MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, October 12, 2019, 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.*
Kenneth C. Crowley
Jennifer Gates
Barry J. Goehler
Meredith Holley
Drake A. Hood
Hon. Thomas A. McHill
Hon. Lynn R. Nakamoto*
Hon. Susie L. Norby
Scott O'Donnell
Hon. Leslie Roberts
Tina Stupasky
Hon. Douglas L. Tookey
Hon. John A. Wolf

*Appeared by teleconference

Members Absent:

Troy S. Bundy
Hon. R. Curtis Conover
Travis Eiva
Hon. Norman R. Hill
Hon. David E. Leith
Shenoa L. Payne
Margurite Weeks
Jeffrey S. Young

Guest:

Matt Shields, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting	Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
Discovery ORCP 1 ORCP 4 ORCP 7 ORCP 9 ORCP 10 ORCP 15 ORCP 17 ORCP 22 ORCP 27/Guardians Ad Litem ORCP 31 ORCP 32 ORCP 36 ORCP 39 ORCP 41 ORCP 43 ORCP 44 ORCP 45 ORCP 46 ORCP 47 ORCP 54 ORCP 55 ORCP 57 ORCP 62 ORCP 69 ORCP 78	Discovery ORCP 7 ORCP 15 ORCP 23 ORCP 23/34C ORCP 27/GAL ORCP 55 ORCP 57	ORCP 1 ORCP 4 ORCP 9 ORCP 10 ORCP 15 ORCP 17 ORCP 22 ORCP 32 ORCP 36 ORCP 36 ORCP 39 ORCP 41 ORCP 43 ORCP 44 ORCP 45 ORCP 46 ORCP 47 ORCP 54 ORCP 62 ORCP 69 ORCP 79		

I. Call to Order

Ms. Gates called the meeting to order at 9:36 a.m.

II. Introductions

All present and on the telephone introduced themselves. An updated roster (Appendix A) was distributed that includes all current Council members

III. Administrative Matters

A. Approval of September 14, 2019, Minutes

Ms. Gates asked whether any Council members had comments or corrections to the September 14, 2019, minutes (Appendix B). There were none. Ms. Stupasky made a motion to approve the minutes. Ms. Holley seconded the motion, which passed unanimously by voice vote.

B. Staff Comments

Ms. Gates reminded the Council that, at the conclusion of the 2017-2019 biennium, Judge Peterson had created staff comments for the promulgated rules and had asked Council members for input on whether those comments accurately reflect the Council's discussions. Ms. Gates noted that Ms. Payne, who was unable to attend today's meeting, had raised two concerns about the comments by e-mail earlier in the week.

Judge Norby asked how much the staff comments influence how people interpret the final rule: is it similar to legislative history? She pointed out that the staff comments regarding an amendment should be taken as background and context and not part of that rule. She wondered how the comments are used or cited. Judge Peterson explained that there is a preface to the comments that explains that they are not written by or voted on by the Council but, rather, represent simply a bystander's report made by staff who do not vote on whether to promulgate the rule amendments. He stated that he had sent them to the Council mainly in case there were any glaring typographical errors but also to make sure that he got them right.

Judge Peterson stated that he would take Ms. Payne's comments regarding Rule 15 into consideration and dial the comments down a bit; however, he wanted to include a red flag to practitioners to not count on being able to enlarge the time necessary to file every motion under the ORCP or they will be disappointed. Ms. Holley stated that she agreed with Ms. Payne's comments regarding Rule 16. Judge Peterson also agreed that Ms. Payne has a point regarding her comments about Rule 16. Judge Roberts opined that Council

staff should not get into the weeds or have the Council vote on the staff comments or they will just be understood to become rules. She noted that she is happy if lawyers even read the rules, let alone the comments. Ms. Gates agreed with Ms. Payne's thoughts on Rule 16, and noted that the Council had a lot of discussion on what the burden is and who would bear it. Judge Peterson stated that he may have gone overboard, but pointed out that he had been given a lot of direction, including from the chair of the Rule 16 committee, that the Council had created a pathway, not a right. He stated that he appreciates the feedback and that he would like to have the comments finished soon so that they can be included on the website.

Ms. Gates asked for clarification on whether the Council actually votes to approve on the staff comments. Judge Peterson replied that, when the Council decided to resume writing staff comments, the idea was that they were just to act as an aid to people. This does not mean that they do not have currency but, If anyone wants to take umbrage with a staff comment, they can go the minutes for the legislative history. He stated that the preface to the comments indicate that the comments are intended to provide an idea as to why the Council did something, not what the rule change means. He also remarked that someone citing a staff comment should be trumped every time by someone who cites the minutes.

Ms. Gates asked the Council to take another look at the draft staff comments over the next few weeks and to get any feedback to Council staff as soon as possible.

IV. Old Business

A. Informational Reports

1. ORCP 17

Judge Peterson reminded the Council that former Council chair Brooks Cooper had suggested that Rule 17 D(3) is the only part of Rule 17 that will allow a safe harbor and exonerate the party but not the attorney (Appendix C). At the September meeting, the Council had wondered if providing the safe harbor to the client but not the attorney was by intent or otherwise, so Council staff researched the history of Rule 17. Rule 17 has been amended five times by the Council and five times by the Legislature. In 1986, the Council put in the sanctions provision, but the particular subsection in question, 17 D(3), was added by the Legislature in 1995 in Senate Bill 385. Judge Peterson stated that he had not read the committee reports for detail, but the safe harbor language was not in the introduced bill; rather, it was added in the senate amendments and that language got carried through pretty much without change for the rest of the bill's legislative history to enactment. Looking at the rest of the rule, it seems like omitting the words "or

attorney" may have been an oversight. Judge Peterson observed that subsection 17 D(3) is already a little long, but it could certainly be redrafted to say "party or attorney."

Judge Peterson noted that the only other part of Rule 17 that is specific to attorneys and not parties is subsection 17 C(3) where, if an attorney is making an allegation or argument, the attorney must certify that it is founded in good faith on existing law or a reasonable modification or reversal of existing law. He observed that it is probably not appropriate to have a lay person make that judgment.

Ms. Gates asked whether Judge Peterson was proposing forming a committee to examine the issue. Judge Peterson noted that this is a small matter, but that there are other things in Rule 17 that could be polished a little bit. He thought that the language difference in the treatment of attorneys in subsection 17 D(3) is partly because different bodies worked on the rule at different times. However, he opined that, even if there was a policy reason for treating parties and their attorneys differently, if the Council thinks that the language does not promote efficient litigation, the Council could make a change. Ms. Gates stated that she is not convinced that the difference was not intentional nor that it should have been. She had no strong feelings about forming a committee. The Council did not form a committee regarding this matter.

2. Guardians Ad Litem

Judge Norby reminded the Council that the Oregon Judicial Department's policy group on the Oregon Rules of Civil Procedure had commented (Appendix D) on the fact that the phrase "guardian ad litem" is confusing to many because it sounds like it must have some connection to a guardian proper and it does not. She noted that the term has even caused confusion to new judges on the Clackamas County bench. Judge Norby had volunteered to try to find a way to insert a simple definition into the ORCP. She stated that she had looked through all of the rules and had not located a place for central definitions, so reorganizing the first section of Rule 27 seemed to make sense. She drafted some preliminary language (Appendix E) that could possibly be added to Rule 27.

Judge Roberts stated that Judge Norby's definition looks fine. She suggested that a lead line could be placed in subsection 27 A(2) because that is the only part of the section that includes a definition. Judge Norby noted that the existing subsections are not preceded by lead lines. Judge Roberts suggested that "definition of guardian ad litem" could also be included in the lead line of section A. Judge Norby felt that, if someone was scanning the rule and looking for the definition, this

might be the way to attract their attention to it. Ms. Stupasky suggested that the definition should perhaps be placed in subsection 27 A(1) instead of 27 A(2), because definitions usually precede everything else. Judge Tookey felt similarly, and also wondered whether the word “means” should be used instead of “is defined as.” He stated that, typically, definitions use the word “means” for a restrictive definition or “includes” for a descriptive definition. He suggested phrasing such as, “guardian ad litem means a party’s legal surrogate in the lawsuit whose duties and obligations exist only within the lawsuit.” He pointed out that a definition is a definition and noted that the Council does not want to introduce substance into a definition. Judge Norby agreed that “means” might be a better option.

Judge Peterson stated that, from the discussion, it appears that a committee may be warranted. He wondered whether the definition should also indicate that a guardian ad litem is appointed by the court so that nobody attempts to self-appoint themselves as one. Judge Norby pointed out that subsection A(1) already states that a guardian ad litem is appointed by the court. Judge Peterson agreed that there could be several places to locate the definition. Mr. Crowley suggested that the definition could also be placed in section 27 B which is all about the appointment of guardians ad litem. Ms. Gates agreed with Judge Peterson that a committee seems appropriate. She suggested that, since the Council is so heavily reliant on its judicial members regarding family law and probate matters, it might be worth having the committee consult with one or more practitioners familiar with this area of law.

Mr. Andersen observed that the phrase “ad litem” from the Latin means "for the lawsuit.” He stated that, to him, that seems like explanation enough, and he did not feel that any further explanation was necessary. He opined that there is no reason for people to be confused. Judge Norby pointed out that not everyone learns Latin. Judge Peterson reminded the Council that the original suggestion was to change the term completely because it is confusing. He noted that the phrase appears many times in the Oregon Revised Statutes, as well as in the statutes of a lot of other states, so that suggestion is not feasible. However, adding a definition might solve some of the confusion.

Judge Norby, Judge Peterson, Judge Tookey, and Judge Wolf agreed to serve on a Rule 27 committee. Judge Norby agreed to chair the committee.

B. Committee Reports

1. ORCP 7

a. New Suggestion Regarding Rule 7

Judge Wolf reported that the committee had met and assigned members various tasks. The committee will add the new suggestion regarding Rule 7 (Appendix F) to its charge. Ms. Nilsson stated that she would forward a copy of the new suggestion to all Rule 7 committee members.

2. ORCP 15

Judge Roberts reported that the committee had not met, but would do so before the next Council meeting.

3. ORCP 23

Ms. Gates reported that the committee had not met, but would do so before the next Council meeting.

4. ORCP 23 C/34

Mr. Andersen reported that the committee had not met, but would do so before the next Council meeting.

