rules." Judge Leith made a motion to approve this amendment to the June 8, 2018, minutes. Judge Norby seconded the motion. The amended minutes were approved unanimously by voice vote.

B. Election of Legislative Advisory Committee

Judge Peterson explained that Oregon statutes require the election of a Legislative Advisory Committee (LAC) each biennium; however, the Legislature does not often call on the LAC for counsel. The LAC's purpose is to answer questions for any legislative committee chair and to provide any needed testimony before the Legislature. Judge Peterson stated that the LAC has traditionally been made up of the chair, the vice chair, and one or two judges, usually those who are located in Salem to make travel to the Legislature easier.

Judge Gerking, Judge Bailey, Judge Leith, and Mr. Keating volunteered to be on the committee. Judge Norby volunteered to join if Rule 55 is promulgated. Mr. Keating suggested that Ms. Gates should be on the LAC since she is the vice chair, and also suggested that the LAC be increased to six members.

1. ACTION ITEM: Nominate and Vote on LAC

Mr. Crowley moved to nominate the suggested slate of six volunteers. Judge Bailey seconded the motion, which passed unanimously by voice vote. Mr. Crowley then moved to elect the six nominated volunteers. Ms. Payne seconded the motion, which passed unanimously by voice vote.

C. Council Membership

Ms. Nilsson listed the Council members with terms expiring at the end of the current biennium who are not eligible for reappointment: Mr. Beattie, Mr. Keating, and Judge Gerking. The Council thanked them all for their dedicated service over the years.
Ms. Nilsson then listed the Council members with terms expiring at the end of the current biennium who are eligible for reappointment: Mr. Bundy, Mr. Crowley, Mr. Snelling, Judge Leith, and Judge Roberts. She asked them to contact her or Judge Peterson to indicate whether or not they wish to be reappointed.

Judge Norby asked whether there are term limits for serving on the Council. Ms. Nilsson stated that two consecutive terms are the limit, although there is nothing in the statute that precludes a member from serving again after a hiatus.

D. Set First Council Meeting for September of 2019

Judge Peterson explained that Council tradition has been to set the first Council meeting for the upcoming biennium at the final December meeting of the current biennium. The first meeting is traditionally held on either the first or second Saturday of September in odd-numbered years. Judge Peterson stated that there are no federal or religious holidays on the first two Saturdays of September, 2019. He noted that there is a home game for the Ducks, but that it is a non-conference giveaway. The Beavers are playing an away game. Ms. Payne asked if choosing this meeting would commit the Council to either the first or second Saturday for the rest of the biennium. Judge Peterson stated that the new Council would make that determination during the first meeting.

After consulting their calendars, the Council decided to schedule the first meeting of the 2019-2021 biennium for September 14, 2019, at 9:30 a.m. at the Oregon State Bar offices.

E. Communication with Legislators

Judge Peterson admitted that he has not done a good job in getting draft emails to the Council for Council members to send to their legislators. He noted that, if he can get a draft promptly to Council members after this meeting, it will be useful and will serve to prepare them for the transmittal letter that Mr. Keating will sign. Judge Peterson

explained that, typically, the transmittal letter is written in less "lawyerly" language and is used to show how the Council's work has improved the Oregon Rules of Civil Procedure to work better for the people.

III. Old Business

A. Committee Reports

1. ORCP 23 C/34 Committee

Ms. Wray explained that Mr. Andersen, Judge Leith, and Ms. Payne had planned to work on a suggestion to the Legislature for improving ORCP 23 but that they had not yet gotten to the point of drafting that language. Judge Peterson stated that the issue can be put on the agenda for next biennium. Ms. Payne observed that the point is that the Council decided that it was not appropriate for the Council to take action, so it was going to ask the Legislature to do so. Mr. Keating asked for a refresher on what the issue was. Ms Payne reminded the Council that the issue had to do with defendants who quietly pass away prior to a case being filed against them, and shortly before the statute of limitations bars an action against the estate. Judge Peterson noted that the Council agreed that the issue is a trap for the unwary, but that there is not a procedural rule fix.

Ms. Wray asked whether the language forwarded to the Legislature would have to be approved by the Council. Judge Peterson stated that, if it is a recommendation from the Council, yes. Ms. Wray agreed that there is not time for the language to be sent to the Legislature this biennium because there are no remaining Council meetings. Mr. Andersen observed that the consensus was that the suggestion would have more impact if it came from the Council, but a suggestion could be submitted by anyone. Judge Peterson stated that the transmittal letter goes to house and senate leadership and officers of the judiciary committees. Judge Norby wondered whether a suggestion could be included in the transmittal letter this biennium. Judge Peterson stated that he does not believe so unless it is a proposal that the entire Council agrees on, and there is no time for the entire Council to review such a proposal.

B. Discussion/Voting on Amendments Published September 8, 2018

Judge Gerking asked for clarification on the promulgation process. He wondered whether the published rules will receive up or down votes only, or whether they can be changed at this time. Judge Peterson stated that the Council published the rules and that the bench and bar have had opportunity to look at them. If there is a plain typographical error between publication and promulgation, or something that needs to be clarified, the Council can fix it. In terms of changing a rule to be vastly different, he stated that he does not believe that is permissible because there would be no opportunity for comment at

that point (although the Council always republishes any rule to which a minor change is made, as required by statute). Judge Norby asked what the point of republishing is if there is no chance for comment. Judge Peterson explained that it is to put everyone on notice that a small change occurred after publication.

1. ORCP 7

Judge Norby stated that no comments from the bench or bar regarding the published amendment to Rule 7 (Appendix B) had been received. Judge Peterson noted that he had a conversation with Holly Rudolph, the forms manager for the Oregon Judicial Department. She mentioned that the change requiring amendment of the certificate of service if electronic alternative service turns out to have been delivered to someone other than the defendant will require her to create a new document. Judge Conover wondered how significant this concern is. Judge Peterson stated his conversation with Ms. Rudolph was enlightening in that he learned about the process she uses when creating new forms such as this new amended certificate of service. Ms. Rudolph did wonder why the Council was also approving mail as a form of alternative service when mail is already an approved method of service. Judge Peterson explained to her that sometimes mail comes back unclaimed or refused and a plaintiff will ask the court for leave to serve by alternative means to avoid the defendant attacking the judgment using Rule 71. He noted Judge Roberts' position that, if one is using alternative service, it is a good practice to also serve by mail. He observed that, often, people are not receptive to being served, so careful lawyers sometimes want to use both the belt and the suspenders.

Judge Peterson explained that, during his conversation with Ms. Rudolph, she mentioned that the she looks at the rule as a sort of flow chart when creating her documents. This led Judge Peterson to examine the rule in a similar way, and he noticed that, in subsection D(6), the sentence structure in the three sentences regarding the follow-up mailing that is required if the plaintiff is using alternative service is not parallel. He expressed concern that this could cause students of statutory construction to wonder why the sentences are worded differently, and pointed out that it was not the Council's intention to indicate any difference between the sentences with different language. He stated that he and Ms. Nilsson had drafted some language to improve the subsection's clarity. Ms. Nilsson read the suggested language and Council members made suggestions to improve the word flow. The final language agreed upon was:

> If the plaintiff does not know, and with reasonable diligence cannot ascertain, the current address of any defendant, the plaintiff must mail true copies of the summons and the complaint by the methods

specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and with reasonable diligence cannot ascertain, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

Judge Norby made a motion to adopt the amended language. Ms. Payne seconded the motion, which passed unanimously by voice vote.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 7

Judge Norby made a motion to promulgate the amendment to Rule 7, as amended above. Mr. Beattie seconded the motion, which passed by roll call vote with 19 votes in favor and one opposed.

2. ORCP 15

Judge Gerking apologized for not attending the September meeting. He thanked Mr. Bundy for his summary of Rule 15 at that meeting and for the Council's thorough discussion. He noted that the Council had received no comments regarding the published amendment of Rule 15 (Appendix C). He opined that the amendment has been thoroughly vetted and suggested that the Council approve the promulgation.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 15

Judge Gerking made a motion to promulgate the amendment to Rule 15. Judge Bailey seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

3. ORCP 16

Mr. Crowley observed that the Council had received many comments about the published amendment to Rule 16 (Appendix D). He noted that most comments were supportive, and that the majority appeared to follow a form response. As far as he could tell, there were two comments opposed to the amendment. One comment was from Judge James Hargreaves, which did not appear to be entirely opposed, as the judge seemed resigned to the idea that the change was going to be approved. However, Judge Hargreaves appeared to be still of the opinion that there is no legal support for the type of change that the Council published.

Attorney David Paul suggested that things are fine as they are right now and did not think the rule change was necessary.

Mr. Crowley stated that one of the things that struck him about the many comments in support of the rule change is that there seemed to be a belief that the rule change gives support to the idea that there is judicial discretion to allow pseudonyms be employed. He stated that he is not sure that was the Council's intent. Rather, the intent of the language of the amendment itself is to provide a procedure for litigants to make an application to the court to allow the use of pseudonyms but the motion needed to be supported by existing law. In other words, the rule change is merely a procedural way for litigants to make that application and it is the court's decision based on the applicable law whether it is appropriate for pseudonyms to be used. He noted that the Council's language is very straightforward, but suggested that there perhaps needs to be a staff comment to clarify that the rule change is not intended to be a substantive change. Mr. Crowley observed that much of the support of the rule change came from organizations, such as the association of district attorneys and victims' rights groups.

Mr. Crowley introduced a guest to speak in favor of the amendment of Rule 16, Brenda Tracy. Ms. Tracy explained that she is a rape survivor who was drugged and gang raped in 1998 by a group of football players, two of whom attended Oregon State University. In 2014, she came forward with her story publicly in the Oregonian. She stated that she came before the Council to support the amendment because she is most concerned about the safety and privacy of survivors of crime. She noted that it is really hard to come forward and say that you are a survivor, and that it is really hard to pursue justice. She stated that anything the Council can to do to support survivors and to empower them to come forward is important. Ms. Tracy observed that survivors often do not come forward in our culture, and one reason is fear of backlash. She stated that she endures this backlash every day, as she is bullied, called names, called a liar, and receives death and rape threats. She stated that she deals with it, but it is not easy. There are days she wants to quit but she does not because she knows how important it is for other survivors to see her coming forward and pushing back on this hatred. She stated that she knows that survivors of stigmatizing crimes are going to endure some backlash no matter what, but some of it can be mitigated in the beginning of a case by allowing survivors to use pseudonyms. She stated that she does not want to discourage survivors from coming forward, because we all deserve the right and opportunity to pursue justice. Ms. Tracy stated that the Oregon Legislature has already done a great job in in supporting survivors and, while this change seems small, it is really big to someone like her and to other survivors. Ms. Tracy thanked the Council for allowing her to come today, and

stated that she had rearranged her schedule to be here. She urged the Council to adopt this amendment. Mr. Keating thanked her on behalf of the Council for a very powerful and moving statement.

Judge Peterson noted that Mr. Crowley had mentioned that the Council is not creating substantive rights with this amendment, and he agreed that such a disclaimer should probably be included in the staff comments. He observed that this clarification is not a big stretch because the Council's enabling statute does not allow it to make substantive law changes. In other words, the Council is neutral on whether Oregon law permits pseudonyms to be used, and that decision is up to individual judges.

Judge Peterson stated that a good part of the discussion during the September meeting had to do with concerns about an ethical trap of ex parte contact. There was some comment that this amendment would allow plaintiffs to go in ex parte and not be concerned about this ethical trap. He does not think that it would. Rule 3.5(b) of the Oregon Rules of Professional Conduct prohibits ex parte contact with a judge, and Rule 3.9 of the Oregon Code of Judicial Conduct also prohibits a judge from having ex parte contact on a matter. He noted that some counties do not have a regularized time for hearing ex parte motions and, if a plaintiff is going to ask to proceed under a pseudonym, the plaintiff would likely ask at the beginning of the case, not later. Multnomah County has a Supplemental Local Rule (SLR) that allows for fictitious names to be used, and Clackamas County has a similar rule. In those rules, a motion seeking leave to proceed using a fictitious name is required to be presented in person at ex parte, rather than filed electronically. For ex parte motions in Multnomah County, one day's judicial notice is required to be given to the other side unless it is a motion for a temporary restraining order. So, unless a local jurisdiction writes into a SLR that this can be an ex parte contact that does not require advising the other side, Judge Peterson believes that advising the other side is necessary.

Mr. Eiva observed that there is no other side until you have filed the case. Judge Peterson disagreed. He recalled that he once needed to sue a mental health facility, and the Illinois Secretary of State did not have a website to tell him who to designate as the proper party defendant, so he called the facility. The person at the other end of the telephone conversation asked why he wanted to know. His response was, "Because we are suing you." Judge Peterson pointed out that a plaintiff is required to contact the other side unless a SLR says that such contact is not required, because otherwise the other side does not have an opportunity to be heard. Mr. Eiva noted that the defendant can object after a plaintiff files. Judge Peterson stated that does not think that this amendment avoids the ethical requirement to not have ex parte contact with a judge. Judge Gerking asked

whether that rule applies to prospective litigation that has not yet been filed. Judge Peterson recalled that there was a fairly beefy discussion at the Council's September meeting as to whether the amendment would give a free pass to approach a judge ex parte. Mr. Eiva explained that this is commonly done in conservatorship cases where a party is given a new name through a conservator without letting anyone on the other side know. Judge Norby observed that conservatorship proceedings are not adversarial proceedings in the same sense as other lawsuits. Mr. Eiva stated that, if plaintiffs are allowed to file cases under a pseudonym, of course the other side can be heard by a motion. He opined that notifying the party being sued would create a delay in the process by turning it into a contested procedure. Judge Peterson stated that it is a telephone call. Mr. Andersen and Judge Gerking wondered who a plaintiff would call. Ms. Payne stated that it is not always so easy to pick up the telephone and get a hold of an individual. Mr. Andersen noted that this would be a lawyer contacting an unrepresented party, which could present its own ethical problems.

Ms. Holley noted that the Council does not have to solve this problem with this rule, but she stated that if the motion and complaint are filed at the same time, using a pseudonym and the other side objects, a party could amend the complaint to use the plaintiff's name. She stated that rules such as the UTCR will likely solve these issues. Mr. Andersen observed that the real change is that right now people sometimes file a lawsuit using a pseudonym without asking a court – they just do it. Other than Judge Hargreaves, he does not know if any judge is having a problem with it. He stated that the defense can ask for disclosure of the name. He noted that the amendment states that a party "may" seek a court order, and that "may" saves the amendment in his opinion. If the Council were to say that a party must give notice to the other side before seeking an ex parte order, it is problematic. Often the other side cannot be located or the statute of limitation is about to run, and there could then be a new body of litigation as to whether the notice was sufficient, the problem of ex parte contact with the unrepresented individual, and potentially alerting the other side that something is coming that may help the defendant evade service of the summons and complaint. These problems magnify, compared to the status quo where plaintiffs just file the case under a pseudonym.

Judge Peterson stated that the discussion from the September meeting seemed to indicate that the amendment removed ex parte contact as a problem. However, just as the amendment does not give a right to file using a pseudonym but, rather, puts in place a procedure to request permission to do so, he does not think that the Council should weigh in on whether a plaintiff has a duty to communicate with the other side beforehand. It will be each attorney's problem to deal with those issues. Judge Bailey stated that this sounds like a good subject for an advisory letter to the Oregon State Bar. Judge Roberts noted that, under Multnomah

County rules, even if it is at ex parte, a party is still required to give a day's notice if possible to the other side. So, the fact that the motion is made at a time reserved ex parte motions does not mean that the motion is actually ruled on ex parte; the other side can come. She observed that motions that are handled in that manner are often not contested.

Mr. Keating stated that his experience has been that, when he has received a complaint filed under a pseudonym, he would call the adverse attorney and ask for the name of the patient so that he could get the medical records. He believes that this is the way that filing under a pseudonym is commonly being done: that most lawyers go ahead and file the case without asking first. He noted that the Council's discussions have concluded that there is nothing in the ORCP that supports this current practice, so the Council is trying to address that concern. Mr. Keating observed that he has never seen a pseudonym case contested. In his experience, the plaintiffs' bar exercises very good discretion in selecting cases where the use of a pseudonym is appropriate.

Mr. Crowley stated that he thinks that this amendment is about developing a procedure, and that it is a starting point. If the subject matter Judge Peterson raised turns into an issue, the next step will be how to address that issue. The place to address it is probably in the UTCR, where there are already rules that address confidentiality.

Judge Peterson explained that he did not mean to throw a wrench in the machinery, but just wanted to make clear that the rule change is neutral. It just provides a procedure while remaining neutral on whether there is authority to grant the order as well as on the ethics of ex parte contact. He noted that practitioners will have to make a decision on what is appropriate under the circumstances.

Judge Conover asked for clarification about comments regarding the discretion of the court. Mr. Crowley stated that many of the comments that the Council received in support of the amendment seemed to have the idea that the published amendment supports the long history of discretionary actions by judges allowing the use of pseudonyms, but it was not the Council's intent to provide support necessarily for this or even to suggest that this is the case. The Council's intent is to provide a procedure for these issues to be addressed.

