MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 9, 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.
Troy S. Bundy*
Kenneth C. Crowley
Jennifer Gates
Barry J. Goehler
Hon. Norman R. Hill
Meredith Holley*
Drake A. Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Shenoa L. Payne
Tina Stupasky*
Hon. Douglas L. Tookey
Margurite Weeks*
Hon. John A. Wolf

Members Absent:

Hon. R. Curtis Conover
Travis Eiva
Hon. Lynn R. Nakamoto
Hon. Leslie Roberts
Jeffrey S. Young

Guest:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	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	Discovery	Discovery	ORCP 41		
ORCP 7	ORCP 7	ORCP 1	ORCP 43		
ORCP 15	ORCP 15	ORCP 4	ORCP 44		
ORCP 23/34C	ORCP 23	ORCP 9	ORCP 45		
ORCP 27/GAL	ORCP 23/34C	ORCP 10	ORCP 46		
ORCP 55	ORCP 27/GAL	ORCP 17	ORCP 47		
ORCP 57	ORCP 55	ORCP 22	ORCP 54		
	ORCP 57	ORCP 32	ORCP 62		
		ORCP 36	ORCP 69		
		ORCP 39	ORCP 79		

I. Call to Order

Ms. Gates called the meeting to order at 9:30 a.m.

II. Administrative Matters

A. Approval of October 12, 2019, Minutes

Ms. Nilsson explained that Judge Norby had e-mailed her with two suggestions for corrections to the October 12, 2019, minutes (Appendix A) as follows:

> Page 24, paragraph 3, edit to read, "some judges enter discovery orders months before the trial starts that require expert information exchange prior to the first day of trial."
>
> Page 28, paragraph 1, edit to read, "a chapter on stipulations in the revised Civil Litigation CLE publication…."

Judge Peterson also suggested specifying that the CLE publication was published by the Oregon State Bar. Judge Wolf made a motion to approve the October 12, 2019, minutes with the amendments made by Judge Norby and Judge Peterson. Ms. Gates seconded the motion, which was approved unanimously by voice vote.

B. Staff Comments

This item is carried over to the December meeting.

III. Old Business

A. Follow-Up on Suggestions from Survey

1. ORCP 4

Ms. Gates explained that she had not yet contacted attorney Dallas DeLuca, who had made the suggestion regarding Rule 4, to get more information. This item is carried over to the December meeting.

2. ORCP 31

Judge Peterson explained that he had not yet contacted attorney Mark Cottle, who had made the suggestion regarding Rule 31, to get more information. This item is carried over to the December meeting.

B. Committee Reports

1. Discovery

Mr. Goehler explained that the committee's two tasks were to examine the issues of privilege logs and the production of expert materials. He referred the Council to the committee's report (Appendix B). He stated that he had done research on privilege logs and that he could not find a jurisdiction with a rule that requires them. He examined Ninth Circuit case law, Washington case law, and Washington rules. The federal case law and the Washington case law puts the burden for proving a privilege on the party asserting it. A privilege log is not required, but a judge can order one. The case law says that a privilege log is useful to prove the privilege.

Oregon is unique because the burden is the opposite; the burden is on the party contesting the privilege to prove that the privilege does not apply, which makes a better case for not having a privilege log than in other jurisdictions. The committee discussed this and also talked about the fact that discovery orders can require a privilege log as well as expert production. The consensus of the committee was to not create a rule dealing with privilege logs but, rather, to have the courts deal with the issue through case management.

Regarding the issue of production of the expert's file, Mr. Goehler could find no case law dealing with this issue. He could not find a case in Oregon talking about production of an expert file, but he noted that it is something that happens commonly in practice. His understanding is that production of the expert file is a function of cross-examination, so it is produced to aid the cross-examination of the expert witness. How that is handled is a also trial management issue. The consensus of the committee was not to amend the discovery rules regarding expert's files.

Mr. Goehler stated that the committee feels that the prudent thing to do is to disband the committee at this time. Council members agreed that the committee is no longer needed at this time.

2. ORCP 7

Ms. Weeks presented an informal, oral report of the committee's work thus far. Committee members reached out to various groups within the state, including the Oregon State Bar's Litigation Section and Family Law Section. The committee received some limited feedback, but not as much as they wanted. Most groups contacted were very much in support of adding a waiver provision to Rule 7 similar

to that in Federal Rule of Civil Procedure (FRCP) 4 D; the Family Law Section was not. Members of that section were concerned about not wanting to add a waiver because it would add a layer of confusion to an already emotionally tense experience on the family law side. The committee decided that it should bring the feedback it had received to the Council and see whether Council members thought that it was wise for the committee to move forward and start working on an amendment to the rule, or whether more discussion was warranted about whether such an amendment is worthwhile.

With regard to the new issue raised by Aaron Crowe from Nationwide Process Service, who suggested adding the term “clerk” to ORCP 7 D(3)(h), Ms. Weeks stated that Mr. Young had researched the term “clerk” and why it was not included in the paragraph of the rules that pertains to public bodies. He went through Council meeting minutes on the website and discovered that the term was originally in the rule but been removed because it was considered to be ambiguous. Ms. Weeks explained that the committee had discussed the level of ambiguity and whether the term could potentially be added back into that subsection to make it comport with other areas of the rule where a clerk is an acceptable service contact for service of process. She stated that the committee had determined that language such as "a clerk in the office of the attorney" would probably satisfy the request without making it too ambiguous for anyone else reading the rule.

Ms. Weeks stated that the committee should probably also have a conversation relating to waiver of service. She noted that the committee can likely have proposed language regarding adding "clerk" back into the rule by the next Council meeting.