C. ORCP/Topics to be Reexamined Next Biennium

1. Discovery

Ms. Gates reminded the Council that she wanted to revisit this topic after some discussion at the September meeting. She noted that the Council did not have time to review all of the suggestions regarding discovery, particularly the one regarding privilege logs. She noted that this topic is somewhat intriguing to her because it comes up frequently in her type of practice; however, she stated that she was not certain that she feels strongly enough about the issue to press for a committee. If anyone would like to join her in a committee she would be happy to form one.

Mr. Crowley, Ms. Gates, Mr. Goehler, Ms. Holley, Mr. O'Donnell, and Ms. Stupasky agreed to form a discovery committee. Mr. Goehler agreed to chair the committee.

V. New Business

A. Potential amendments received by Council Members or Staff since Last Biennium

1. ORCP 4

Ms. Gates explained that the Council had received a suggestion from attorney Dallas DeLuca (Appendix G) regarding his concern that ORCP 4 G was limited to "domestic corporations." She stated that she is not aware of the rule's history. Ms. Holley noted that domestic limited liability corporations (LLC) are not included.

Judge Peterson stated that the Council had not made changes to Rule 4 in quite some time but, if there is a problem that someone is experiencing because personal jurisdiction could be expanded, he has no objection to finding out whether it is really a problem. Judge Roberts pointed out that she is not sure that the Council can expand or contract the jurisdiction of the courts. Judge Peterson agreed that the Council does not want to extend its reach too far. Mr. Goehler stated that there is also overlap because there are many bases for personal jurisdiction so, even though being a member of an LLC is not specified, there may be personal jurisdiction in some other way. He stated that he did not know if it is really a problem.

Ms. Gates noted that comments received by the Council are sometimes the result of just one or two instances where people are having a problem and there is nothing the Council can do. She stated that she was curious as to whether Mr. DeLuca had encountered a situation where a judge had ruled that he was out of luck because an LLC is not a corporation. She stated that she would reach out him to see if he had a bad experience and whether it might be a judicial education issue or something that needs to be changed.

The Council did not form a committee regarding this matter at this time. Ms. Gates will report back to the Council regarding Mr. DeLuca's response.

2. ORCP 10

Ms. Gates stated that the Council had received a plea from attorney Mary Johnson (Appendix H) to clarify and unify rules for service of and submission of judgments between UTCR 5.100 and ORCP 10 B. She observed that it might be that the UTCR is creating an issue rather than the ORCP. Judge Peterson recalled a past Council discussion (that could only have taken place between lawyers) about how four days is actually a longer period of time than seven days under Rule 10 B. He stated that the Council can make a suggestion to the UTCR Committee, but cannot do

anything about this inconsistency. He did point out that item 23 on the survey results is related, which is a suggestion to do away with the three-day rule for e-mail service and add five days for United States Postal Service. Judge Peterson noted that his experience with the postal service is that he gets one-day delivery almost everywhere within Oregon. He stated that almost every biennium there has been a suggestion to get rid of the three-day rule; however, not everyone is sitting and waiting for e-mail delivery, and the three-day rule provides an extra cushion so that, for example, a lawyer does not come back after a short vacation and find they missed a deadline.

Judge Roberts wondered whether the three days really make that much of a difference. Judge Wolf observed that, if three days are really that critical, the party could just hand the document to the opposing party. Judge Norby noted that a party would still have to attest to a court that they waited the appropriate amount of time. Judge Wolf noted that the party would just have to wait the time required by UTCR 5.100, not the added three days, because it was delivered personally. He stated that the three days only get added if the document is mailed.

Judge Peterson observed that it appears that Ms. Johnson is making the additional days allowed for service under Rule 10 C and the additional days for the other side to object under UTCR 5.100 consecutive, but asked whether they would actually be consecutive or concurrent. Judge Roberts replied that they must be consecutive, since Rule 10 defines what it means to be served (adding three days for mail or e-mail) while UTCR 5.100 allows three days, or seven days, for the non-movant to make known any objections. Rule 10 is used to determine how to compute the three days.

Judge Norby pointed out that the Council had just made big strides trying to move forward with the rules of serving by technology in Rule 7, yet the rule still presumes that people are using paper and the postal service methodology. She stated that it resonates with her that perhaps Rule 7 also might deserve some modification in recognition that e-mail tends to be the form of mail that people use now and it does not require three extra days for transmission. She stated that she does not want to further complicate the rule but, if the Council is trying to bring the rules in line with new technology, perhaps this is a place that it should also be happening. However, she does not feel strongly about it.

Judge Peterson asked whether Mr. Goehler has any insight since he practices in both Oregon and Washington. Mr. Goehler stated that the practice in Seattle is to always use messenger service. The attitude is to give one's opponent as little time as possible to respond. He stated that he is trying bit by bit to improve things by not using messenger service when he practices in Washington, and suggested that

Oregon does not want to go down that kind of road where a party will be trying to limit the time for the adversary. He stated that there should be enough time allowed for a reasonable response. Judge Norby agreed philosophically but stated that she thought that more time is added for mailing because that is how long mailing takes, not just to give people extra time and pretend it is for mailing. If it is indeed to give people extra time, she is all for it but, if the three days were in fact added because the postal service used to take more time than it does now, the Council is being inconsistent.

Judge Roberts observed that the postal service actually used to take less time than it does now. She stated that people who are agonizing about the fact that their adversary gets an extra day makes her concerned that people are looking for new ways to trap their adversary. Mr. Crowley agreed. He stated that the Department of Justice has a pretty active litigation practice and a pretty systematic way of submitting orders to the court; it is very rare for there to be an issue and, if there is one, it seems to him that it is an issue of professionalism, not an issue with the rule. Ms. Holley pointed out that there are extra concerns with self-represented litigants.

Judge Wolf noted that the three-day rule is not just for mailing; it is also for service by facsimile and e-mail. There is a three-day cushion in case someone's computer is off or not working. Judge Norby asked when the three-day rule was written. Judge Peterson stated that it has been amended a number of times. He agreed with Judge Wolf that it was decided it would be better to give people those extra three days. He asked how many have had something faxed to them at 5:00 p.m. on a Friday afternoon. The fact that the fax arrives at the office does not mean that receipt is instantaneous. The idea is to give a cushion so that no one is playing "gotcha." Mr. O'Donnell agreed that, just because something is served to a person's office does not mean that person is immediately there to receive it. So e-mail is essentially not as effective as personal service or office service. The vast majority of the time, people are collegial and, if there is an issue, lawyers extend the time. Oregon is fortunate in that way. He stated that he practices occasionally in Washington and that he is shocked by what happens there. There is not much collegiality.

The Council decided not to form a committee regarding this suggestion. Ms. Gates asked Judge Peterson to suggest that Ms. Johnson approach the UTCR Committee regarding her concern.

3. ORCP 39

Ms. Gates stated that attorney John Kaempf had suggested that ORCP 39 should be amended to make it clear that an attorney cannot be videotaped during a deposition (Appendix I). Ms. Holley disagreed with the suggestion. Ms. Stupasky observed that it is sometimes necessary to have an attorney on video. She stated that there are some attorneys who will not behave unless they are recorded. Mr. O'Donnell wondered how such a rule would be written, since it is discretionary. He stated that many attorneys have probably had a judge order a deposition to take place in a jury room when the parties have not gotten along, in order to preclude such problems. However, he noted that most depositions in Oregon are collegial. Judge Norby wondered why an attorney would be intimidated during a deposition when it is usually the witness who feels intimidated. Mr. O'Donnell stated that he has actually seen attorneys show a judge a video of an opposing attorney as context for intimidation or harassment by that attorney. Judge Peterson noted that one can take up the matter with a judge if any behavior is out of hand.

The Council decided not to form a committee regarding this suggestion.

4. ORCP 54

Ms. Gates explained that Holly Rudolph, the forms manager for the Oregon Judicial Department, had suggested the requirement in Rule 54 A(1) that a party submit a form of judgment is meaningless and that the Council should consider deleting this requirement. (Appendix J). Judge Peterson explained that the Council made a change some time ago so that either party can submit the form of judgment. He stated that Ms. Rudolph is a good source of information because she is where the rubber meets the road, so to speak. However, judgments have independent meaning and, as a judge, he is tired of creating judgments for parties who are too lazy to do so themselves. It is also up to the attorneys to specify the type of relief they are seeking. Judge Roberts pointed out that it is specifically up to attorneys to specify the award of costs, which is discretionary for the judge. Judge Wolf stated that he had checked with his clerk, who stated that she rejects notices of dismissals that are submitted without a judgment. If she misses one, she contacts the attorneys to submit it. And, if none is submitted, she creates it herself and assumes that, if nobody wanted to submit a form of judgment, nobody wanted costs either. Judge Wolf stated that his assumption is that, if an attorney has some dog in the fight with regard to costs or fees, they will submit a judgment.

Judge Norby observed that part of the request from Ms. Rudolph appears to be to put the onus in dismissal cases on the court to create the judgments. She stated that, depending on the court, that is a scary proposition. Ms. Rudolph may not

realize the volume the courts have or how difficult it would be to start tracking creation of judgments with the limited available staff. She stated that she is not sure that this is a burden that can be shifted to the courts at this point based on budget and staff. Judge Wolf pointed out that it is not complicated to create forms of judgment individually but, with a lot of cases, and trying to figure out costs, it becomes burdensome. Judge Norby stated that there are numerous ways dismissals arrive at the court, so it would likely be many different staff members completing the forms of judgment as well.

Judge Peterson opined that this seems to be a solution in search of a problem. The Council decided not to form a committee regarding this suggestion.

5. ORCP 57

Judge Peterson explained that both Multnomah County Circuit Court's Presiding Judge Steven Bushong (Appendix K) and Matt Shields, the Council's liaison from the Oregon State Bar, had brought this issue to his attention. Both Judge Bushong and Mr. Shields pointed out that the Court of Appeals' recent ruling in *State v. Curry*, 298 Or App 377 (2019), appeared to invite the Council to make a procedure for *Batson* challenges [*Batson v. Kentucky*, 476 U.S. 79, 89 (U.S. 1986)] regarding the validity of peremptory challenges in a jury trial. Judge Peterson agreed that the facts of the *Curry* case seem to show that there may be a better procedure that could be crafted for making such challenges. He also noted that Rule 57 applies to criminal cases by statute.

Judge Bailey, Ms. Holley, Mr. Hood, Judge McHill, Justice Nakamoto, and Judge Tookey agreed to serve on a Rule 57 committee. Ms. Nilsson noted that, although Judge Leith was not able to attend the meeting, he had expressed interest in joining any committee that was formed regarding Rule 57. Ms. Holley agreed to chair the committee.