Judge Peterson stated that he will write a staff comment regarding this.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 16

Judge Leith made a motion to promulgate the published amendment. Justice Nakamoto seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

4. ORCP 22

Mr. Beattie explained that the Council had received many comments to the published amendment to Rule 22 (Appendix E). These were mostly objections from the plaintiffs' bar and centered on the published change to subsection C(1) that eliminates the requirement that all parties agree to add a new third-party defendant if 90 days have elapsed from the service of the original summons. He stated that the objections claim that the change is unfair, but stated that the basis of these claims seems somewhat unclear to him.

Mr. Beattie stated that the existing rule is patently unfair to defendants because it restricts their access to justice and their ability to fully litigate a case that involves a defendant who should share the liability, but who was discovered at a later date, more than 90 days after the case was commenced. As the rule is currently constituted, when a defendant discovers another defendant who needs to be brought into the case to have that potential defendant's fault compared, the defendant currently in the case has to get agreement from every other party and, in a single plaintiff and single defendant case, that means agreement from the plaintiff, before that potential defendant can be brought in. The court has no supervision or discretion to bring in that potential defendant if the plaintiff objects; therefore, the plaintiff has a unilateral veto right in third-party practice. There is no such veto right in the federal rules or any state procedural rule that he is aware of that gives either party the right to unilaterally veto an activity by the other party without any sort of oversight by the court. Third-party practice is merely an aspect of pleading and practice. It is adding a defendant, it is handled by an amendment, and amendments are historically and throughout the ORCP allowed at the discretion of the court. Defendants do not have the right to prevent a plaintiff from amending his or her complaint; that does not appear in the rules. Defendants do not have the right to prevent the plaintiff from bringing in another defendant, or bringing in another plaintiff, for that matter.

Mr. Beattie admitted that bringing in new and different parties can create some prejudice, but stated that amending a complaint to add a claim can also cause prejudice. Judges figure out whether the prejudice is so overwhelming that the amendment should be denied. He opined that the published amendment simply places third-party practice on the same footing as other amendment practice and leaves it up to the court's discretion. He stated that it conforms the rule somewhat

to the federal rule [FRCP 14(a)(1)] that allows amendment as a matter of right for 14 days, after which the authority of the court is required. It creates the same kind of fairness in our rule for all parties. Mr. Beattie stated that he strongly supports the amendment.

Judge Gerking stated that, on the drive to the Council meeting, he was not sure what side he was going to take regarding this amendment. He stated that he does not agree with the 90 day period because he thinks it is unreasonably short. On the other hand, he thinks that, if a defendant wants to amend to add a third-party defendant after six to eight months of litigation where depositions have been taken, that should not be allowed because that would be clearly prejudicial. But to him, it is all beside the point. He noted that Oregon trial judges were reminded recently that it is the court that has ultimate responsibility to make sure a case is properly administered from the standpoint of efficiency, timeliness, and obtaining a just disposition. This is the court's responsibility and the court's alone. In this particular rule, one of the parties has veto power over what the court might otherwise believe to be an appropriate motion. Because that party's veto power is embedded in Rule 22 and that interferes with the court's ultimate responsibility for the administration of that case, he has no other choice but to support the amendment to the rule. Without a change, the rule does interfere with the court's discretion to control a case.

Judge Bailey agreed with all of Judge Gerking's comments. He stated that when he presides over construction defect cases in Washington County, one of the first things he does is to set a cutoff date for the parties to get their third-party defendants in, with the understanding that the case is subject to bifurcation if any parties are brought in later. He stated that he believes that this is where the discretion should be. He noted that courts know the timely disposition standards that the Chief Justice just adopted where courts are expected to get 90% of their cases done in a year and a half period of time, and he stated that it is incumbent upon judges to exercise their authority to get these cases done. Judge Bailey observed that, if the defendant had the right to veto the use of a pseudonym under Rule 16, the plaintiffs' bar would be getting up in righteous indignation about it, and rightfully so, because that would be absolutely wrong. He stated that, if one really believes the court system is about fairness, he cannot understand how anyone would oppose this change.

Ms. Payne pointed out that it is important to understand where a rule came from and its history. She stated that the rule at one time allowed 10 days to have third-party practice by right. There was then a compromise between the plaintiffs' bar and defense bar to change the rule to its current form. The defense bar wanted the 90 days and the plaintiffs' bar agreed, but only if there was an agreement

among the parties to add any third-party defendants after the 90 days. Ms. Payne opined that now the defense bar is wanting to have its cake and to eat it too. She noted that the federal rule is 14 days, and that Oregon's rule used to be 10. The 90 day period is to allow the extra time that the defense wanted, but it is important to remember the compromise and not to take away what was given in exchange for that extra time.

Mr. Beattie stated that this compromise occurred in the 1979-1981 biennium. He pointed out that, since then, Oregon's tort law has been completely rewritten and has eliminated joint and several liability, and noted ORS 31.600, which has specific third-party practice built into it. He pointed out that the world has changed.

Mr. Eiva stated that we are dealing with the controversies and claims that one party brings. He suggested taking a step back with regard to the idea that this is what the plaintiffs' bar wants. He stated that, in the 1999-2000 biennium, the idea to remove the post-90 day agreement of the parties rule came up. Prof. Maury Holland, who was no great friend of the plaintiffs' bar, actually suggested shortening the time because we should know who the parties are early in the litigation. Judge Richard Barron disagreed and said that 90 days is enough.

Mr. Eiva stated that the way this request is being sought is all from the perspective of counsel. However, the plaintiff's bar is dealing with the perspective of their clients, who have a duty to know what they have been through and who caused the harm. Plaintiffs and defendants can be identifying the appropriate parties early on. If a defendant engaged in some kind of conduct, they should have knowledge. The suggestion that third-party defendants are a bolt from the blue is generally not the case. Mr. Eiva opined that there is framing that is calling it a "plaintiffs' veto," but there is another side – are we going to give defendants some authority to change the chess board after 90 days? He stated that he is not worried about day 91 but, rather, he is worried about month 10. He observed that this problem can occur on the eve of trial, and some counsel are far more persuasive in getting these motions through. Mr. Eiva also noted that there are more and more judges on the bench with less experience who may not be familiar with the complexity of multi-party litigation. He expressed concern that adding third parties at the last minute is driving up costs and compromising principles of efficiency. He stated that it will create unnecessary motion practice if we give defendants the authority to seek to change the chess board late in the game.

Mr. Eiva also pointed out that the Council did not receive a request from the bar saying that it needed to change Rule 22 in this regard. He stated that the Council was looking at Rule 22 because there was a request from the bar regarding making a cross claim to a party that was already in the case, and Mr. Beattie stated that he

hates the veto. Mr. Eiva claimed that there is no giant record of injustices and that no one has brought forward a single case to try and prove that this horrible thing is happening.

Mr. Beattie noted that he can state on behalf of his firm that there are often late-discovered defendants in multi-party cases where the courts recognize the injustice of Rule 22 and allow parties to bring a separate claim and join that case with the case where adding the third-party defendant was disallowed. In other words, the courts are doing an "end around" on this rule already. What about plaintiffs adding defendants after 90 days, in terms of fairness? Mr. Eiva stated that the statute of limitations prevents plaintiffs from adding defendants most of the time. Mr. Beattie wondered about newly discovered defendants, where a plaintiff did not even know that a defendant was involved, and the plaintiff wanted to bring them in. What if there were a 90 day rule that said you cannot bring them in without permission of the defendant? That is why we have good judges.

Mr. Andersen stated that Mr. Beattie is correct that tort law has changed over the years, with one such change being eliminating joint and several liability. He stated, however, that the mischief of this amendment is the clever defendant who discovers that they can add additional defendants, no matter how nebulous the claim may be. Post-1990, with the rules of joint and several liability being eliminated, there can be a defendant who recognizes that, the more people on the verdict form, the more the potency of the main claim against that defendant is diminished. If there is a true meritorious third-party defendant, plaintiffs will also want them in the case. However, if a defendant wants to add a third-party defendant after 90 days, a plaintiffs' lawyer's first suspicion is about diluting the verdict form. As far as the plaintiff being able to add a third-party defendants at any time, that cannot be done without court approval. Oregon made the compromise, rather than following the federal rule, giving the defendant 90 days as a complete freebie, with the trade off being, after 90 days, the defendant has to have the plaintiff's permission because the litigation is in progress and discovery has occurred. If it is a meritorious defendant, the plaintiff will agree.

Mr. Beattie posited a situation where plaintiff's counsel is unreasonable and dislikes him for reasons beyond the litigation. He noted that this is why we have judges. Judge Roberts stated that, as a judge, she feels that judges generally make decisions in a reasonable way. She noted that the supposition of the plaintiffs' bar seems to be that judges will be putty in the hands of unscrupulous parties but, on the other hand, if a plaintiff asks to add a party late, judges will never allow that. She stated that this is unrealistic and not the way that Oregon judges behave. She also pointed out that this debate has already taken place and does not need to be rehashed. Mr. Beattie agreed. Mr. Eiva noted that the change had been rejected in

1992 and in 1999. Mr. Beattie noted that the United States used to have slavery, which it also eventually rejected.

Mr. Keating stated that there is an underlying assumption that 90 days is adequate time to identify other parties that should be involved in the litigation. Things have changed dramatically in the 45 years he has been in practice. The Council has been born, and rules have changed. In the medical malpractice context, in identifying providers who might have liability, changes have been made in policies and rules that affect what a defendant can discover in a timely fashion. It occurs more often than one might believe that service of a summons and complaint is the first notice that a claim exists and then it can take a while to get to the desk of a defense attorney. The defense attorney then must talk to the client and find out what parties might have been involved. After that meeting, the attorney files a request for production for medical records, which takes up to 30 days of the 90 days. In his experience, common responses from the plaintiff are: 1) that they will provide discovery at a later date; or 2) an objection that he is seeking privileged material. If the defendant files a motion to compel after that response, getting the motion argued and heard in a timely manner is very difficult. Assuming that happens and the judge orders the plaintiff to provide the requested records, the 90 days has already passed. The second way to get the records is to notice the deposition of the subsequent treating physicians that you know about because your client can identify them, but that is going to be quashed. The third thing you can do is file a subpoena for the records, but you have to go to the plaintiff's lawyer and there are 14 days before you can serve the subpoena to the doctor or hospital. Within the time to object, the plaintiff makes an objection for privilege, and the only way the plaintiff's counsel will agree is if you issue a subpoena directing the health care provider to provide the medical records to them. Then that also takes a period of time. The reason that plaintiff's counsel objects is to go through and edit the records for privilege. That is also going to take time. When the records come to the defendant's attorney, they need to be reviewed to see if there is a basis for a claim against a potential third-party defendant.

Mr. Keating stated that, as a practical reality, it is impossible to bring in a third-party defendant within 90 days using the procedures and rules in effect. The reason there are not a lot of complaints about subsection C(1)'s 90-day rule is because there are no judicial opinions about whether it would be reasonable to add a third-party defendant after 90 days, because plaintiffs' counsel know how to read the rule. As a practical matter, he does no third-party practice, because it cannot be done in 90 days. If something develops in discovery, he does not have the right he would have in federal court to say, "justice requires that I be allowed to bring this defendant into the case." This has always been the rule in the federal court, and everywhere else of which he is aware.

Mr. Keating stated that he did read the comments that the Council received regarding the amendment to Rule 22. He stated that, of the list of "horrible injustices" that are posited to happen, he has never heard a word about that in trial practice. He stated that all lawyers understand that, if you have a dispute, you go to the judge who is managing the litigation. Every argument in the comments received by the Council is an argument that can be made to the judge. He stated that his understanding is that the current rule was created because of the desire of the plaintiffs' bar to maintain some control over the structure of the litigation. The current rule gives the plaintiffs' bar a significant advantage with regard to the structuring of who the players are going to be. He noted that any concern about a defense lawyer's motives or reasonableness can be brought before a trial judge. Mr. Keating pointed out that the Council has observed frequently that the discretion of the trial court can solve problems, and he stated that Rule 22 is the only rule in the ORCP that restricts the discretion of a duly appointed or elected trial judge.

Judge Norby stated that, if the original language of the rule was a compromise between the plaintiffs' bar and the defense bar, perhaps the amendment should undo the whole compromise, not only half. For example, the time period could be changed back to 10 days. Mr. Keating stated that he looked at the legislative history and that his interpretation was a lot different from Mr. Eiva's. He stated that the Council did not focus on this issue in 1992. Mr. Keating stated that the desire of one side of civil litigation to maintain control of the structure of the litigation should not be something that governs what this Council does. He opined that it really is not a matter of negotiation between the plaintiffs' bar and defense bar but, rather, a matter of what is right and proper. Mr. Keating stated that this is a circumstance that is not fair, that the playing field is tilted, and that all he wants is the opportunity to make a case to the court in light of the context of the specific case.

Judge Gerking stated that he is unaware of any previous compromise with regard to amending Rule 22 but, if there was a compromise, he believes that it was a compromise that had no right to be made because it usurps the authority of the trial court judge to exercise his or her discretion to determine who the parties will be at the time of trial. Judge Norby stated that judges do not have much discretion on over who the parties are. She also noted that many things usurp the discretion of trial court judges, such as sentencing guidelines. She observed that perhaps not all judges are always fair at all times. Judge Norby opined that, ultimately, if there was a compromise, it does have meaning or value. She noted that the Council is a body that requires people who are on very different sides of an issue to meet and try to agree to things, and this is important. Judges do get distanced from discovery procedures over time, whereas practitioners know and have strong

feelings about them. She stated that, if both sides were able to meet in the middle, that agreement should be honored.

Judge Hill noted that the Council has plowed this ground before, but that he keeps coming back to what Mr. Beattie said at the beginning. There is already a workaround that courts frequently use. He stated that he is hearing from the plaintiffs' bar that their primary objection is additional motion practice, but the rules already allow for that by filing a direct action and then filing a motion to consolidate. The exact same discretionary rules are used by the judge in deciding whether the case should be consolidated. The amendment would simply allow to be done in a more streamlined way what is currently being done in a more complex way. Judge Norby stated that the current workaround requires that the defendant not be a strategic ploy type of defendant, which seems like a good check and balance.

Mr. Beattie wondered why a defendant would bring a non-legitimate third-party defendant into the case. Mr. Andersen stated that it is to get such a defendant on the verdict form. Mr. Beattie noted that he has no reason to put someone on the verdict form to whom the jury will not allocate liability and damages. He stated that, with ORS 31.600 and the elimination of joint and several liability and active/passive indemnity, as well as the potential elimination of contribution actions because of *Eclectic Investment, LLC v. Patterson* [357 Or 25, 346 P3d 468, *aff'd on rehearing*, 357 Or 327, 346 P3d 468 (2015)], a defendant can actually be in the position of losing their contribution rights if they do not bring in someone as a third-party defendant who should be paying some part of a loss. While they may not be not a defendant who is attractive to the plaintiff, and they might add to the plaintiff's burden in the case, nonetheless they should be paying part of the verdict. Mr. Eiva stated that *Eclectic Investment* was carefully worded and did not necessarily strike that right. Mr. Beattie stated that It remains to be seen whether Oregon will go this way, but he pointed out that Arizona has virtually the same statute as Oregon and its courts have interpreted its statute as eliminating claims for indemnity and contribution and requiring the defendant to bring defendants in at trial so the same jury can compare the fault of all of the defendants. Mr. Eiva stated that he thought that Oregon is far away from any court ruling that a newly discovered defendant post 90 days will eliminate the indemnification claim that has always been there since 1856. Mr. Beattie stated that he would again like to dispel the notion that defendants want to bring in phony third-party defendants. Mr. Keating agreed that there is no reason to do that.

Mr. Andersen stated that most of his work is medical malpractice and that he has never seen a fact situation where it was not pretty evident who the defendant should be. As far as a defendant in a medical malpractice case, it is not necessary

for all of the discovery to come in to determine who might be an appropriate third-party defendant. It is pretty clear and, if there are negotiations before, the defendant sometimes identifies who the third-party defendant should be and the plaintiff will add that party to the complaint. Mr. Andersen stated that Judge Gerking recently addressed the Jackson County bar about the need to get every case tried within one year. He opined that adding third-party defendants more than 90 days after service of the summons will lead to no trials being completed in a year. On the plaintiffs' side, every open case is a case that is costing money in terms of time and expenses for the plaintiff's attorney and emotion for the client. Justice delayed is justice denied. Judge Bailey stated that he rarely hears that sentiment from plaintiffs because they are frequently the ones asking to go past the one year mark. Judge Roberts reiterated that she resents the implication that all judges are so utterly feckless that they will allow any motion.

