MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 14, 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.
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
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
Shenoa L. Payne
Hon. Leslie Roberts
Tina Stupasky*
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Troy S. Bundy
Hon. Norman R. Hill
Hon. David E. Leith
Hon. Douglas L. Tookey
Margurite Weeks

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
ORCP 15 ORCP 23 C/34 ORCP 27/Guardians Ad Litem ORCP 32 ORCP 58	Discovery ORCP 7 ORCP 15 ORCP 23 ORCP 23/34C ORCP 27/GAL ORCP 55 ORCP 57	Discovery ORCP 1 ORCP 4 ORCP 9 ORCP 10 ORCP 17 ORCP 22 ORCP 32 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

Mr. Crowley called the meeting to order at 9:34 a.m.

II. Administrative Matters

A. Approval of November 9, 2019, Minutes

Ms. Nilsson explained that Judge Tookey was unable to attend today's meeting, but had asked for a change to the draft November 9, 2019, minutes (Appendix A). In the discussion on Rule 27, he asked to modify two sentences to read as follows:

> 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.

Mr. Andersen made a motion to amend the minutes as requested by Judge Tookey. Ms. Payne seconded the motion, which was approved unanimously by voice vote. Judge Norby made a motion to approve the minutes as amended. Mr. O'Donnell seconded the motion, which was approved unanimously by voice vote.

B. Council Continuing Legal Education (CLE) Credit

Judge Peterson explained that Council members did not receive CLE credit for Council service prior to 2019. He contacted the Oregon State Bar's Minimum Continuing Legal Education (MCLE) Department and lobbied for Council members to get credit. He told the MCLE Department that it would be helpful for Council members to be eligible for two credits in odd-numbered years and three credits in even-numbered years because the Council is asymmetrically biennial, with fewer meetings in odd-numbered years. However, the Department adopted a rule that requires attendance at nine hours of regularly scheduled Council meetings per year in order to receive three hours of CLE credit in both odd-numbered and even-numbered years. Those regularly scheduled Council meetings do not include committee meetings. Because the Council has been holding efficient meetings, it likely will not meet the 9-hour threshold in 2019. Judge Peterson stated that the Council might want to ask the MCLE Department to change the rule so that Council members can get some credit in both years.

C. Council Travel Reimbursement

Judge Peterson noted that the Council receives $4,000 per year from the Oregon State Bar (OSB) for travel reimbursement, and those funds do not carry over from year to year. Again due to the Council's asymmetrically biennial nature, there has been less demand for reimbursement this year because there are fewer meetings in odd-numbered years. There is a large balance remaining for 2019. Judge Peterson asked Council members who have traveled for meetings to submit reimbursement forms. Reimbursement request forms are available on the Council's website and Ms. Nilsson can assist with any questions. Judge Peterson asked members to return the forms to Ms. Nilsson as soon as possible.

III. Old Business

A. Follow-Up on Suggestions from Survey

1. ORCP 4

Ms. Gates was not present at the meeting at the time this topic was discussed. Judge Peterson stated that he was not aware of the status of Ms. Gates' follow up with the person who suggested an amendment to ORCP 4. This topic is carried over to the next meeting.

2. ORCP 31

Judge Peterson stated that he had attempted to contact attorney Mark Cottle to get more detail on why Rule 31 is confusing. He left a voice mail, but did not get a call back. Judge Peterson will call again and follow up with an e-mail. This topic is carried over to the next meeting.

B. Committee Reports

1. ORCP 7

Ms. Weeks was not able to be present at the meeting. Mr. Young explained that the committee is currently working on proposed language for an amendment and that they hope to have it ready by the next meeting.

Judge Peterson explained to the Council that Ms. Nilsson had provided an electronic version of the current base text of the rule for Ms. Weeks to work with. He recommended that any committee that is ready to work with a rule ask Ms. Nilsson for the correct base text to ensure that the committee does not

accidentally start with incorrect text. Judge Wolf noted that Ms. Weeks had already incorporated some of the committee's proposed language into the text that Ms. Nilsson had provided, so it has been helpful.

2. ORCP 15

Ms. Payne stated that the committee had met in December and presented the committee's report to the Council. (Appendix B). One issue with the current rule is that it, in its literal text, applies to pleadings and motions, and the committee wants to clarify that it includes all motion practice, including responses to motions and replies to responses.

Judge Peterson explained that he and Ms. Nilsson had researched the origin of the language in Rule 15 D all the way back to Deady's Code, and the lead line used to say "etc." rather than "do other acts." Other than that, the language in Rule 15 D has remained virtually unchanged from the 1860s to the present, with the exception that it also used to be combined with the language on relief from judgments that is currently located in Rule 71 B. Ms. Payne stated that she was under the impression that the language was broader and included all acts and at some point was changed to motions and pleadings, and that the committee also wanted to look at why that was done. At this point, if the rule is going to stay limited to pleadings and motions, the committee wants to make sure it includes all motion practice.

Ms. Payne stated that the committee had also talked about whether documents that most lawyers and judges think that the rule applies to, but that are not specifically included, such as petitions and responses, should be added to the rule. She stated that the committee could not think of anything that is not already specifically addressed in other statutes or rules. The committee believes that everyone thinks that Rule 15 is a catch-all rule so that, if timelines are not covered in a statute or another rule, Rule 15 D allows an extension, and that seems to be the purpose of the rule, despite its plain language that it only applies to pleadings and motions. Unless the Council thinks otherwise, the committee feels like it wants to lean toward an amendment that would make it that catch-all rule. Other than expanding it to include all motion practice, the committee also wanted to ask the Council if there is something that might be missing from the rule that is not already covered.

Ms. Payne stated that the other issue the committee discussed is putting something in the rule to alert newer members of the bar that this rule has been construed by the court to not apply to some rules because those timelines have been deemed to be jurisdictional. The committee is not in agreement on that.

Some members feel like adding language to the rule is not appropriate because it is an educational issue for the bar and adding such language may change the substance of the rule or create unintended consequences. Others members feel that something needs to be done because it is a malpractice trap since there is nothing in the text of other rules with hard deadlines that would alert anyone that Rule 15 would not allow extending those deadlines. The committee has been struggling as to what the Council's role is in helping practitioners to be aware that those cases are out there and that Rule 15 D does not apply to every other rule, because some of the timelines are jurisdictional. The committee discussed perhaps including a staff comment to let practitioners know of these cases, and this is her preference. Judge Peterson's preference is to include something in the rule itself, perhaps language such as "unless prohibited by statute or other rule," but Ms. Payne's concern is that the statute or rule does not prohibit it but, rather, judicial construction of the statute or rule does. The committee wanted to get the Council's perspective on this.

Judge Norby asked whether the staff comment would be located at the end of the rule. Judge Peterson noted that the staff comments do not appear in the Oregon Revised Statutes and that, at this time, they only appear on the Council website and only those who are aware enough to find them there will know about them. He stated that Legislative Counsel might eventually publish a book that contains them, but that is not definite.

Judge Peterson stated that Ms. Payne had pointed out that the rule does not actually allow for enlarging times for motion practice, despite the fact that the title of the rule is "Time for Filing Pleadings and Motions." It seems like that is not a big stretch and that it is procedural, so that seems like an appropriate thing for the Council to do. He suggested that perhaps the Council can find a more elegant way of saying, "doing other acts." The precursor language to ORCP 15 D said "or other act to be done," whatever that is. He stated that he had also raised this issue last biennium, and wondered if anyone is aware of any acts that people extend the time to do under Rule 15 D. He wondered whether that means motions, which currently seem to be covered, or whether the Council wants to expand the rule to include "documents," since there are things other than motions and pleadings that are filed. Judge Roberts mentioned statements for attorney fees. Ms. Payne pointed out that such statements are pleadings according to the Court of Appeals. Judge Roberts opined that the Court of Appeals is wrong about that. Judge Peterson stated that the Council can at least agree that it is a document, as opposed to an activity. Mr. Crowley asked about discovery requests. Ms. Payne stated that the committee had looked at the discovery rules and found that they seem to include language allowing parties to seek extensions, so the committee did not feel like those needed to be added to Rule 15 D.

However, those are the kinds of things the committee is looking at, because the committee does not want to leave anything out.

Ms. Gates suggested that the committee might want to look at how the rule would apply in a situation where missing a deadline would have an immediate effect. For example, when someone does not submit a response to a request for admission by a deadline, it is deemed admitted. She wondered if someone could use Rule 15 to get an extension of time and get around that. Judge Peterson observed that there is the opportunity to seek relief within the rule on requests for admissions, and that is true in a number of the rules. He stated that a third question is whether there should be a disclaimer. He stated that motion practice should clearly be added in. He again wondered what the "other acts" in the lead line are. He suggested changing the lead line to, "enlarging time to file pleadings and motions," or "enlarging time to file documents," which is more expansive, but he did not know if the Council wants to do that. Judge Norby suggested, "enlarging filing times." Justice Nakamoto stated that this still covers a broad range of activity. Ms. Payne observed that, right now, the rule is limited to pleadings and motions. Judge Norby then suggested, "enlarging some filing times," which could be a clue that the rule does not apply in all cases.

Mr. Eiva asked whether the Council has an example of where this rule has caused a problem. Judge Peterson stated that his concern is a self-represented litigant who asks to enlarge the time to respond to a motion, but the rule does not say they can do that. In terms of a motion for new trial, the rule literally says "any motion," but it really does not mean any motion; that is simply not true. Mr. Hood asked whether the trial court has the inherent power to do that, particularly as it would relate to a reply or response or to a self-represented litigant. In his experience, courts bend over backwards to extend time. Judge Norby stated that judges frequently are able to extend time by stipulation, and many give grace if there was not a stipulation and it happened anyway. She stated that judges know that no one will complain if the problem gets solved. Ms. Payne observed that sometimes there are two rules, one that is broader and one that is more specific, and the court has ruled that there are some rules that are more specific and/or more jurisdictional that conflict with Rule 15 D, and lawyers just have to be aware of that. She observed that the Council is having a conversation about how much it is the Council's role to help new practitioners or self-represented litigants understand the law. She stated that she understands the concern, but there are many instances where statutes and rules are very broad but do not apply in every situation because there are other rules or statutes that govern the specific situations.

Judge Roberts pointed out that it is one thing to say that it is not the Council's role

to make rules to teach people who do not practice law how to practice law, but it is another thing when the rules lay snares for the unwary. She opined that the Council must at least raise the sign that Rule 15 D does not always apply. She noted that statutes very commonly say “unless otherwise prohibited.” Ms. Stupasky agreed. Ms. Payne stated that she is not opposed to that, but she wants to make sure the Council is not creating a substantive exception that does not already exist.

Mr. Eiva asked whether there is a comprehensive list of exceptions to Rule 15. Judge Peterson stated that he created a list last biennium of rules with deadlines in them, rules where no deadlines are mentioned but we know that they exist, and rules that do not have deadlines. He stated that he would provide it to the committee at the next meeting. Judge Norby noted that the concept of “comprehensive” is a moving target, as the Legislature can change things at any time and new court rulings can happen at any time. Ms. Payne stated that she likes the language, “except as otherwise provided by law.” Judge Wolf observed that it at least raises a flag that someone should have looked ahead of time. Mr. Eiva stated that there are certain rules where there is nothing in the rule that suggests a deadline, so using the language “except as otherwise provided by law,” could cause problems. Judge Peterson pointed out that the current rule has some buried language, “after the time limited by the procedural rules.” He suggested language such as, “the time may not be enlarged in violation of a substantive rule.” Ms. Payne suggested, “except as otherwise prohibited by law,” since it would get people to look to see if they are prohibited from extending the timeline in some way by law. Judge Roberts agreed that this seems like a better term. Judge Wolf stated that there are also instances where extensions are only prohibited by case law, not by statute.