6. ORCP 55

Ms. Nilsson noted that she had accidentally mis-categorized this suggestion on the agenda under Rule 68 when it should have been under Rule 55. Judge Peterson stated that Judge Marilyn Litzenberger had raised the issue of what happens when a non-party gets subpoenaed (Appendix L). He stated that, if a non-party defends their right not to appear, they may have to pay an appearance fee or find a lawyer to make the argument against appearing for them. Mr. Anderson opined that it should be as easy as possible for a non-party to make objections known, even if by letter or by e-mail. He stated that, if the choice is between having to pay a filing fee and/or hire an attorney or ignore the subpoena, people will be encouraged to

break the rule and ignore the subpoena. He noted that he is not sure what the mechanics would be, but the threshold should be very low that the non-party should be able to object in any way that brings it to the attention of the opposing party and the judge.

Ms. Gates observed that Judge Litzenberger had given examples of what happens when a non-party is subpoenaed, which she has asio encountered, but she was uncertain of the exact problem. Judge Roberts stated that the lack of clarity about what happens next is the issue. If the objection is only raised orally, is it effectively raised? She opined that it is a significant enough problem that a committee should be formed. Judge Norby asked whether Judge Litzenberger was saying that non-parties were objecting to having received a subpoena. Judge Roberts explained that it is more that a non-party objects to *responding* to a subpoena. The question then becomes whether a non-party simply saying, "I don't want to be involved," is enough of an objection, and what happens next.

Judge Bailey, Mr. Crowley, Judge Norby, Mr. O'Donnell, Judge Peterson, and Judge Roberts agreed to form a committee. Ms. Gates suggested that Mr. Eiva, who was not present at the meeting, would be a good addition to the committee. Mr. O'Donnell agreed to chair the committee.

B. Potential amendments received from Council Survey

Ms. Gates noted that the Council had gone through suggestions 1 through 20 from the survey (Appendix M) during the September meeting. She suggested reviewing the remaining items one at a time and deciding whether to form a committee on each.

Item 21:

Fix ORCP 1 E(2) so that it requires "personal knowledge" as opposed to "knowledge and belief." ORE 602 requires "personal knowledge." Some people have a "belief" that the Moon landings were fake.

Judge Peterson noted that Rule 17 C(1) would also need to be changed if this change were made to Rule 1. Mr. Crowley observed that such a change might cut down on litigation. The Council decided not to form a committee regarding this suggestion.

Item 22:

admittedly there are a lot of rules and nuances but you should identify 12 or so that would apply in small claims courts (Rule 1 says that the rules don't apply) which might make the small claims courts

more consistent and more justice like. Now each small claims judge does what he wants and sometimes the decisions are horror stories. Plus Washington allows certain appeals which would be nice and would result in a better process for pro se people.

Judge Peterson stated that small claims are covered by chapter 46 of the ORS and cannot be changed by the Council. The Council decided not to form a committee regarding this suggestion.

Item 23:

Nothing specific. However, I am always at somewhat of a loss as to how to give notice/serve an opposing party with the proposed form of (Q)DRO in cases where it has been many years, sometime decades, since the divorce judgment was entered. Parties often wait YEARS to take care of the QDRO. When I cannot locate an opposing party, or they are not responding or cooperating, I have to get creative... I don't find much direction in the ORCP on this.

Judge Peterson stated that it seems to him that this issue is covered by Rule 9 and, if more than a year has passed, one effectively has to serve the opposing party with a summons. Judge Norby stated that she has had motions to show cause years later where no party had ever done a QDRO, so they made a motion to show cause to get everyone back, which seemed effective. Judge Wolf wondered how the Council could fix a "can't locate a party" problem. Judge Peterson noted that the Council had done what it could about that issue with Rule 7. The Council decided not to form a committee regarding this suggestion.

Item 24:

Do away with the "extra-3-day" rule for responding to email service. Add 5 days for USPS service. It regularly takes at least 5-6 days for mail between Salem and Portland. I find some lawyers using the USPS only just for that reason.

Judge Peterson noted that the Council had already discussed the three-day rule and determined that it should not be changed. The Council decided not to form a committee regarding this suggestion.

Item 25:

> *ORCP 22 C "Third Party Practice" should changed to enable a defendant to assert third-party claims more easily. The rule requires a defendant to assert a third-party claim within 90 days of being served. To assert a third-party claim after 90 days requires both consent of all parties AND court approval. The rule should be amended to require consent of all parties OR court approval. It is unrealistic in most civil litigation for the defendant to know within 90 days the parties against whom it may have third-party claims. Allowing one party to "veto" the litigation of the third party claim is unfair and deprives the trial judge of the chance to efficiently resolve matters against all potential defendants.*

Ms. Gates stated that the Council had spent significant time on this issue last biennium and was unable to promulgate a rule. The Council decided not to form a committee regarding this suggestion.

Item 26:

> *Edit ORCP 27 to make it more clear - that an unemancipated minor must always have a GAL, and who should be appointing the GAL*

Judge Peterson pointed out that Rule 27 already states that a minor *shall* appear by a guardian ad litem appointed by the court. Ms. Gates asked the Rule 27 committee to add this suggestion to its charge.

Item 27:

> *Interpleader statute is confusing to everyone including judges ORCP 31.*

Ms. Goehler stated that the suggestion that ORCP 31 is confusing was not very specific. Judge Peterson offered to contact attorney Mark Cottle to see if he has more specific information about what is confusing and/or suggestions for improvement. The Council did not form a committee at this time, but will keep ORCP 31 on the agenda for October.

Item 28:

ORCP 32H and I should be eliminated. At the least, 32I should have a strict timeline for compliance.

Judge Roberts observed that the suggestion appeared to want a change that would not require members of a class to be notified. Ms. Holley stated that this would be inappropriate. Ms. Nilsson noted that the Legislature has made significant amendments to Rule 32 regarding class actions, and that it might affect the substantive rights of litigants if the Council were to make a change like this. The Council decided not to form a committee regarding this suggestion.

Item 29:

Codify whether a party may be required to prepare a privilege log anytime an assertion of privilege is made to a document request/subpoena.

Ms. Gates asked the Discovery committee to add this suggestion to its charge.

Item 30:

ORCP 36B(2) should have an automatic provision that a party must pay $10,000 if they do not produce the insurance information when requested unless they have filed for a protected order. Too many lawyers ignore this rule.

Ms. Gates noted that there is already a process for sanctions for failure to produce documents. After a brief discussion, the Council decided not to form a committee regarding this suggestion.

Item 31:

ORCP 41 C should be revised and clarified. For example, ORCP 39 D(3) requires objections to be stated concisely, while many practitioners state that, under ORCP 41 C, the only pertinent objections are to the form of the question and objections on the grounds of privilege. Respectfully, ORCP 41 C(1) and (2) are vague and unhelpful to practitioners.

Judge Roberts stated that she does not understand what is vague. Ms. Gates stated that the defending attorney may only object as to the form of question and privilege. Mr.

Andersen stated that this issue comes up with some attorneys who make speaking objections during a deposition and, in the course of making the objection, actually instruct the client what to say, essentially giving an objection that is coaching the witness. He stated that he is not sure that a rule to prevent speaking objections is necessary, because he thinks that they are objectionable already. Judge Roberts pointed out that most counties' Supplemental Local Rules (SLR) do not allow speaking objections. She suggested going to the court if this happens.

Ms. Holley wondered whether the person who made the suggestion simply wants the two rules to have the same language. Ms. Stupasky noted that Rule 39 D(3) essentially says that speaking objections are allowed. Ms. Holley stated that Rule 41 C says what those objections can be. Ms. Stupasky stated that she believes that the rule is clear, but that it just needs to be enforced. Ms. Gates stated that she believes that the commenter is saying that, under Rule 39 D(3), there can be more than just objections to form and privilege, as long as those objections are made concisely, so the two rules are not consistent. Judge Roberts stated that nowhere does the rule say that counsel defending a deposition cannot make an objection; the rule just says what objections are waived if they are not made, but no objections are prohibited. The local rules talk about form of objections. Judge Peterson noted that sometimes lawyers will want to make objections just to break up a deposition and throw off the witness. Judge Roberts stated that there are some lawyers who will object to every single question as being vague, and the opposing attorney just plows on regardless.

Judge Norby observed that the balance between having rules be vague enough that they can apply in a variety of situations but specific enough that they have value is a balance the Council is always trying to strike. Judge Roberts stated that the rule just says what things are not waived if objections are not made. A lawyer is not required to make any objection and a lawyer is not prohibited from making any objection.

The Council decided not to form a committee regarding this suggestion.

Item 32:

> *Parties should provide a date no more than 30 days after the deadline to respond to RFPs by which they will provide actual documents.*

Ms. Gates noted that the Council has received similar suggestions before, and stated that she understands the frustration. Ms. Stupasky stated that there is a remedy: the right to file a motion to compel. Judge Roberts agreed, if the Council wants to encourage many more motions. Judge Wolf stated that the parties have hopefully conferred as required under UTCR 5.010(2). Judge Roberts observed that what is most maddening to parties,

and sometimes to judges, is when a lawyer says they will provide the documents, then keeps stringing the other lawyer along. Ms. Holley stated that some lawyers will make the opposing attorney do all of the work on a motion to compel, then just provide the documents as soon as the motion is filed. Judge Norby asked whether there is an argument against giving a 30-day deadline. Mr. Crowley observed that discovery is getting bigger and bigger in the electronic age. Ms. Holley noted that it is sometimes reasonable to take longer than 30 days. Judge Peterson noted that sometimes the lawyer just does not have the documents for reasons out of the lawyer's control.

Mr. Goehler noted that the rule requires production by the date required, so this would be an extra 30 days and would require the rule to be amended internally. The rule already requires the documents to be labeled and organized. With Oregon's collegiality, his experience is that people will usually produce; perhaps they will not do it right away, but the lawyers confer and it happens. He stated that he has personally never had to file a motion to compel. Ms. Gates stated that she does not like the idea of codifying an extra 30 days. Ms. Holley pointed out that no rule is going to solve the problem of people withholding documents. Judge Norby stated that she thinks that a lot of attorneys would provide the documents but the problem is that the client is not cooperating. This is when a motion to compel can be useful to show the client the penalty for not complying. Mr. O'Donnell noted that one aspect of the problem is technology, especially with health care providers using outside technology companies to store older documents. He stated that hard and fast deadlines are not practical and can cause unforeseeable problems. Mr. Hood agreed that the motion to compel can sometimes be helpful for defense attorneys, particularly in defending companies that have no presence in Oregon. If the company has no office in Oregon and no centralized document depository and they are taking a long time to look for documents in multiple locations, letting them know that a judge has looked at a motion to compel and that there are sanctions for not complying can actually be more helpful than having a deadline in a rule.