Judge Peterson expressed surprise that the family law bar would be opposed to a waiver of service provision because it is a cost-saving measure and, in divorce cases, the parties are usually in agreement about the marriage needing to be dissolved. Judge Norby noted that people can file as co-petitioners and avoid service altogether. Judge Peterson asked how many divorce cases are filed by co-petitioners. Judge Norby stated that quite a few are. Judge Wolf stated that more than he would like are filed that way, and that it can lead to confusion later in the case. He stated that he assumed that the family law bar would be on board because they sometimes deal with reluctant spouses who do not want to accept service, and an amendment might persuade those reluctant parties to be more cooperative. Judge Leith noted that it might also be helpful in cases where people want to avoid the embarrassment of having someone show up to serve them at their place of work.

Mr. Crowley wondered about where the committee is considering inserting the word "clerk." Judge Leith explained that the word “clerk” would be inserted right after the word “attorney.” Mr Crowley wondered who could be served in that case. Judge Wolf stated that the committee believes that the rule used to just say "or clerk," and it was not clear whether that meant the officer’s clerk or the director’s clerk. He pointed out that the other parts of the rule that use the word “clerk” indicate which clerk it is. He stated that, if the Council adds the word “clerk” back into this part of the rule, it needs to specify in some fashion which clerk it is. Judge Peterson stated that the Council should recognize that some public bodies are very small and informal. Mr. Crowley noted that the other side of the coin is that some bodies are huge, with a myriad of clerks.

Ms. Weeks stated that some of the people whom the committee had reached out to for feedback, especially on the waiver of service issue, were adamant that they would want a 60-day extension, similar to that in FRCP 4, as the cost savings was not quite as much of an impetus as the extra time was. The committee had some questions about how that would fit into current court calendars and how that might change things on the circuit court side. She noted that this was really the only other major comment that the committee received.

Judge Peterson observed that there is both a carrot and a stick here; you can bear the costs but, if you accept service, you can get extra time. Ms. Stupasky stated that she does not understand why extra time to respond would be necessary just because someone is accepting service. Ms. Gates agreed that it seems like a really big carrot. Judge Wolf stated that the committee is aware that this is an issue. The federal rule gives 60 days from the date it is mailed, so the 60 days does not start with acceptance but, rather, with mailing. So it may not really be an extension of 60 days, since there may be a delay in the mail or in someone deciding whether to sign an acceptance of service. He expressed concern about running into the disposition standards. Mr. Goehler stated that his experience with the federal rule is that it is done because the default procedures are so draconian in federal court whereas they are not in state court with the ORCP’s notice provisions. So, giving that extra time to respond in federal court makes sense because of the default rules. Judge Peterson stated that, in Oregon, a party has to give notice of intent to take a default, which is a much more civilized process. Ms. Stupasky stated that, as an attorney, one has more time than 30 days because one has to wait 30 days before giving the 10 day ORCP 69 notice, which is usually sent by mail. There is already more time to respond than there used to be.

Ms. Weeks stated that the committee will meet again and that she is hopeful that they will have draft language by December. She stated that it is an issue that she, personally, would like to move forward with.

3. ORCP 15

Ms. Payne referred the Council to the committee's written report (Appendix C). She reminded the Council that, having looked at Rule 15 last biennium, it became a concern that the scope of Rule 15 D, the section that gives the court discretion to enlarge the time to plead or do some other act, is not clear. That section currently appears to give the court discretion to allow or extend time for filing any pleading or motion. However, just from discussions at the September Council meeting and during the committee's meeting, it appears that some lawyers and judges think that the rule is broader than the language contained within it, and that it gives judges discretion to extend replies and responses to motions. However, the rule does not, in its express language, actually do that. The committee wanted to look at whether the rule needs some clarification in that regard, as well as whether the bench and bar, primarily younger attorneys, need notice that there are exceptions to this rule for certain motions.

Ms. Payne explained that the committee had discussed the possibility of putting some lead-in language in section D that does not cite specific statutes but, rather, provides an alert that, even though the rule seems broad, there are some exceptions. She suggested language such as, "Unless otherwise governed by statute or other rule...." She noted that the committee is also considering adding language regarding replies and responses to motions. She reiterated that the current rule is not clear and that it can be a trap for lawyers who are not aware of how the rule really works. She stated that the committee plans to meet again before the next Council meeting and come up with proposed language for the Council to consider.

Judge Peterson noted that Mr. Goehler had pointed out that the language "any other" in section 15 D is a little misleading. He suggested that phrase could also be retooled a bit. He pointed out that another concern is self-represented litigants, some of whom do try to read the ORCP, and who may not understand the unlisted exceptions in Rule 15 and why extensions for some motions are not permitted. He stated that making the rule a little more accurate seems like a worthwhile endeavor.

Judge Leith wondered whether the language"do other act" could be removed and the current language replaced with language such as, "enlarging time to plead, move, respond, or reply." Judge Peterson stated that he had also wondered what those "other acts" were last biennium, and suggested that there might be a way to rephrase that language. He noted that the language only exists in the lead line, but it seems that it should be part of the cleanup of the rule.

Ms. Gates wondered whether the committee had looked at the history of Rule 15. Ms. Payne stated that it had not, but agreed that it is a good idea to look at the rule history any time the Council amends a rule and stated that the committee would do so. Judge Peterson stated that he had briefly looked at the history and found that much of the language was taken directly from the Oregon Revised Statutes at the time the rules were first promulgated, so many of the words were not crafted by the Council.

4. ORCP 23

Ms. Gates stated that the committee is scheduled to meet soon and will report to the Council at the December meeting.