Mr. Goehler wondered about the word, “prohibited,” as he does not know if there are specific prohibitions within some of the substantive cases and rules. Judge Norby suggested the word, “precluded.” Mr. Goehler was also concerned about a ripple effect. Rule 15 deals with enlarging time, which happens before the deadline runs, and also allows for late filing. Rule 45 allows enlargements (or contractions) within such longer or shorter time as the court would allow, but the rule does not allow for a late filing of answers to a request for admissions. However, he has seen attorneys point to Rule 15 to say that does allow for a late filing in responding to a request for admissions. Whether that is good or not good, that is an argument that can be made now. If the Council says that Rule 15 does not apply if there is something else that does apply, the time for requests for admissions can be enlarged before the 30 days runs, but afterwards there is no time to avoid the admission. He kind of likes that, but worried that there might be ripple effects. Ms. Payne stated that she does not believe that, under the current

language of Rule 15 D, a response to a discovery request is a pleading or motion or motion practice, so she does not believe that Rule 15 can be used. Mr. Goehler opined that the Rule 45 response is an answer because one answers a request for admission. Ms. Payne disagreed that it is a pleading. Judge Peterson pointed out that Rule 13 defines what a pleading is. Mr. Hood asked whether a change to Rule 15 could affect the case law rulings that have been made and whether a change by the Council would create a substantive expansion in some way. Judge Peterson stated that it could not; the Council's enabling statute states that the Council cannot affect substantive law, only procedural law.

Ms. Payne noted that, if the Council added documents to Rule 15, the case law saying that Rule 15 is limited to motions and pleadings would change. Judge Peterson agreed that it would change with regard to procedural processes. He noted that the rule now says "any pleading," which is defined by Rule 13, or allow any motion, so it would seem to be limited to pleadings and motions and not to the many other documents that are filed during the course of litigation.

Judge Roberts noted that the Council seems to be trying to conform Rule 15 to present practice because, in present practice, courts allow extensions unless the law prohibits them. She thinks judges generally believe that they have the ability to give the time to reply to a motion, a summary judgment motion, etc., so she opined that the Council would not actually be changing anything by making Rule 15 conform to what is working in practice. She suggested that the Council just needs to be careful to not go beyond that.

Ms. Payne pointed out for clarification that the change to "any pleading" would be made because the Council feels that the current language left out cross claims and counterclaims. Judge Peterson stated that this would apply to pleadings or motions, but he asked whether anyone knows of anyone who has used Rule 15 to extend times for anything other than pleadings or motions. Mr. Crowley stated that it seems like that language is intended for miscellaneous things that could happen in litigation. Judge Peterson wondered if there are any that of these things that this rule needs to continue to talk about. Judge Bailey noted that, in his experience as a judge, if you are not sure what it is, it is usually entitled "motion to do acts." So if motions are included in the rule, that should take care of it.

Ms. Nilsson explained that the research that she and Judge Peterson had done was interesting. The "do other act" language and other language in Rule 15 D has existed since before Oregon was a state. In the 1855 Oregon law there was a preface that indicated Oregon's respect for the New York laws that had recently been revised and adopted and, until Oregon created its own code, it was going to adopt the New York code in its entirety. She stated that additional research could

be done into the old New York code to try to determine what the “other acts” might be.

Judge Roberts stated that there are objections sometimes, which are not responses or motions. Judge Bailey asked whether the rule could be changed to include motions, pleadings, and objections. Judge Wolf suggested motions, pleadings, or other filings. Mr. Eiva stated that it is motions, responsive documents, and objections. Ms. Payne asked if Mr. Eiva meant to include declarations and affidavits along with motions. Mr. Eiva asked whether declarations or affidavits are ever filed without being attached to motions. Ms. Payne stated that they are not.

Mr. Andersen stated that he thinks that Deady had it right: just say “etc.” and it is all covered. Mr. O’Donnell noted that he could not think of a time in which this has come up. He stated that lawyers stipulate to all kinds of things and ask judges to agree to all kinds of things. In looking at the cases under Rule 15, they are things that do not come up regularly, and he is not sure what the problem is that is trying to be solved, except for someone who reads the title and thinks there is something more. Judge Peterson pointed out that the language of the rule reads, “any motion,” but that is literally not true. Mr. Eiva stated that the Council should make sure that everyone knows they can ask for an extension if they want one, and then make sure everyone knows there are rules that this does not apply to. He observed that people who do not know much about the law do not have trouble asking for more time, and judges know this, so he did not feel like that is a problem. He suggested that perhaps “unless prohibited by law,” is the only change that needs to be made to the rule. Judge Peterson stated that this would be a big red flag, which he thinks is a good thing.

Judge Conover asked whether this red flag is directed to the litigant or to the judge. He stated that the judge should already know what is allowed or prohibited, as opposed to what their discretion is. If the red flag is to the litigant, the lead in language talks about the court’s discretion. So, if someone believes they can have an extension to a Rule 71 motion, and the court then says it is going to deny the motion because it is actually prohibited, is that all of a sudden some lightning bolt that the person should not have anticipated? It is still in the court’s discretion. He does not think it is misleading someone to say that, if they file a motion pursuant to Rule 71 and believe that they may be able to get relief, they may be disappointed. Judge Peterson pointed out that the court does not have discretion in certain instances. Judge Norby added that the court also does not always know when it does not have discretion. Judge Conover asked whether there is really a problem with litigants saying they would not have wasted their time filing a motion if they knew it was prohibited by another rule.

Mr. O'Donnell noted that, with the term, "unless expressly precluded by law," the Council may start inviting people to start arguing what is precluded or is not precluded. Mr. Eiva noted that the staff comment could say that the Council changed the rule because it realized that the court does not have discretion for several deadlines, the Council specifically identified certain of those rules, and there may be others out there, but the Council believes that the court has discretion for the rest of the rules. This is just intended to give notice. Mr. O'Donnell stated that this could be a little dicey. Ms. Payne re-emphasized her concern about not wanting to create an exception. She asked whether it really helps anyone to read "except as prohibited by law" when none of the rules the Council is concerned about expressly provide any exception. The phrase alerts them there may be an exception, but does it really help them? Judge Norby stated that she believes it would be helpful. When she was practicing, if the opposing party had asked for more time and she wanted to argue against it, if she had read the rule they referred to in their motion and saw "unless otherwise prohibited by law," she would go do research and see if it was prohibited and make an objection if appropriate. She stated that she thought it would be a helpful thing to practitioners. Ms. Payne again stated that the Council needs to be really clear that it is not creating a new exception by this language, and include in the staff comments that this is only intended to alert to existing laws. Judge Peterson agreed that such a statement would not be intended to change the law in any way, only to alert to the fact that existing law says that some timelines are immovable. He pointed out that the rules are written for judges, as well as litigants and lawyers. There are judges with a strong criminal law background who are now hearing civil cases and could use this guidance.

Mr. Crowley asked whether the Council should vote on whether to move forward on any of these proposals. Ms. Payne suggested that the committee bring formal language next month and the Council can proceed from there.

3. ORCP 23

Ms. Gates stated that the committee had met and discussed the issue of defendants amending their entire answer rather than just responding to the amended portions when an amended complaint is filed. She stated that all of the committee members had been operating as if the amended complaint was a new pleading and that the answer could address everything in the original complaint as well. As a plaintiffs' lawyer, she has thought about this and purposely weighed whether she would seek an amendment or not, knowing that this could affect what would happen in the case. The next steps are for Mr. Bundy to check with the Oregon Association of Defense Counsel and for Ms. Gates to check with the Oregon Trial Lawyers' Association for feedback on the issue. The committee will

report on this feedback at the next meeting.

4. ORCP 23 C/34

Mr. Andersen presented the committee's report and suggested language for the Legislature to the Council (Appendix C). He noted that the language change to ORS 12.190 previously proposed by the committee was deemed unacceptable by the Council for multiple reasons. He stated that the committee had a new proposal that adds a new subsection to ORS 12.190. Mr. Crowley also had another proposal that is included in the committee report. Mr. Andersen noted that everyone on the Council has agreed that the problem needs to be solved; the question is how to do it, recognizing that Legislative Counsel will probably do it its own draft in any case.

Ms. Payne stated that it seemed that the thought would be that the plaintiff would discover within 60 days that a defendant was dead, but she wondered whether there would be time within 60 days to open an estate and file against that estate. She opined that a 60-day hard deadline seems too short. Ms. Stupasky stated that 90 days seems like a more reasonable time period, because that is 60 days to find out that the party is dead, and then 30 more days to serve them. Judge Roberts noted that 60 days is an echo of the 60 days allowed to serve after filing. She stated that, according to the probate department in Multnomah County, it takes five days to open an estate. She noted that she shares the timing concern and actually prefers an approach where it relates back on service. She noted that, at the last Council meeting, someone said that it would not work because there cannot be relation back, but there can be, because the beauty and wonder of statutory change is that it changes the law. If you have a statute that says it relates back, it sure will relate back. It is simpler to say that, if you serve the estate within 60 days, it will relate back to the original filing, and you do not have to both amend and serve.

Mr. Andersen agreed that the concern at the last Council meeting was that it could not relate back. Judge Roberts pointed out that it could not under current law, but if the law is changed, it will. Mr. Andersen noted that he has no pride of authorship; his goal is a solution to the problem. Ms. Payne stated that the idea was to give the Legislature some options, so she suggested giving them an option with 90 days and an option with relation back and letting the Legislature enact the fix that it determines to be appropriate.

Judge Peterson agreed that Legislative Counsel will write it the way they want to write it, but that the Council will do a lot of thinking so that the Legislature will be well informed and it will be a better law.

Mr. Andersen thought that a letter to the Legislature should probably come from Judge Peterson. Judge Peterson stated that he initially thought that it could be sent with the Council's transmittal letter, but noted that it could be done sooner. He stated that the cover page of the committee's report is a good statement of the substantive problem. Judge Bailey observed that the Legislature has a short session coming up where it could make changes. Mr. Andersen noted that there are now three alternatives: the committee's original suggestion, its new suggestion, and Mr. Crowley's suggestion. Ms. Payne pointed out that there is also the relation back option, which she would be happy to draft. Judge Peterson stated that it sounds like the committee should come back one more time to have the full Council look at the language. He stated that he likes the idea of multiple options, and suggested that the Council's discussion of the discovery of the death of the defendant should also be included in the letter to the Legislature. The Council should not make whether the plaintiff knew or should have known about the death one more thing to litigate. Judge Bailey stated that, if the law is just changed and essentially made a misnomer, you get the relation back anyway. He opined that this is the right approach based on the case law. Mr. Eiva stated that a misnomer is based on the fact that the true defendant would have known of the lawsuit. Judge Roberts pointed out that the Legislature would be changing the law. Judge Bailey agreed that such a change would essentially make this situation fall within the misnomer category.

5. ORCP 27/Guardians Ad Litem

Judge Norby stated that the committee had met and has some suggestions for the Council (Appendix D). The committee had a couple of points of consensus, one of which was that the word "unemancipated" should be inserted to modify "minor." The committee also agreed that it is appropriate to insert the word "mandatory" into section B because of the word "discretionary" in section C, which was a later addition by the Council. At the time section C was added, however, the Council the did not go back and change the lead line to section B, so making that change now makes sense.