The Council decided not to form a committee regarding this suggestion.

Item 33:

> *Filing of Requests for Admission is discussed in Rule 9((C), but many attorneys do not know that these should be filed with the court. Suggest that ORCP 45 at least refer to rule 9(C) for information on filing.*

Ms. Gates stated that she has encountered people not filing requests for admission and that this seems like an easy fix, but noted that perhaps there is a reason it has not been done. Judge Peterson stated that the Council has had the discussion about internal references within the rules before and determined that it is not a viable undertaking. As

has been pointed out numerous times by Council members, lawyers need to read the rules. Judge Roberts stated that perhaps this could be a good use of staff comments. The Council decided not to form a committee regarding this suggestion.

Item 34:

> *Make an award of attorney fees mandatory under ORCP 46 on the first motion to compel. These changes are necessary to accommodate the shortened disposition standards, or else there will be many stays and no discovery.*

Judge Peterson stated that this change is not within the Council's purview. The Council decided not to form a committee regarding this suggestion.

Item 35:

> *Authorize automatic sanctions for failure to comply with discovery after along with a motion to compel. Having to jump through SO many hoops to get basic documents is costly and the attorneys know there is no consequence anyway. IF they produce documents, they are late, subject to a motion to compel, and often the judges even say, "Counsel you should produce the documents but I'm not going to sign an order to do it, just do it." There are no punishments or teeth to the ORCP in this regard. They are just told to provide the documents the ORCP already tells them to provide.*

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

Item 36:

> *If someone files a Motion to Compel, documents produced less than 15 days before a hearing should trigger a payment by the producing party of $500 (or some other amount), unless otherwise agreed by counsel.*

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

Item 37:

> *I just moved here after 50 years of practicing in NJ & NY. I find the discovery rules anachronistic. Trial by ambush has long been done away with in those two states. Interrogatories should be added as a discovery tool. Discovery of expert's reports should also be added. To do this will assist of the settling of cases.*

After a brief discussion, the Council determined that these topics have been re-litigated by the Council multiple times over the years and that there is no enthusiasm for such changes. The Council decided not to form a committee regarding this suggestion.

Item 38:

> *Get rid of Motions for Summary Judgment*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

Item 39:

> *amend setting motions for summary judgment where opposing counsel refuses or unnecessarily delays in agreeing to a date.*

Judge Wolf wondered whether this is an ORCP problem. Judge Roberts stated that the setting of motions is always in the SLR. The Council decided not to form a committee regarding this suggestion.

Item 40:

> *ORCP 47E needs work. First, it should not [sic] be made clear that it is not applicable to pro se litigants who are not admitted to the Bar and who are not subject to discipline. Second, it needs further refinement because there can be differences of opinion as to the scope of permissible expert testimony and whether such testimony relates to the summary judgment issue in play.*

Judge Peterson pointed out that the rule already states that it is not applicable to self-represented litigants. A non-represented party cannot file that declaration. Ms. Gates stated that it does appear obvious from reading the rule that it is only the attorney who can do it. The Council decided not to form a committee regarding this suggestion.

Item 41:

> *I suggest the CCP look at ORCP 47E (use of attorney affidavit or declaration when expert opinion required) and recent appellate cases applying the rule. I noticed, while I was in private practice, that appellate decisions, starting with Moore v. Kaiser Permanente, 91 Or.App. 262 (1988) seem to have modified the plain language of the rule by effectively changing the "is required to provide the opinion of an expert ..." language in the rule to a "may or must" standard, which essentially changes the mandatory nature of the rule to a permissive nature.* ***(See Appendix M for remainder of comment)***

Judge Peterson noted that this suggestion had come from Multnomah County Circuit Court Judge Eric Dahlin. Judge Roberts stated this is an area that both the courts and the Council have weighed in on, so it has already been vetted. Judge Norby stated that the appellate decision is clear. Judge Peterson noted that there are two parts to the comment: 1) declarations where evidence by an expert *might* be necessary; and 2) if a Rule 47 E declaration is submitted and the case is litigated and the expert has not been produced, should an expert be brought to a hearing to find out who the expert was and what they had to say. Judge Roberts observed that, if a party wants to assert the consequences of filing a false affidavit, the party should move on it and the party has a procedure that they can use. She felt that it should not be written into the rule that this is a procedure that always has to be followed no matter what. Mr. O'Donnell agreed. He stated that the has seen it happen twice that a judge heard argument on this issue. It was not pretty, and in both cases it was the same opposing counsel exhibiting this behavior. That opposing counsel is no longer practicing law.

Judge Peterson stated Judge Dahlin is saying that the rule does not provide a clear opportunity for such a hearing to happen, but he does not know that the rule needs to. Judge Wolf stated that it would come up if a party moved for sanctions under Rule 17. Ms Gates stated that it could also come up at trial if a party asked to depose the expert. Judge Peterson suggested that it could be done after trial, as a post-trial matter. Mr. O'Donnell stated that someone could move for a directed verdict, asking for an explanation as to why the other party went to trial without an expert.

Judge Bailey noted that this does occur more often than people think. He opined that, if an attorney files a Rule 47 E declaration, goes to trial, and does not use an expert, and uses the declaration to avoid a summary judgment, there should be some sanction if the attorney never really had that expert in the first place. Ms. Gates asked if Judge Bailey is seeing the issue because a party is saying in the middle of trial that they want to pause trial and depose that person. Judge Bailey stated that it usually happens after the trial has

occurred; the attorney never called the witness at trial, the other party believes that they never really had that witness or were never prepared to call that witness, and now they have wasted those resources by having to go to trial, and there should be sanctions. Judge Norby asked why that would not just be considered in the attorney fee and costs analysis. Mr. O'Donnell suggested moving for sanctions under Rule 47 G. Judge Roberts agreed that it is covered under Rule 47 G. Mr. O'Donnell stated that the question is just whether a party chooses to use it. Ms. Stupasky agreed that an aggrieved party has the procedure to do so if they want to pursue it.

The Council decided not to form a committee regarding this suggestion. Ms. Gates suggested sending Judge Dahlin a copy of the minutes from this meeting.

Item 42:

Clarify alternatives for service of subpoenas.

Judge Peterson noted that significant changes were made to Rule 55 last biennium and that time should be allowed to see how those changes play out. The Council decided not to form a committee regarding this suggestion.

Item 43:

I recommend additional clarity on the procedure for trust and estate litigation, and especially a change to how Rules 62C(2)(a) and 27 work in that context. There should have an exception if the proceeding is to replace a Trustee who no longer has financial capacity to continue acting as trustee -- jumping through the hoops slows down the replacement process too much and in the times I have seen this occur usually the incapacitated trustee has someone in their life draining funds from the trust without authorization. A similar exemption should probably apply in other situations where the incapacitated person is occupying a fiduciary position with respect to an entity. A delay to a default judgment does not protect the incapacitated person and increases any potential ongoing harm.

Judge Peterson noted that Rule 62 covers requesting findings of fact and conclusions of law, and it has built-in timelines. He wondered whether a party can move to truncate those. If that party is prevailing, can they ask to have the findings and conclusions to the judge in a week and have their responses in a week? Ms. Gates asked whether any judges are encountering this and have created their own timeline to protect the represented person. Judge Norby stated that her understanding is that the different counties have different methods, some of which work more slowly or quickly. The first issue is alerting

the courts, then it is the question of how fast it can be put on the docket. She noted that it is a serious issue that comes up with regularity, but that she is not sure that there is a solution that can be put in the rules. Judge Bailey agreed and stated that it is probably more of a statutory situation where the Legislature needs to look at it.

Judge Peterson wondered how Rule 27 would adversely impact someone in these situations. He stated that it seems like a party could ask the court to make Rule 27's timelines longer or shorter based on the circumstances. Judge Norby agreed that the courts have discretion on timelines on estate and trust matters. The Council decided not to form a committee regarding this suggestion.

Item 44:

> *Please review Rule 69 for terminology and clarity. There is disagreement about whether a party is "in default" once the time to respond has passed or if they are only "in default" after a court grants a motion for default.*

Ms. Gates stated that it is pretty clear that a party can be in default but can apply for an order of default. Mr. Goehler noted that "in default" does not exist; there is an order of default and a judgment by default, but “being in default” is just a colloquial phrase. Judge Norby pointed out that sometimes when court is in session there is an observation that someone is in default without a motion having been made or filed, but that is not very frequent. Judge Roberts agreed that this is colloquial; the party is subject to default, but certain things need to be shown in order to obtain an order for default. Judge Norby stated that when the trial occurs and the party has not appeared, the judge takes a prima facie case, there is no paper motion and no motion from the party, but the judge just issues a judgment. Judge Roberts pointed out that this is based on the trial. She noted that the only people who she has ever encountered who are confused about this issue are self-represented litigants. As an example, a self-represented litigant could believe that they could file a counterclaim or cross-claim that says that, “plaintiff comes from the moon and therefore cannot sue,” and, when they do not see a response to that allegation within the time proscribed, they believe that they do not have to serve anything else on that party and will prevail without making any other gesture. However, the Council cannot really write the rules just for people who have never been to law school.

Judge Peterson noted that a party is not in default until the judge says they are in default. The Council decided not to form a committee regarding this suggestion.

Item 45:

> *It would be doctrinally simpler to brief and argue preliminary injunction motions if ORCP 79 tracked the federal standard for injunctive relief, or at least coalesced into a single Oregon standard, rather than having two alternative prongs--ORCP 79 A(1)(a) and (b)--neither of which parallels the federal standard.*

Ms. Gates stated that the Council addressed this issue last biennium and specifically opted not to have the Oregon rule follow the federal rule. Judge Peterson explained that he has been on two committees that looked at this rule and the suggested change did not pass out of either committee. The Council decided not to form a committee regarding this suggestion.