5. ORCP 23 C/34

Mr. Andersen distributed a committee report to Council members (Appendix D). He stated that the committee had met and discussed the issue at hand, which is the situation in which a plaintiff files a lawsuit within the statute of limitations, the papers go out to be served, and the process server discovers that the defendant is deceased. The plaintiff then wants to amend the complaint to name the personal representative in place of the deceased person; however, there are two decisions by the Oregon Court of Appeals that state that the deceased person is a non-entity so the estate of the deceased person cannot be substituted because it is an entirely new party so a substitution would relate back to the commencement of the action. Mr. Andersen explained that, last biennium, a committee had attempted to solve the problem by an amendment to Rule 23 and Rule 34, but the consensus of the Council was that this would be a change of substantive law and it was suggested that recommending a statutory change to the Legislature to solve the problem would be more appropriate.

Mr. Andersen stated that the committee had looked at various places where a legislative fix could be made, and suggested adding the following language at the end of ORS 12.190(2):

> However, if the plaintiff does not know of the death of the defendant until after filing the lawsuit, then the plaintiff shall have 60 days from the date of filing to substitute a personal representative for the decedent, and shall have 60 days after such substitution to complete service of summons upon the personal representative, as provided by ORS 12.020(2).

Ms. Payne asked whether the substitution of a party relates back so that there would not be statute of limitations problems. Mr. Andersen stated that a substitution does not, but a misnomer does. If a plaintiff sues Jack Jones and his real name is John Jones, and he knows of the case even if he has not been served, that is a misnomer that can be corrected after the statute of limitations has elapsed and that amendment will relate back to the filing. Ms. Payne explained that her concern is that the 60-day substitution does not solve the problem if a plaintiff sued a dead person and the statute of limitations has run. Mr. Andersen stated that he saw Ms. Payne's point. Mr. O'Donnell agreed that it does not solve the relation back issue.

Mr. Goehler pointed out that the case law says that suing a non-entity is a non-case because, if the case is already dead, a new person cannot be substituted into a dead case. Judge Hill noted that this is limited to when the plaintiff does not know of the death of the party, and this is a relatively small extension in just a relatively small number of cases. He suggested that it might be cleaner to write a rule that applies whether the plaintiff knew of the death of the defendant or not. He noted that it would extend the statute of limitations but, since the death adds a level of complexity to the case, there is a fairness component to giving a little more time, and it is cleaner because the parties would not be arguing about whether the plaintiff knew or should have known that the defendant was dead. Ms. Gates asked whether that is what the original language in ORS 12.190(2) was trying to do. Ms. Payne stated that she did not believe that section 2 contemplated that the year would run before the filing. Mr. Crowley observed that section 1 and section 2 kind of mirror each other; however, section 2 does not accomplish the whole goal.

Mr. O'Donnell stated that having a contested issue about whether a plaintiff knew or should have known that someone died would be a difficult process to have adjudicated. Mr. Andersen pointed out that there is absolutely no practical way to protect against this issue. Judge Leith asked whether there is some possibility in some cases that this new language would unintentionally shorten the extended period provided by the first sentence of section (2), since the first sentence gives a whole year but the new language gives just 120 days total. Ms. Payne suggested adding a "whichever period is longer" clause and making sure that the relation back issue is solid. Judge Wolf opined that the relation back needs to be expressed instead of a reference to ORS 12.020(2). He stated that it is not clear what the reference to ORS 12.020(2) does when there is a case filed that was not a case that someone is somehow relating back to that original filing.

Mr. Andersen read the language of ORS 12.020(2):

> If the first publication of summons or other service of summons in an action occurs before the expiration of 60 days after the date on which the complaint in the action was filed, the action against each person of whom the court by such service has acquired jurisdiction shall be deemed to have been commenced upon the date on which the complaint in the action was filed.

Ms. Payne opined that ORS 12.020(2) does not provide for relation back against a deceased party. Judge Peterson pointed out that, if the right person has been sued but service has not been completed, the case can continue; however, if the right person was not originally sued, he does not believe it solves the problem. Judge Wolf stated that any new language has to somehow refer back to the original errant service date.

Judge Leith stated that he believes that the Legislature will decide whether they want to do something about the issue that the Council presents to it and, if so, they will send the issue to Legislative Counsel, which prefers concepts over language. He suggested that perhaps the committee needs to explain the concept in the letter to the Legislature, rather than attempting to craft language. Judge Peterson agreed that Legislative Counsel has its own way of doing things. However, he stated that having this kind of discussion about language and where it might fit into the statute can be helpful in formulating exactly how to express the issue to the Legislature. Judge Norby asked whether the Council has ever sent such a suggestion to the Legislature before. Judge Peterson stated that it had, and that the Legislature had acted on the suggestion.

Mr. Andersen stated that he understands the feedback from the Council to be that substitution is a problem because one cannot substitute a new party for a non-entity, and relation back needs to be spelled out in the statute. Judge Wolf agreed and stated that, if you relate back to the errant filing, that covers the substitution issue as well. Judge Peterson suggested that perhaps a whole new section of the statute is needed.

Mr. Crowley asked whether this would basically just be extending the statute of limitations 60 days if it is discovered that a person has died and a personal representative needs to be sued instead. Mr. Goehler agreed and stated that, since discovery rules are fact specific, perhaps a new discovery rule that extends the statute of limitations would be appropriate. Judge Peterson noted that he had heard some discussion that using language such as "knew or should have known" is a bad idea. It may be better to just state as an objective fact that, if the

defendant is deceased, this is the new rule that is used. Judge Hill observed that the Council does not want to unnecessarily create a malpractice trap for people. If a plaintiff does not understand that they have to sue a personal representative and instead sues the dead person, they may end up in an argument about "knew or should have known." Mr. Goehler stated that it would involve a level of investigation before naming any party and it might create a level of inequity before even filing a suit. Judge Bailey noted that the flip side would be a plaintiff who really knew that the defendant was dead, and wondered whether anyone really cares. Judge Hill stated that this is his point, that creating a special category of cases where the statute of limitations has been extended because of this complexity, and adding a discovery rule might make sense, but he is not sure the juice is worth the squeezing. He stated that clarity and simplicity should weigh more heavily than going into that.