Judge Norby explained that she is suggesting rewriting the first sentence of section A. However, since the committee spent so much time focusing on the term "guardian ad litem" (GAL), it did not discuss her suggestion. She still thinks that the rest of the sentence should be re-crafted to be more clear, and her suggestion is included in Draft 1B . Draft 1A contains the parenthetical language

that Judge Leith had suggested be placed after the term GAL to explain that it is a guardian for purposes of the litigation. He made this suggestion at the last Council meeting. Judge Norby explained that she had subsequently spoken with Judge Leith and that he is not wedded to the exact parenthetical language in Draft 1A, but he does agree with the concept of a parenthetical explanation.

Judge Norby stated that she does not agree with Draft 1A. For her, the duration is not the primary point of confusion with the phrase GAL, so recycling the word “guardian” to describe a GAL actually exacerbates the problem. For her, the word “guardian” as used in Rule 27 has two fundamental separate meanings, and that is where the confusion is created. A “guardian” is a person who has duties and obligations that are delegated through court letters of authority for whatever duration, either short or long term. A guardian decides where a person lives, what medical care they get, who takes care of their daily needs, and a number of other things. A GAL does none of those things and yet is called the same thing. She believes that the use of the word “guardian” in GAL is a misnomer and that clarity is needed. A GAL is, in her experience, nothing more than an intermediary with the court for a minor or incompetent person. If a GAL is merely an intermediary between the unemancipated minor and the court, or at most a special advocate, but not a guardian in the fundamental sense of the word, it is irresponsible to pretend to define the term GAL by saying that it is a guardian for purposes of the litigation. It is a half answer that is completely unhelpful.

Judge Norby’s suggestion is to rewrite the first sentence in section A and include a parenthetical explanation of a GAL as follows:

> When a person who is a party to any court action has a guardian or a conservator or is an unemancipated minor, the person shall appear in the court action through the guardian, conservator, or a guardian ad litem (competent adult spokesperson) appointed by the court in which the action is brought.

Judge Roberts stated that she does not agree with Judge Norby as to what a GAL is. She pointed out that it is not just a spokesperson or intermediary but, rather, a person who has authority to make decisions on behalf of the person who is the subject of the guardianship. The relationship of a GAL is as a representative or as an authorized agent, but not just a spokesperson. Judge Norby noted that she is not wedded to the word “spokesperson,” but that the committee had not gotten to the point of discussing alternatives. She stated that, if the Council could agree that a parenthetical is needed, perhaps a better word could be found.

Mr. Goehler stated that he would like to lobby on the side of not including parenthetical language. He stated that the term GAL has been around for a long time and it has a defined meaning. Judge Norby asked what the defined meaning is. Mr. Goehler observed that a GAL can have many responsibilities, including a decision maker, a spokesperson, and a person with fiduciary duties. It is a guardian whose only duties relate to the litigation. It serves the same function as a broader guardian, but only relating to whatever the issues are in the litigation. He stated that he thinks that trying to delineate any duty, or trying to define the term to say that a GAL is only a spokesperson, is troublesome. He prefers to leave the rule the way it is. Judge Norby pointed out that a GAL is not a parental guardian, not a guardian in a probate sense. It is very limited in its fiduciary obligation and very, very limited in its authority.

Judge Roberts pointed out that the current discussion is about substantive law, i.e., the substance of what a guardian is, and the Council needs to be careful. She suggested that Judge Norby may be wanting to translate GAL to a different term that has a different meaning. Judge Norby explained that she does not want to do this but, rather, to translate it to a term that has the same meaning, but that is more easily accessible. She worried that the rule is using the word guardian in different ways in the same sentence and expecting people to understand what the distinctions are without help, which is irresponsible.

Justice Nakamoto agreed with judge Roberts that a GAL is not a mere spokesperson. She stated that GAL is a different term than guardian, and she stated that she does not see the confusion. Mr. Andersen also agreed. He pointed out that the term “ad litem” means “for the suit,” and that this is clearly different from a guardian or conservator. Judge Norby asked whether it is different because of the duration. Ms. Payne stated that it is not just because of the duration but because it is for the substantive purposes of the lawsuit. Judge Bailey stated that the GAL is standing in for the unemancipated minor for purposes of the litigation. Judge Norby noted that this is the concept that she was hoping to convey with her parenthetical–a stand in or surrogate, or another word that ties it to what their duty actually is during the lawsuit. For the scope of the lawsuit, their duties are completely different from any other type of guardian.

Judge Bailey asked who is confused as to what a GAL is. Judge Norby stated that self-represented litigants certainly are. Judge Bailey stated that he appreciates that the Council is trying to make the rules easier to understand for those without law degrees. However, the fact that they have entered litigation without a lawyer should not result in the Council potentially making substantive changes to law. Judge Norby explained that there are also new judges who do not understand what a GAL is. When she first became a judge, she did not fully understand it

either, until she had appointed a few GALs and gone through the proceedings and seen how they worked. She opined that the phrase is complicated for both more educated and undereducated people, and that it deserves a description.

Mr. Eiva suggested a parenthetical referencing the relevant statues next to the words guardian and conservator, because at least it would tell the reader that GAL is different. The practitioner could then look and see what a guardian is and what a conservator is, determine that a GAL is neither of those things, and figure out that they need to consult someone. Judge Norby expressed frustration because it seems like the Council is saying that the term cannot be described, so the Council should not describe it. Judge Roberts stated that it is inappropriate to give a law lesson attached to a rule. Judge Norby asked if Judge Roberts could explain what a GAL is. Judge Roberts stated that a GAL is a person appointed by the court pursuant to a statute or Rule 27 who has the authority to act on the behalf of a person in that action and for the purposes of that litigation. Mr. Eiva appreciated this definition.

Judge Norby asked whether there is any disagreement among the Council about trying to improve the first sentence in section A even if there is no effort to clarify what a GAL is. Judge Peterson expressed concern that, the way Judge Norby's sentence was rewritten in Draft 1B, it would always force the court to appoint a GAL, even if the person had a guardian or conservator who would be more appropriate to represent the person in the litigation. Judge Norby pointed out that the sentence does not say who needs to be appointed but, rather, it just lists them in the same order that they appear earlier in the section. Judge Peterson stated that he may have read the sentence incorrectly, but he will look at it further to be sure that it does not have unintended consequences.

Judge Norby asked whether there is any disagreement on using the words "mandatory" or "unemancipated." Mr. Andersen stated that his concern is that the language appears to make it a mandatory appointment for an unemancipated minor, but it is not clear that it is required for an incapacitated or financially incapable person. Judge Peterson suggested changing the conjunction to "and" to remedy this problem. Mr. Andersen stated that he likes the lead line to section A because it lists all three possibilities: guardian, conservator, and guardian ad litem.

Justice Nakamoto asked whether making appointment mandatory for an unemancipated minor actually changes the rule, because a 14-year-old plaintiff could come to court and act without a guardian ad litem. Mr. Hood stated that he believes that there are certain situations, like access to some medical care, where such minors do not need parental permission. Justice Nakamoto pointed out that subsection B(1) states that, if the minor is 14 years of age or older, then the court

will appoint a GAL on application of the minor. A 14 to 17 year old can initiate litigation on their own without a GAL. Judge Norby acknowledged that it is more than unemancipated minors. Judge Peterson stated that it has always been his understanding that a 15 year old can file the case, but the rule presumes that they will have the sense to ask for appointment of a GAL. If a minor is under 14, they are not competent enough to do that. He wondered whether Justice Nakamoto was saying that a 15 year old can file a case and proceed without a GAL. Judge Wolf pointed out that the rule says that, from age 14 to 17, the minor has to apply for a GAL, not that they can proceed without one. However, under age 14, a relative or friend asks for a GAL to be appointed or the court appoints a GAL on its own. Judge Peterson agreed that, if a 15 year old does not move for appointment of a GAL in some fashion, he imagines that the court would not proceed without one.

Mr. Eiva asked whether there is any defined procedure is to get a GAL appointed on a case that has no case number. He stated that he goes into ex parte and the court appoints the GAL and everyone winks and nods and says go file your case. It is a little bit odd. Judge Peterson stated that he would assume that a lawyer would have the complaint ready to file and do it simultaneously. Mr. Eiva pointed out that the complaint needs to be filed with the GAL's name on it. He stated that he would love to have a rule that lays out a procedure for this.

Ms. Payne stated that she does understand the rule to require a GAL for anyone who is an unemancipated minor, but it just depends on who is filing the application for a GAL. The intent is that, if the minor is 14 or older, they are competent enough to participate in the GAL appointment process. However, if they are under 14, they are not competent enough to participate in that process. Ms. Gates agreed that this is how the rule reads, but asked whether there are any circumstances where a minor can go forward without a GAL. Justice Nakamoto stated that a 15 year old can initiate an action without a GAL, but paragraph B(2)(b) says that, if a minor does not seek a GAL, another party can try to impose a GAL on the minor. She stated that she could see a judge sua sponte saying to a minor, "Look, you probably need some guidance from a competent adult." Judge Wolf observed that the rule says "shall." Judge Peterson agreed. He stated that he has always assumed that a 15 year old can file an action, but that it is not going to go forward without a GAL. Mr. Hood stated that he thinks that subsection B(1) assumes that the case has been filed already. If the lawsuit has been initiated, the court will ask the minor's age and start that process. Mr. Crowley noted that the procedures are laid out in section D, section E, section F, and section G.

Judge Peterson stated that, when he used to file motions to waive filing fees, he would have the complaint and motion prepared, would first present the motion,

and then would file the case. In the Rule 27 context, his solution would be to show up and say he needed a GAL appointed and have his case ready to file with the GAL's name on it. Mr. Andersen stated that he just files the motion and the case at the same time. Mr. Eiva agreed that this is generally what he does, but the rule is not clear. He stated that he was trained that a lawsuit cannot be filed without a GAL if the person is under 18, so the knowledge that the rule allows a suit to be filed for a 16 year old with a motion attached for a GAL relieves a lot of pressure.

Ms. Gates asked whether the Council is ready to take a vote on any of the issues brought up by the committee. Judge Norby stated that she feels that the Council should not take any action at this point if it is not going to be clarifying what a GAL is. Judge Bailey stated that an unemancipated minor is also a correction. Ms. Gates stated that she thinks that the lead line changes are useful. Judge Peterson noted that, if the lead lines are changed, the text throughout will need to be changed to match the lead lines. He stated that the title of the rule would also need to be changed. Ms. Gates asked the committee to bring those changes back to the Council.

6. ORCP 55

Mr. O'Donnell stated that he has been in trial and that the committee has not made a lot of progress. They will meet and report at the next Council meeting.

Mr. Andersen stated that he has always understood that, when a subpoena is issued, whether it is signed by the court or by an attorney as an officer of the court, the person receiving the subpoena is obligated to show up and, if they do not, they can be held in contempt of court. For his own clarification, he asked whether the person issuing the subpoena has to go to court to enforce it before someone can be held in contempt for not complying. Mr. O'Donnell stated that this was, in part, Judge Marilyn Litzenberger's issue with an unrepresented fact witness and what they have to do to lodge an objection sufficient to avoid contempt. That is unclear. He stated that this is something that the Rule 55 committee can look at because, when it comes to subpoenas for documents, it can be even a little more confusing. Judge Peterson agreed that it would be nice to flesh this out better.

7. ORCP 57

Ms. Holley stated that the committee had not met since the last Council meeting, and that they are still in the research stage. She has looked at about half of the states to see if they have a rule comparable to Washington State's and she has not found anything close so far. Judge Tookey sent the committee a work group

summary from the Washington rule that is interesting. The committee will meet again this month.