Item 46:

> *Too many litigators are gaming the discovery rules. There should be a more direct way to compel violations of the rules.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

Item 47:

> *codify the procedure for the production of a testifying expert's file at trial (timing) and what information must be included (content of expert's "file"). See FRCP 26(b)(4)(B) and (C).*

Judge Norby wondered what would be on a list of things that must be included. Ms. Gates posited that perhaps it would be the opposite–things that do not need to be included, such as correspondence with an attorney or drafts of reports. Mr O'Donnell stated that the federal rule includes a list of things that an expert is required to provide, in discovery, such as a list of cases in which the expert has been involved and a list of cases that have been tried where the expert has testified. He observed that there does not seem to be strong momentum among Oregon lawyers to get into federal discovery, and he does not think that the Council should make this one change without making other changes to federalize the Oregon discovery rules. Judge Roberts noted that there is an ambiguity about what an expert's file is because so many records today are electronic, and she has had people say that the expert does not have a file to provide because everything is on their computer. Mr. O'Donnell wondered how a judge would even make a decision on what should be in the file.

Judge Roberts suggested that a committee might be warranted. Mr. O'Donnell agreed but stated that, without any other rules about experts, it would be difficult to compartmentalize this. Judge Norby noted that FRCP 26 (a)(2)(B) does not say what should be in the expert's file but, rather, states that a report must be provided disclosing a statement of the opinions the witness will express and the basis and reasons for them; the facts or data considered by the witness in forming them; exhibits that will be used to summarize or support them; the witness's qualifications; a list cases in which the witness testified as an expert; and a statement of the compensation to be paid.

Ms. Gates agreed that this is not discovery at all, but pointed out that there is a separate rule that says what does *not* need to be provided, such as expert drafts. However, Oregon does not have any of that; there is no structure whatsoever. Ms. Holley asked whether the assumption in Oregon is that a party will have to make the argument as to why they are withholding something, rather than defaulting to that they do not have to provide it. Ms. Gates stated that this is how she has found it to operate in Oregon, but noted that everything is fair game, which is why lawyers are much more careful about how they communicate with experts in Oregon state court than they are in federal court.

Judge Norby pointed out that, even among judges who take special assignments for complex cases, some judges enter discovery orders months before the trial starts that require expert information exchange prior to the first day of trial, while other judges do not require that it be produced until the expert has taken the stand. Mr. O'Donnell noted that Judge Charles Carlson in Lane County takes the position that he does not have the authority to require that files be provided the day before, or even on the morning of, trial because, just because there is an expert, it does not mean that the expert is going to be called. The only way that the file comes into play is when the expert takes the stand.

Judge Norby noted that judges have the authority to control the proceedings as they unfold, but they also have to think about a jury who may potentially have to be sent away for days while the parties examine an expert. Mr. O'Donnell stated that he absolutely agrees in principle. Judge Norby stated that there is so much variety on how judges are handling expert discovery that it would be awkward to dictate a rule that adopts some judges preferences over others. Mr. O'Donnell posited that there is no authority for the Council to do so.

Ms. Gates suggested that the Discovery committee add this issue to its charge.

Item 48:

> *ORCP's should disincentivize obstructive behavior by lawyers and clients.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

Item 49:

> *Judges treat pro se people really differently depending on the judge. Many do not seem to know that they can explain the process etc. to these litigants. Many treat them rudely and expect them to know rules they have no way to know. I think you could clarify these rules better.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

Item 50:

> *The rules are confusing unless one is very familiar with them. In my practice they mostly don't apply, but when they do I find it difficult to navigate my way through them. I'd like to see them written and organized more clearly.*

Judge Peterson noted that this is an ongoing mission of the Council, and specifically pointed out the reorganization of Rule 55 last biennium. After a brief discussion, the Council decided not to form a committee regarding this suggestion.

Item 51:

> *Many ORCPs contain only partial information and it is necessary to locate and review additional statutes, ORCPs, UTCRs or SLRs. It would be very helpful if the rules referenced the other statutes, ORCPs, or UTCRs that interact with the ORCP in question, and that UTCRs and SLRs be minimized or incorporated into ORCPs where appropriate*

Ms. Gates stated that adding internal references to other rules seems like kind of a nightmare. Judge Norby stated that it is a grand concept, and agreed that everyone would prefer to have their research made easier. However, once those internal references are

added, it becomes a nightmare for staff to continually update and locate those cross-references and monitor changes in other rules. She also expressed concern that adding these cross-references could make it too simple and that, over time, lawyers would come to rely on the Council as their only source of research. She did suggest that, if the Council were to move in this direction, it should not be to include internal references within the rules themselves. She instead suggested a table at the beginning or end of the rule with those cross-references.

Mr. Goehler suggested that this might be a good subject for an Oregon State Bar or other publication to go through and create a roadmap for the practitioner. He opined that it is not the rules that should be that roadmap. Judge Norby noted that Bar publications are not updated that often, so they likely would not keep current with the different rule changes.

Judge Peterson pointed out that the SLR and UTCR are not adopted in the same time frame as the ORCP, so the ORCP would need to be updated at different times of the year to be current. The Council does not have the staff resources for such an undertaking. Ms. Nilsson stated that, by statute, the Council works on a biennial schedule and submits the promulgated ORCP to the Legislature every other year, so continual updates would not work functionally. Mr. Shields agreed and noted that the Legislature only prints the rules in January of even numbered years.

The Council decided not to form a committee regarding this suggestion.

Item 52:

> *ORCPs should generally be more fair to unrepresented/self-represented parties.*

After a brief discussion, the Council decided not to form a committee regarding this suggestion.

Item 53:

> *Implement a non-optional expedited jury trial procedure for cases under a certain amount, that includes limited discovery and a firm trial date. Dispose of the mandatory court-annexed arbitration. Make rules to prevent attorneys from pleading around arbitration/expedited trial.*

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

Item 54:

> *The main focus of the committee is litigation not focused on probate or protective proceedings. When changes are made to the general rules, more care and attention needs to be given to the impact on probate/protective proceedings. The committee has really tried to do this, but it is an almost impossible task to make the ORCP's match practice with probate, protective proceedings, and trust proceedings. I think Matt Whitman and others have tried, but the problem is with the probate statutes. Right now I am working on the changes to the Oregon probate code (ORS Chapters 111 to 118) to try and help fix things inside of the Uniform Laws Commission Probate Modernization Group. The committee may be interested in this because we have spent a great deal of time sorting through the concept of when the ORCP's apply and when the probate code provisions apply. There is no direction in the statutes so in practice there is a division. We are trying to define when a matter becomes a contested matter which will then bring in the ORCP's for things like responsive pleadings. We have been working in a small group which includes litigators and lawyers who do the administration and are trying to make it easier for people to understand. It could be helpful to have the CCP's assistance.*

Judge Peterson noted that a statute should specify whether there is a procedure that is outside of the ORCP and, otherwise, the rules should apply. Judge Wolf stated that it would make sense that the Legislature should say whether the ORCP apply in certain situations or whether they do not, not that the Council would choose that. Judge Peterson stated that he believes that it is a default; unless the statute says that the ORCP do not apply, they apply.

Judge Norby stated that she does a lot of probate cases and that she is on the e-mail listserv for the Uniform Laws Commission Probate Modernization Group mentioned in the suggestion. She stated that she would be happy to be the intermediary between the Council and the group. Judge Peterson stated that he would reach out to attorney Heather Gilmore, who made this suggestion, and let her know that Judge Norby will be the group's point of contact. Judge Norby stated that she will pay particular attention to e-mails from the group.

Item 55:

create a form for protective orders. feds have them.

Ms. Holley noted that this comment is regarding discovery protective orders, which is not the Council's purview. Judge Norby stated that she helped update a chapter on stipulations in the revised OSB Civil Litigation CLE publication coming out this year and that this publication includes a form protective order provided by the state. This may be helpful to practitioners.

The Council decided not to form a committee regarding this suggestion.

Item 56:

Certificates of readiness are a waste of time in dependency law

After a brief discussion, the Council determined that this is a UTCR issue and not within the Council's purview. The Council decided not to form a committee regarding this suggestion.

Item 57:

Rules should mandate each trial judge allow at least 30 minutes for direct ex parte appearances to secure order and judgment signing and entry, resolve hearing scheduling issues. As things stand now in some counties, there are weeks of delay in securing orders for simple matters or signatures on judgments that are long overdue.

After a brief discussion, the Council determined that this change is not within the Council's purview and decided not to form a committee regarding this suggestion.

Item 58:

Simplify the calculation of time and update for electronic filing

Judge Peterson stated that the Council has already made some changes in this area. He noted that the word "simplify" is very generic. He wondered whether there are a lot of mistakes coming before the court. Judge Roberts pointed out that e-filing is covered by the UTCR. The Council decided not to form a committee regarding this suggestion.

VI. Adjournment

Judge Peterson asked any committees who have draft language for a rule amendment to send it to Ms. Nilsson, who will put it into Council drafting format for ease of reading.

Ms. Gates asked any Council members who have not signed up for a committee, but who wish to join one, to contact Council staff and the committee chair to express their interest.

The next Council meeting will take place on November 9, 2019, at 9:30 a.m. at the Oregon State Bar.

Ms. Gates adjourned the meeting at 11:25 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

Oregon Council on Court Procedures
Roster *(Revised 10/7/19)*
2019-2021 Biennium

Kelly L. Andersen
Kelly L. Andersen PC
1730 E McAndrews Rd Ste A
Medford OR 97504
Telephone: (541) 773-7000
Fax: (541) 608-0535
E-mail: kelly@andersenlaw.com
Term Expires: 8/31/21

Hon. D. Charles Bailey, Jr.
Washington Co Circuit Court
145 NE 2nd Ave
Hillsboro OR 97124
Telephone : (503) 846-4403
E-mail : d.charles.bailey@ojd.state.or.us
Term Expires: 8/31/21

Troy S. Bundy
Hart Wagner LLP
1000 SW Broadway Ste 2000
Portland OR 97205
Telephone: (503) 222-4499
FAX: (503) 222-2301
E-mail: tsb@hartwagner.com
Term Expires: 8/31/23

Hon. R. Curtis Conover
Circuit Court Judge
125 E 8th Ave
Eugene OR 97401
Telephone : (541) 682-4497
Fax: (541) 682-6660
E-mail: curtis.conover@ojd.state.or.us
Term Expires: 8/31/21

Kenneth C. Crowley
DOJ Trial Division Civil Litigation
1162 Court St NE
Salem OR 97301
Telephone : (503) 947-4700
FAX: (503) 947-4791
E-mail: kenneth.c.crowley@doj.state.or.us
Term Expires: 8/31/23