Judge Tookey also emphasized giving the Legislature a good description of what the problem is. He stated that, while it does not hurt to propose language, that is not the most important thing. Judge Norby asked whether it would be possible to let the Legislature know that the Council had considered several approaches and is ultimately suggesting the one proposed in the letter. Judge Peterson suggested including by reference a final committee report that outlines the issues and why a particular method is recommended. Judge Bailey noted that the current committee report sets forth the problem very well.

Judge Hill synthesized the discussion into two analytical approaches: 1) add a discovery rule to allow it; or 2) come up with a separate procedure that creates a safe harbor. He stated that he does not know which one is best, and it may make sense for the committee to flesh that out and ultimately recommend one over the other. Judge Tookey reiterated that, when he was working for Legislative Counsel, it was always helpful to have the problem described, not so much the language. Ms. Stupasky stated that she does not understand why it is a problem to provide more information to Legislative Counsel about what the Council has considered. More information is helpful, and Legislative Counsel can always decide what they want to do. She opined that the Council should not be afraid of putting all alternatives and language in a letter to them.

Mr. Andersen asked whether the consensus is that the committee rework the report with some proposed language without spilling too much ink on the language, or come back to the Council with another statute draft. Judge Norby asked whether the committee considered the safe harbor approach. Mr. Andersen stated that it had not. Judge Norby suggested including that in the committee's next discussion. Ms. Gates also suggested adding some of the Council's discussion to the report. Judge Peterson pointed out that sometimes concepts can be

nebulous but, when he sees draft language, he can see issues that remain unclear or whether a proposed change may create more issues than it fixes.

Mr. Andersen stated that the committee would draft a report describing this discussion, both approaches, and attempt another pass at the language. Mr. Crowley noted that those who brought this issue to the Council last biennium did contemplate that it would be discussed vigorously.

6. ORCP 27/Guardians Ad Litem

Judge Norby reminded the Council that it had received an anonymous suggestion to make ORCP 27 more clear that an emancipated minor must always have a guardian ad litem. The rule was also brought to the Council's attention by Holly Rudolph and the Law and Policy Workgroup of the Oregon Judicial Department (OJD), who suggested that the phrase "guardian ad litem" be eliminated because it is confusing. She stated that the committee is looking at whether the rule can and should be changed. The committee met on November 6, 2019 (Appendix E). The crux of the conversation was basically that the Council is at the crossroads of where lawyers understand clarity one way and lay people another way. There are particular rules getting flagged that highlight that conflict. She sought the input of her probate coordinator, who is not a lawyer, regarding whether she spends any time and effort helping people understand both the phrase guardian ad litem and that they need to use one. Her probate coordinator stated that she encounters people every week who do not understand the phrase, particularly in identity change cases. Her coordinator stated that she tries to point them to ORCP 27 B that says that a minor must have a guardian ad litem, but then people ask "why"?

Judge Norby stated that, in this day and age, people want to know why the rule exists and why they have to follow it. Staff people who are not lawyers are trying to explain the rules to lay people. She opined that, if the Council can elegantly, simply, and more clearly state ORCP 27 A to help lay people better understand the rule in totality, that would be a worthy pursuit. She stated that it may be possible, but that the committee did not want to make that strong suggestion before seeking the input of the Council.

Mr. Bundy stated that he is not really fond of starting a process of explaining to younger generations why things are happening. It seems to him that the courts could provide some kind of explanation sheet rather than modifying the rules so that lay people understand everything in them. Judge Tookey stated that he looked in the ORS and the phrase "guardian ad litem" appears there about 80 times and is not defined. He wondered whether there is another way to be helpful to people without defining the term guardian ad litem. Judge Norby stated that

she does not believe that the Council is being asked by younger generations to do a rewrite of the whole ORCP. On the contrary, the Council is receiving questions about certain rules that are particularly time-intensive for non-lawyer court staff, and the Council is being asked to lighten their load since the Council is supposed to be good with words.

Judge Leith stated that he thinks that the rule is pretty clear. However, if it is not clear, the most he would be comfortable adding would be a parenthetical after the term "guardian ad litem" that says something like "a guardian for purposes of the litigation" to explain it. Judge Norby stated that her probate coordinator stated that she is frequently asked why lawyers think that minors are incapacitated. People are confused by this because they feel that their children are smart and capable. Despite the fact that the Council considers this to be simple, it still needs to be explained.

Judge Hill expressed frustration with the theme of the proposed change. He stated that it seems ludicrous to try to modify well-established rules that everyone understands because someone cannot get an attorney. He stated that he has seen this happen with a whole host of things, and wondered why the trend is to try to make it so people do not need attorneys, rather than trying to get them attorneys. It would be a better system to try to allow people to get qualified representation so that these questions can be explained to them. He noted that the gist of the conversation so far has been how to make it so the rule explains what the law is so that litigation do not need someone to explain what the law is. He observed that this is what lawyers have done as a profession over thousands of years. Judge Hill acknowledged that the approach is well meaning, but opined that it is going in the wrong direction.