Judge Peterson stated that he is assuming that the case law behind Rule 23 is in effect. He appreciates from the many comments that one half of the bar does not want to be bothered with these motions on the eve of trial and is concerned about getting to justice. He stated that he believes that the case law is pretty clear that, the closer you are to trial, the more this motion is disfavored and the more havoc that it causes in terms of discovery having occurred. This motion is also disfavored to the extent that the defendant should have known about the party and come forward earlier. Mr. Eiva opined that the way the amendment is written it is standardless and expressed concern as to whether judges would make the right decision. Judge Peterson noted that it is the Rule 23 standard. Mr. Eiva asked if there has ever been a Court of Appeals decision where a judge erred by granting an amendment to a pleading, rather than denying one. He stated that the power is only one way, and the judicial review is only based on whether amendments are denied. He fears such pure judicial power and discretion with no parameters, since nothing in the rule even requires that the defendant has to show that they could not have identified the third-party defendant within 90 days. Judge Roberts opined that it is of course an appealable issue.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 22

Mr. Beattie made a motion to promulgate the published amendment to Rule 22: Judge Bailey seconded the motion, which failed by roll call vote with 11 votes in favor and 9 opposed.

Mr. Keating pointed out that, aside from the change to subsection C(1), there is also an amendment to Section B and staff amendments to sections B, C, and D that appear to be noncontroversial. Prof. Peterson stated that

the change to section B is a law improvement amendment that was suggested by a member of the Council. He asked whether the Council would like to vote on promulgating only these amendments to sections B through D. Judge Gerking made such a motion. Judge Norby seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

5. ORCP 43 - Legislative Counsel Recommendation

Judge Peterson reminded the Council that, when Rule 43 was amended last biennium, the first section did not read well. On recommendation from Legislative Counsel, the Council staff made a change in wording without a change in substance. Section A was broken into subsections: one for documents and things, and one for entering property. Changes were also made to change the word "shall" to "must" or "may" or "will" as appropriate. Judge Peterson noted that the amendment was put on the Council's publication docket early in the biennium and that no comments were received from the bench or bar on the published amendment to Rule 43 (Appendix F).

Ms. Payne stated that the change of the word "shall" to "may" on line 25 of subsection B(2) seems substantive to her. Judge Peterson explained that the word "shall" is disfavored because it means different things in different contexts. Ms. Payne stated that she understands changing a "shall" to a "must," but that she believes that changing it to "may" has a very different meaning. Judge Leith stated that "may not" does mean that it is forbidden. Ms. Payne stated that she did not see the word "not." Judge Peterson stated that the intent was to indicate what the word "shall" actually meant. Judge Leith asked whether "must" is better. Judge Peterson stated that "must not" are words of command, whereas "may not" are words of permission. Judge Bailey opined that either phrase would have the same meaning.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 43

Mr. Crowley made a motion to promulgate the published amendment to Rule 43. Ms. Payne seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

6. ORCP 55

Judge Gerking noted that he was not at the September meeting when Rule 55 was discussed comprehensively. He stated that he appreciated that Ms. Nilsson lead

the discussion. He read the minutes carefully regarding suggested changes and did not disagree with any of them. Mr. Andersen stated that he was on the Rule 55 committee with Judge Gerking and Judge Norby. The committee's task was to make order out of what had been chaos without making any substantive changes, and he believes that was accomplished. He stated, however, that Richard Lane, an accomplished attorney in legislative matters, offered some last-minute comments to the published amendment to Rule 55 (Appendix G) that suggested some items he flagged as potential substantive changes. Mr. Andersen stated that he believes that only one of those items may be an unintended substantive change. Current subsection H(2) reads as follows:

> Individually identifiable health information may be obtained by subpoena only as provided in this section. However, if disclosure of any requested records is restricted or otherwise limited by state or federal law, then the protected records shall not be disclosed in response to the subpoena unless the requesting party has complied with the applicable law.

However, the language in the amendment at subsection D(3) reads as follows:

> A subpoena to command production of CHI 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 the subpoena and withhold the CHI it seeks.

Mr. Andersen agreed with Mr. Lane that the current language in subsection H(2) invites some discussion between the health care provider and attorneys, whereas the amendment's language in subsection D(3) appears to give the health care provider unilateral discretion to disregard the subpoena. Mr. Andersen suggested that the problem can be fixed by putting the existing language in the new sentence as follows:

> If a subpoena does not comply, then the CHI shall not be disclosed in response to the subpoena unless the requesting party has complied with the appropriate law.

Judge Norby stated that, to her, the current language in subsection H(2) is just a softer and more vague version of subsection D(3) in the amendment. She explained that she wanted the new version to be crystal clear so that, ultimately, next biennium, the Council could decide whether the rule needed to be further modified. While she believes that the new language in subsection D(3) says the same thing, she was not opposed to the change. Mr. Beattie opined that the

language may be structural and wondered to what degree it can be changed at this point. Judge Peterson observed that he was surprised that Mr. Beattie did not say that the decision to make records available is really up to the health care record holder, so it does not make a dime's worth of difference what our rule says. Mr. Beattie agreed that it does not matter because the record holder is following the Health Insurance Portability and Accountability Act (HIPAA) and could not care less about Oregon's court rules. However, he asked whether the minor language change was procedurally appropriate. Judge Norby thought it was appropriate. Judge Gerking agreed, but suggested changing the word "unless" to "until."

Judge Norby asked Mr. Andersen to restate his suggested language. He stated that, with Judge Gerking's suggested change, it would read as follows:

> If a subpoena does not comply, then the CHI shall not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

Mr. Snelling asked if the word "protected" could be inserted before the term "CHI." He stated that his concern is that the existing subsection H(2) seems to suggest that records custodians would only be able to withhold protected information; however, the amended language in subsection D(3) seems to imply that, if there is one technical flaw with the subpoena, the whole thing is null and void and the holder of the records does not have to provide anything. Judge Gerking stated that he likes Mr. Andersen's suggested language. He stated that it does not matter to him if the word "protected" is there. Judge Peterson noted that "CHI" (confidential health information) is already defined. Judge Norby suggested that adding "protected" would be a substantive change because the current law says the record holder does not have to provide anything. Mr. Snelling stated that the current rule says that the protected records shall not be disclosed. Judge Peterson asked whether the definition of CHI in subsection D(1) takes care of it. Judge Norby stated that it does because it cites to statutes that define those words. Mr. Snelling stated that, to him, referring to other state and federal protections looks like a pretty big change from the existing rule that states that, if compliance requirements have not been met, then those records that are protected by state and federal rules would not be disclosed. He stated that it appears that the published amendment makes a change that, if there is one bit of that request that is protected by a state or federal law then, even if the remainder of the records are not protected, the entire request is going to be denied. He admitted that he might not be reading it correctly. Judge Norby stated that he is reading it correctly, and that inserting the word "protected" does make sense. Ms. Holley noted that this clarifies that it means versus all other records.

Mr. Beattie asked whether the amendment can be changed and promulgated, because it seemed to him that this would be a substantial modification. Judge Norby stated that her rewrite is different from the existing rule. Ms. Payne agreed that this is an instance of going back to the language in the original rule rather than changing the language of the amendment in any substantive way. Judge Peterson stated that, in this context, the principal author of the amendment seems to argue that the proposed amendment is for clarification. He noted that the Council is simply trying to clarify to say that this is what we meant. Judge Leith observed that one way to test is whether there is any possibility that there is a person who exists who would object to the rule with the change as opposed to without the change. He does not think that there is, but the Council is trying to be clear in our intent of not making a substantive change. Judge Norby made a motion to amend with the addition of the word "protected" as suggested by Mr. Snelling. Judge Bailey suggested taking the changes one at a time because some people might not agree with the structural change or the word "protected." Judge Norby stated that Mr. Andersen was trying to come up with a way to say what the existing rule already said, and Mr. Snelling was trying to help him to add a word that he had inadvertently missed. Mr. Andersen agreed.

Mr. Andersen proposed the following language:

> If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

Ms. Payne made a motion to amend the published amendment to Rule 55 as suggested by Mr. Andersen. Judge Gerking seconded the motion, which passed by unanimous voice vote.

Judge Norby pointed out that Mr. Lane had also suggested that the language in the amendment's paragraph D(6)(b) would authorize recovery of the expense for inspecting records, not just for copying them. This is different from the existing rule. Judge Norby suggested changing deleting "the inspection or copies" and inserting "the copies." Judge Norby made a motion to amend accordingly. Mr. Andersen seconded the motion, which passed unanimously by voice vote.

Judge Norby stated that Mr. Lane had also pointed out that, in the amendment's subsection D(11), the language used is "notwithstanding any other provisions this section does not expand the scope of discovery," whereas the existing language in subsection H(6) is "notwithstanding any other provisions this rule does not expand the scope of discovery." She noted that, at the time this language was originally added to the rule, the word "rule" was used, which meant that nothing in the

entirety of Rule 55 should expand the scope of discovery. She stated that she does not believe it was an issue before the question of individually identifiable health information came up, as people historically did not assume that any subpoena process could expand the scope of discovery so there was no need for any comment about it. Her understanding of why the language was kept is to advise people not to get too haughty about CHI and to let them know that the fact that they are subpoenaing it does not override any other limitation on the scope of discovery. Ms Payne asked whether there is anything else in Rule 55 that expands the scope of discovery. Judge Norby stated that there is not, and she believes that leaving the existing language causes no harm, whereas the change could potentially cause harm. Ms. Payne stated that she prefers to keep the language the same to avoid unintended consequences.

Judge Norby pointed out that, because section D only applies to CHI, the only way to keep the existing language is to move it to section A in order to make it apply to the whole rule. Judge Tookey suggested making a new section E. Judge Norby opined that having a whole section for one item that could have gone into section A would be odd. Ms. Holley agreed with creating a new section E. Judge Gerking also agreed with Judge Tookey that the language should be in a separate section, as a concluding, stand-alone statement about the impact. Mr. Andersen agreed. Mr. Eiva stated that he liked that positioning for ease of finding it.

Judge Norby reiterated that everything that applies to the entire rule is in section A, so it would be odd to put this in its own section. Mr. Eiva stated that he can support loyalty to that principle. Ms. Payne made a motion to amend to move subsection D(11) to a new subsection A(8) to read:

> 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.

Judge Norby seconded the motion, which passed unanimously by voice vote.

Mr. Andersen congratulated Judge Norby for her enormous undertaking. Judge Leith stated that, since it was such a huge undertaking that is intended to be non-substantive, there will inevitably be something that someone can point to that will have an unintended consequence. He stated that is he nervous about the possibility that the amendment has inadvertently done something to affect the discoverability of confidential health information. Judge Norby noted that Mr. Lane is nervous about that too, and that it is a natural reaction. She pointed out that the committee and staff had spent hundreds of hours of work on this, and that Legislative Counsel had also reviewed it. Judge Leith clarified that, while it is almost inevitable something will come up that the Council will need to fix, the

purpose of fixing the rule warrants the risk and he supports the change.

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendment of ORCP 55

Judge Norby made a motion to promulgate the published amendment to Rule 55, as amended above. Ms. Holley seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

7. ORCP 38, 44, 65

Judge Peterson reminded the Council that Rule 38, Rule 44, and Rule 65 were only amended because there are references to Rule 55 in them. Staff also made a few minor stylistic changes. He suggested a joint motion to promulgate all three published amendments (Appendix H).

a. ACTION ITEM: Vote on Whether to Promulgate the Published Amendments of ORCP 38, 44, 65

Judge Bailey made a motion to promulgate the published amendments to Rule 38, Rule 44, and Rule 65. Ms. Holley seconded the motion, which passed by roll call vote with 20 votes in favor and none opposed.

IV. New Business

A. Potential amendment to Rule 7, Rule 17, and regarding Guardians Ad Litem

Mr. Keating noted that these potential amendments are information items only and require no discussion today. They will be placed on the docket for next biennium.

B. UTCR Committee Workgroup on E-Signatures for Declaration of Parties and Witnesses

Judge Peterson stated that the UTCR Committee had requested that the Council have one of its members participate in its Workgroup on E-Signatures for Declaration of Parties and Witnesses. He had previously reached out to the Council for volunteers, and Judge Conover agreed to participate.

C. Budget and Website

Judge Peterson stated that a budget person from Oregon Judicial Department (OJD) typically calls him each biennium and asks for the Council's budget needs. He usually

replies that whatever biennial increase allotted to other agencies will suffice. The OJD representative suggested that the Council should ask for a higher amount this biennium. Judge Peterson pointed out that his Executive Director stipend is $1000 a month, and it has probably been at that level since the inception of the Council. At some point, he will pass the job off to someone else, and that low stipend is not a big incentive for anyone to take the job. The OJD representative suggested doubling the stipend, and he put in a request for that increase. Someone from the Council may have to testify regarding the budget request.

Judge Peterson also reported on some changes regarding the Council's website. He reminded the Council that the site is a creation of Ms. Nilsson, who also has a day job at the Campaign for Equal Justice (CEJ). CEJ has recently changed to a Wordpress platform for its website, which makes editing the site much easier and more streamlined. The Council also decided to hire a contractor to convert the site to Wordpress, and the new site should be ready by the fall of 2019. Mr. Keating asked whether this is just an informational item or whether the Council needs to vote on it. Judge Peterson stated that it is just informational.

V. Adjournment

The meeting was adjourned at 12:20 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

**COUNCIL ON COURT PROCEDURES**
**RULES OF PROCEDURE**

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). These rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in ORS 1.725-1.760.

**I. MEETINGS**. Meetings of the Council shall be held regularly at the time and place fixed by the Chair after any appropriate consultation with the Council. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of any such meeting shall be given personally, by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of that meeting except when a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called. All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

**II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES**

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a term of one year. Officers for the succeeding year shall be elected at the September meeting of the Council each year and shall serve until a successor is elected. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and shall perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to the meeting and provide reasonable notice to Council members of the agenda.

C. Committees. The Chair may appoint any committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. All committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee elected pursuant to ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. the Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

b. the LAC, after a request by a legislative committee, has presented any proposal to the Council and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the

Council on Court Procedures. The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless that position has been submitted to the Council and approved by a super majority. Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and who has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that the member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

## III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of all required notices of meetings of the Council; preparation and distribution of Council meeting agendas; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, the Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council appropriated by the Legislature shall be retained by the Lewis and Clark Law School and funds authorized for the Council by the Oregon State Bar shall be retained by the Bar. All such funds shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. The Council shall designate a location for an administrative office for the Council. All Council records shall be kept in that office under the supervision of the Executive Director.

## IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE.

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgation, amendment, or repeal of any rule included or to be included within the Oregon Rules of Civil Procedure, the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.

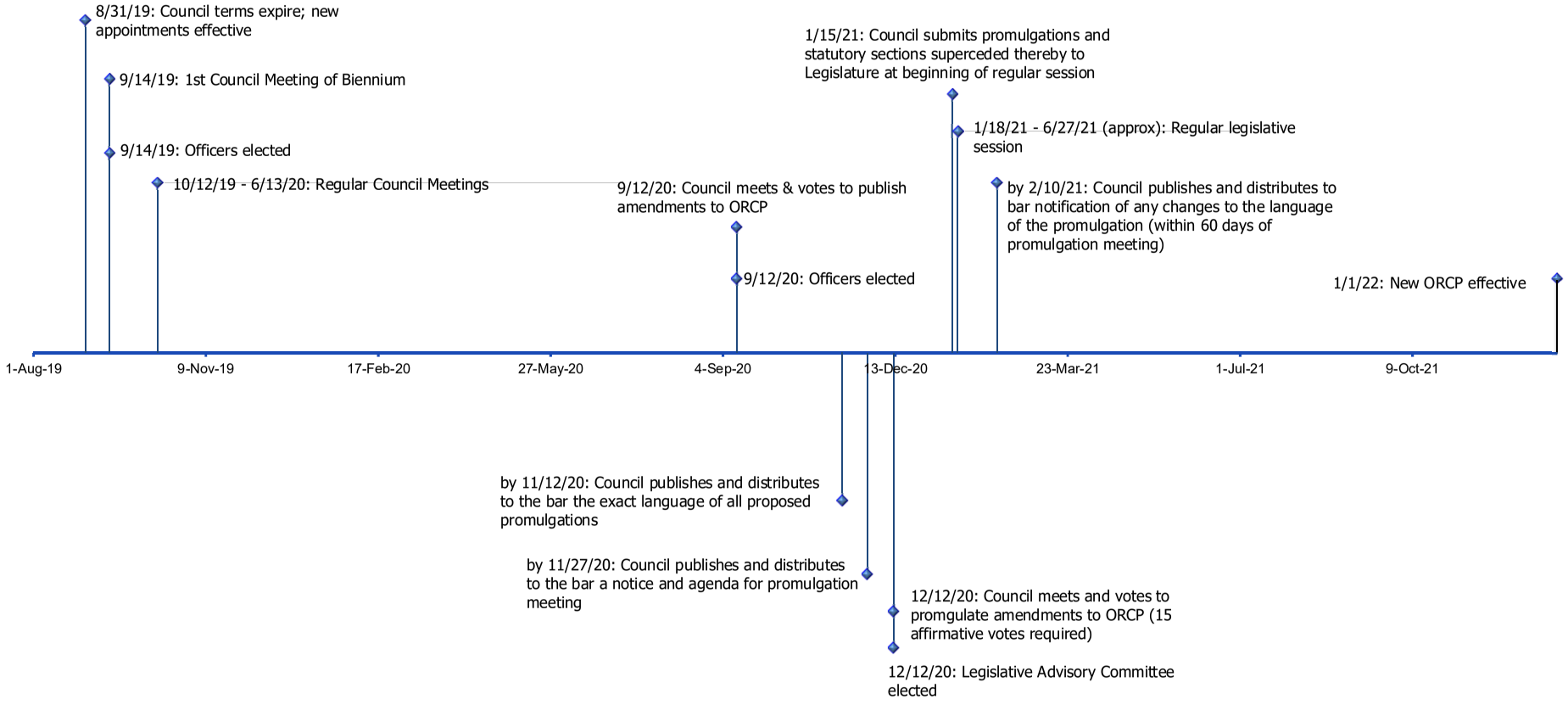
B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed promulgations, amendments, or repeals, together with a list of statutory sections superseded thereby in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby, to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this 3rd day of December, 2016.