IV. New Business

A. ORCP 32

Mr. Crowley explained that this issue (Appendix E) was brought to his attention through the State of Oregon's Special Litigation Unit and Trial Division. Under the current rule, if a settlement is reached before the class has been certified, the settlement needs to be approved by the court and the class members need to be notified. However, if the class is not certified, that creates problems for the resolution of the settlement. Judge Peterson explained that one part of the concern is whether notice has to be provided to some or all of the class members. The suggestion is to give the court a little more discretion to say that no notice need to be sent to anyone if it is a class that is not likely to be certified or is undefined. It would allow the court to take a look, say, "I don't smell any rat here," and allow settlement without notifying potential class members. Ms. Gates observed that the goal is to avoid disincentivizing a settlement because of having to certify a class when it is disputed that it even is a class.

Judge Bailey noted that he appreciates that the reason that the rule is there is to protect those who may not have been given notice that they may be part of a class. He wondered what the settlement would be that where one would be looking to not give notice to the class. Who are the plaintiffs that are going to prevail in that settlement that the court is not going to take a look at? Mr. Crowley stated that he is not in a very good position to answer that but, when a class action is filed, there is a certain group that stands up in representation of the class, and he assumes that the settlement is going to be arranged between the lawyers representing those specifically identified individuals and that defendant. The rest of the class has not fully been identified and has not been certified, so the actual class is not a party to the lawsuit until a certification has taken place. Judge Bailey clarified that the settlement only involves the plaintiff as an entity or individual. Mr. Crowley agreed that this is his understanding.

Judge Peterson stated that this is also covered in Rule 54 A. He stated that, typically, a plaintiff can dismiss five days before trial with just a notice of dismissal, but Rule 54 A carves out that under Rule 32, if you have filed as a class, you cannot simply, as an individual, dismiss a case. Judge Bailey stated that the rule is trying to protect those who are potentially part of the class who have not been certified as the class yet so, as long as it somehow reads that the lawsuit is being resolved in terms of the individuals only, it should be all right. Judge Wolf stated that, in that case, he thinks that they do not need to provide notice. But, If a defendant is settling with just the proposed class representative and that representative is the only one affected by the settlement, notice is required

even thought the class has not been certified under the rule as it exists. Judge Roberts asked how one knows who to notify if the class has not been certified. Judge Wolf pointed out that this is the problem.

Ms. Gates stated that it seems reasonable to take a look at the issue. Ms. Payne wondered whether the Council has the authority to change the rule because a notice requirement to class members may be substantive since it might affect people's rights. She suggested that the committee examine that issue. Ms. Gates agreed that this should be the first part of the committee's charge. Judge Peterson pointed out that the Council did make a change in Rule 32 about 10 years ago that covered the notice and there was a lot of discussion about it, but he could not recall whether the Council had asked the Legislature to make the change or whether the Council had made the change itself. He suggested that the committee look at this history as well.

Mr. Crowley and Ms. Gates agreed to join a Rule 32 committee, with Mr. Crowley as chair. Ms. Gates suggested that Judge Hill and Judge Tookey would also make good members of this committee.

B. ORCP 58

Judge Peterson explained that another new suggestion involved Rule 58 (Appendix F), which states that parties are allowed two hours of closing argument. In the case brought to the Council's attention, a self-represented defendant apparently insisted on using the full 120 minutes that the rule provides. Judge Peterson stated that he had not previously read that part of Rule 58 closely, but it does seem to say that, if you want two hours, you get two hours, with no discretion on the part of the court to limit it. Judge Bailey noted that there can be some type of judicial discretion, in the form of a suggestion such as, "Counsel, I think the jurors have heard enough." He noted that this is not a limitation but, rather, a suggestion.

Ms. Gates pointed out that, typically, when the Council hears of one instance of a problem, it does not form a committee. Judge Norby suggested that, if the Council were consider a change to the rule, perhaps the length of argument should be connected to the length of the case. Mr. O'Donnell noted that each case can be very different, regardless of the length of the trial. Judge Bailey stated that he likes the idea of an hour as a base time and then leaving it to the discretion of the judge if the parties need more time.

Mr. Goehler stated that he had not previously read Rule 58, but that the two-hour allowance seems like something that ought to be just taken away. He nominated himself to be on a Rule 58 committee. He remarked that he has never known of a situation where the argument has gone too far but, if a judge does not have the discretion to cut

someone off, he has a problem with that. Mr. Eiva opined that discretion should be very limited if an attorney is substantively arguing the case. Mr Goehler stated that he believes that a judge should have the discretion to say each side gets half an hour and, if each party says they need a little bit more, they can work it out. Judge Norby noted that judges do not usually have to tell people to stop talking. Mr. Andersen stated that the last thing attorneys want is to have judges telling them how long to take. If it is a very complicated trial with a lot of issues, a lawyer might need more time. Mr. Goehler observed that appellate cases do have time limits. Mr. O'Donnell opined that this would be ad hoc justice. He worked for Multnomah County Circuit Court Judge R.P. Jones, who told him to take attorneys who were taking too long on closing arguments outside the courtroom and tell them, "You lost this jury two hours ago; Judge Jones says do not let it happen again." That was pretty effective. Judge Bailey observed that many of Oregon's rules are not inspired by good attorneys.

Judge Norby wondered about the history of the rule. Judge Roberts stated that she vaguely remembers a case that did deal with limitations on time, a misdemeanor case in front of then-circuit court Judge Ellen Rosenblum. Judge Rosenblum limited the time, and got reversed on appeal. Judge Bailey noted that, in that case, it was a very short amount of time. Mr. O'Donnell stated that there are already ways that judges can deal with the issue. Judge Roberts stated that lawyers should try the cases, not judges. Judge Norby asked whether the two hour allowance applies to jury trials or court trials. Mr. Goehler replied that it only applies to jury trials.

The consensus of the Council was not to form a committee on this issue.

C. Legal Needs Study

Ms. Nilsson noted that much of the discussion regarding Rule 27 at the last meeting involved how much to change the rules to assist self-represented litigants. The view was expressed that the effort should be to get lawyers for those litigants, rather than changing the rules for their benefit. Ms. Nilsson explained that her full-time job is with the Campaign for Equal Justice, a support organization for legal aid. She noted that there has been a consistent effort to increase the number of legal aid lawyers over the years but, despite those efforts, only 15% of the legal needs of low-income Oregonians are currently being met. She distributed a Legal Needs Study (Appendix G) completed in 2018 and noted that many of its findings are stark; for example, the average low-income household has 5.4 legal problems, and 84% of low-income people with a civil legal problem went without representation or legal assistance. She asked that Council members consider these things when thinking about the needs of self-represented litigants.

V. Adjournment

Judge Peterson reminded the Council that there are five meetings remaining to get the rest of its work done. The Council does not typically meet in July or August, but it can, if necessary. If would behoove Council members to have all committee reports ready in January.

Ms. Gates explained that the next meeting will be held on January 11, 2020, at the Bar offices. She adjourned the meeting at 11:22 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

<u>DRAFT</u> 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
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
Scott O'Donnell
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 ORCP 7 ORCP 15 ORCP 23/34C ORCP 27/GAL ORCP 55 ORCP 57	Discovery ORCP 7 ORCP 15 ORCP 23 ORCP 23/34C ORCP 27/GAL ORCP 55 ORCP 57	Discovery ORCP 1 ORCP 4 ORCP 9 ORCP 10 ORCP 15 ORCP 17 ORCP 22 ORCP 32 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 9:30 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 file, Mr. Goehler could find no case law dealing with that. 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 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, with the exception of the family law section. 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 the section on service upon a public body in Rule 7, Ms. Weeks stated that Mr. Young had researched the term “clerk” and why it was not included in the subsection 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 the rest of the rules 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 everybody 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 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 this might be able to 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 and 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 it 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 notice and all that. 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 other act, is not clear. That section currently gives the court discretion to allow or extend time of 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 in certain statutes.

Ms. Payne explained that the committee had discussed the possibility of putting some lead-in language in the rule 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 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 it 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. 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 that does not relate back. 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 they suggest 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 you sue 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 that 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 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 section 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 back to ORS 12.020(2). He stated that it is not clear what the reference back does when there is a case that was not a case that someone is somehow relating back.

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 be filed; 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 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 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 it might just be a new discovery rule that can cover it; since discovery rules are fact specific, perhaps a new discovery rule that extends the statute of limitations would work. 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 put 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 include in the letter that the Council considered several approaches and landed a favorite approach. 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 more information to the Legislature about what the Council considered is a problem. More information is helpful, and the Legislature 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 see draft language, he can see issues that are 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 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 term guardian ad litem and they need to use one. Her probate coordinator stated that she encounters people every week who do not understand the term, 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 tends to agree with Mr. Bundy. He 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. 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 they do not need somebody 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 do to 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 there, 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 in 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 emancipated minor does not 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 people who have an objection and the process by which those people 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 had 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 you 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 other 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 an 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 they 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 the losing party in civil cases they can sue you 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 it could amend ORCP 57 D(4) 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 is 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 prefer 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

<u>COCP Rule 15 Committee Report</u>
December 5, 2019 5:00 p.m.

<u>Present</u>: Hon. Norman R. Hill, Shenoa L. Payne (Chair), Hon. Mark Peterson,

<u>Not present</u>: Barry J. Goehler, Hon. Leslie M. Roberts

After the last meeting, the committee agreed that Rule 15 D needed to be amended or clarified in some manner, in particular, to expand the rule to ensure it is truly a "catchall" rule and to clarify that it included all motions practice (i.e. not only motions, but also responses and replies), and to add some sort of "disclaimer" or "notice" to alert the bench and bar that some timelines may not be extended due to case law interpreting statutes or rules as jurisdictional.

<u>Expanding the rule to ensure it is a catchall rule</u>:

The committee discussed the following proposed amendment:

ORCP 15. Time for filing pleadings or motions

D Enlarging time to plead or do other act. **<u>Unless prohibited by statute or other rule,</u>** [*T*]**t**he court may, in its discretion, and upon any terms as may be just, allow **<u>any pleading,</u>** [*an answer or reply*] to be made, or allow any [*other pleading or*] motion**<u>, or response or reply to a motion,</u>** after the time limited by the procedural rules, or by an order enlarge such time.

The committee agreed that this amendment accomplishes the goal of expanding the rule to include all motions practice. The committee further discussed whether the rule needed further expanding to make it a catchall rule. Other areas discussed were family law petitions and responses, which the committee believed were covered either by statutes or were "pleadings" covered by this rule. The committee would like the council to weigh in to make sure that there are not areas that the committee is not thinking of.

The committee also discussed changing the language "Or do other act" in the lead line but have not yet come up with appropriate language.

<u>Disclaimer or notice language</u>

The committee initially discussed an amendment along the lines of "**<u>Unless prohibited by statute or other rule . . ."</u>**

However, during this discussion, it became clear that the committee is not in complete agreement about whether a disclaimer or notice language is appropriate.

Judge Peterson is of the position that some sort of language is necessary to put practitioners on notice that Rule 15 does not apply to all timelines in the procedural rules.

Judge Peterson suggested possibly adding language along the lines of: "Time limitations that are considered to be substantive may not be expanded or enlarged by this section."

Shenoa Payne had concerns about adding express language in the rule that really didn't change anything but could have unintended consequences. The appellate cases already hold that certain timelines in certain rules cannot be extended by Rule 15 D. Nothing we add in Rule 15 D will change that; however, if we are not careful, we could potentially create more limitations on judicial discretion. Shenoa believes attorneys have the obligation to keep updated on appellate opinions and know which rules are exempt. If it is an education issue, it is not our job to notify the bar of those rulings. Shenoa would suggest, if anything, alerting the bar through a comment to the rule and not changing the rule itself.