Judge Norby noted that identity changes have been an area of increased case filings but, with the new guide and serve process that encourages people to do it themselves, the court staff is left holding he bag. She stated that it is not just a question of whether the Council can do a better job with its clarity (and she noted that even new judges do not understand guardians ad litem), but a question of overburdened court staff. She agreed that, philosophically, Judge Hill has an interesting point, but her focus is the practical one of saving court staff time and not making court staff, who are constantly cautioned that they cannot give legal advice, walk a fine line in translating things that the Council refuses to translate. Judge Leith asked whether Judge Norby would want to do more than add the parenthetical he suggested. Judge Norby stated that she would like to have that conversation within the committee. She has more ideas than that, but she understands that the Council may ultimately reject those ideas. She pointed out that today is not the day to decide what to do but, rather, whether to allow the

committee to go forward.

Judge Peterson pointed out that part of the problem with guide and serve is that the Oregon Judicial Department (OJD) is doing a great deal of work in terms of creating forms, but the OJD is not completely aware, particularly with regard to name and identity changes, that the fact that someone is the parent of the person who is filing does not necessarily mean that they are qualified to file the lawsuit. For example, the minor's other parent may have a very different opinion. There is a reason for the rule requiring a guardian ad litem. The forms are not draconian and mandatory. In some counties the guardian ad litem form was optional, and it should not be. Ms. Payne stated that she does not understand why anyone is still using the court system for name changes, since they can now do it directly with the Secretary of State without going through the guardian ad litem process. Judge Norby stated that she is not sure why, but many people still do use the court system.

Judge Hill stated that it makes sense for the committee to keep working on the issue. However, he is philosophically resistant to changing rules to solve problems that are educational problems and training problems for court staff and judges. He thinks that the rule is clear on its face and that there is no ambiguity. He stated that, when it tries to make changes to accomplish this objective, the Council runs the risk of taking a clear and unambiguous rule and making it ambiguous.

Mr. Goehler noted that, as to the "why" of the rule, that is a substantive issue: the law is that minors do not have the capacity to file a lawsuit, just like they do not have the capacity to enter into a contract. The Council cannot change that, but the procedural rule just implements how minors can appear through a guardian ad litem. What the committee is discussing is purely procedural and, if the Council tries to get into the why of it, it would be putting a restatement in the rule, and that is not the right function of the Council.

Ms. Gates asked whether the committee can have a discussion about whether a detailed question and answer document can be prepared and attached to the guide and file forms. Judge Norby stated such question and answer documents are being created, but it is the same non-lawyer staff person doing it. Ms. Gates asked whether they can be made by lawyers. Judge Norby replied that there are no lawyers on staff. Ms. Gates opined that, if the issue is important to the Council, perhaps the Council's time is better spent crafting such documents that the whole group supports rather than having the whole issue shut down because there is a division of philosophy on whether to change a rule. Judge Norby stated that perhaps Council members' expectations of proposed rule changes are daunting or they believe such changes would be too cumbersome or too invasive to the clarity

of the rule. She pointed out that the idea is to make the rule simpler, not more complicated, so she would appreciate the opportunity to try to present such changes.

Judge Bailey asked whether the goal is the explanation of the rule itself, or the explanation of what a guardian ad litem means, because those are two different things. A parenthetical explanation of a guardian ad litem is one thing, but explaining that a minor by law cannot engage in these activities starts to get to the point of legal advice. Judge Norby explained that the anonymous suggestion asked for it to make clear that an unemancipated minor does need a guardian ad litem, which would seem to be a simple one-word fix. Judge Bailey asked whether that change would clarify the rule enough that the clerks would still have questions. Judge Norby noted that questions can never be eliminated; however, they can be clarified.

Ms. Gates encouraged evaluating alternative action in addition to proposing language. Judge Norby noted that committee member Judge Tookey can very well represent that alternative perspective. She stated that the committee would meet again and report back to the Council in December.

7. ORCP 55

Mr. O'Donnell stated that the committee had not yet met. He noted that the issue raised by Judge Marilyn Litzenberger regards trial subpoenas served on unrepresented non parties who have an objection and the process by which those individuals can access the court to get some sort of relief. Mr. O'Donnell noted that, when a non-party receives a subpoena, the idea of getting a lawyer may be unfair or unrealistic. He stated that he talked to Judge Karsten Rasmussen and asked him how often the issue comes up in Lane County. Judge Rasmussen stated that he does not see it much, but there is a concern that people ignore subpoenas and the parties just live with it and do not bring it to the attention of the court. Mr. O'Donnell stated that the committee will meet soon.

Mr. O'Donnell stated that he also has some other ideas about ORCP 55 issues that he would like to raise with the committee. His experience is that a lot of people these days are issuing subpoenas right out of the blocks as an easier method for defendants to get medical records, and there are some challenges in terms of objections and accessing the court. If it is early in a case, it is somewhat difficult to brief issues if there has been no meaningful discovery. One of his pro bono clients is often inundated with last-minute subpoenas, and the process is challenging. He does not know if any of the concepts he is concerned about would merit discussion, but he has at least one or two people in his office doing some research.

Judge Norby asked whether they have the rule that the Council amended last biennium and that goes into effect in January of 2020. Mr. O'Donnell stated that he believes that they have looked at it. He stated that he will also talk more with Mr. Eiva and discuss the issues from his perspective.