## Council on Court Procedures: 2019-2021 Biennium Timeline (some dates approximate)



**COUNCIL ON COURT PROCEDURES**
**MEMORANDUM**

To: Council Members

From: Mark Peterson, Executive Director

Re: 79th and 80th Legislative Assemblies' ORCP Amendments Outside of Council Amendments

Date: September 3, 2019

Rules amended:

- ORCP 69 C in a lengthy reviser's bill to change and make current the reference to the Servicemembers Civil Relief Act

Bills enacted that mention the ORCP:

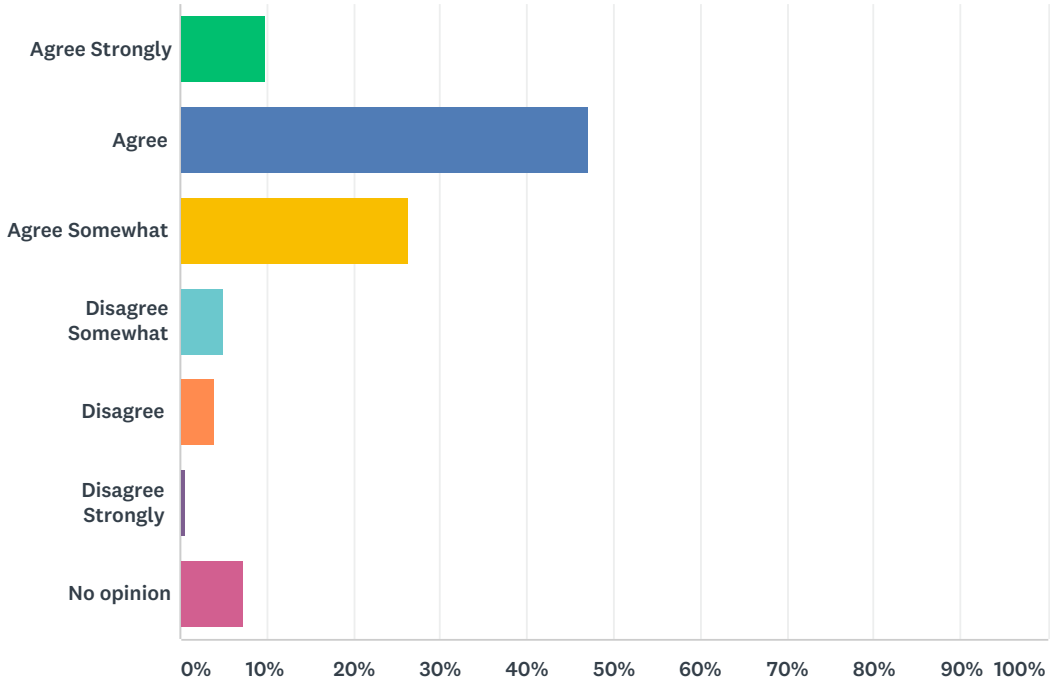
- HB 2096 amending ORS 244.400 providing for discretion in awarding attorney fees in Oregon Government Ethics Commission cases but otherwise using ORCP 68
- HB 2285 amending ORS 105.430 providing for notice in building/housing code violation cases with receiverships and adding ORCP 7 D and ORCP 9 C standards
- HB 2286 amending ORS 131A360 and 131A.365 defining costs and fees in forfeiture judgments and using ORCP 68 A
- HB 2400 amending ORS 19.255 and softening the filing deadlines for appeal for the person adjudged to be mentally ill but otherwise using ORCP 64, ORCP 64 F and ORCP 63 and ORCP 63 D
- HB 2480 amending ORS 40.450's definition of hearsay and retaining a reference to ORCP 39 I
- HB 2530 amending ORS 105.113 and requiring new information in notices of termination of tenancy and notices of foreclosure and the ORS 105.113 summons and maintaining the longstanding exception that the summons in these summary proceedings is different from ORCP 7
- HB 2592 amending an earlier session law (Sec. 149, ch 750, OR laws 2017, as further amended) and continuing use of the ORCP 1 E standard in declarations for rebates for zero emission vehicles
- HB 2598 amending ORS 130.045 and using the ORCP 7 F standard in notices of filing of settlement agreements for noncharitable business trusts
- HB 2601 amending ORS 125.325 relating to restricting the protected person and using the ORCP 1 E standard in declarations in the guardians's annual report
- HB 4024(2018) amending ORS 98.302 regarding the escheat of U.S. savings bonds and using the ORCP 1 E standard for a petition to claim the funds
- SB 360 amending ORS 65.207 and assigning priority (but not over ORCP 79 B(3) cases) to

litigation over nonprofit corporations' meetings and amending ORS 65.224 using ORCP 79 and ORCP 82 A standards for undertakings in litigation over membership lists

- SB 364 amending ORS 107.135 and using ORCP 7 standards in serving orders for enforcement of child support orders
- SB 376 amending ORS 125.325 and using the ORCP 1 E standard for guardian's reports
- SB 385 amending ORS 107.434 and using ORCP 1 E standards in motions for expedited parenting time hearings
- SB 454 amending ORS 113.105 using the ORCP 82 D-G standard for the personal representative's bond in will contests and amending ORS 116.253 using the ORCP 1 E standard for the declaration in a petition to recover an escheated estate and amending ORS 98.386 deleting a reference to ORCP 1 E in cases of escheatment of U.S. savings bonds (see HB4024)
- SB 608 amending ORS 105.124 and using the ORCP 17 standard for an attorney signing an FED complaint
- SB 708 amending ORS 20.190 on prevailing party fees, referring to ORCP 32 and continuing to not award such fees in class action cases
- SB 729 amending ORS 124.005 andusing the ORCP 1 E standard in declarations in elder abuse cases
- SB 995 amending ORS 163.765 and referring to ORCP 7 D(6)(a) for alternative service in sex abuse cases
- SB 1011 amending ORS 107.135 and referring to ORCP 7 in motions to modify child support or custody

# Q1 Do you agree that the Oregon Rules of Civil Procedure promote the just determination of civil court actions?

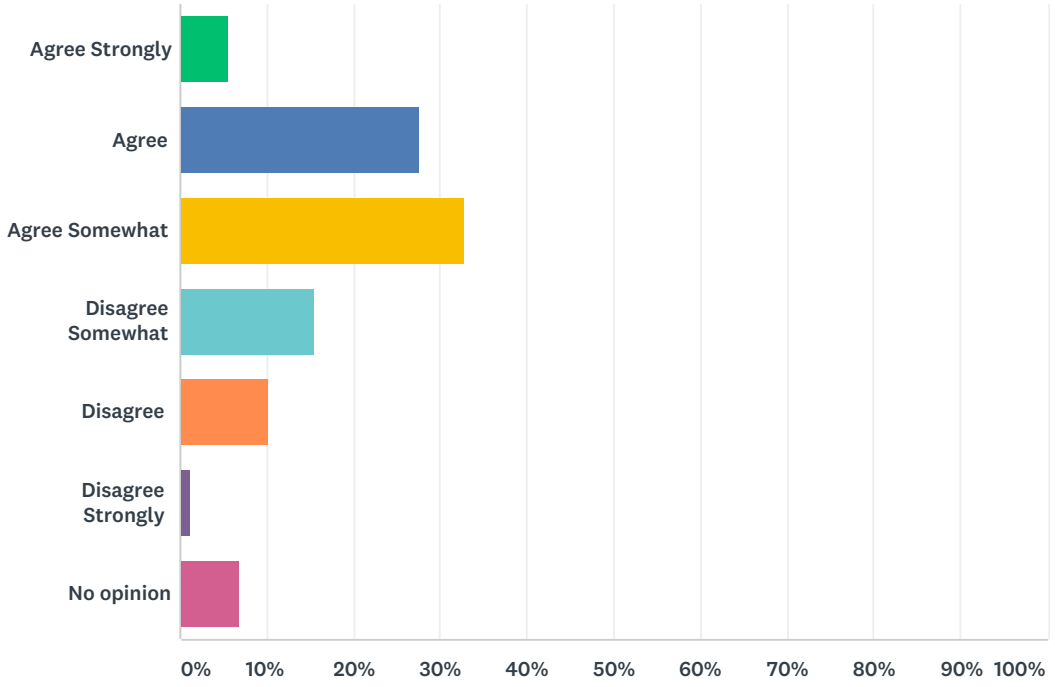
Answered: 304 Skipped: 0




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Agree Strongly | 9.87% | 30 |
| Agree | 47.04% | 143 |
| Agree Somewhat | 26.32% | 80 |
| Disagree Somewhat | 4.93% | 15 |
| Disagree | 3.95% | 12 |
| Disagree Strongly | 0.66% | 2 |
| No opinion | 7.24% | 22 |
| TOTAL | | 304 |

# Q2 Do you agree that the Oregon Rules of Civil Procedure promote the speedy determination of civil court actions?

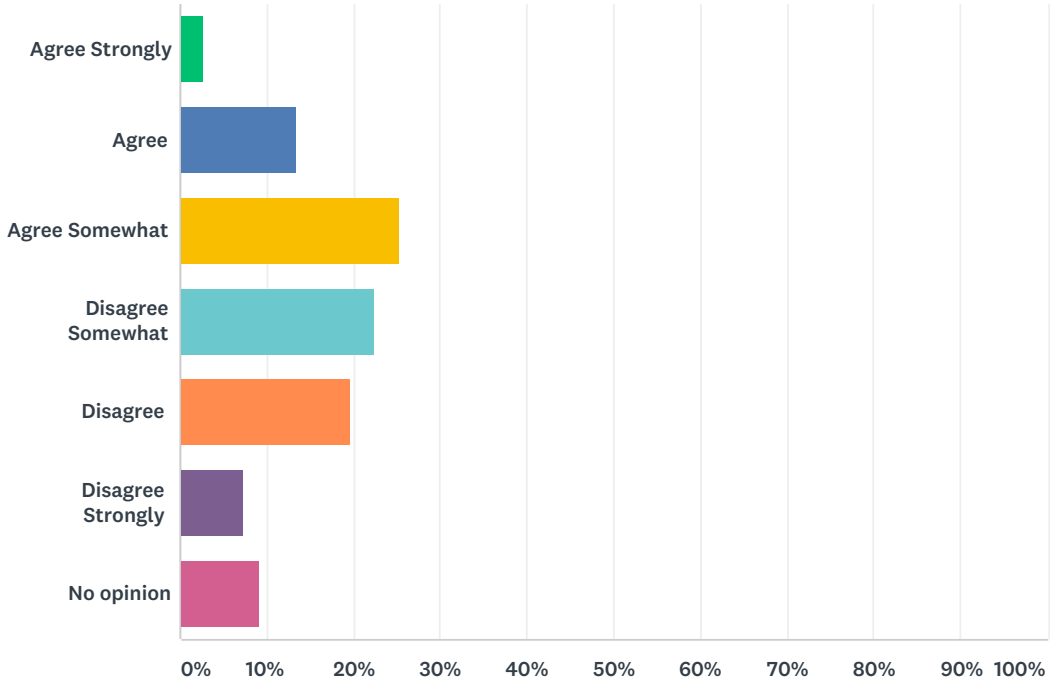
Answered: 304 Skipped: 0




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Agree Strongly | 5.59% | 17 |
| Agree | 27.63% | 84 |
| Agree Somewhat | 32.89% | 100 |
| Disagree Somewhat | 15.46% | 47 |
| Disagree | 10.20% | 31 |
| Disagree Strongly | 1.32% | 4 |
| No opinion | 6.91% | 21 |
| TOTAL | | 304 |

# Q3 Do you agree that the Oregon Rules of Civil Procedure promote the inexpensive determination of civil court actions?

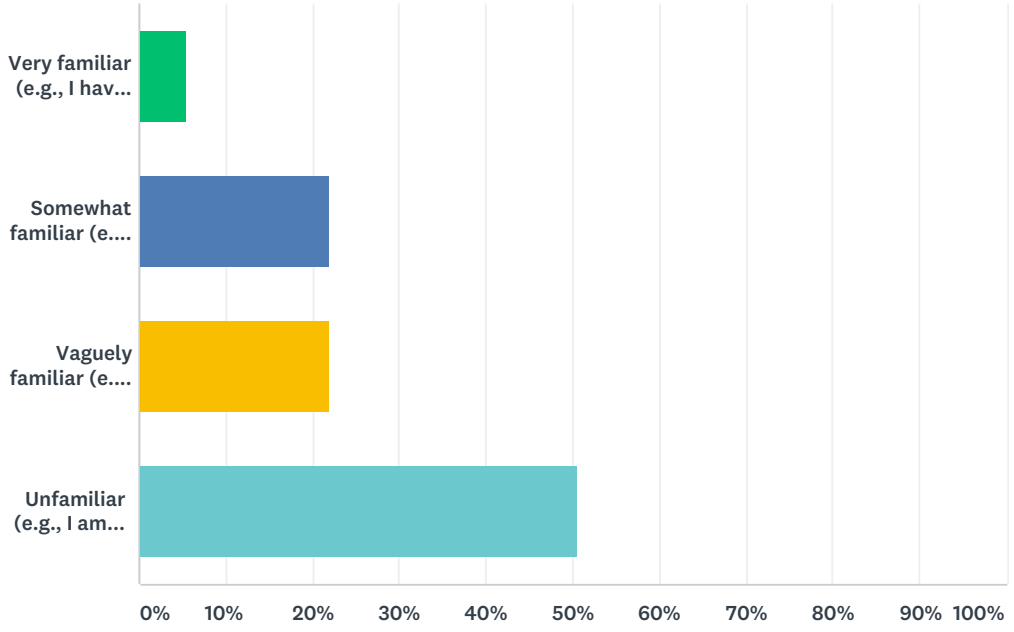
Answered: 304 Skipped: 0




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Agree Strongly | 2.63% | 8 |
| Agree | 13.49% | 41 |
| Agree Somewhat | 25.33% | 77 |
| Disagree Somewhat | 22.37% | 68 |
| Disagree | 19.74% | 60 |
| Disagree Strongly | 7.24% | 22 |
| No opinion | 9.21% | 28 |
| TOTAL | | 304 |

# Q4 Please rate your familiarity with the composition of the CCP.

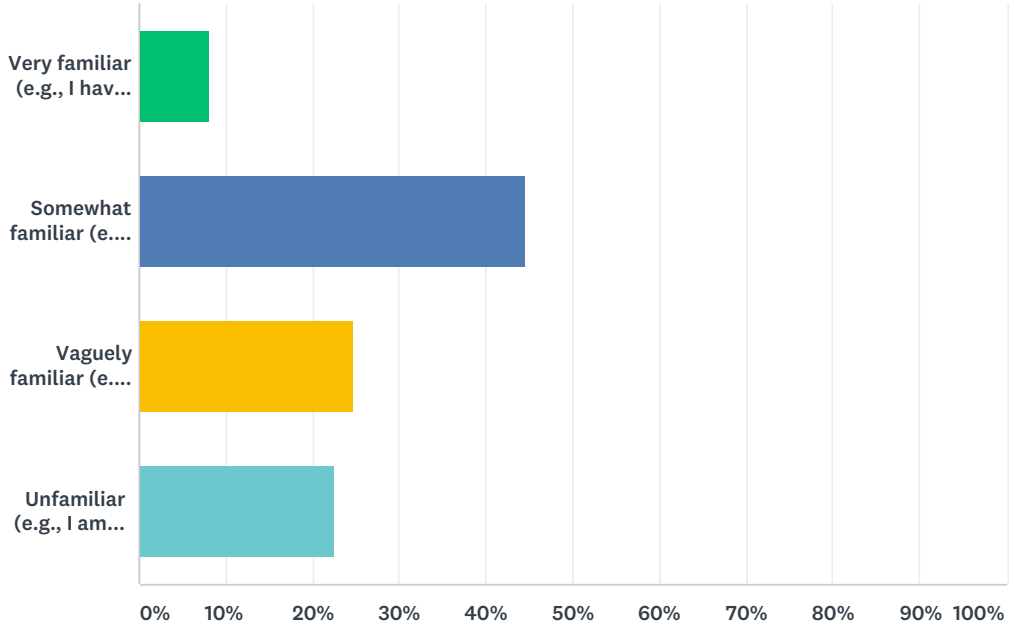
Answered: 296 Skipped: 8




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Very familiar (e.g., I have read the statute that provides for appointments to the Council and its makeup; I have served on the Council) | 5.41% | 16 |
| Somewhat familiar (e.g., I am somewhat aware of the makeup of the Council; I have a friend or colleague who has served on the Council) | 21.96% | 65 |
| Vaguely familiar (e.g., I may know someone who has served on the Council) | 21.96% | 65 |
| Unfamiliar (e.g., I am unsure of who serves on the Council) | 50.68% | 150 |
| TOTAL | | 296 |