Travis Eiva
Zemper Eiva Law
101 East Broadway, Suite 303
Eugene OR 97403
Telephone: (541) 636-7480
E-mail: travis@zempereiva.com
Term Expires: 8/31/21

Jennifer Gates
Pearl Legal Group PC
529 SW 3rd Ave Ste 600
Portland OR 97204
Telephone : (971) 808-5666
Fax : (503) 445-1270
E-mail: jgates@pearllegalgroup.com
Term Expires: 8/31/21

Barry J. Goehler
Goehler & Associates
4000 Kruse Way Pl Bldg 1 Ste 135
Lake Oswego OR 97035
Telephone: (503) 534-4518
FAX: (855) 827-7901
E-mail: bgoehler@travelers.com
Term Expires: 8/31/23

Hon. Norman R. Hill
Circuit Court Judge
Polk County Courthouse
850 Main St
Dallas OR 97338
Telephone: (503) 623-5235
E-mail: norm.r.hill@ojd.state.or.us
Term expires: 8/31/21

Meredith Holley
Attorney at Law
2852 Willamette St., #351
Eugene, OR 97405
Telephone: (485) 221-2671
E-mail: meredith@freedomresourcecenter.com
Term Expires: 8/31/21

Drake A. Hood
Brisbee & Stockton LLP
139 NE Lincoln St
Hillsboro OR 97123
Telephone: (503) 648-6677
FAX: (503) 648-1091
E-mail: dah@brisbeeandstockton.com
Term Expires: 8/31/23

Hon. David Euan Leith
Marion County Circuit Court
100 High St NE
Salem OR 97309
Telephone : (503) 588-5160
Fax: (503) 588-5117
Email : david.e.leith@ojd.state.or.us
Term Expires: 8/31/23

Hon. Thomas A. McHill
Linn County Circuit Court
PO Box 1749
Albany, OR 97321
Telephone: (541) 776-7171 x162
FAX: 541-967-3848
E-mail: Thomas.A.McHill@ojd.state.or.us
Term Expires: 8/31/23

Hon. Lynn R. Nakamoto
Oregon Supreme Court
Supreme Court Bldg
1163 State St
Salem OR 97301
Telephone: (503) 986-5701
E-mail: lynn.r.nakamoto@ojd.state.or.us
Term Expires: 8/31/21

Hon. Susie L. Norby
Circuit Court Judge
Clackamas Co Courthouse
807 Main St Rm 301
Oregon City OR 97045
Telephone: (503) 650-8902
Fax: (503) 650-8909
E-mail: susie.l.norby@ojd.state.or.us
Term expires: 8/31/21

Scott O'Donnell
Keating Jones Hughes PC
1 SW Columbia St Ste 800
Portland OR 97258
Telephone: (503) 222-9955
FAX: (503) 796-0699
E-mail: sodonnell@keatingjones.com
Term Expires: 8/31/23

Shenoa L. Payne
Shenoa Payne Attorney at Law PC
805 SW Broadway Ste 470
Portland OR 97205
Telephone: (503) 517-8203
E-mail: spayne@paynelawpdx.com
Term Expires: 8/31/21

Hon. Leslie Roberts
Multnomah County Circuit Court
1021 SW Fourth Ave
Portland OR 97204
Telephone: (503) 988-6760
E-mail: leslie.m.roberts@ojd.state.or.us
Term Expires: 8/31/23

Tina Stupasky
Jensen Elmore Stupasky & Lessley PC
199 E 5th Ave Ste 25
Eugene OR 97401
Telephone: (541) 342-1141
FAX: (541) 485-1288
E-mail: tstupasky@jeslaw.com
Term Expires: 8/31/23

Hon. Douglas L. Tookey
Oregon Court of Appeals
1163 State St
Salem OR 97301
Telephone: (503) 986-5423
E-mail: douglas.l.tookey@ojd.state.or.us
Term Expires: 8/31/21

Margurite Weeks
HKM Employment Attorneys LLP
1607 NE 41st Avenue
Portland OR 97232
Telephone: (503) 389-1130
E-mail: margyweeks@gmail.com
Term Expires: 8/31/21

Jeffrey Sherwin Young
Lindsay Hart Neil Weigler
1300 SW 5th Ave Ste 3400
Portland OR 97201
Telephone: (503) 226-7677
FAX: (503) 226-7697
E-mail: jyoung@lindsayhart.com
Term Expires: 8/31/23

Hon. John A. Wolf
Circuit Court Judge
Wasco County Courthouse
511 Washington Street
P.O. Box 1400
The Dalles, OR 97058
Telephone: (541) 506-2717
E-mail: john.wolf@ojd.state.or.us
Term Expires: 8/31/21

Council Staff

Mark A. Peterson
Executive Director
10015 SW Terwilliger Blvd
Portland OR 97219
Telephone: (503) 768-6505
E-mail: mpeterso@lclark.edu

Shari C. Nilsson
Executive Assistant
10015 SW Terwilliger Blvd
Portland OR 97219
Telephone: (503) 768-6505
E-mail: nilsson@lclark.edu

DRAFT 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
ORCP 7 ORCP 9 ORCP 10 ORCP 15 ORCP 17 ORCP 23/34 ORCP 36 ORCP 39 ORCP 43 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 (Appendix E). 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 F), 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 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 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). 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 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 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

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

RULE 27. MINOR OR INCAPACITATED PARTIES

A. Appearance of parties by guardian or conservator; Definition of guardian ad litem.

A(1) When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought.

A(2) Guardian ad litem ("GAL") is defined as a party's legal surrogate in a lawsuit. A GAL's duties and obligations exist only within the lawsuit.

A(3) The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

Shari Nilsson <nilsson@lclark.edu>

Suggested Amendment to ORCP 7D(3)(h)

1 message

Zack Holstun <zack@mercurypdx.com> Tue, Sep 17, 2019 at 1:55 PM
Reply-To: zack@mercurypdx.com
To: ccp@lclark.edu
Cc: Desiree White <desiree@mercurypdx.com>

Hi there,

I am writing to recommend amending ORCP 7D(3)(h), which is for *service upon Public Bodies* other than the State or Federal Government (which does not have a 7D subsection to my knowledge).

ORCP 7D(3)(h) does not mention the phrase "personal service upon any clerk on duty" as you have in 7D(3)(b) for Corporations, nor does it have the wording "by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk", as you have in 7D(3)(g) for service upon the state.

ORCP 7D(3)(h) only mentions "personal service or office service upon an officer, director, managing agent, or attorney thereof."

This phrasing as Office Service triggers the need for a mailing (since personal service of a clerk on duty or leaving true copy with clerk is not mentioned as an option), unless you are lucky enough to get the County/City attorney or other busy officer/higher up to come out and accept personally, which is unlikely due to their schedules.

We do a lot of mailings, and I am no whiner, nor am I just lazy!! It just seems like this may be an oversight/omission of verbiage, as it does not make a ton of sense to me to allow personal service on the receptionist of "Acme Widgets", but not call that manner of service the same thing for service of a Paralegal or Support Staff in the office of a County Official.

If you agree, we would save some time and paper by adding some verbiage allowing personal service to staff at the office for a Public Body!

Thank you for your time and consideration of this.

Regards,

Zack Holstun

President

Shari Nilsson <nilsson@lclark.edu>

New submission from Contact Form - Dallas DeLuca

1 message

COCP Website Form <info@councilonCourtProcedures.org> Wed, Sep 4, 2019 at 12:47 PM
Reply-To: dallasdeluca@mhgm.com
To: nilsson@lclark.edu

Name

Dallas DeLuca

Email

dallasdeluca@mhgm.com

Phone

(503) 295-3085

Subject

ORCP 4 G

Message

Hello - Why limit ORCP 4 G to just "domestic corporations"? To be consistent with the original goal of ORCP 4, does ORCP 4 G need to be expanded to members and managers of LLCs, and further expanded to include the officers & directors & partners of all entities that can be served under ORCP 7 D(3)(b), (c), (d), (e) and (f)? I understand that with the "catch-all" in ORCP 4 L that this might not be necessary, but the original Council stated that adding as many examples as possible was needed. See comment pasted below.
Thank you for your review of this question.
Sincerely,
Dallas
ORCP 4 G currently provides, "G Director or officer of a domestic corporation. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer."

The original comment to ORCP 4, referred to above, is as follows: "The intent of the Council was to extend personal jurisdiction to the extent permitted by the federal or state constitutions and not foreclose an attempt to exercise personal jurisdiction merely because no rule or procedure of the state authorized such jurisdiction."

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
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 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

Mary W. Johnson, P. C.

365 Warner Milne RD STE 203

Oregon City, OR 97045

Tel: 503 656-4144

Fax: 503 656-1183

www.NWLegalHelp.com

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**

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
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

---------- 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

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
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

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

Please note that the Court cannot receive any correspondence including e-mail about a particular case unless copies are provided to all parties to that case. Any e-mail sent to the court (which includes the Judge's Judicial Assistant or Judicial Clerk) must certify that a copy has been provided to all counsel by email. All e-mails about a particular case must contain the case number for that case. Thank you.