Mr. O'Donnell also noted that it will be good to get the perspective of judges on the issue of lay persons accessing the court, and how often it happens. He stated that it is hard to think how the rule could be changed to address when a fact witness has a problem and needs to access the court. Mr. Andersen stated that it would be a very bad thing if people start to ignore subpoenas, so the Council should keep that in mind when attempting to craft a solution to this problem. Judge Peterson stated that it seems to him that what he heard at the last meeting is that there should be an easy threshold to make a record and that there should be some kind of record so that one can find out what happened. He pointed out that, when Rule 55 was rewritten last biennium, the intention was not to change anything but, rather, to make the rule more clear. Mr Crowley stated that, as a matter of policy, it is better to give easy access to the court if people have a problem, rather than having them ignore subpoenas. Judge Wolf stated that, right now, judges are just winging it. There is nothing that outlines what they are supposed to do.

Judge Hill observed that a person who receives a subpoena has two choices: either appear or file a motion to quash. Mr. Andersen pointed out that the discussion is about non-party lay persons. Mr. O'Donnell stated that the concern with these non parties is that sometimes they cannot appear and sometimes they will not appear. They could just write on a piece of paper "I move to quash," and file it, but the thinking is that some people do not understand the process very well or are overwhelmed by it. Judge Hill asked why the Council is considering changing the rule to accommodate that. Mr. Andersen stated that, to the lay person who has no stake in the litigation and has another commitment and does not know the law, it is pretty daunting. Judge Hill pointed out that it should be daunting, because it is a command from the court to appear and it is serious. Mr. Andersen raised the scenario of a witness who has a vacation out of the country planned and has to decide whether to give up their ticket and appear in court. If the only solution is to get an attorney and pay money, it tempts them to ignore the subpoena. He opined that there should be a very low threshold, perhaps even something on the subpoena that tells them what to do. Judge Bailey observed that this is potentially giving legal advice. Judge Hill again stated that the person should file a motion to quash or show up in response to a subpoena. He opined that the last thing the Council wants to do is suggest that there is a third alterative. He suggested that this would create even greater confusion and risk that people will ignore subpoenas.

Judge Bailey asked whether timing is the issue, as in a time limit when non entities can appear, or whether providing a solution for access to the court is the issue. Mr. Andersen posited a situation where an attorney does not anticipate needing a witness, but that witness then becomes important because the other side has raised an issue that the attorney did not anticipate. The attorney calls the witness, who says they are not available, so the attorney subpoenas the witness. If the witness is represented by an attorney, it is very simple, they file a motion to quash. But, if the person is not represented by an attorney, it is not as simple. He stated that we want it to be very serious so recipients of a subpoena obey but not so inaccessible that they flee. Judge Hill stated that there are already consequences for failing to respond to a subpoena, such as being found in contempt and being sued by the losing party in civil cases sue for damages for not showing up. He stated that he does not see the problem other than the potential inconvenience that subpoenas sometimes raise for those who are called to testify in court.

Mr. Bundy stated that he does not know anyone who is not aware of what a subpoena is. However, if a person does not, they should call a lawyer. He stated that the rule provides for a remedy already. Mr. O'Donnell noted that, 98% of the time, that is true; however, he has seen instances where people do not plan very well and they are foisting a subpoena on someone where they should have been talking to the person beforehand. If it is a trial subpoena, where the force of law is being used on someone with no interest in the litigation, it puts them in a really unfair position. While he doubts the Council can do anything about it, he acknowledges that it is unfair.

Ms. Gates observed that the Council has given the committee a lot of feedback, including whether the problem even exists, and stated that she looks forward to their report next month.

8. ORCP 57

Judge Tookey explained that the committee had met in October. The committee's charge was to look at *State v. Curry*, 298 Or App 377 (2019), and see if ORCP 57 D(4) could be amended to help ensure that jury selection is free from discrimination, whether explicit or implicit. He stated that the Court of Appeals decision noted that there is not a lot of guidance in the ORCP about that issue.

Justice Nakamoto was going to contact colleagues on the Washington Supreme Court and see if they have thoughts about their rule that was adopted in 2018. Judge Tookey was also going to check with a former law clerk who works in that court system to see what has happened in response to the Washington state rule and see if that provides guidance to the committee in how to deal with those

suggestions. Ms. Holley stated that she is going to look at other jurisdictions as well.

Mr. O'Donnell stated that, when he recently picked a jury in Washington, the judge really emphasized issues of discrimination in the initial questioning of the panel. He noted that he was not even aware of the issue prior to that. The issue was incorporated into the introductory instructions as well, with firm and direct language about implicit bias.

Ms. Payne also suggested encouraging the Uniform Civil Jury Instructions Committee to work on an instruction regarding bias.

IV. New Business

A. Making the Rules More Accessible to Non-Lawyers

Judge Norby asked to take a straw poll of Council members regarding who feels a philosophical opposition to trying to make the rules more accessible to non-lawyers. Judge Hill and Ms. Payne stated an objection to how the question was framed. Judge Norby stated that she did not mean to make the question sound confrontational but, rather, to try to determine how much support there is for this concept. Ms. Payne stated that she is opposed to amending the rules if they are already clear for the sole reason that self-represented litigants cannot understand them. Judge Peterson noted that, as good lawyers, it is best to take this on a case-by-case basis. He stated that there are different aspects of it, such as whether the Council should put internal references within a rule or whether the rule should be framed so that a new lawyer or a pro se litigant can understand it. He stated that he is really comfortable with making a change to a rule like Rule 15 D where a literal reading of the rule is unclear, which is one extreme. But another extreme is where lawyers understand it and the rule works well, but self represented litigants are unsure of what it means.