# Q5 Please rate your familiarity with the work of the CCP.

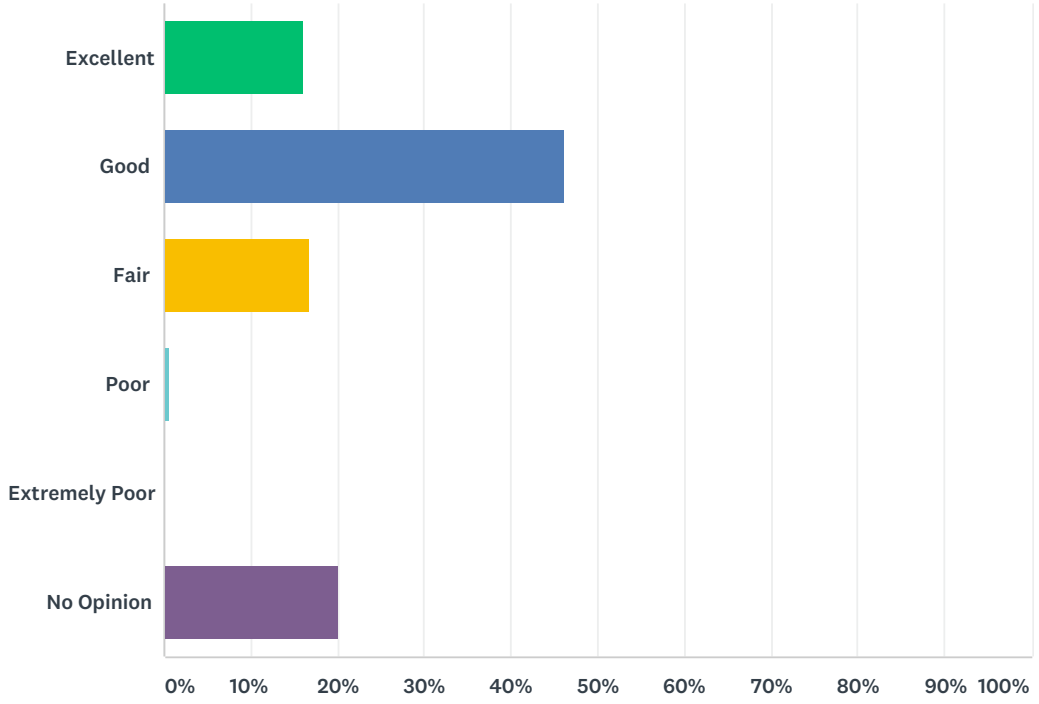
Answered: 296 Skipped: 8




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Very familiar (e.g., I have or a colleague has served on the Council; I have made a proposal to the Council; I regularly follow the work of the Council) | 8.11% | 24 |
| Somewhat familiar (e.g., I pay attention to when the Council amends the ORCP) | 44.59% | 132 |
| Vaguely familiar (e.g., I know that the Legislature does not have primary responsibility for the ORCP; I am unsure of when and how amendments are made) | 24.66% | 73 |
| Unfamiliar (e.g., I am uncertain as to how the ORCP were created; I do not know when or how the ORCP are amended) | 22.64% | 67 |
| TOTAL | | 296 |

# Q6 How would you rate the quality of the CCP's work?

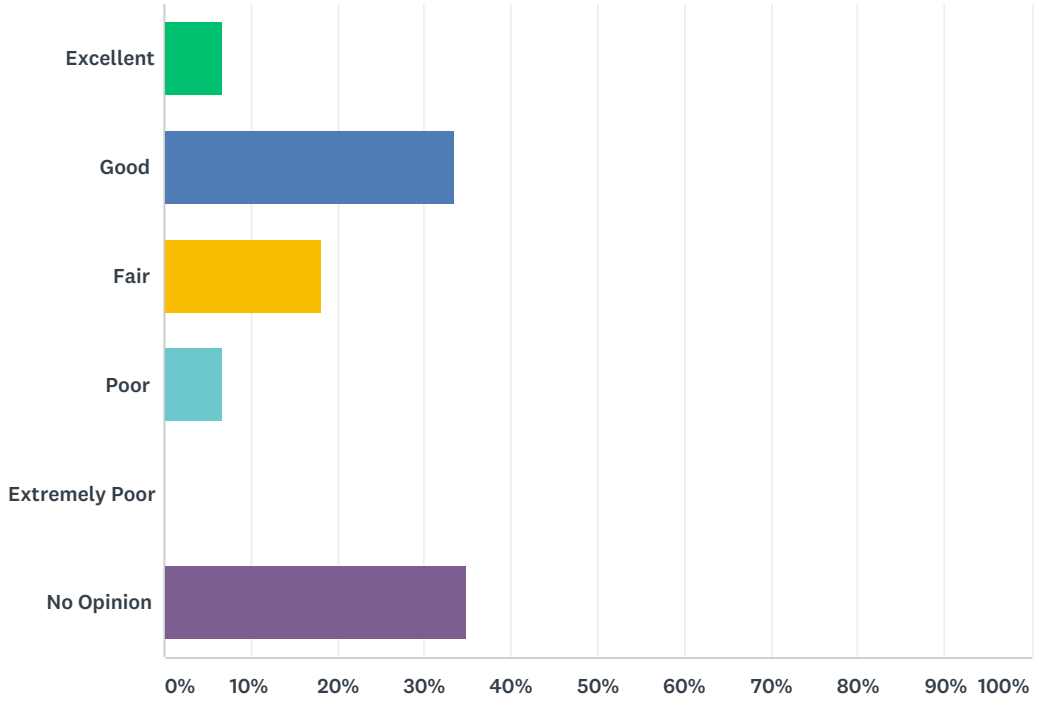
Answered: 149 Skipped: 155




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Excellent | 16.11% | 24 |
| Good | 46.31% | 69 |
| Fair | 16.78% | 25 |
| Poor | 0.67% | 1 |
| Extremely Poor | 0.00% | 0 |
| No Opinion | 20.13% | 30 |
| TOTAL | | 149 |

# Q7 How would you rate the CCP's responsiveness to the needs of litigants?

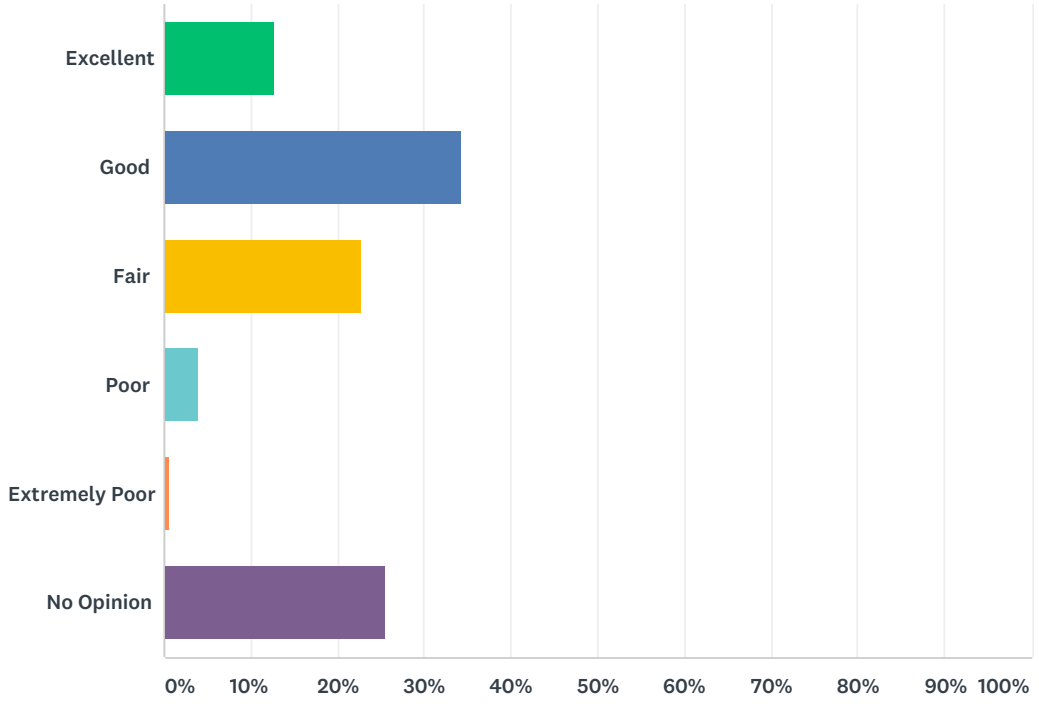
Answered: 149 Skipped: 155




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Excellent | 6.71% | 10 |
| Good | 33.56% | 50 |
| Fair | 18.12% | 27 |
| Poor | 6.71% | 10 |
| Extremely Poor | 0.00% | 0 |
| No Opinion | 34.90% | 52 |
| TOTAL | | 149 |

# Q8 How would you rate the CCP's responsiveness to the needs of lawyers?

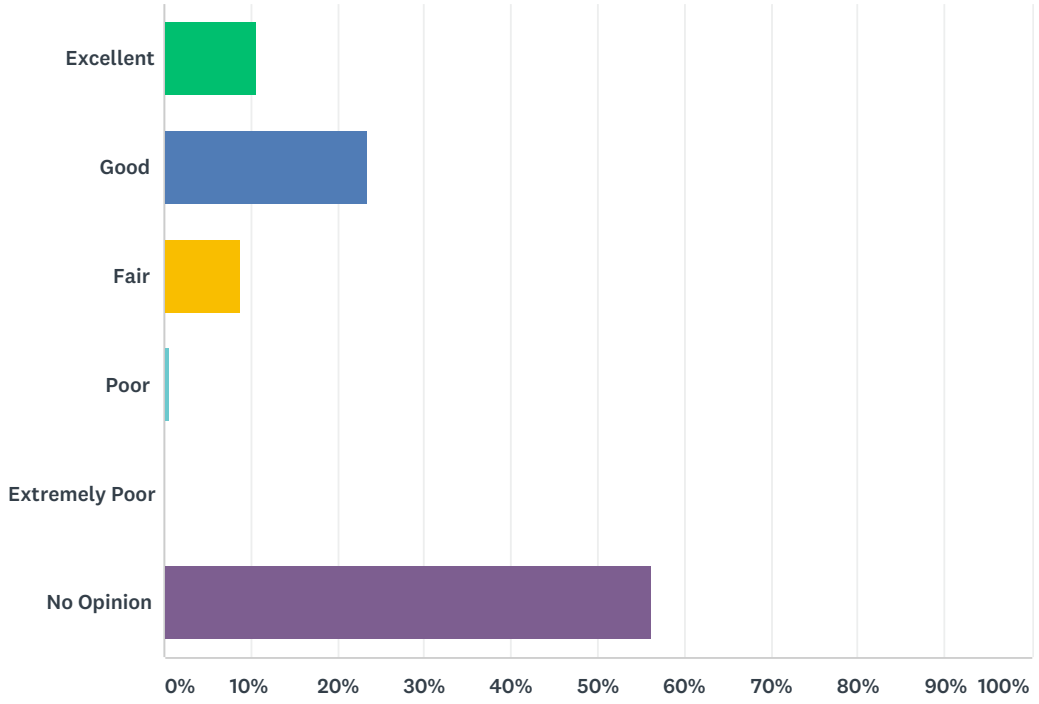
Answered: 149 Skipped: 155




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Excellent | 12.75% | 19 |
| Good | 34.23% | 51 |
| Fair | 22.82% | 34 |
| Poor | 4.03% | 6 |
| Extremely Poor | 0.67% | 1 |
| No Opinion | 25.50% | 38 |
| TOTAL | | 149 |

# Q9 How would you rate the CCP's responsiveness to the needs of judges?

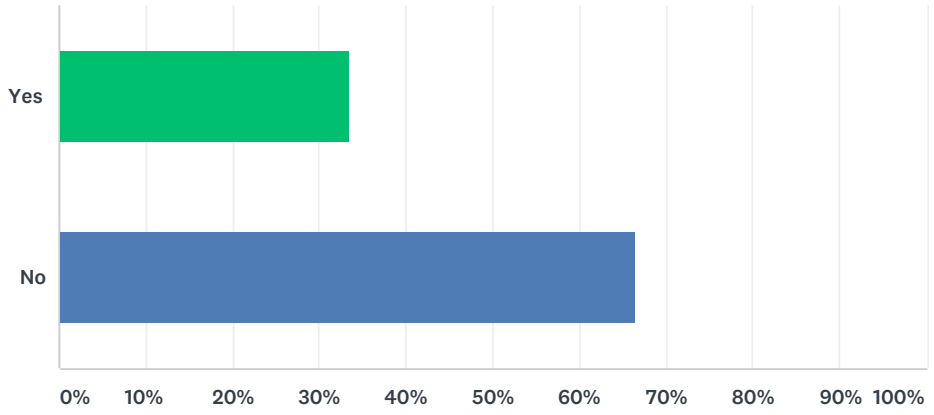
Answered: 149 Skipped: 155




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Excellent | 10.74% | 16 |
| Good | 23.49% | 35 |
| Fair | 8.72% | 13 |
| Poor | 0.67% | 1 |
| Extremely Poor | 0.00% | 0 |
| No Opinion | 56.38% | 84 |
| TOTAL | | 149 |

# Q10 Have you visited the CCP website?

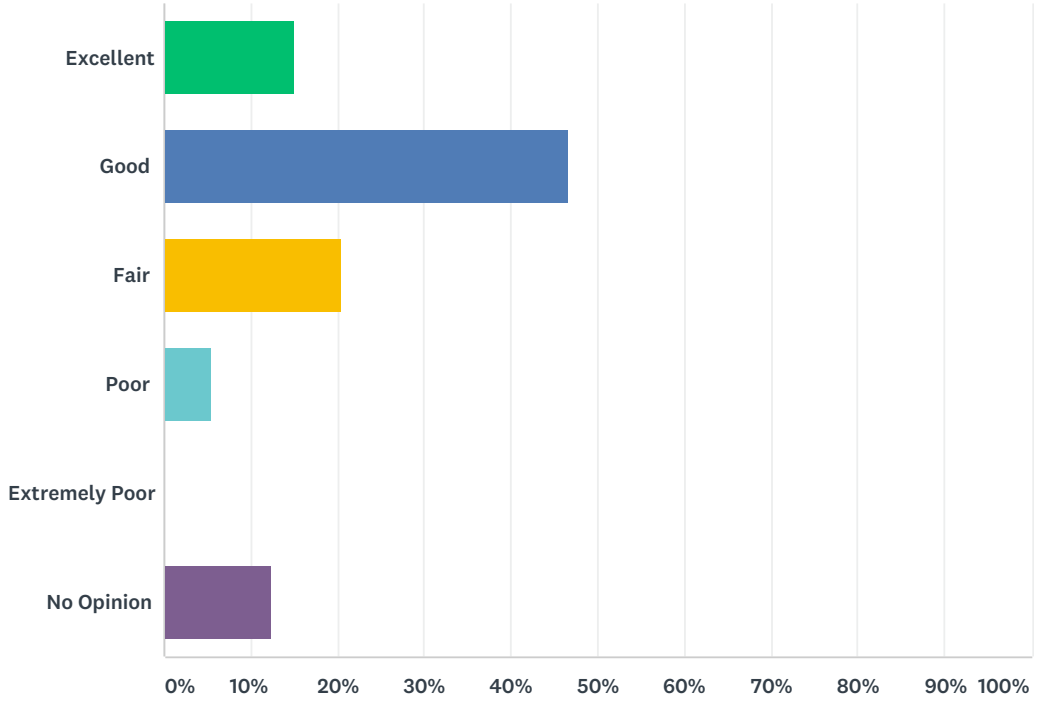
Answered: 221 Skipped: 83




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Yes | 33.48% | 74 |
| No | 66.52% | 147 |
| TOTAL | | 221 |