Judge Hill was undecided and stated that it could be a malpractice trap but adding language also could cause issues we do not intend.

The committee would like the council to weigh in on this issue.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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 defend within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.

B Pleading after motion.

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

B(2) If the court grants a motion and an amended pleading is allowed or required, 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 must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

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

REVISED 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.

Version 1 (already rejected by the Council on November 9, 2019)

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).***

NOTE: THE COUNCIL HAD THE FOLLOWING CONCERNS WITH THE ABOVE LANGUAGE:

1. A KNOWLEDGE REQUIREMENT ("IF THE PLAINTIFF DOES NOT KNOW OF THE DEATH...") WOULD SPAWN NEEDLESS LITIGATION.

2. "RELATION BACK" UNDER ORS 12.020(2) WOULD NOT WORK SINCE THERE CANNOT BE RELATIONBACK TO A NON-ENTITY (I.E. A DECEASED PERSON).

3. LEGISLATIVE COUNCIL WILL LIKELY DO ITS OWN WORD-SMITHING, SO WE SHOULD TRY TO EXPRESS THE PROBLEM AS CLEARLY AS POSSIBLE WITHOUT DEVLING TOO DEEPLY INTO THE EXACT WORDING TO BE USED.

Version 2 (for consideration of Council on December 14, 2019)

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.*

(3) The time to commence an action against a person described in subsection (2) is extended 60 days beyond the time otherwise limited for its commencement.

NOTE: THIS VERSION GETS RID OF ANY KNOWLEDGE REQUIREMENT AND AVOIDS ANY RELATION BACK PROBLEMS.

Shari Nilsson <nilsson@lclark.edu>

RE: Council of Court Procedures

Kelly Andersen <kelly@andersenlaw.com> Thu, Dec 12, 2019 at 3:03 PM
To: Crowley Kenneth C <Kenneth.C.Crowley@doj.state.or.us>, "Leslie M. Roberts (Leslie.Roberts@ojd.state.or.us)" <Leslie.Roberts@ojd.state.or.us>
Cc: Shari Nilsson <nilsson@lclark.edu>

Ken,

Good suggestion. I am passing this on to Shari, but it might be too late to get it into her packet for this Saturday's meeting.

Shari,

Please see Ken's suggestion below.

Kelly L. Andersen

Andersen Morse & Linthorst

1730 E. McAndrews Road, Suite A

Medford, OR 97504

Telephone: (541) 773-7000.

Facsimile: (541) 608-0535

Web: www.andersenlaw.com

From: Crowley Kenneth C [mailto:Kenneth.C.Crowley@doj.state.or.us]
Sent: Thursday, December 12, 2019 11:43 AM

To: Kelly Andersen; Leslie M. Roberts (Leslie.Roberts@ojd.state.or.us)
Subject: RE: Council of Court Procedures

Perhaps it would be simpler to modify section (2):

(2) *If a person against whom an action may be brought dies within the time limited for its commencement, the time to commence the action against the personal representative of the deceased person shall be extended by 60 days beyond the time otherwise limited for commencement of the action.*

Kenneth C. Crowley

Oregon Department of Justice

503.947.4730

From: Kelly Andersen [mailto:kelly@andersenlaw.com]
Sent: Tuesday, December 03, 2019 1:08 PM
To: Crowley Kenneth C; Leslie M. Roberts (Leslie.Roberts@ojd.state.or.us)
Subject: Council of Court Procedures

Dear Judge Roberts and Mr. Crowley,

Please find attached my attempt at re-working the language to address the concerns raised at our last Council meeting on November 9. We need to present something of this sort at our next meeting on December 14.

Please let me know your thoughts as soon as possible. If we find we need to talk, can we do it sometime early next week?

Thanks so much.

Kelly L. Andersen

Andersen Morse & Linthorst

CCP Summary – Rule 27 Committee Mtg
December 9, 2019

Members Attending: Judge Norby, Judge Wolf, Judge Tookey, Judge Peterson

Summary:

At our November CCP Meeting, the Council members appeared to remain conflicted over whether ORCP 27 should be amended to clarify the meaning of the phrase "guardian ad litem" or to clarify when appointment of one is mandatory. However, it seemed that many on the Council may not object to insertion of a brief parenthetical to describe the phrase in simple terms. The Committee met to attempt to refine such a proposal.

Judge Tookey suggested that the Committee offer the Council three options. One is the option Judge Norby prepared. The other is an option based on Judge Leith's suggestion at the November CCP meeting. The third option is to take no action to amend ORCP 27.

First, the Committee discussed the most minor revisions proposed, including the expansion of the term "minor" to be "unemancipated minor," and the addition of the word "Mandatory" to the lead line of Section B. Judge Peterson reported on the history of Section C, which is a more recent addition to the Rule to cover discretionary appointment of guardians ad litem. He endorsed the suggestion to add "Mandatory" to the lead line of Section B to clarify and emphasize that the appointments under that Section are required, and to illustrate the difference between Sections B and C. Judge Wolf asked Judge Peterson about the CCP's duty with regard to lead lines in rules. Judge Peterson advised that the CCP is responsible for those components of rules as well as the text.

Judge Norby pointed out that Rule 27 is currently inaccurate because of the absence of the qualifier "unemancipated" in front of the term "minor" throughout. The Committee agreed that it would improve the rule's accuracy to include "unemancipated" as a descriptor before "minor," including in the lead line for Section A.

Judge Norby noted that her proposal changed the first sentence to create better parallelism in the grammar, as well as to add "unemancipated" and to include a parenthetical descriptive phrase after "guardian ad litem." The Committee did not discuss the effort to streamline the grammar. Judges Tookey and Wolf reviewed the minutes of the November CCP meeting and noted that Judge Leith proposed the phrase "a guardian for purposes of litigation" as the parenthetical, if any, to clarify the meaning of "guardian ad litem." They proposed that the Committee offer that option to the Council, as an alternative to Judge Norby's proposed phrase "competent adult spokesperson."

Judge Norby said that she spoke to Judge Leith after the November meeting and learned that his concern with her prior suggestion was that the phrase was at too high a reading level to be a useful translation of the Latin for self-represented court users. So, she drafted a new proposal that would capture the meaning of "guardian ad litem" in plain English without using advanced words. That new proposal is "competent adult spokesperson."

The Committee expressed concern that a GAL is not exactly a "spokesperson," and Judge Peterson suggested "representative" instead. Judge Norby worried that attorneys are often referred to as legal representatives, so that could also be confusing. Judge Peterson said that "spokesperson" makes it sound like the GAL does all the talking for the minor. Judge Norby said that the GAL does do all the talking, unless there is an attorney for the minor. People have no confusion about what attorneys do, though, they are only confused about GALs when there are no attorneys. She suggested "stand-in" but the Committee members did not prefer that word.

The Committee decided to submit both Judge Norby's proposal, and the phrase Judge Leith suggested at the November meeting, to the CCP at the December meeting. Judge Norby lamented the unhelpfulness of defining a phrase by repeating the same word already in the phrase. If judges and attorneys with decades of experience can't define "guardian ad litem" in plain simple English, that underscores why lay people are confused. Judge Norby said she is intrigued by the challenge to find a way to say plainly what a "guardian ad litem" is -- and how it is different from a "guardian" with more expansive powers -- because professionals with our level of experience ought to know the answer, and ought to be able to express it definitively.

Judge Peterson offered to work with Shari to format the alternative proposals for submission to the Council in December.

[*MINOR*] UNEMANCIPATED MINORS OR INCAPACITATED PARTIES

RULE 27

A Appearance of parties by guardian or conservator or guardian ad litem. When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem **(a guardian for purposes of the litigation)** appointed by the court in which the action is brought. The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

B [*Appointment*] Mandatory appointment of guardian ad litem for unemancipated minors; incapacitated or financially incapable parties. When a minor or a person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule, as follows:

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the minor, or other interested person;

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons; or

B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any other party or of a relative or friend of the minor, or other interested person;

B(3) when the plaintiff or petitioner is a person who is incapacitated or financially

1 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
2 the person, or other interested person; or
3 B(4) when the defendant or respondent is a person who is incapacitated or is financially
4 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
5 the person, or other interested person, filed within the period of time specified by these rules
6 or any other rule or statute for appearance and answer after service of a summons or, if the
7 application is not so filed, upon application of any party other than the person.
8 **C Discretionary appointment of guardian ad litem for a party with a disability.** When a
9 person with a disability, as defined in ORS 124.005, is a party to an action, the person may
10 appear by a guardian ad litem appointed by the court in which the action is brought and
11 pursuant to this rule upon motion and one or more supporting affidavits or declarations
12 establishing that the appointment would assist the person in prosecuting or defending the
13 action.
14 **D Method of seeking appointment of guardian ad litem.** A person seeking appointment
15 of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in
16 which the guardian ad litem is sought. The motion shall be supported by one or more affidavits
17 or declarations that contain facts sufficient to prove by a preponderance of the evidence that
18 the party on whose behalf the motion is filed is a minor, is incapacitated or is financially
19 incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined
20 in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is
21 given pursuant to section E of this rule; however, the appointment shall be reviewed by the
22 court if an objection is received as specified in subsection F(2) or F(3) of this rule.
23 **E Notice of motion seeking appointment of guardian ad litem.** Unless waived under
24 section H of this rule, no later than 7 days after filing the motion for appointment of a guardian
25 ad litem, the person filing the motion must provide notice as set forth in this section, or as
26 provided in a modification of the notice requirements as set forth in section H of this rule.

Notice shall be provided by mailing to the address of each person or entity listed below, by first class mail, a true copy of the motion, any supporting affidavits or declarations, and the form of notice prescribed in section F of this rule.

E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years of age or older; to the parents of the minor; to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and custody of the minor during the 60-day period before the filing of the motion; and, if the minor has no living parents, to any person nominated to act as a fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.

E(2) If the party is 18 years of age or older, notice shall be given:

E(2)(a) to the person;

E(2)(b) to the spouse, parents, and adult children of the person;

E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or persons most closely related to the person;

E(2)(d) to any person who is cohabiting with the person and who is interested in the affairs or welfare of the person;

E(2)(e) to any person who has been nominated as fiduciary or appointed to act as fiduciary for the person by a court of any state, any trustee for a trust established by or for the person, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of attorney;

E(2)(f) if the person is receiving moneys paid or payable by the United States through the Department of Veterans Affairs, to a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the person;

E(2)(g) if the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a

1 representative of the department;

2 E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided

3 under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a

4 representative of the authority;

5 E(2)(i) if the person is committed to the legal and physical custody of the Department of

6 Corrections, to the Attorney General and the superintendent or other officer in charge of the

7 facility in which the person is confined;

8 E(2)(j) if the person is a foreign national, to the consulate for the person's country; and

9 E(2)(k) to any other person that the court requires.

10 **F Contents of notice.** The notice shall contain:

11 F(1) the name, address, and telephone number of the person making the motion, and the

12 relationship of the person making the motion to the person for whom a guardian ad litem is

13 sought;

14 F(2) a statement indicating that objections to the appointment of the guardian ad litem

15 must be filed in the proceeding no later than 14 days from the date of the notice; and

16 F(3) a statement indicating that the person for whom the guardian ad litem is sought may

17 object in writing to the clerk of the court in which the matter is pending and stating the desire

18 to object.

19 **G Hearing.** As soon as practicable after any objection is filed, the court shall hold a

20 hearing at which the court will determine the merits of the objection and make any order that

21 is appropriate.