Mr. Crowley stated that his office probably has about 500 open cases with self-represented litigants at any one time, and he is not opposed to clarity within the ORCP. He agreed that it would make things more efficient at times, but we need to look at each rule individually and decide. Judge Bailey agreed that clarity is always good, but it should be universal clarity and not specific to make it more clear for access to justice proposes. If there is a Latin is a term that is defined nowhere, defining it works not only for non-attorneys but for attorneys. Getting back to the heretic idea of changing rules for clarity for folks when they are already clear, he agreed that it should not be done. Ms. Holley stated that, if clarifying a rule makes it more simple for everyone and more accessible for a self-represented litigant, there is no harm, but if it makes it more difficult for attorneys practicing she does not think it is necessary. Mr. Bundy agreed that, if a rule

is unclear, the Council's function is to make it more clear, but it is not the Council's job to make it clear so that every lay person understands what lawyers studied in law school. He stated that there are some rules within the ORCP that are more likely to be used by lay people, but he is opposed to changing rules for the sole purpose of making them easy for lay people to understand. Mr. O'Donnell stated that his experience with self-represented litigants is not that they do not understand the rules but, rather, that they do not want to follow the rules. In civil cases, he is concerned about encouraging people to enter the system on their own and not have a lawyer.

Ms. Gates stated that she leans further toward supporting self-represented litigants than anyone she has heard speak. She stated that she lives in the real world where people have been saying "we need to get people lawyers" for 50 years and they still do not have them, so clearly that is not working. She prefers to do it by questions and answers and hiring people to do the explaining but, if that is not sufficient, we should take steps to clarify rules. This is not a blanket statement, but there are certain instances where issues are coming up frequently and making it a lot more expensive for the represented party to deal with the non-represented party so, if that can be remedied by some slightly greater explanation in some of the rules, she would support that.

Judge Norby thanked Council members for their input.

V. Adjournment

Ms. Gates reminded the Council that the next meeting will be held on December 14, 2019, at 9:30 a.m. at the Oregon State Bar. She adjourned the meeting at 11:05 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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 require that expert information be exchanged months before the trial starts, 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 a CLE publication coming out this year and that this publication includes a form protective order they received from 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

COCP Discovery Committee Report
November 7, 2019

Committee Members Present: Barry Goehler (Chair), Meredith Holley, Ken Crowley, Jennifer Gates

Not Present: Scott O'Donnell

Issue: The committee was tasked with evaluating whether a rule should be added requiring privilege logs in connection with discovery production.

The consensus of the committee is that a rule is not warranted.

Research revealed that there is no appellate case law in Oregon requiring or relating to privilege logs. Review of other jurisdictions did not find any rules requiring privilege logs. Cases from federal jurisdictions and Washington state courts show that privilege logs are not required, but may be helpful in many cases. In these jurisdictions, the burden is on the party claiming a privilege to prove that privilege applies. A privilege log is one useful way to meet that burden. Additionally, a court may order a party to produce a privilege log in connection with a discovery order or to facilitate *in camera* review.

In Oregon, the burden is on the party opposing a privilege, which might be a reason against imposing a privilege log requirement. It was the opinion of the committee that a privilege log could be ordered by the court in a particular case.

Issue: The committee was tasked with evaluating whether a rule should be added relating to production of a testifying expert's file.

The consensus of the committee is that a rule is not warranted.

Research did not find any case law addressing the production of a testifying expert's file. The understanding is that production of an expert's file is a function of cross-examination. As a result, the file is generally produced prior to when cross-examination is to take place. The view of the committee is that how and when an expert's file is produced should be handled by the trial judge, as part of managing the trial.

COCP Rule 15 Committee Report
October 23, 2019

Committee Members Present: Barry J. Goehler, Shenoa L. Payne (Chair), Hon. Mark Peterson,

Not Present: Hon. Norman R. Hill, Hon. Leslie M. Roberts

Rule 15 (as amended last biennium) is attached.

Issue: At the September Council meeting, Judge Peterson noted that he believed that a question exists as to the scope of Rule 15 D and the rule is unclear. Judge Peterson's concern is that many judges believe that Rule 15 D allows them discretion to extend any timeline, when that is not the case – it is limited only to motions and pleadings. *See Ornduff v. Hobbs*, 273 Or App 169, 176 (2015) (determining that attorney fee statement was subject to Rule 15 D because petition for attorney fees was a "pleading"). Also, some motions simply are not subject to the rule – for example, motions for new trials and motions notwithstanding the verdict.

Other members of the council seemed to believe that the timelines not subject to Rule 15 are not procedural but, rather, jurisdictional or otherwise determined by statute. Thus, a fix to the rule likely is not necessary. These council members expressed the opinion that members of the bar need to be aware of statutory deadlines or caselaw in addition to the statutory rules.

The consensus of the committee is that Rule 15 needs to be amended or clarified in some manner.

Judge Peterson initially noted that he would prefer putting all of the substantive (statutory) exceptions in Rule 15 D, but the committee agreed that doing so simply isn't practical. The committee agreed that some language that would alert the bench and bar that the rule doesn't cover *all* motions and pleadings would be helpful. Shenoa suggested some preface language to the rule along the lines of "Unless otherwise governed by statute or other rule," that would provide a hint that there are some aspects not covered by the rule, and there was agreement that language along these lines could help provide clarification.

There also was discussion about what was *missing* from the rule that likely should be added. There was some discussion about the fact that "motions" may not technically include responses or replies to motions. The committee agreed that responses and replies in motion practice are clearly procedural and should be encompassed within the rule. Thus, an amendment likely is needed to added responses and replies to motions.

A question also was raised about whether responses to discovery requests should be added, but it appears that the discovery rules already provide the ability for a judge to extend the deadlines within those rules.

ORCP 15. Time for filing pleadings or motions

A Time for filing motions and pleadings. An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, must be filed with the clerk within the time required by Rule 7 C(2) to appear and defend. If the summons is served by publication, the defendant must appear and defendant within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.