# Q11 Please rate the CCP website's usefulness in terms of content:

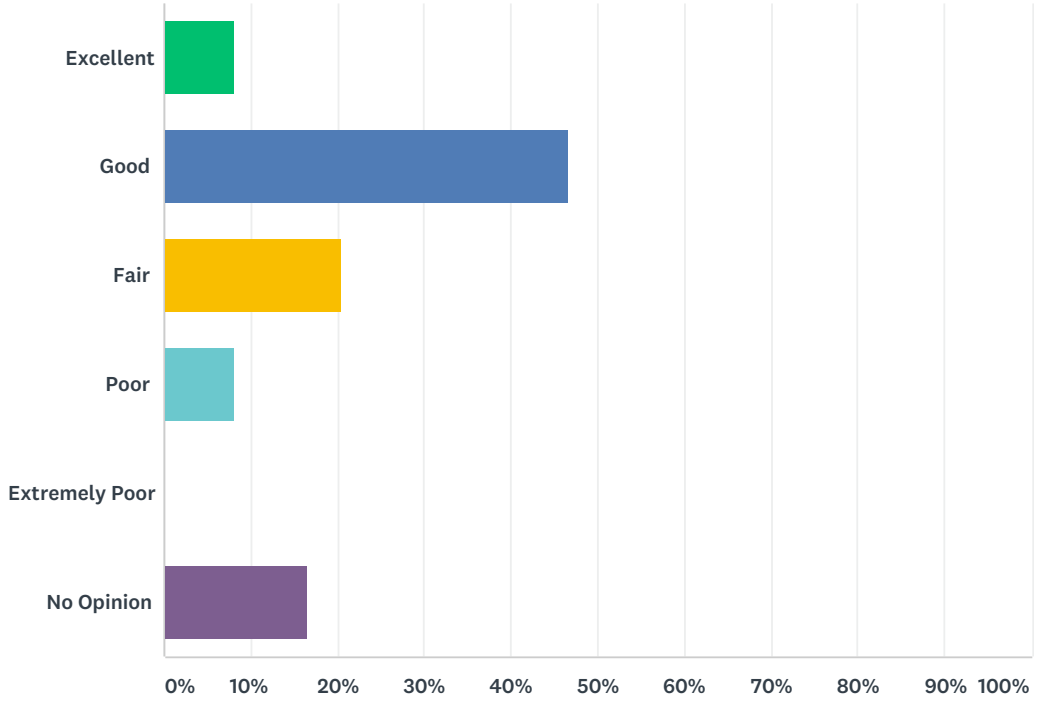
Answered: 73 Skipped: 231




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Excellent | 15.07% | 11 |
| Good | 46.58% | 34 |
| Fair | 20.55% | 15 |
| Poor | 5.48% | 4 |
| Extremely Poor | 0.00% | 0 |
| No Opinion | 12.33% | 9 |
| TOTAL | | 73 |

# Q12 Please rate the CCP website's usefulness in terms of organization:

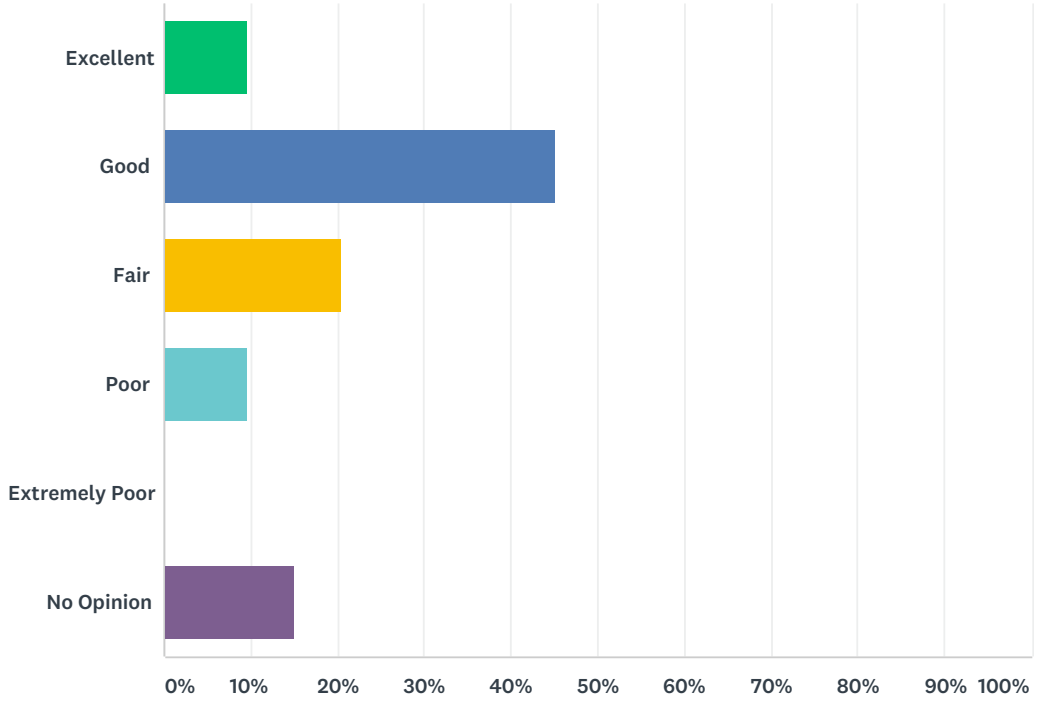
Answered: 73 Skipped: 231




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Excellent | 8.22% | 6 |
| Good | 46.58% | 34 |
| Fair | 20.55% | 15 |
| Poor | 8.22% | 6 |
| Extremely Poor | 0.00% | 0 |
| No Opinion | 16.44% | 12 |
| TOTAL | | 73 |

# Q13 Please rate the CCP website's usefulness in terms of navigability:

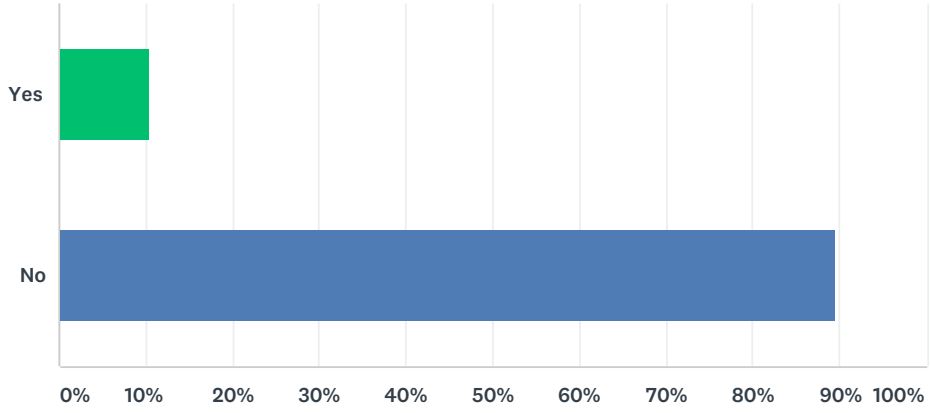
Answered: 73 Skipped: 231




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Excellent | 9.59% | 7 |
| Good | 45.21% | 33 |
| Fair | 20.55% | 15 |
| Poor | 9.59% | 7 |
| Extremely Poor | 0.00% | 0 |
| No Opinion | 15.07% | 11 |
| TOTAL | | 73 |

# Q14 Have you ever made a proposal to the CCP?

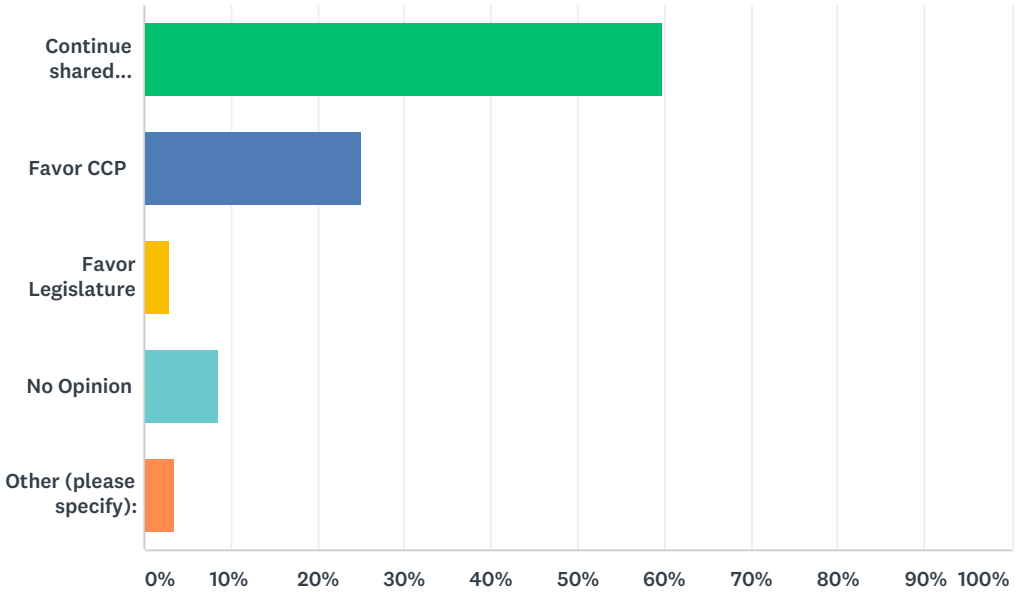
Answered: 219 Skipped: 85




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Yes | 10.50% | 23 |
| No | 89.50% | 196 |
| TOTAL | | 219 |

# Q15 Prior to 1979, most civil trial procedures were found in statutes enacted by the Legislature. The ORCP were drafted by the CCP and can be amended by the CCP, subject to a review by the Legislature, which can amend or reject the CCP's promulgated changes (i.e., the authority is now shared between the Legislature and the CCP). Who do you think should have the authority to draft and amend Oregon's civil trial procedures?

Answered: 282 Skipped: 22



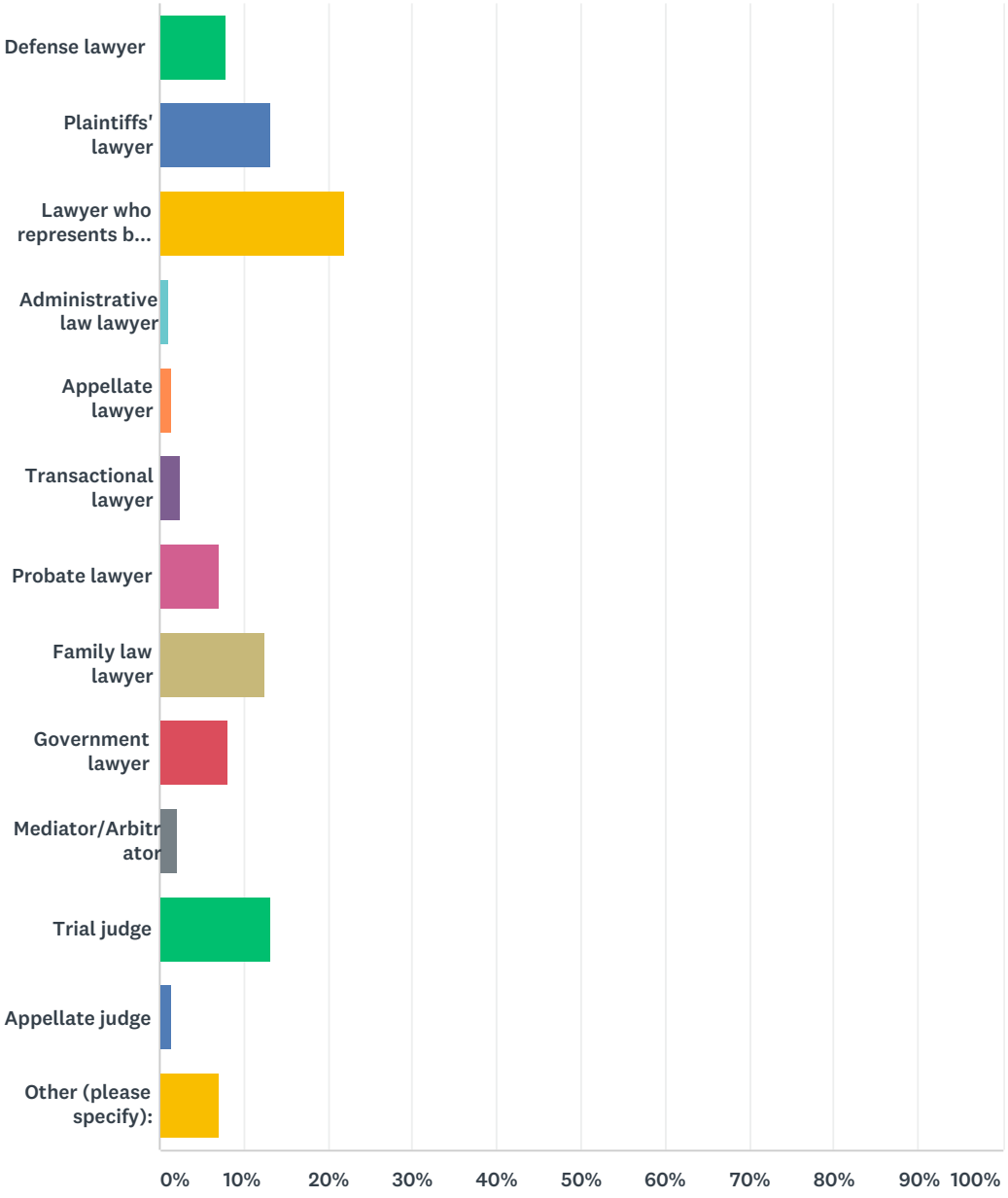

| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Continue shared authority | 59.93% | 169 |
| Favor CCP | 25.18% | 71 |
| Favor Legislature | 2.84% | 8 |
| No Opinion | 8.51% | 24 |
| Other (please specify): | 3.55% | 10 |
| TOTAL | | 282 |

| # | OTHER (PLEASE SPECIFY): | DATE |
|---|---|---|
| 1 | CCP should draft; legislature should be required to approve rules and amendments. | 8/2/2019 2:30 AM |
| 2 | Oregon Supreme Court | 7/29/2019 6:01 PM |
| 3 | should include practitioners since often I have the sense that neither the ORCP nor the legis.ature understands the issues. | 7/29/2019 2:01 PM |
| 4 | ORCPs have gotten too complicated over time and are routinely not enforced by the courts. | 7/29/2019 10:29 AM |
| 5 | e-file coders should help draft | 7/29/2019 9:50 AM |

| | | |
|---|---|---|
| 6 | A more neutral body, somewhat like Carter's judicial selection committees from the 1970s, working to get the best product instead of people fighting over the interests of the "group" they are designated to represent | 7/29/2019 7:56 AM |
| 7 | Oregon Supreme Court | 7/29/2019 7:03 AM |
| 8 | Supreme Court should propose changes, considered by the legislature | 7/29/2019 6:57 AM |
| 9 | Oregon Supreme Court (or a committee of judges to whom the task is delegated) | 7/29/2019 6:35 AM |
| 10 | State Supreme Court, like Washington | 7/29/2019 6:23 AM |

# Q16 The following best describes my practice area:

Answered: 279 Skipped: 25



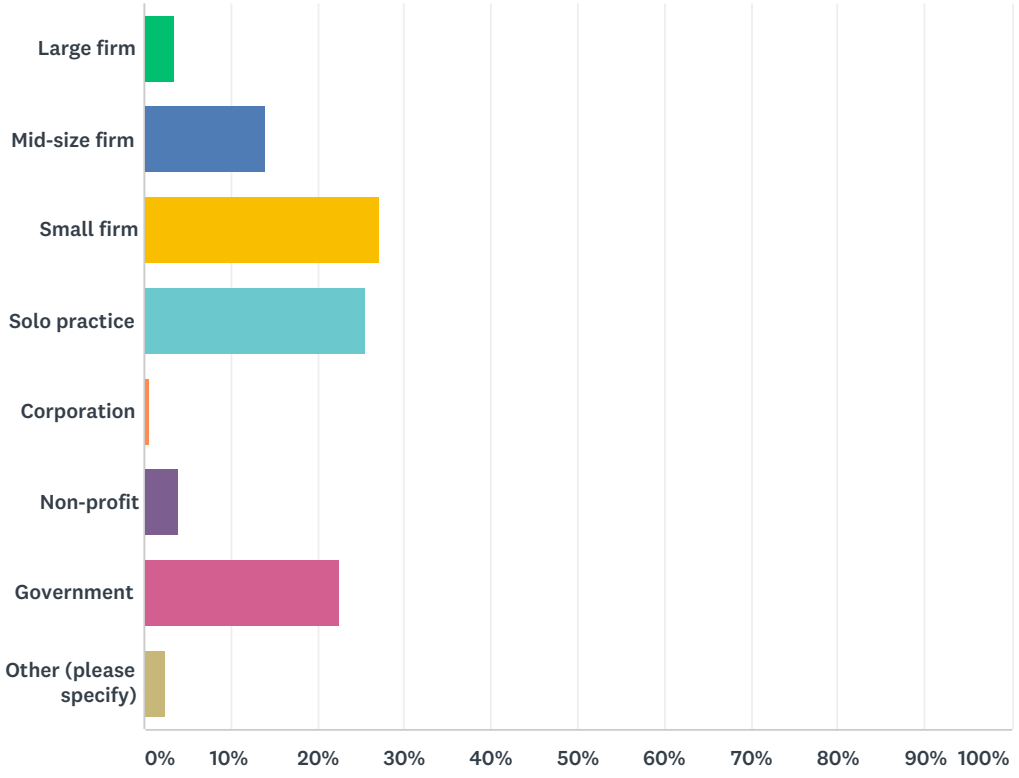

| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Defense lawyer | 7.89% | 22 |
| Plaintiffs' lawyer | 13.26% | 37 |
| Lawyer who represents both plaintiffs and defendants | 21.86% | 61 |
| Administrative law lawyer | 1.08% | 3 |
| Appellate lawyer | 1.43% | 4 |
| Transactional lawyer | 2.51% | 7 |

| | | |
|---|---|---|
| Probate lawyer | 7.17% | 20 |
| Family law lawyer | 12.54% | 35 |
| Government lawyer | 8.24% | 23 |
| Mediator/Arbitrator | 2.15% | 6 |
| Trial judge | 13.26% | 37 |
| Appellate judge | 1.43% | 4 |
| Other (please specify): | 7.17% | 20 |
| TOTAL | | 279 |

| # | OTHER (PLEASE SPECIFY): | DATE |
|---|---|---|
| 1 | Legal aid lawyer | 8/9/2019 6:00 AM |
| 2 | I am a government lawyer, but my practice are is plaintiff civil | 8/5/2019 6:28 AM |
| 3 | Estate Planning | 7/30/2019 9:33 AM |
| 4 | General Practice Lawyer | 7/30/2019 7:13 AM |
| 5 | environmental/administrative | 7/30/2019 3:57 AM |
| 6 | do both Plaintiff and Defense work and am former pro tem | 7/29/2019 2:02 PM |
| 7 | Federal trial judge (ret.) | 7/29/2019 1:41 PM |
| 8 | Family Law Attorney | 7/29/2019 7:48 AM |
| 9 | In-House Counsel | 7/29/2019 6:53 AM |
| 10 | general practice | 7/29/2019 6:52 AM |
| 11 | general practice | 7/29/2019 6:43 AM |
| 12 | (Q)DRO lawyer (post divorce division of retirement benefits) | 7/29/2019 6:38 AM |
| 13 | Mixed, Civil, Probate and Family | 7/29/2019 6:33 AM |
| 14 | Probate Court Litigation and Mediation | 7/29/2019 6:30 AM |
| 15 | Estate planning and elderlaw | 7/29/2019 6:30 AM |
| 16 | Previously did Civil Defense, but now do Transactional work | 7/29/2019 6:22 AM |
| 17 | I have been both a plaintiff and a defense atty and am now retired from litigation serving as an arbitrator/mediator | 7/29/2019 6:21 AM |
| 18 | Several of the above: general litigation, transactional, probate | 7/29/2019 6:20 AM |
| 19 | bankrputcy | 7/29/2019 6:19 AM |
| 20 | estate planning and probate law | 7/29/2019 6:11 AM |