22 **H Waiver or modification of notice.** For good cause shown, the court may waive notice

23 entirely or make any other order regarding notice that is just and proper in the circumstances.

24 **I Settlement.** Except as permitted by ORS 126.725, in cases where settlement of the

25 action will result in the receipt of property or money by a party for whom a guardian ad litem

26 was appointed under section B of this rule, court approval of any settlement must be sought

and obtained by a conservator unless the court, for good cause shown and on any terms that the court may require, expressly authorizes the guardian ad litem to enter into a settlement agreement.

[*MINOR*] **UNEMANCIPATED MINORS OR INCAPACITATED PARTIES**

RULE 27

A Appearance of parties by guardian or conservator or guardian ad litem. [*When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought*.] **When a person who is a party to any court action has a guardian or a conservator or is an unemancipated minor, the person shall appear in the court action through the guardian, conservator, or a guardian ad litem (competent adult spokesperson) appointed by the court in which the action is brought.** The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

B [*Appointment*] **Mandatory appointment of guardian ad litem for unemancipated minors; incapacitated or financially incapable parties.** When a minor or a person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule, as follows:

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the minor, or other interested person;

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons; or

1 B(2)(b) if the minor fails so to apply or is under 14 years of age, upon application of any
2 other party or of a relative or friend of the minor, or other interested person;
3 B(3) when the plaintiff or petitioner is a person who is incapacitated or financially
4 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
5 the person, or other interested person; or
6 B(4) when the defendant or respondent is a person who is incapacitated or is financially
7 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of
8 the person, or other interested person, filed within the period of time specified by these rules
9 or any other rule or statute for appearance and answer after service of a summons or, if the
10 application is not so filed, upon application of any party other than the person.
11 **C Discretionary appointment of guardian ad litem for a party with a disability.** When a
12 person with a disability, as defined in ORS 124.005, is a party to an action, the person may
13 appear by a guardian ad litem appointed by the court in which the action is brought and
14 pursuant to this rule upon motion and one or more supporting affidavits or declarations
15 establishing that the appointment would assist the person in prosecuting or defending the
16 action.
17 **D Method of seeking appointment of guardian ad litem.** A person seeking appointment
18 of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in
19 which the guardian ad litem is sought. The motion shall be supported by one or more affidavits
20 or declarations that contain facts sufficient to prove by a preponderance of the evidence that
21 the party on whose behalf the motion is filed is a minor, is incapacitated or is financially
22 incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined
23 in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is
24 given pursuant to section E of this rule; however, the appointment shall be reviewed by the
25 court if an objection is received as specified in subsection F(2) or F(3) of this rule.
26 **E Notice of motion seeking appointment of guardian ad litem.** Unless waived under

section H of this rule, no later than 7 days after filing the motion for appointment of a guardian ad litem, the person filing the motion must provide notice as set forth in this section, or as provided in a modification of the notice requirements as set forth in section H of this rule. Notice shall be provided by mailing to the address of each person or entity listed below, by first class mail, a true copy of the motion, any supporting affidavits or declarations, and the form of notice prescribed in section F of this rule.

E(1) If the party is a minor, notice shall be provided to the minor if the minor is 14 years of age or older; to the parents of the minor; to the person or persons having custody of the minor; to the person who has exercised principal responsibility for the care and custody of the minor during the 60-day period before the filing of the motion; and, if the minor has no living parents, to any person nominated to act as a fiduciary for the minor in a will or other written instrument prepared by a parent of the minor.

E(2) If the party is 18 years of age or older, notice shall be given:

E(2)(a) to the person;

E(2)(b) to the spouse, parents, and adult children of the person;

E(2)(c) if the person does not have a spouse, parent, or adult child, to the person or persons most closely related to the person;

E(2)(d) to any person who is cohabiting with the person and who is interested in the affairs or welfare of the person;

E(2)(e) to any person who has been nominated as fiduciary or appointed to act as fiduciary for the person by a court of any state, any trustee for a trust established by or for the person, any person appointed as a health care representative under the provisions of ORS 127.505 to 127.660, and any person acting as attorney-in-fact for the person under a power of attorney;

E(2)(f) if the person is receiving moneys paid or payable by the United States through the Department of Veterans Affairs, to a representative of the United States Department of

Veterans Affairs regional office that has responsibility for the payments to the person;

E(2)(g) if the person is receiving moneys paid or payable for public assistance provided under ORS chapter 411 by the State of Oregon through the Department of Human Services, to a representative of the department;

E(2)(h) if the person is receiving moneys paid or payable for medical assistance provided under ORS chapter 414 by the State of Oregon through the Oregon Health Authority, to a representative of the authority;

E(2)(i) if the person is committed to the legal and physical custody of the Department of Corrections, to the Attorney General and the superintendent or other officer in charge of the facility in which the person is confined;

E(2)(j) if the person is a foreign national, to the consulate for the person's country; and

E(2)(k) to any other person that the court requires.

F Contents of notice. The notice shall contain:

F(1) the name, address, and telephone number of the person making the motion, and the relationship of the person making the motion to the person for whom a guardian ad litem is sought;

F(2) a statement indicating that objections to the appointment of the guardian ad litem must be filed in the proceeding no later than 14 days from the date of the notice; and

F(3) a statement indicating that the person for whom the guardian ad litem is sought may object in writing to the clerk of the court in which the matter is pending and stating the desire to object.

G Hearing. As soon as practicable after any objection is filed, the court shall hold a hearing at which the court will determine the merits of the objection and make any order that is appropriate.

H Waiver or modification of notice. For good cause shown, the court may waive notice entirely or make any other order regarding notice that is just and proper in the circumstances.

I Settlement. Except as permitted by ORS 126.725, in cases where settlement of the action will result in the receipt of property or money by a party for whom a guardian ad litem was appointed under section B of this rule, court approval of any settlement must be sought and obtained by a conservator unless the court, for good cause shown and on any terms that the court may require, expressly authorizes the guardian ad litem to enter into a settlement agreement.

Shari Nilsson <nilsson@lclark.edu>

FW: ORCP amendments

1 message

Crowley Kenneth C <Kenneth.C.Crowley@doj.state.or.us> Sat, Nov 30, 2019 at 9:09 AM
To: Mark Peterson <mpeterso@lclark.edu>, Shari Nilsson <nilsson@lclark.edu>
Cc: Stineman Renee <renee.stineman@doj.state.or.us>

Mark and Shari,

Here is a suggestion for possible rule change from DOJ's Special Litigation Unit. The issue is whether court approval should be necessary for settlement's in potential class action litigation prior to certification of the class.

Kenneth C. Crowley

Attorney in Charge | Civil Litigation | Trial Division

Oregon Department of Justice

1162 Court Street NE

Salem, Oregon 97301-4096

503.947.4700

From: Barrett, James M. [mailto:james.barrett@ogletree.com]
Sent: Thursday, November 21, 2019 2:12 PM
To: Stineman Renee; Crowley Kenneth C
Subject: RE: ORCP amendments

Ken and Renee:

Here are my thoughts, which relate to ORCP 32 D, the rule governing dismissals or compromises of class actions:

ORCP 32 D requires court approval of the voluntary dismissal of any action filed as a class action, even when the court has not made a class determination under ORCP 32 C. Further, the rule requires the court to provide notice to "some or all members of the class in such manner as the court directs." There an exception to this notice rule if the voluntary dismissal is against the class representative only and there is a showing that no compensation has passed

to the class representative or his/her attorney (and that there is no promise of such compensation).

After reviewing some authorities, this rule is not as strange as I had initially thought. I now understand that, prior to 2003, the Oregon rule was generally consistent with the prevailing interpretation of what FRCP 23 required for a voluntary dismissal or settlement of class claims. But that is no longer true, and it has not been true for some time. In 2003, FRCP 23(e)(1)(A) was amended to clarify that court approval is required only for a settlement or voluntary dismissal of a certified class. *See* 5 J. Wm. Moore et al., *Moore's Federal Practice* § 23.160 (3d ed. 2017) ("[T]he 2003 amendments to Rule 23(e) intentionally ... limit[ed] the courts' supervisory powers over dismissals and voluntary settlements to class actions in which a class has been certified."); *see also* 7B Wright, Miller, & Kane, *Federal Practice & Procedure* § 1797 (3d ed. 2017) ("[T]he 2003 amendments make clear that Rule 23(e) only applies to the 'claims, issues, or defenses of a certified class.' Thus, settlements or voluntary dismissals that occur before class certification are outside the scope of subdivision (e)."). (In 2018, the rule was slightly modified to require court approval if the parties were proposing that a class be certified for purposes of settlement.)

There are justifications for keeping ORCP 32 D in its current form, just as there were justifications for the pre-2003 FRCP rule. Requiring court approval avoids putting an undue premium on early settlements and provides a disincentive for parties to collude in a way that could prejudice absent class members. On the other hand, in my view, the Oregon rule can be unduly burdensome in requiring parties to seek court approval – and also requiring courts to provide notice to "some or all members of the class" – when the parties hotly contest whether a class even exists, much less what the boundaries of that class should be. In my recent experience, for example, the plaintiff clearly could not state a class action claim, but the parties wanted to avoid expensive motion practice, and there were other non-class action claims that were the focus of the parties' settlement. Moreover, it would be extraordinarily time consuming (and very expensive) to identify everyone who might be in a putative, disputed class.

Given that the federal courts now have had more than 15 years of experience with the 2003 amendments to FRCP 23, apparently without undue problems – or at least no problems significant enough to consider revisiting court supervision of pre-certification dismissals/settlements – I think Oregon should consider whether to bring ORCP 32 D into closer alignment with FRCP 23 on this issue. Alternatively, I think ORCP 32 D could be improved by making clear that the trial court has broader discretion than it arguably has now – specifically, that the court can decide whether notice to any class members is appropriate, not just whether notice should be provided to "some or all" of the putative class members.

Please let me know if you need anything more than this.

James M. Barrett | Shareholder | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
The KOIN Center, 222 SW Columbia Street, Suite 1500 | Portland, OR 97201 | Telephone: 503-552-2145 | Fax: 503-224-4518
james.barrett@ogletree.com | www.ogletree.com | Bio

From: Stineman Renee <renee.stineman@doj.state.or.us>
Sent: Wednesday, November 20, 2019 7:49 AM
To: Barrett, James M. <james.barrett@ogletreedeakins.com>; Crowley Kenneth C <Kenneth.C.Crowley@doj.state.or.us>
Subject: RE: ORCP amendments

Oh, hey Ken, we should make sure that we run whatever we get from Jim by Lisa Udland to make sure our thoughts aren't a problem for our enforcement side. And then probably an update to Fred, in case he hates any of it.

Renee R. Stineman

Oregon Department of Justice

971.673.5021

From: Barrett, James M. [mailto:james.barrett@ogletree.com]
Sent: Tuesday, November 19, 2019 5:03 PM
To: Stineman Renee
Cc: Crowley Kenneth C
Subject: RE: ORCP amendments

Hi Renee, yes, not a problem. I'll try to do this by end of week.