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

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

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

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

	Suggestion	Result	Rule(s)	Staff Summary of Comment	Suggestion By
1	I would like to see Oregon adopt the "proportionality" language from the FRCP that cover the scope of discovery.	No committee	36 C	Adopt FRCP proportionality language	Matthew Colley
2	Allow interrogatories similar to FRCP 33.	No committee	Discovery	Provide for interrogatories like FRCP 33	Scott Gowgill
3	Add interrogatories. Every other state and the feds have them. Just because they could be abused in not a reason not to have them, as deposition can be abused but we still have them. Simply enact safeguards to limit the ability to abuse them, and seek input from attorneys who have experience with them in federal court or other states to help craft those rules.	No committee	Discovery	Add smart interrogatories	Michael Stevens
4	The current rules on expert discovery are far bellow the standard in a 21st Century practice. They do NOT promote settlement nor a just trial. The FRCP are the model that should be incorporated onto ORCP.	No committee	Discovery	Federalize rules on expert discovery to promote settlement and just trials	James Rice
5	Very limited interrogatories to parties.	No committee	Discovery	Very limited interrogatories	Michael Hallas
6	ORCP 36 should add language requiring proportionality in discovery, similar to FRCP	No committee	36 C	Require proportionality in discovery, like FRCP	Anonymous
7	the continuing refusal of the CCP to incorporate a rule addressing proportionality in civil discovery is an embarrassment. It directly results in absurd arguments in court and costs of $100K in single plaintiff employment disputes. Lack of judicial control over litigation processes directly contravenes equitable, speedy adjudication.	No committee	36 C	Allow incorporating proportionality in civil discovery	Anonymous
8	Organizational depositions under 39(c)(6) need less draconian sanctions.	No committee	39 C(6)	Less draconian sanctions for organizational depositions	Anonymous
9	ORCP 43 should have a requirement that production be made forthwith--there is too much dinking around.	No committee	43 B(2)	Require production of documents forthwith	Anonymous
10	1) The discovery rules should more closely align with the federal rules. This is NOT a proposal for adding interrogatories. This IS a proposal for stricter review of objections (specifically general objections, which just serve to obfuscate and create greater expense to litigants), Discovery rules should also explicitly provide that documents be produced contemporaneously with any response. 2) Judges should be encouraged to strictly apply these rules.	No committee	43 B(2) Discovery	Align discovery rules with FRCP - strict review of objections and produce documents contemporaneously with response	Anonymous
11	Will anything be done to address service by email?	no committee - addressed last biennium	7 D(6)	Wil anything be done to address service by e-mail?	Cynthia Domas
12	service by alternative means. Its almost 2020 and ORCP is making us publish in newspapers no one reads. Please look at service by social media, email, and other methods that reflect the changing way individuals interact with society and one another.	no committee - addressed last biennium	7 D(6)	Allow service by social media, e-mail, etc., not just newspapers.	Anonymous
13	I have always thought the second sentence of ORCP 15A needs to be changed, because the 10 days to respond to a motion appears to conflict with the 14 days in UTCR 5.030(1). Everyone just follows the UTCR anyway, so why not put 14 days in ORCP 15A as well?	no committee - addressed last biennium	15 A	10 days to respond to "motion" in conflict with UTCR's 14 days, so eliminate the second sentence	Anonymous
14	Currently a plaintiff must seek leave to amend a complaint. However, once the plaintiff files the amended complaint, there is no rule limiting the defendant from simply answering the amendments. Thus, the defendant will often respond to the amended complaint by adding entirely new defenses without seeking leave from the court, where it would otherwise be required to do so. For example, if a plaintiff amends by narrowing claims for trial, a defendant should not be able to ADD a brand new defense right before trial without seeking leave. ORCP 23 A or ORCP 19 should be amended to address this issue.	Rule 23 committee	23 A 19	Since plaintiffs must seek leave to amend, require defendants to likewise seek leave to amend if they intend to add new defenses in responding to amended complaints	Anonymous
15	Simplify and shorten times for service per ORCP 7, 9 and 10. These changes are necessary to accommodate the shortened disposition standards, or else there will be many stays and no discovery.	Rule 7 committee	7 9 10	Simplify and shorten times for service	Mary Johnson
16	Add flexibility in notice procedures to achieve actual notice.	Rule 7 committee	7 9?	Add flexibility to achieve actual notice	Anonymous
17	Rule 7 is needlessly complex and requires parties to frequently pay 2 servers. If personal service is not accomplished, many (or most) sheriffs will either not serve at all or will only perform the primary substitute service but not the required 1st class mailing. There's no reason the party can't put a copy of the documents in the mail without having to find or pay a second qualified server to drop an envelope in the mail. The rule would benefit from far fewer exceptions and special party designations. The new email service option is great, but includes repetitive and conflicting thresholds and should be treated as just another substitute service method.	Rule 7 committee	7	Rule 7 needlessly complex. Shouldn't have to find second server for follow-up mailing after substitute or office service. Fewer exceptions and special party designations. E-mail service great but should just be another alternative service method without repetitive/conflicting thresholds.	Anonymous

	Suggestion	Result	Rule(s)	Staff Summary of Comment	Suggestion By
18	Please streamline the service rules in ORCP 7. With the advent of e-court, everyone seems to be confused about the different means of service and the timelines for each form.	Rule 7 committee	7	Streamline Rule 7. With e-court, confusion on means of service and timelines for each	Anonymous
19	Adopt waiver of service rules similar to FRCP 4(d)	Rule 7 committee	7 F(3)	Have FRCP 4(d) waiver of service provision	Scott Gowgill
20	Fix ORCP 1 E(2) so that it requires "personal knowledge" as opposed to "knowledge and belief." ORE 602 requires "personal knowledge." Some people have a "belief" that the Moon landings were fake.		1 E Declarations	Require personal knowledge, not knowledge and belief, like OEC 602	Charles Markley
21	admittedly there are a lot of rules and nuances but you should identify 12 or so that would apply in small claims courts (Rule 1 says that the rules don't apply) which might make the small claims courts more consistent and more justice like. Now each small claims judge does what he wants and sometimes the decisions are horror stories. Plus Washington allows certain appeals which would be nice and would result in a better process for pro se people.		1 A	Identify roughly 12 rules that apply in small claims department to improve consistency/correctness of rulings. Allow some appeals of small claims judgments, as Washington does	Anonymous
22	Nothing specific. However, I am always at somewhat of a loss as to how to give notice/serve an opposing party with the proposed form of (Q)DRO in cases where it has been many years, sometime decades, since the divorce judgment was entered. Parties often wait YEARS to take care of the QDRO. When I cannot locate an opposing party, or they are not responding or cooperating, I have to get creative... I don't find much direction in the ORCP on this.		9	How to serve opposing party in (Q)DRO cases, sometimes years after divorce judgment	Stacey Smith
23	Do away with the "extra-3-day" rule for responding to email service. Add 5 days for USPS service. It regularly takes at least 5-6 days for mail between Salem and Portland. I find some lawyers using the USPS only just for that reason.		10 B	Additional time to respond - eliminate for e-mail, increase to five (5) days for USPS	Paul Sundermier
24	ORCP 22 C "Third Party Practice" should changed to enable a defendant to assert third-party claims more easily. The rule requires a defendant to assert a third-party claim within 90 days of being served. To assert a third-party claim after 90 days requires both consent of all parties AND court approval. The rule should be amended to require consent of all parties OR court approval. It is unrealistic in most civil litigation for the defendant to know within 90 days the parties against whom it may have third-party claims. Allowing one party to "veto" the litigation of the third party claim is unfair and deprives the trial judge of the chance to efficiently resolve matters against all potential defendants.		22 C	Allow third-party claims to be filed more than 90 days after service if approved by all parties or court	Dan Keppler
25	Edit ORCP 27 to make it more clear - that an unemancipated minor must always have a GAL, and who should be appointing the GAL		27 B(1) through (4)	Make mandatory that minor must have GAL, who appoints **(current rule?)**	Anonymous
26	Interpleader statute is confusing to everyone including judges ORCP 31.		31	Interpleader "statute" confusing to all	Mark Cottle
27	ORCP 32H and I should be eliminated. At the least, 32I should have a strict timeline for compliance.		32 H & 32 I	Eliminate prior demand requirement for money damages class actions. Eliminate or strict timelines for ID of and notice to class members requirement	Anonymous
28	Codify whether a party may be required to prepare a privilege log anytime an assertion of privilege is made to a document request/subpoena.	No committee	36	Codify whether responding party must prepare privilege log for each assertion of privilege	Joseph Arellano
29	ORCP 36B(2) should have an automatic provision that a party must pay $10,000 if they do not produce the insurance information when requested unless they have filed for a protected order. Too many lawyers ignore this rule.		36 B(2)	$10K penalty for failure to produce requested insurance information	Anonymous
30	ORCP 41 C should be revised and clarified. For example, ORCP 39 D(3) requires objections to be stated concisely, while many practitioners state that, under ORCP 41 C, the only pertinent objections are to the form of the question and objections on the grounds of privilege. Respectfully, ORCP 41 C(1) and (2) are vague and unhelpful to practitioners.		41 C(1) and 41 C(2)	Effect of errors and irregularities in deposition questions and objections thereto, vague and unhelpful	Peter Bunch
31	Parties should provide a date no more than 30 days after the deadline to respond to RFPs by which they will provide actual documents.		43 B(2)	Provide date no more than 30 days after deadline to produce actual documents	Sonia Montalbano
32	ORCP 44 needs amended to allow discovery/inquiry into plaintiffs' conversations with their treating providers in personal injury/medical malpractice cases.		44	Allow discovery of plaintiffs' conversations with treating healthcare providers in PI and medical malpractice cases	Anonymous
33	Filing of Requests for Admission is discussed in Rule 9((C), but many attorneys do not know that these should be filed with the court. Suggest that ORCP 45 at least refer to rule 9(C) for information on filing.		45 B 9 C	Add reference in Rule 45 B to remind responding party of need to file responses	Anonymous
34	Make an award of attorney fees mandatory under ORCP 46 on the first motion to compel. These changes are necessary to accommodate the shortened disposition standards, or else there will be many stays and no discovery.		46	Attorney fees mandatory on first motion to compel	Mary Johnson