# Q17 The following best describes my office:

Answered: 279 Skipped: 25




| ANSWER CHOICES | RESPONSES | |
|---|---|---|
| Large firm | 3.58% | 10 |
| Mid-size firm | 13.98% | 39 |
| Small firm | 27.24% | 76 |
| Solo practice | 25.45% | 71 |
| Corporation | 0.72% | 2 |
| Non-profit | 3.94% | 11 |
| Government | 22.58% | 63 |
| Other (please specify) | 2.51% | 7 |
| TOTAL | | 279 |

| # | OTHER (PLEASE SPECIFY) | DATE |
|---|---|---|
| 1 | Trial Judge | 8/4/2019 7:56 AM |
| 2 | 2-person law firm | 8/1/2019 6:20 AM |
| 3 | Legal Aid | 7/30/2019 2:50 AM |
| 4 | Retired; part time law professor | 7/29/2019 1:41 PM |
| 5 | Judicial Branch | 7/29/2019 10:30 AM |
| 6 | In-House private company | 7/29/2019 6:53 AM |

| | | |
|---|---|---|
| 7 | retired from active litigation; serve as an arbitrator/mediator now | 7/29/2019 6:21 AM |

Council on Court Procedures
2019-2021 Biennium Survey
General Suggestions

| Suggestion | Subject Matter | Suggestion By |
|---|---|---|
| CCP should have appointees who are dedicated to neutrality in the rules, not just representing their constituent group, and people who are dedicated to the speedy, just, cost-effective resolution of civil disputes (not maximizing gains for one side or the other or maximizing attorney fees). The CCP, and perhaps lawyers generally, seem to have lost sight of the purpose of the civil legal system. | Council Composition | Anonymous |
| The CCP is a turf battle between plaintiffs' counsel and defendants' counsel, and nothing seems to get done unless the plaintiffs' bar approves. For the most part, it seems that the CCP is unable to address the significant issues that exist in the rules because of this political divide. The CCP should be a non-partisan group looking out for the best interests of Oregon's judicial system as a whole and the litigants who are involved in it to be sure EVERYONE gets a fair, efficient and cost effective trial--plaintiffs and defendants both. | Council Composition | Anonymous |
| It is very apparent that CCP does not regularly include family law practitioners, so the rules tend to be vague, incomplete, or problematic in family cases. Please create a fixed post for a family practitioner. A notes or FAQs option would also be helpful in researching rule questions. If there is a repository for questions the committee has already answered. Thank you! | Council Composition | Anonymous |
| E-court was to speed up the legal processing of civil cases and produce efficiencies. My observation is it has had just the opposite effect. I recently waited for more than 4 months on an uncontested probate order to be signed with no ability to appear at an ex parte time before the assigned judge to get an explanation and move the matter forward. I was stonewalled by fact that the only mechanism to filing was e-file and wait. Inexcusable and impossible to explain to a fee paying client who expects and deserves prompter action. The courts in Oregon have become agonizingly slow in dispute resolution. I practiced more than 4 decades and compared to rules then vs. now, justice was dispensed then swiftly and efficiently. Not so today. | E-Court | John Peterson |
| I think there needs to be an expectation if you have a rule, that lawyers should be able to avail themselves of it. ORCP 21 motions have been frowned upon, as have many MSJs. I think that is detrimental to the efficient use of court time and client funds. | Following the rules | Anonymous |
| CLEs for judges would be a good idea | Following the rules | Anonymous |
| Thanks for asking - just recently looked at the website - had no real prior knowledge. | General | Cindee Matyas |
| I have only a general suggestion. There used to be only rules in the statutes. Now there are the ORCP, the UTCRs and the SLRs. Judges expect lawyers to have all these rules memorized. It is difficult for a general practitioner (of member of the public) to be aware of all these rules and obey them faithfully. Try not to enact more rules! Keep them simple. Keep them short. | Integration of rules | Charles Williamson |
| I was not familiar with the CCP, but I use the ORCP every day and it generally works fine, so I see no reason to let the legislature get involved in changing the ORCP since most of them are not lawyers. | ORCP Authority | Anonymous |
| The shared responsibility has allowed COCP to pass on some issues and "refer" it to legislation. More family law representation would be helpful. Since I have never volunteered, I should just be grateful to those who have and regularly show up for the meetings. | ORCP Authority | Hon. Keith Raines |
| I think the idea of legislative oversight is a good one, even though it is rarely used. Plus, if a lawyer does not get the CCP to pay attention to an idea, the lawyer can go to a legislator and try to get the rule changed that way. However, the CCP should develop a very clear "legislative history" of the new or changed rule for use in court. | ORCP Authority | Paul Sundermier |
| I think it is appropriate for lawyers who use the rules, and the courts, to be primarily involved in setting and amending the rules. The legislature has very few lawyers, and, accordingly, is likely unfamiliar with what is practical and what is not. | ORCP Authority | Anonymous |

September 14, 2019, Minutes
Appendix G-1
Council on Court Procedures

Council on Court Procedures
2019-2021 Biennium Survey
General Suggestions

| Suggestion | Subject Matter | Suggestion By |
|---|---|---|
| I am working on the probate section with Jennifer Todd, Brooks Cooper and Matt Whitman. Someone probably needs to go through ORS 130 and consider some of the same issues for trusts. For the most part, ORS 125 has been addressed, but there are some gaps. | ORS | Heather Gilmore |
| The just resolution of matters involving pro se litigants should be key to the rules | Pro Se Litigants | Anonymous |
| I am grateful for the work you all have done to put the history of amendments online. I recently had to argue with opposing counsel that their summary judgment motion was not an "appearance" that allowed them to avoid default. The website's organization of history by rule was very helpful and fairly ease to use. Previously, amendments were issued with comments by CCP . The practice of CCP commenting seems to have fallen out of favor. In order to understand amendments without comment, time must be spent in reviewing the meeting minutes, which is cumbersome. Although resort to the minutes may still be useful, official commentary would have saved me significant research time. I would like to see CCP reinstate the practice of commenting on its amendments. | Staff Comments | Jonathan Dennis |
| It is my understanding that the current CCP commentary on the ORCP is not available for review. There might be a good reason for that, but that eliminates what might be a helpful resource for litigators. | Staff Comments | Anonymous |
| Should make comments to ORCP easier to find and access. | Staff Comments | Anonymous |
| The comments of the CCP are often helpful in explaining the rules to trial judges. | Staff Comments | Dan Keppler |
| Where's the app? Come on ... get with the 21st Century! | Technology | Anonymous |
| stay in touch with updated technology | Technology | Anonymous |
| Anything the CCP can do to encourage uniform application of the rules between counties would be much appreciated. The lack of uniformity makes it very difficult to practice in more than a couple counties because each additional county requires learning a new way of interpreting the rules. | Uniformity between counties | Anonymous |

Council on Court Procedures
September 14, 2019, Minutes
Appendix G-2

Shari Nilsson <nilsson@lclark.edu>

# RE: Rule 7 inquiry

1 message

**Mark.A.Peterson@ojd.state.or.us** <Mark.A.Peterson@ojd.state.or.us> Tue, Nov 13, 2018 at 5:22 PM

To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Cc: nilsson@lclark.edu

Holly,

Fair enough. In the case of substitute service (7 D(2)(b)), office service (7 D(2)(c)), and service on a mail agent (7 D (3)(a)(iv)) the current wording is that the plaintiff "shall cause to be mailed" (or a variant of that phrase in 7 D(3)(a) (iv)(B)). Service by alternate method is by its nature an effort to secure service when ordinary methods fail and is done under the direction of the court. Securing personal jurisdiction is serious business and having a pro se plaintiff be the only source of evidence that service was completed seems to open up a potential for defaults being undone and judgments being set aside when the evidence on service is evenly balanced. I think that you and I have agreed to disagree on this point. Subsection D(6) is a different form of service and is largely self contained within the subsection. The question for the Council is whether writing an explicit exception for alternate service into section E (or writing a section E exclusion into subsection D(6)) makes the rule more or less clear.

Mark

Holly Rudolph ---11/13/2018 02:49:42 PM---(so then does 7E not apply to alternate service at all?) Holly C. Rudolph, J.D.

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/13/2018 02:49 PM
Subject: RE: Rule 7 inquiry

---

(so then does 7E not apply to alternate service at all?)

*Holly C. Rudolph, J.D.*
*OJD Forms Manager*
*Executive Services Division*
*holly.rudolph@ojd.state.or.us*
*503-986-5400*

*"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell*

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**From:** Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>
**Sent:** Wednesday, November 07, 2018 6:18 PM
**To:** Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
**Subject:** RE: Rule 7 inquiry

Holly,

You are correct that the existing language relating to mailing copies of the summons and complaint under subsection D(6) places the burden on the plaintiff to actually perform the act of mailing. (It does seem to me that the plaintiff can delegate or contract with another person to perform that duty so long as that other person can provide evidence of the act of mailing.) The language in the proposed amendment (also at subsection D(6)) retains the direction to the plaintiff to mail the copies but uses the currently approved word "must" in place of "shall". One rationale is that the existing language did not require the plaintiff to find another person and "cause" that person to mail the summons and complaint. A better rationale is that alternate service is only available when the court, in its discretion, authorizes such service and, presumably, the court will give adequate direction to the plaintiff, i.e., the service is performed at the direction of the court. I know that when I approve alternate service, I spell out each step that the plaintiff is required to perform. By the way, your observation caused me to look anew at subsection D(6) and I noticed that, for mailing to alternate addresses of defendant, the language goes from active to passive. We may change that.

The amendment's language on electronic alternative service is silent on who is allowed to send the e mail, text, fax, or whatever. Again, the motion and declaration should specify how the plaintiff expects to effect service and the court's order should spell out exactly what is required. The Council had expert input on electronic service and understands that any kind of electronic message or post from an unknown sender is likely to be blocked or screened by privacy settings whereas a message from one's so-to-be former spouse may be received and read. It will be up to the plaintiff to indicate in the motion and affidavit or declaration why electronic service is the most likely method of getting notice to the defendant and that might include an averment that the other party sends and receives communications to and from the plaintiff (or possibly the plaintiff is blocked but another person is in communication with the defendant via the electronic means mentioned in the motion). This whole new approach still causes me concern but, in many cases it is really the best means available to actually get the message to the defendant and almost anything is likely to be more efficacious than is the case with publication in a newspaper or posting the summons and complaint at the courthouse. Finally, the amended paragraph D(6)(d) now gives defendants served by alternate service, not just publication, an opportunity to come late to the litigation or to set aside a judgment that has been entered.

You are not "hounding" me. You have useful insights on the work product of the Council and it would be nice if the ORCP could mesh with the ODJ's forms.

Best,

Mark

Holly Rudolph ---11/07/2018 11:05:13 AM---Oh I did have one other question for you though. The regular R7 rules use the phrase "plaintiff shal

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/07/2018 11:05 AM
Subject: RE: Rule 7 inquiry

---

Oh I did have one other question for you though. The regular R7 rules use the phrase "plaintiff shall cause to be mailed" – which we kind of wrangled with a few years ago, ending up with 'plaintiff can't actually mail it because of 7E.

However, R7(D)(6) doesn't use that phrase, it says 'plaintiff must mail', and that's retained in the amendments. Does that mean that the party can actually do the mailing that's associated with alternative service themselves?

And finally … the electronic service section. I had already added an open-ended option to forms for that, so I've given this some thought. I feel strongly that the rule needs to either expressly allow or at least allow discretion for the court to order that the party can perform electronic service themselves. I have reasons.

For any of these methods, it's very common (and wise) for people to set their inbox or phone to screen out unknown numbers or unidentified senders. So the chances of having service blocked by technology is pretty high if 7E still applies and some random person is sending emails or texts. For social media it's even more important since the recipient is likely to have privacy settings in place that would prevent an unknown server from actually contacting them. The 'most reasonably calculated method to apprise recipient' is 100% to allow the party to serve instead of requiring a third party server. This is backstopped by the availability of screenshots to prove what exactly was sent and received, which is an element I included in the instructions. The other-server rule is – as I understand it – a way to insert a neutral party in between litigants to ensure that what NEEDS to be served is what's ACTUALLY served. That factor is negligible in an electronic setting. I advocate for an exception to 7E for service under (new) 7D(6)(b).

Apologies for hounding you – it just so happens that I've been working on the revisions for this packet over the past couple of weeks so it's all front and center for me!

Thank you! I'm excited that electronic service is happening. Going down this little rabbit hole last week made me realize that I don't even know the addresses of some of my best friends! We know how to get to each other's homes, but actual street addresses? No.

*Holly C. Rudolph, J.D.*
*OJD Forms Manager*
*Executive Services Division*
*holly.rudolph@ojd.state.or.us*
*503-986-5400*

*"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell*

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**From:** Mark.A.Peterson@ojd.state.or.us <Mark.A.Peterson@ojd.state.or.us>
**Sent:** Tuesday, November 06, 2018 2:51 PM
**To:** Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
**Cc:** nilsson@lclark.edu
**Subject:** Re: Rule 7 inquiry

Holly,

The "time for response" phrase is captured from the leadline in subsection 7C(2) and means the time to appear, to file an answer or a motion, or to otherwise defend. That phrase is in the last line of paragraph 7D(6)(a) in the current rule and will be found in paragraph 7D(6)(a) in the proposed amendment that can be found on the Council's website--councilonourtprocedures.org. The notice that is required on the summons (see 7C(3) for three versions) is intended to inform defendants as to what they must do to avoid a default. So, the time to respond is the last date before a default may be entered rather than the date on which the 30 days in which to respond begins.

The alternative service provisions as written are likely behind the times and the proposed amendments are intended to be a brave but modest effort to make them more useful in light of current technology and the ways in which many users of the court system communicate. Recall that there is good case law that holds that actual notice of the litigation is not necessarily adequate notice. I take the alternate service amendments to be saying, "If you do not know of a means by which the defendant may be served personally, what method is the most likely process to provide the defendant with notice of the pendency of the litigation and an opportunity to appear and defend. See subsection 7D(1) which is the constitutional standard. One impetus for the amendment is that no one believes that service by publication is at all likely to let a defendant know of pending litigation that is filed against him or her.

Have I made things worse or helped?

Mark

Holly Rudolph ---11/06/2018 09:48:09 AM---Hi! What does the phrase "time for response" mean in Rule 7D(6)(a) - last line?

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 11/06/2018 09:48 AM
Subject: Rule 7 inquiry

---

Hi!

What does the phrase "time for response" mean in Rule 7D(6)(a) - last line?

We think it means the time when alternative service is deemed complete and the statutory response time begins to run against the other party.

That's not what the words say though, so we're confused, because none of the other things we think it could mean make any sense.

I generally want to red-line the living daylights out of the alternative service rules ... between you and me it's a lot of words that boil down to "any way you can let them know", bracketed by "and as long as they know it's fine". But that's an effort for another time ... perhaps as part of a concerted effort to make guidelines for service by email and social media?