B Pleading after motion.

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

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

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

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

REPORT ON ORCP 23 AND 34

The Problem: Occasionally after filing a lawsuit a plaintiff learns that the defendant has died, usually discovering this fact during the 60 days allowed for service of summons under ORS 12.020 (2) when the process server finds out about the death and reports it to the plaintiff. There is no reasonable way for a plaintiff to avoid this trap, except by filing and attempting to serve well before the statute of limitations. This is not always an option, since sometimes plaintiffs come to an attorney just before the expiration of the statute and many attorneys do not know of the trap until they are caught in it.

The problem is highlighted by two decisions of the Court of Appeals. In *Wheeler v. Williams*, 136 Or. App. 1 (1995), plaintiff was injured April 3, 1991. She filed her lawsuit against the other driver, Ira. O. Williams, on March 31, 1993, not knowing that Mr. Williams had died on April 26, 1992 (11 months earlier), and that a small estate had been opened and closed shortly after his death. After the statute of limitations had passed, plaintiff attempted to substitute a personal representative for Mr. Williams's estate, claiming that this was merely an amended pleading under ORS 23C, and that the new filing should relate back to the date of the original filing. The court held that the suit against a non-entity (a deceased person) had no validity and hence the amended pleading could not relate back.

In *Worthington v. Estate of Davis*, 250 Or. App. 755 (2012), the plaintiff was injured December 10, 2007. She filed suit on December 9, 2009, not realizing that the other driver, Milton Davis, had died in September 2008, 14 months earlier. As in *Wheeler*, plaintiff attempted to substitute a personal representative in place of the decedent, claiming this was simply a correction of a name under ORCP 23C. The court distinguished between misnaming a party (a "misnomer"), which enjoys the benefit of the "relation back" doctrine, and suing the wrong party (a "misidentification"), which does not. Finding that plaintiff had sued the wrong party (a deceased person) instead of incorrectly naming an existing party, the court held that substituting the personal representative after the statute of limitations would not save the case.

When this Council studied this problem in March 2018, we agree this was a problem that needed to be solved, but felt that doing so would require a substantive change of law, and that we should recommend a change to the Legislature.

After studying the problem further, our committee recommends the following words (set forth in bold and enhanced font) be added to ORS 12.190.

ORS 12.190 Effect of death on limitations.

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

(2) *If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, an action may be commenced against the personal representative of the person after the expiration of that time, and within one year after the death of the person.* ***However, if the plaintiff does not know of the death of the defendant until after filing the lawsuit, then the plaintiff shall have 60 days from the date of filing to substitute a personal representative for the decedent, and shall have 60 days after such substitution to complete service of summons upon the personal representative, as provided by ORS 12.020(2).***

CCP Summary – Rule 27 Committee Mtg
November 6, 2019

Members Attending: Judge Norby, Judge Wolf, Judge Tookey

Absent: Judge Peterson

Summary:

The impetus for formation of this committee was an anonymous suggestion presented to the CCP asking us to "[e]dit ORCP 27 to make it more clear – that an emancipated minor must always have a GAL, and who should be appointing the GAL." [At the September council meeting Judge Peterson noted that the rule already says "shall" in ORCP 27 B (1).]

This issue was also flagged by Holly Rudolph and the Law and Policy Work Group of the OJD, which suggested that the phrase "guardian ad litem" be eliminated. (See September 14, 2019 CCP minutes, p. 24.) Judge Wolf recalled that the Council members reacted to this proposal with concern that "Guardian ad litem" as a term is broadly used in many laws and rules in every state. The Council generally disfavored a re-statement of the term, and earnestly questioned whether "Guardian ad litem" is obscure or perplexing enough to justify a rule clarification.

Judge Tookey expressed uncertainty about whether a problem exists that can and should be addressed by clarification of this term.

Judge Norby noted that a problem does exist for self-represented litigants who are unfamiliar with Latin and confused by the similarity of the terms "guardian" and "guardian ad litem." The court probate coordinator, a non-lawyer, reports that: "I do think the guardian ad litem terminology causes a lot of confusion." "I am coming from the probate side of things with incapacity/lacking competency. To me as a non-lawyer, the age of minority is very different from incapacity. The part of the phrase 'for a party who lacks competence' stands out to me… but from a lawyer's perspective it may make sense to think that a lack of competence encompasses being a minor." "I can also tell you that when I help filers with identify record changes it is really common to hear 'Well, I am already his parent, so why does it matter?' and 'I am already his guardian, so I don't need to file that.' I hope you are able to create some clarity for these and other probate filings, which are increasingly being pursued by pro se parties." She also wrote: "Guide and File forms and types of cases that are allowed through that system are expanding. I'm not sure if you are familiar with Guide and File, but it is basically an e-filing system that is free for pro se filers to use (except to pay the filing fee if any), to try to increase access to justice and the courts without someone coming to the courthouse. This type of pro se filing is increasing, and will continue to increase. We are already getting pro se identity record changes through Guide and File. Luckily, we have generic forms online for the guardian ad litem documents, and we have tried to explain what it is in the introduction to those generic forms. But it is still confusing to people." She reports that she spends time explaining the distinction between guardians and guardians ad litem to folks frequently, but is concerned that she should not be defining legal terms for the public. She would like to refer them to a clearer rule rather than continue conversing about it herself so often.

Judge Wolf said that he also deals with identity record changes and understands the problem the probate coordinator describes.

Judge Tookey suggested that we describe the concern to the Council and gather feedback about whether a simple addition of clarifying language in ORCP 27 is a good idea to address the concern. If so, we can meet to hammer out a proposal.