James M. Barrett | Shareholder | Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
The KOIN Center, 222 SW Columbia Street, Suite 1500 | Portland, OR 97201 | Telephone: 503-552-2145 | Fax: 503-224-4518
james.barrett@ogletree.com | www.ogletree.com | Bio

From: Stineman Renee <renee.stineman@doj.state.or.us>
Sent: Tuesday, November 19, 2019 4:59 PM
To: Barrett, James M. <james.barrett@ogletreedeakins.com>
Cc: Crowley Kenneth C <Kenneth.C.Crowley@doj.state.or.us>
Subject: FW: ORCP amendments

Hi Jim,

Ken is my counterpart in the section of DOJ Trial that defense the more traditional tort cases (among many other things). He's on a Council that works to improve the ORCPs. He's willing to take our concerns about the process set up in the Oregon class action rule to the Council for consideration to improve. Would you be willing to write up some bullet points about the procedural weirdnesses that we've come across in our case and suggestion as to whether those issues might be avoided by deleting specific requirements or more thoughtful modifications might be required. The idea is not to do any major rewrite but instead to flag the issues for the committee that covers that rule to consider more in depth for fixes, etc.

Renee R. Stineman

Oregon Department of Justice

971.673.5021

From: Crowley Kenneth C
Sent: Tuesday, November 19, 2019 4:50 PM

To: Stineman Renee
Subject: RE: ORCP amendments

The sooner the better. The Council has recently formed committees to look at possible rule changes. This is something we'd probably want to get into committee review soon.

Kenneth C. Crowley

Oregon Department of Justice

503.947.4730

From: Stineman Renee
Sent: Tuesday, November 19, 2019 4:21 PM
To: Crowley Kenneth C
Subject: RE: ORCP amendments

Is there a timeframe that it's best to submit suggested changes, or is it a rolling thing? We're wrapping up our case soon and I'd like to ask the SAAG to give feedback after the whole experience is behind us.

Renee R. Stineman

Oregon Department of Justice

971.673.5021

From: Crowley Kenneth C
Sent: Friday, November 8, 2019 9:58 AM
To: Stineman Renee
Subject: RE: ORCP amendments

Yes, that is exactly what the Council on Court Procedure is all about. Give me a summary of the problems your facing and the proposed fix and I can run with it.

Kenneth C. Crowley

Oregon Department of Justice

503.947.4700

From: Stineman Renee
Sent: Friday, November 08, 2019 8:48 AM
To: Crowley Kenneth C
Subject: ORCP amendments

That committee that you're on, do they look at amendments to the ORCP? That's what I think, but my memory is super iffy. We're experiencing some real weirdnesses coming out of how the ORCP32 for class actions is written and if we have an avenue of having the problems looked at, I'd like to do that.

Renee Stineman

Attorney in Charge | Special Litigation Unit | Trial Division

Oregon Department of Justice

100 SW Market St.

Portland, Oregon 97201

Main: 971.673.1880 - Direct: 971.673.5021 - Fax: 971.673.5000

renee.stineman@doj.state.or.us

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Shari Nilsson <nilsson@lclark.edu>

FW: ORCP 58B(7)

Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us> Wed, Dec 4, 2019 at 3:07 PM
To: "nilsson@lclark.edu" <nilsson@lclark.edu>

From: Thomas M Ryan
Sent: Wednesday, December 4, 2019 10:19 AM
To: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: ORCP 58B(7)

Mark:

As we discussed, ORCP 58B(7), provides, in part, that closing argument may not be limited to less than 2 hours. It apples to criminal cases via ORS 136.330. See also State v. Doern 156 Or. App. 566 (1998).

I believe that part of the rule should be eliminated altogether or amended to 1 hour. Surely those cases deserving of longer argument should get it, I just think we can rely on judges to not unfairly restrict argument in those cases.

Thank you to you and the OCCP for your consideration of this matter.

Tom Ryan

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Appendix F-1

Barriers to Justice

A 2018 STUDY MEASURING THE CIVIL LEGAL NEEDS OF LOW-INCOME OREGONIANS

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Legal Problems are Widespread

75% of survey participants live in a household that experienced a legal problem in the previous 12 months.

Fraud
Denial of Benefits
Child Custody
Unfair Eviction
Restraining Order

Legal Problems Multiply

5.4 legal problems were experienced by the typical low-income household in Oregon in the last 12 months.

The Need for Legal Aid Outpaces Resources

84% of people with a legal problem did not receive legal help of any kind.

Methodology

This report is based on a survey conducted in partnership with the Portland State University (PSU) Survey Research Lab. There were 1,017 survey participants from a statewide, address-based sample of 15,000 residents of high-poverty census blocks distributed according to Oregon's population. Participants were initially contacted by mail and completed the survey by mail, phone, or internet. The paper survey was only available in English. The web and phone surveys were conducted in both English and Spanish. PSU collected surveys during the winter of 2017-2018. To participate in the survey, participants had to have a household income at or below 125% of the federal poverty line. This is the same household income limit used to determine eligibility for legal aid in Oregon. The demographic characteristics of survey participants were analyzed (race, age, gender, etc.). The data collected was sufficient to allow for analysis of civil legal needs specific to individual groups. Additionally, researchers conducted door-to-door, in-person surveying in areas of known farmworker concentration, collecting 111 migrant farmworker responses. These were analyzed separately from the rest of the survey. For more information or to view the full statistical report from PSU go to: olf.osbar.org/LNS

Date of Publication: February 2019

Why Do We Need a Legal Needs Study?

Letter from Chief Justice Martha Walters

Every day in communities around our state, low-income Oregonians seek help from their local legal aid office. These potential clients might include a tenant facing eviction, a single mother needing to file a domestic violence protective order, or a senior citizen who cannot access his food stamps. Legal aid offices take as many cases as they can, but limited resources mean they must turn away most who seek help. This report summarizes the most recent findings about the unmet civil legal needs of low-income people in Oregon.

This is not the first time Oregon has assessed the civil legal needs of its low-income communities. The 2000 Civil Legal Needs Study was the first evaluation of the unmet civil legal needs of low-income people in Oregon since the 1970s. The 2000 study found that there was a high need for civil legal services for people with low and moderate incomes, and that the existing legal services delivery network was not adequately meeting that need. The 2000 study strengthened and spurred ongoing efforts to increase resources to address the critical legal needs of Oregon's most vulnerable citizens.

With the support of the Oregon Department of Justice, the 2018 Civil Legal Needs Study was commissioned by the Oregon Law Foundation, Oregon State Bar, Oregon Judicial Department, Campaign for Equal Justice, Legal Aid Services of Oregon, and the Oregon Law Center to assess the current ability of low-income individuals to access the civil justice system. The researchers endeavored to gather reliable and useful data to help policy makers, legislators, agencies, funders, and legal aid service providers inform their investment and service decisions. This report summarizes and highlights the key findings of the study.

The study findings are stark. Legal problems are widespread, and the impact they have on the lives of low-income individuals can be life altering. People of color, single parents, domestic violence and sexual assault survivors, people with disabilities, those with prior juvenile or criminal records, and youth experience civil legal emergencies at a higher rate than the general public. This report is both an assessment and a call to action. Despite concerted efforts over the past two decades, our state's civil justice system is not meeting the needs of Oregon's poor. When these needs go unmet, the health, safety, and resiliency of individuals, families, and entire communities are impacted.

We can and must do better.

Our justice system must help every Oregonian know what their rights are and understand where to find legal help.

Our justice system must help achieve justice for Oregon's low-income communities by addressing ongoing and large-scale injustices such as racial discrimination and the cumulative effects of poverty over time.

Every Oregonian deserves a justice system that is accessible and accountable. The legitimacy of our democracy depends on the premise that injustices can be addressed fairly within the bounds of the law, no matter who you are or where you live. Let us work together in Oregon, to ensure that justice is a right, not a privilege—for everyone.

Martha Walters

Chief Justice, Oregon Supreme Court

Civil Legal Aid

What is It?

Civil legal aid in Oregon ensures fairness for all in the justice system, regardless of how much money a person has. Legal aid provides essential services to low-income and vulnerable Oregonians who are faced with legal emergencies.

Civil legal aid connects Oregonians with a range of services—including legal assistance and representation; free legal clinics and pro bono assistance; and access to web-based information and forms—that help guide them through complicated legal proceedings. In doing so, civil legal aid helps Oregonians protect their livelihoods, their health and safety, and their families. Legal aid helps people know and defend their rights.

Civil legal aid helps Oregonians of all backgrounds to effectively navigate the justice system, including those who face the toughest legal challenges: children, veterans, seniors, persons with disabilities, and victims of domestic violence.

Who Does it Help?

Approximately one in five Oregonians (807,000 people) has a household income below 125% of the poverty level. For a family of four, 125% of the 2018 Federal Poverty Level was $31,375 per year. Low-income households struggle to afford even basic living expenses of food, shelter, and clothing. Poverty is pervasive in both urban and rural communities. People of color, single women with children, persons with disabilities, and those who have not obtained a high school diploma are overrepresented in the poverty population.

General Study Findings

Legal problems are widespread and seriously affect the quality of life for low-income Oregonians. A vast majority of the low-income Oregonians surveyed experienced at least one legal issue in the last year. These legal problems most often relate to basic human needs: escaping abuse, finding adequate housing, maintaining income, living free from discrimination, and accessing healthcare. Even though their legal problems are serious, most people face them alone.

Problems are Widespread

The legal needs survey asked a series of questions in 18 categories intended to reveal the kind of problems people experienced in the previous year. Each question was designed to reveal an experience where it is likely that either legal help could ease a problem or legal advice could clarify rights and obligations. The goal was to determine the issues that low-income Oregonians experienced where civil legal aid could help. In this report, a yes to one of the issue-specific questions represents a civil legal problem.

75% of study participants reported experiencing at least one civil legal problem in the preceding 12 months.

Problems are Related

Low-income Oregonians rarely experience civil legal problems in isolation, with 61% of households experiencing more than one problem in the prior year. Loss of a job can lead to loss of a home, and experiencing a sexual assault or domestic violence can lead to a torrent of civil legal problems. One-quarter of those surveyed experienced eight or more problems in the last year.

The average low-income household experienced **5.4** civil legal problems over the last year.

Civil Legal Help is Needed

84% of people with a civil legal problem did not receive legal help of any kind.

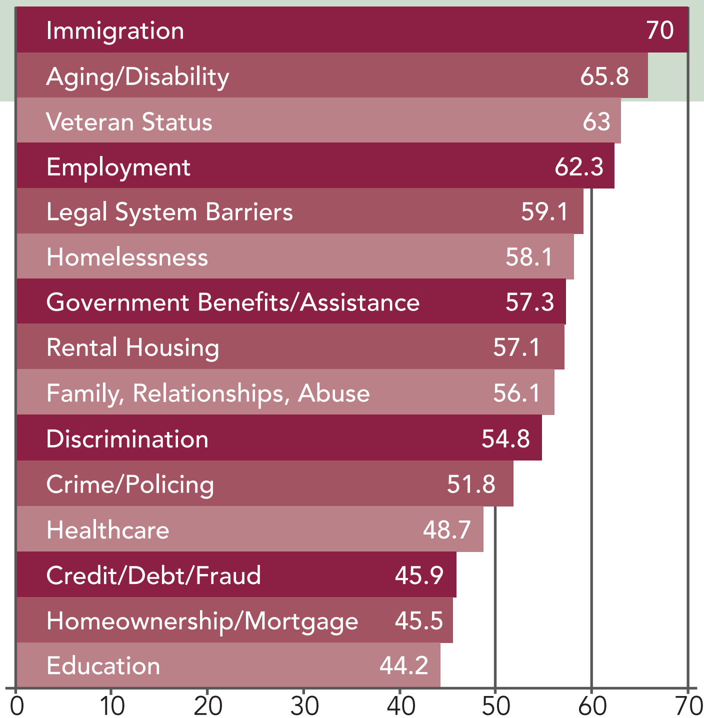
The U.S. Constitution guarantees the right to legal representation in criminal cases. This right does not extend to people with civil legal problems. This leaves the majority of low-income Oregonians to face their legal problems alone, without the help of a lawyer, regardless of how complicated or serious the case is.