Yes - that noise you just heard was Pandora's box

Holly C. Rudolph, J.D.
OJD Forms Manager
Executive Services Division
holly.rudolph@ojd.state.or.us
503-986-5400

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Shari Nilsson <nilsson@lclark.edu>

# Re: An issue for the Council to Consider

1 message

**Mark Peterson** <mpeterso@lclark.edu> Fri, Nov 2, 2018 at 3:01 PM
To: brooks@draneaslaw.com
Cc: Shari Nilsson <nilsson@lclark.edu>

Good to hear from you Brooks! Maybe the rule is meant to hang the attorney out to dry. Your suggestion will be placed on the Council's agenda for the September, 2019, meeting when, as you may recall, the Council will take up items and rules to be considered by committees for implementation and amendment.

Hope that you are doing well,

Mark
--
Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219
mpeterso@lclark.edu
(503) 768-6505

On Fri, Nov 2, 2018 at 2:51 PM Brooks Cooper <brooks@draneaslaw.com> wrote:

> ORCP 17 speaks of sanctions that can be granted against a PARTY or an ATTORNEY.
>
> ORCP D(3) provides a safe harbor of 21 days whereby an alleged false certification can be amended or withdrawn. But it only uses the word PARTY. That could lead to an interpretation that ATTORNEYs facing sanctions motions have no safe harbor to withdraw their alleged false certifications.
>
> I would argue that this is not and should not be a correct interpretation of the rule and that ORCP 17 D(3) should be amended to say “party or attorney” in each place where it now says only “part.”
>
> Hi everybody! I miss our council meetings.
>
> NOTE OUR NEW SUITE NUMBER
>
> Draneas & Huglin, PC
>
> 4949 Meadows Road
>
> Suite 600
>
> Lake Oswego, OR 97035

V: 503-496-5500

F: 503-496-5510

D: 503-496-5511

Shari Nilsson <nilsson@lclark.edu>

# Re: Request for OCCP re: GAL from LPWG

1 message

**Mark.A.Peterson@ojd.state.or.us** <Mark.A.Peterson@ojd.state.or.us> Wed, Oct 31, 2018 at 11:01 AM
To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Cc: nilsson@lclark.edu

Holly,

I understand and even empathize a bit with the plain English movement in our profession. On the other hand, maybe we are moving in the wrong direction. Why not require the study of Latin as a part of our basic school curriculum? Being in the bottom five per cent of the nation in being able to get our children to graduate from high school tells me that we are doing something wrong. If our standards are too low, maybe it's res ipsa loquitur.

Nonetheless, I will place your request on the Council's possible projects for law improvement for discussion in the coming biennium, The next biennium's first meeting is in September of 2019. Please keep that time frame in mind for any suggestions that you might want to pass along for the Council's consideration. If I have your suggestions by sometime in the summer, I can put them together with appropriate materials for the September, 2019, meeting packet.

Your observations regarding the occasional confusion with the work "guardian" are certainly fair. On the other hand, I think that we all like the term GAL. I tend to agree that the word "representative" is problematic. The Council can identify unintended consequences with virtually any change that we might make.

Best.

Mark

Holly Rudolph ---10/31/2018 10:06:03 AM---Happy Halloween! I'm pinging you with a request from the Law and Policy Workgroup for the ORCPs to r

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>
Date: 10/31/2018 10:06 AM
Subject: Request for OCCP re: GAL from LPWG

Happy Halloween!

I'm pinging you with a request from the Law and Policy Workgroup for the ORCPs to replace the non-English (let alone PLAIN English) "Guardian ad litem" with something English. Preferably plain.

The group doesn't have any specific recommendations, but I would ask that whatever it becomes not use "guardian" so as not to conflict with chapter 125 guardians.

Perhaps party advocate? Anything using 'representative' gets dicey too with probate "personal representatives" and representing attorneys.
It's just a braindrizzle, but 'party advocate' has some tread with the familiar and similar use of CASA.

Not a thing I'm going to chase – just passing along a request.

Cheers!

Holly C. Rudolph, J.D.
OJD Forms Manager
Executive Services Division
holly.rudolph@ojd.state.or.us
503-986-5400

"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

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Shari Nilsson <nilsson@lclark.edu>

# Re: Inconsistencies between ORCP and UTCR re service and submission of orders and judgments

1 message

**Mark Peterson** <mpeterso@lclark.edu> Thu, Jun 6, 2019 at 9:27 AM
To: Mary W Johnson <maryjohnson@orlaw.us>
Cc: Shari Nilsson <nilsson@lclark.edu>

Mary,

Thank you for raising this timing concern. The Council works on a biennial schedule and will begin a new round of deliberations and amendments in September. Your suggestion will be included on the agenda for the opening Council meeting where items are considered as possible amendments to the ORCP. A survey will be sent out via e mail from the OSB this summer soliciting potential improvements to the rules but your suggestion will already be on the agenda. You may follow the Council's work at its website: councilonc ourtprocedures.org.

Mark

--
Mark A. Peterson
Executive Director
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Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219
mpeterso@lclark.edu
(503) 768-6505

On Wed, Jun 5, 2019 at 12:50 PM Mary W Johnson <maryjohnson@orlaw.us> wrote:

> Dear Council on Court Procedures,
>
> I have been a civil litigator in Oregon for 35 years. This is a plea to clarify and unify rules for service and submission of orders and judgments as between UTCR 5.100 and ORCP 10.
>
> UTCR 5.100 requires service on opposing counsel 3 days prior to submission to court. However, under ORCP 10, you have to add 3 days and since the time period is less than 7 days, and you can't count weekends, no order or judgment can be submitted sooner than 9 days after service.
>
> If after service, there is an objection that is resolved, nowhere in UTCR 5.100 does it say whether or not you have to re-serve the order or judgment and wait at least another 9 days.
>
> UTCR 5.100 requires service on a *pro se* opposing party seven days before submission to court under a cover sheet notice instructing that any objection must be made within 7 days of the date of service. That required notice is inconsistent with ORCP 10, which requires an addition of 3 more days, so it is really a 10-day rule.

No client should have to pay their lawyer to individually calculate days under multiple rules relating to service and submission for each order or judgment.

Some counties require a form of order to be submitted with a motion, say, for postponement of trial, at the time the motion is submitted. UTCR 5.100 does not authorize that method of submitting an order.

The certificate of service and the certificate of readiness should be combined and simplified into a one-page form.

**Mary W. Johnson, OSB 843843**

Attorney at Law

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Shari Nilsson <nilsson@lclark.edu>

# RE: 2019 Council on Court Procedures Survey

1 message

**John Kaempf** <john@kaempflawfirm.com> Mon, Jul 29, 2019 at 1:18 PM
To: "nilsson@lclark.edu" <nilsson@lclark.edu>

Please amend ORCP 39 C make it clear that only a party or witness in a deposition can be video recorded, and **not** an attorney. The request to videotape the attorney asking questions is an improper intimidation technique, in my view. Thank you.

**John Kaempf**
**Kaempf Law Firm PC**

**1050 SW Sixth Avenue Suite 1414**

**Portland, OR 97204**

**(503) 224-5006**

**Bio** | **Website**

This email and any attachments are confidential. If you are not the intended recipient, please delete it.

**From:** Oregon CCP <surveys@osbar.org>
**Sent:** Monday, July 29, 2019 1:09 PM
**To:** John Kaempf <john@kaempflawfirm.com>
**Subject:** 2019 Council on Court Procedures Survey

**Shari Nilsson <nilsson@lclark.edu>**

# Fwd: Quick ORCP suggestion

1 message

**Mark Peterson** <mpeterso@lclark.edu> Wed, Aug 7, 2019 at 5:20 PM
To: Shari Nilsson <nilsson@lclark.edu>

ORCP 54 A original inquiry. I thought my response helped inform the issue

M
--
Mark A. Peterson
Executive Director
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mpeterso@lclark.edu
(503) 768-6505

---------- Forwarded message ---------
From: **Holly Rudolph** <Holly.Rudolph@ojd.state.or.us>
Date: Mon, Apr 29, 2019 at 8:27 AM
Subject: Quick ORCP suggestion
To: Mark Peterson (mpeterso@lclark.edu) <mpeterso@lclark.edu>

Hi!

Rule 54A requires a party to submit a 'form of judgment' on a voluntary dismissal. That form is currently in Odyssey because it's very basic and usually contains no substantive relief. I suggest removing the requirement to submit a form of judgment. If a party wants costs and fees or something else it going on, there's nothing prohibiting it, but if it's just a dismissal, it's simpler to just create a form in Odyssey.

A(1) **By plaintiff; by stipulation.** Subject to the provisions of Rule 32 D and of any statute of this state, a plaintiff may dismiss an action in its entirety or as to one or more defendants without order of court by filing a notice of dismissal with the court and serving the notice on all other parties not in default not less than 5 days prior to the day of trial if no counterclaim has been pleaded, or by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim unless the court directs that the dismissal shall be without prejudice. Upon notice of dismissal or stipulation under this subsection, [~~a party shall submit a form of judgment and~~] {in the alternative - …."may submit a form of judgment"} the court shall enter a judgment of dismissal.

Cheers!
*Holly C. Rudolph, J.D.*
*OJD Forms Manager*
*Executive Services Division*

*holly.rudolph@ojd.state.or.us*
*503-986-5400*

*"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell*

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**Shari Nilsson <nilsson@lclark.edu>**

# Possible amendment of ORCP 57 D(4)

1 message

**Mark Peterson** <mpeterso@lclark.edu> Fri, Jul 5, 2019 at 4:37 PM
To: Oregon Council on Court Procedures <ccp@lclark.edu>

All,

The presiding judge in Multnomah County pointed out State v. Curry, 298 Or App 377 (2019) as an important new case bearing on the mode and procedure for raising, responding to, and deciding Batson challenges when a juror is subject to a peremptory challenge and it is contended that the challenge is impermissibly based on race or gender. Our OSB liaison, Matt, pointed out that the Court of Appeals invited the Council on Court Procedures to provide more guidance as to the procedures to be utilized to determine "when a prima facie case of prohibited discrimination has been rebutted." Id., at 389. ORS 136.230 makes ORCP 57 the applicable rule for criminal cases in Oregon's circuit courts. And, the Curry case reiterates that appeals based on alleged impermissible bias in juror selection apply in the civil context as well. Id., n. 3 at 380.

The Curry case includes in an appendix Washington General Rule 37 as one potential procedure. Personally, I think that Washington's rule is over long and could be improved upon but we have is nicely presented for discussion.

At the Council's September meeting (and possibly October's as well) we will discuss and select those potential amendments to be assigned to committees for consideration this biennium. This is advance notice of an item that will appear on that list.

Mark

Mark A. Peterson
Executive Director
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Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219
mpeterso@lclark.edu
(503) 768-6505

Shari Nilsson <nilsson@lclark.edu>

# Fw: Q re ORCP

1 message

**Mark.A.Peterson@ojd.state.or.us** <Mark.A.Peterson@ojd.state.or.us> Wed, Jan 16, 2019 at 1:37 PM

To: nilsson@lclark.edu

----- Forwarded by Mark A Peterson/MUL/OJD on 01/16/2019 01:37 PM -----

From: Marilyn E LITZENBERGER/MUL/OJD
To: Mark A Peterson/MUL/OJD@OJD
Date: 01/16/2019 11:58 AM
Subject: Re: Q re ORCP

Thank you Mark, for your insight and for taking time to reply to my question.

Hon. Marilyn E. Litzenberger
Senior Judge, State of Oregon
Multnomah County Courthouse
1021 SW Fourth Avenue, Rm. 548
Portland, OR 97204-1223
Tel: (503) 988-3365
Fax: (503) 276-0979

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Documents sent to the court must be e-filed as of December 1, 2014. Documents received by the court via e-mail will not be filed in the official court record.

Mark A Peterson---01/16/2019 11:47:17 AM---Thanks Marilyn. I like having enumerated (in Rule 13) pleadings and motions. "Objections" and the

From: Mark A Peterson/MUL/OJD
To: Marilyn E LITZENBERGER/MUL/OJD@ojd
Date: 01/16/2019 11:47 AM
Subject: Re: Q re ORCP

Thanks Marilyn. I like having enumerated (in Rule 13) pleadings and motions. "Objections" and the like without an explanation of any procedure to describe what it looks like and how it is communicated are not helpful. The Council has eliminated some instances of this kind of loose verbiage but there remain many examples of similar non-specific responses that may or may not be a document. I have no problem with requests and objections as used in Rule 43 because what they are, and the procedures involved, are spelled out. Likewise the use of statements, objections, and responses in Rule 68. That said, I favor using the term "motion" when a rule authorizes a party (or a nonparty) to make a request of the court. I suspect that, when the Council revisits Rule 55 to clarify some of the ambiguities that the rewrite exposed, your concern regarding the "objection" will be addressed. While I cannot speak for the Council, it

seems to me that failing to take some clear act in response to a subpoena is not a reasonable solution if that course leads to having to defend a motion to compel or an order to show cause. And, why should the issuer of the subpoena have to take the extra step (involving time and expense)? Leaving it to another party to seek a protective order seems similarity flawed. Of course, an e mailed "objection" to the party that issued the subpoena that results in a documented response that compliance is not required would resolve the problem.

The short answer to your initial question is that the Council has not addressed your concern in my tenure and, often when concerns about Rule 55 have come up, they have been dismissed as falling within the Rule 55 quagmire. A wealth of information is available on the Council's website: councilonc ourtprocedures.org.

Mark

Marilyn E LITZENBERGER---01/16/2019 11:00:30 AM---What I have seen (in more than one case over the years): 1. The nonparty believes simply writing a l

From: Marilyn E LITZENBERGER/MUL/OJD
To: Mark A Peterson/MUL/OJD@OJD
Date: 01/16/2019 11:00 AM
Subject: Re: Q re ORCP

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What I have seen (in more than one case over the years):

1. The nonparty believes simply writing a letter or email or making a phone call to the attorney that issued the subpoena is sufficient to "object" as that term is used in ORCP 55, so does nothing further; or
*I've been given the impression that the nonparty does not move for a protective order itself because that involves a filing fee (that is incorrect) and a court appearance, retaining an attorney (because the nonparty doesn't have an legal department or the legal department attorneys "do not appear in court")*

2. The party issuing the subpoena moves to compel responses by the nonparty; or
*In this case, sometimes the party that believes it could be harmed if the nonparty responds to the subpoena steps in to seek a protective order for itself instead of, or in addition to, the nonparty making a "special appearance" in response to the motion to compel.*

3. The party issuing the subpoena applies for an Order to Show Cause, initiating a contempt proceeding, against the nonparty because it failed to comply with the subpoena.
*When this happens, the nonparty stands on its objections and argues it had no further obligation after the objections were made.*

I'm sure there are other examples, and the situation seems to be becoming more frequent, so other judges may have examples to add to what I've mentioned above.

Mark A Peterson---01/16/2019 09:24:57 AM---Marilyn, As you may know, the Council did a complete re-write of Rule 55 that was promulgated in Dec

From: Mark A Peterson/MUL/OJD
To: Marilyn E LITZENBERGER/MUL/OJD@ojd
Date: 01/16/2019 09:24 AM
Subject: Re: Q re ORCP

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Marilyn,

As you may know, the Council did a complete re-write of Rule 55 that was promulgated in December and will become

effective on January, 1, 2020. unless the Legislature rejects the promulgation. The rule was poorly written and contained many redundancies. However, the task was to keep the current rule in better form to get a better version passed and then, once the rule is in order and makes sense, to clean up deficiencies next biennium. Is there a reason that a nonparty cannot move for a protective order? Is that what a document entitled "objection" would do? I have other issues on subpoena abuse that I hope to address. In your case, it seems like a nonparty should not have to disobey a subpoena and force the party that issued the subpoena to move to compel? That makes no sense to me. Your thoughts?

Mark

Marilyn E LITZENBERGER---01/16/2019 08:50:17 AM---Good Morning Mark: Can you tell me if the CCP has considered addressing the question of contested su

From: Marilyn E LITZENBERGER/MUL/OJD
To: Mark A Peterson/MUL/OJD@OJD
Date: 01/16/2019 08:50 AM
Subject: Q re ORCP

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Good Morning Mark:

Can you tell me if the CCP has considered addressing the question of contested subpoenas to non-parties? Over my years on the bench, there have been several times when the lack of clarity on this subject was raised. Some seem confused as to how a non-party can make an appearance in a case to secure protection from the court with respect to its obligation to respond to, for example, a *subpoena duces tecum* or a notice of deposition. The rule contemplates an objection by a non-party, but provides no specific guidance as to how that objection is to be resolved. The party issuing the subpoena sometimes moves to compel a response to its subpoena, although it seems to me that is not the only procedural vehicle appropriate for the situation. There might be a motion for protective order by the party to whom the subpoena was issued or there might be a motion for an order to show cause why the non-party has not complied with the subpoena. So, I'm just wondering if the CCP has discussed this in the past and, if so, if any minutes reflect that body's discussion. If you don't know, don't worry about it - I don't have a motion pending before me at this time.

Thank you.
Marilyn Litzenberger