	Suggestion	Result	Rule(s)	Staff Summary of Comment	Suggestion By
35	Authorize automatic sanctions for failure to comply with discovery after along with a motion to compel. Having to jump through SO many hoops to get basic documents is costly and the attorneys know there is no consequence anyway. IF they produce documents, they are late, subject to a motion to compel, and often the judges even say, "Counsel you should produce the documents but I'm not going to sign an order to do it, just do it." There are no punishments or teeth to the ORCP in this regard. They are just told to provide the documents the ORCP already tells them to provide.		46	Motions to compel should provide for automatic sanctions for failure to provide discovery	Anonymous
36	If someone files a Motion to Compel, documents produced less than 15 days before a hearing should trigger a payment by the producing party of $500 (or some other amount), unless otherwise agreed by counsel.		46 A	Monetary penalty if fail to produce documents 15 days prior to hearing	Sonia Montalbano
37	I just moved here after 50 years of practicing in NJ & NY. I find the discovery rules anachronistic. Trial by ambush has long been done away with in those two states. Interrogatories should be added as a discovery tool. Discovery of expert's reports should also be added. To do this will assist of the settling of cases.		Discovery	Add interrogatories to discovery tools. Allow discovery of experts' reports.	Barry Siegel
38	Get rid of Motions for Summary Judgment		47	Eliminate motions for summary judgment	Anonymous
39	amend setting motions for summary judgment where opposing counsel refuses or unnecessarily delays in agreeing to a date.		47 C	Amend setting Rule 47 motions where non movant causes delays	Anonymous
40	ORCP 47E needs work. First, it should not be made clear that it is not applicable to pro se litigants who are not admitted to the Bar and who are not subject to discipline. Second, it needs further refinement because there can be differences of opinion as to the scope of permissible expert testimony and whether such testimony relates to the summary judgment issue in play.		47 E	Section E needs work. Allow expert affidavits only for attorneys. **(Current rule.)** Confusion as to scope of expert testimony and whether relates to the issue before the court on Rule 47 motion.	Stephen McCarthy
41	I suggest the CCP look at ORCP 47E (use of attorney affidavit or declaration when expert opinion required) and recent appellate cases applying the rule. I noticed, while I was in private practice, that appellate decisions, starting with Moore v. Kaiser Permanente, 91 Or.App. 262 (1988) seem to have modified the plain language of the rule by effectively changing the "is required to provide the opinion of an expert ..." language in the rule to a "may or must" standard, which essentially changes the mandatory nature of the rule to a permissive nature. The Moore court stated "Rule 47 E is designed to enable parties to avoid summary judgment on any genuine issue of material fact which MAY or must be proved by expert evidence" (emphasis added). But the court did not explain why it added the "may" language, and this was not in response to an argument that the rule was ambiguous nor was it an attempt to interpret the plain language of the rule; it seemingly came out of nowhere. Decisions subsequent to Moore quote the "may or must" standard without explaining how that is consistent with the plain language of the rule. I express no opinion about whether as a policy matter the rule should be mandatory or permissive, but it does seem concerning that the judicial decisions have effectively re-written the plain language of the rule Another suggestion I have for ORCP 47E is to make clear that if an expert affidavit is used to defeat summary judgment but the attorney changes his/her mind about how to prove a claim at trial and does not use expert testimony at trial that the attorney nonetheless needs to prove to the court and opposing counsel that the attorney did in fact have an expert lined up and ready to testify at the time the ORCP 47E affidavit was submitted, and in fact was planning on proceeding at trial on that theory. I had a case while in practice where opposing counsel defeated a motion for summary judgment by using an ORCP 47E affidavit, yet at trial did not present any expert testimony. I moved for a directed verdict on the grounds that the attorney had previously represented that expert testimony was required on each of the claims and by not presenting an expert at trial the plaintiff necessarily failed to prove his case. The trial judge denied the motion for directed verdict, though my client subsequently prevailed at trial. After trial, I sought to compel the identity and opinion of the purported expert for a possible sanctions motion because I strongly believed that the attorney did not in fact have an expert retained (especially considering that some of the claims were purely		(continued)		

	Suggestion	Result	Rule(s)	Staff Summary of Comment	Suggestion By
	fact based and expert testimony seemingly would have had no relevance, and the plaintiff did not even attempt at trial to prove those claims using lay testimony) but opposing counsel claimed this was protected by the work product doctrine and the attorney client privilege. I argued this could not be privileged because the lawyer had previously represented that the expert would be testifying at trial so this could not have been expected to remain confidential for all times, and I also argued that the work product doctrine should not apply with respect to this particular issue after trial. The trial judge denied the motion to compel on the grounds that the work product doctrine and the attorney-client privilege prohibited disclosure, and my client decided not to appeal. I suggest that the CCP consider modifying the rule to make clear that in the event the expert does not testify at trial that the opinion is not privileged or otherwise protected from disclosure, and that the attorney would also need to explain why the attorney changed his/her mind to go with a different theory at trial than the attorney was using at the summary judgment stage. Otherwise, an attorney could effectively use an ORCP 47E affidavit in bad faith to avoid summary judgment even without having an expert, knowing that in the unlikely event that the case went to trial the lawyer could avoid sanctions for the bad faith conduct by invoking the work product doctrine or the attorney-client privilege and there would be no way to prove that the lawyer did not have an expert. This is particularly important considering that the Oregon Supreme Court in Two v. Fujitec Am., Inc., 355 Or. 319 n.5 (2014) contemplated attorneys using an ORCP 47E affidavit at the MSJ stage but not using an expert at trial ("Therefore, a party may submit a ORCP 47 E affidavit on summary judgment but rely on non-expert evidence at trial, contending that expert testimony is unnecessary. In that circumstance, at least, and perhaps in others, the fact that a party submitted an ORCP 47 E affidavit but did not call an expert to testify will not necessarily establish that the affidavit was not made in good faith"). I am not suggesting that ORCP 47E should be abolished or that pretrial expert testimony be allowed - the expert affidavit rule is the result of an informed policy decision to decrease the cost of litigation by not having expensive expert discovery - but considering how ripe the rule is for potential abuse by an unscrupulous attorney who uses an expert affidavit without actually having an expert and then hides that misconduct by invoking work product or attorneyclient privilege, I would think eliminating the possibility of invoking work product or privilege would provide more fairness and accountability to the rule.		47 E	Make clear expert affidavit to defeat summary judgment only where the expert <u>is</u> essential to establish a material fact <u>or</u> go with *Moore v. Kaiser Permanente* , 91 Or App 261 (1988) to say expert <u>may be</u> essential to establish a material fact. Provide procedure to authorize disclosure of expert if expert affidavit is filed but party changes their mind or a theory and produces no expert at trial.	Hon. Eric Dahlin
42	Clarify alternatives for service of subpoenas.		55	Clarify alternatives for service of subpoenas **(Done?)**	Anonymous
43	I recommend additional clarity on the procedure for trust and estate litigation, and especially a change to how Rules 62C(2)(a) and 27 work in that context. There should have an exception if the proceeding is to replace a Trustee who no longer has financial capacity to continue acting as trustee -- jumping through the hoops slows down the replacement process too much and in the times I have seen this occur usually the incapacitated trustee has someone in their life draining funds from the trust without authorization. A similar exemption should probably apply in other situations where the incapacitated person is occupying a fiduciary position with respect to an entity. A delay to a default judgment does not protect the incapacitated person and increases any potential ongoing harm.		62 C 27 E, F	Clarify procedures for trust and estate cases. Timelines can result in harm to incapacitated person.	Anonymous
44	Please review Rule 69 for terminology and clarity. There is disagreement about whether a party is "in default" once the time to respond has passed or if they are only "in default" after a court grants a motion for default.		69	Unclear when in default, after deadline has passed or after court order	Anonymous
45	It would be doctrinally simpler to brief and argue preliminary injunction motions if ORCP 79 tracked the federal standard for injunctive relief, or at least coalesced into a single Oregon standard, rather than having two alternative prongs--ORCP 79 A(1)(a) and (b)--neither of which parallels the federal standard.		79 A(1)(a) and 79 A(1)(b)	Use federal standard for preliminary injunctions or at least refine to one Oregon standard	Rachel Lee
46	Too many litigators are gaming the discovery rules. There should be a more direct way to compel violations of the rules.		Discovery	Too many litigators game the discovery rules.	Paul Sundermier
47	codify the procedure for the production of a testifying expert's file at trial (timing) and what information must be included (content of expert's "file"). See FRCP 26(b)(4)(B) and (C).		Discovery	Codify timing and content of experts' file produced at trial, like FRCP 26(b)(4)(B) and (C) - to protect attorney-client privilege	Joseph Arellano
48	ORCP's should disincentivize obstructive behavior by lawyers and clients.		General	Disincentivitize obstructive behavior	Anonymous
49	Judges treat pro se people really differently depending on the judge. Many do not seem to know that they can explain the process etc. to these litigants. Many treat them rudely and expect them to know rules they have no way to know. I think you could clarify these rules better.		General	Since some judges expect pro se litigants to know the ORCP, clarify them better	Anonymous
50	The rules are confusing unless one is very familiar with them. In my practice they mostly don't apply, but when they do I find it difficult to navigate my way through them. I'd like to see them written and organized more clearly.		General	Clearer and more organized rules	Anonymous

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51	Many ORCPs contain only partial information and it is necessary to locate and review additional statutes, ORCPs, UTCRs or SLRs. It would be very helpful if the rules referenced the other statutes, ORCPs, or UTCRs that interact with the ORCP in question, and that UTCRs and SLRs be minimized or incorporated into ORCPs where appropriate		General	Include internal references to relevant ORCP, UTCR, SLR, so reader knows to also look at these references. Minimize or incorporate UTCR and SLR by including in ORCP	Hon. Charles Zennaché
52	ORCPs should generally be more fair to unrepresented/self-represented parties.		General	Make ORCP more fair to pro se litigants	Anonymous
53	Implement a non-optional expedited jury trial procedure for cases under a certain amount, that includes limited discovery and a firm trial date. Dispose of the mandatory court-annexed arbitration. Make rules to prevent attorneys from pleading around arbitration/expedited trial.		General ORS 36.400 - .425	Mandatory expedited jury trial procedures for civil cases less than a specified amount -- limited discovery Eliminate court-annexed mandatory arbitration	Anonymous
54	The main focus of the committee is litigation not focused on probate or protective proceedings. When changes are made to the general rules, more care and attention needs to be given to the impact on probate/protective proceedings. The committee has really tried to do this, but it is an almost impossible task to make the ORCP's match practice with probate, protective proceedings, and trust proceedings. I think Matt Whitman and others have tried, but the problem is with the probate statutes. Right now I am working on the changes to the Oregon probate code (ORS Chapters 111 to 118) to try and help fix things inside of the Uniform Laws Commission Probate Modernization Group. The committee may be interested in this because we have spent a great deal of time sorting through the concept of when the ORCP's apply and when the probate code provisions apply. There is no direction in the statutes so in practice there is a division. We are trying to define when a matter becomes a contested matter which will then bring in the ORCP's for things like responsive pleadings. We have been working in a small group which includes litigators and lawyers who do the administration and are trying to make it easier for people to understand. It could be helpful to have the CCP's assistance.		Probate, protective proceedings & trusts	Unclear when ORCP apply and when statutory provisions apply - ORCP only when contested?	Heather Gilmore
55	create a form for protective orders. feds have them.		Protective orders	Create a form for protective orders, feds have them	Anonymous
56	Certificates of readiness are a waste of time in dependency law		Trial readiness	Certificates are a waste of time in dependency cases	Anonymous
57	Rules should mandate each trial judge allow at least 30 minutes for direct ex parte appearances to secure order and judgment signing and entry, resolve hearing scheduling issues. As things stand now in some counties, there are weeks of delay in securing orders for simple matters or signatures on judgments that are long overdue.		UTCR 5.060	Require each judge to allocate time for ex parte to get orders/judgments signed, resolve scheduling issues	John Peterson
58	Simplify the calculation of time and update for electronic filing		UTCR Chapter 21	Simplify calculations of time and update for e-filing	Paul Sundermie