The Most Harmful and Most Common Problem Areas

Civil Legal Problems Affect People's Lives

Many of the legal problems that low-income Oregonians face relate to essential life needs: maintaining housing, protecting children, or managing a health issue. For low-income Oregonians, these are not *legal issues*. Rather, they are critical *life issues*. What is certain is that poverty absolutely has an effect on the legal problems people face, as well as how those individuals experience the justice system.

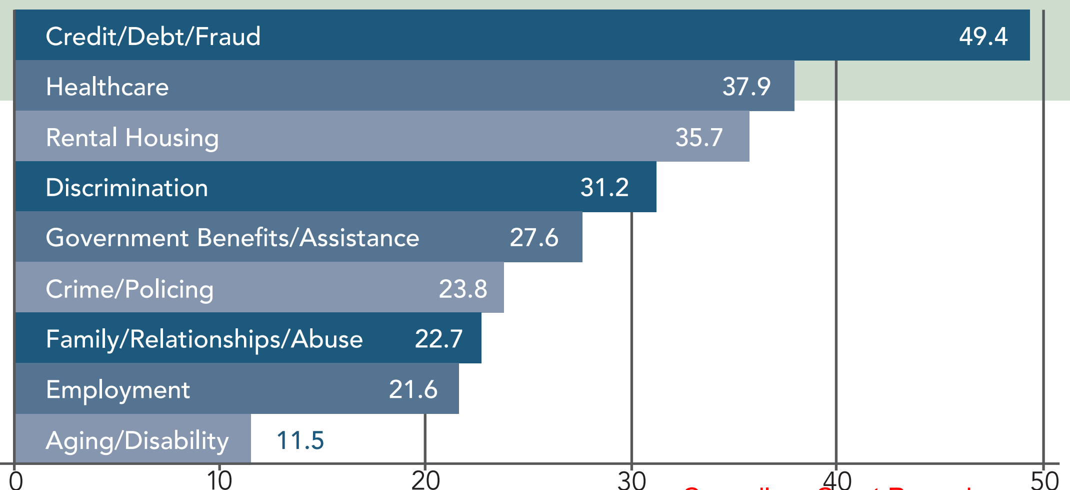
Most Harmful Issues



Percent of participants who experienced a civil legal problem in a given subject area, and who rated the effects of that civil legal problem as either very or extremely negative.

In order to determine which legal problems had the greatest direct impact on people's lives, participants were asked to rate how negatively an issue in a specific legal category affected them or their household. A five-level scale was used: not at all, slightly, moderately, very, or extremely negatively.

Most Common Problems



Percent of households that experienced at least one issue in a problem area in the last year.

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Below we highlight some, but not all, of the most critical issues reported in the study. These are issues that are top priorities for legal aid, given the frequency that they occur and the severity of the impact these types of legal problems have on people's lives.

Housing and Homelessness

At the time of this legal needs study, Oregon experienced a housing and homelessness crisis. The fact that this study occurred in the middle of the housing crisis gives us the chance to see the housing-related problems people continue to experience in connection with the crisis. The study shows that in Oregon, many struggle to find affordable housing, many struggle to continue to afford the housing they are in, and nearly 1 in 10 households has experienced homelessness in the last 12 months. For low-income Oregonians, obtaining and maintaining affordable housing is a serious issue no matter what kind of housing is involved.

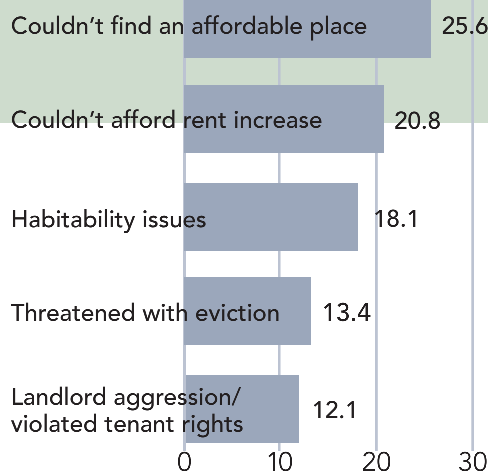
Rental Housing

The study showed that 65% of all participants were renters. Within that category, 81% of African Americans were renters, and 71% of single parents were renters. The two most common rental housing issues are related to the unaffordability of housing: 26% of participants had trouble finding an affordable place to live and 21% reported that they could not afford a rent increase.

53% of renters experienced at least one housing-related issue.

Habitability issues were common, with 18.1% of participants reporting problems related to their landlord failing to keep their home in a decent, safe, or clean condition. This includes problems with mold or vermin; proper roof, windows, and structure; and working heat and water. 13.4% reported threats of eviction and 12.1% reported that their landlords acted aggressively. Aggressive action by a landlord includes entering without notice, turning off utilities, locking out tenants, harming a tenant's property, or threatening any of these actions.

Most Highly Reported Rental Housing Problems



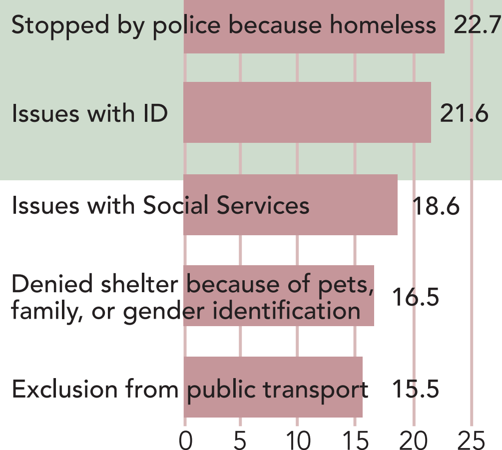
Percent of households that rent that experienced each rental housing problem.

Homelessness

A staggering 10% of those who completed the survey reported that someone in their household had been homeless in the previous 12 months. That percentage bears even more weight considering that the survey was mailed to those currently residing at a physical address. These are individuals who lost their housing and regained it. Those who lost their housing and were unable to find new housing remain uncounted by this survey. Additionally, those experiencing long-term, chronic homelessness were not counted by this survey's methodology. The fact that so many experienced intermittent homelessness speaks to the depth of the housing crisis in Oregon.

Three subgroups stand out as disparately affected by homelessness. First, survivors of domestic violence and sexual assault were 6.2 times more likely to be in a household affected

Most Common Civil Legal Problems Reported by Homeless Individuals



Percent of households that reported having someone who was homeless within the prior 12 months that experienced each homelessness-related problem.

10% of survey participants reported a household member had been homeless in the last 12 months.

by homelessness than the rest of the population. Second, those with criminal and juvenile records were 4.4 times more likely to be in a household affected by homelessness than the rest of the population. Third, single parents were over 2.5 times more likely to be in a household affected by homelessness than the rest of the population.

Although homelessness is often considered an urban problem, households in the most rural counties reported being affected by homelessness at a rate more than 3 times higher than that reported in the most urban counties.

Domestic Violence and Sexual Assault

Survivors of domestic violence and sexual assault (DV/SA) suffer civil legal problems at significantly higher rates compared to the general population. Their legal problems go beyond family law and abuse issues. They experience a greater rate of legal problems in nearly all of the legal subject areas in the survey: rental housing, homelessness, financial, age and disability, veterans', tribal, employment, farm work, education, government assistance, policing, healthcare, and discrimination. Violence is pervasive, causing ripples that disrupt housing, jobs, and children's educations.

Just under 10% of survey participants reported suffering DV/SA in the previous 12 months. African Americans experienced DV/SA at 2.2 times and single parents experienced DV/SA at 2.4 times the rate of those not in these groups.

Households with DV/SA survivors were:

6.2 times more likely to experience the effects of homelessness

3.7 times more likely to have an education-related issue

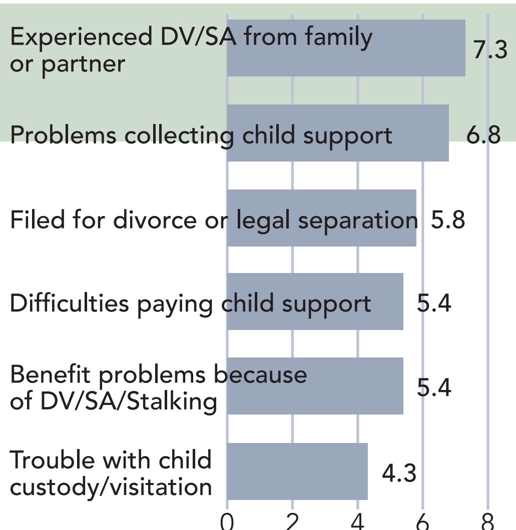
3.0 times more likely to have an employment issue

2.1 times more likely to have a rental housing problem

Family

Family law problems were ranked highly in both severity and frequency by survey participants. Problems related to safety and financial stability were the most critical family law issues. DV/SA at the hands of a family member or partner was the most highly-reported issue, and difficulty collecting child support was the second-most reported family law problem. Single parents and people of color disproportionately experience family law problems; single parents who were surveyed were 2.8 times more likely to have a family law problem, and African Americans were 1.5 times more likely to have a family law problem.

Most Highly Reported Family Law Problems

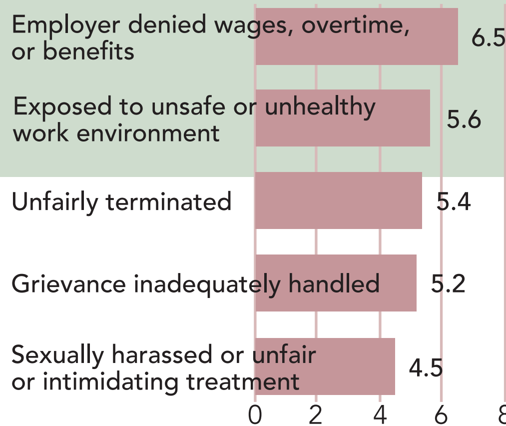


Percent of all participating households that experienced each family or abuse-related problem.

Employment

For 62.3% of survey participants with an employment issue, the problem was very or extremely likely to negatively affect their life. Parenthood and involvement with the criminal justice system increased the likelihood that a survey participant would have an employment legal problem. The more children a participant had, the more likely they were to have an employment law problem. Single parents were 1.4 times more likely to have an issue with employment. People with criminal or juvenile records were 1.5 times more likely to have an issue. Frequency of employment issues was also a problem, as 9% of survey participants reported more than one employment issue.

Most Highly Reported Employment Law Problems

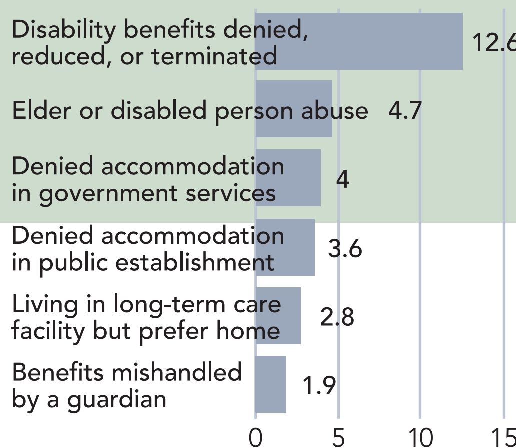


Percent of participating households that experienced each employment problem.

Aging & Disability

Oregon's community of people with disabilities disproportionately experiences legal problems and is disproportionately low income. Over 44% of the households surveyed included someone with a disability. The survey also highlighted the intersectionality of race and disability, with Native Americans and Asian Pacific Islander participants being 1.9 times more likely to be affected by aging and disability-related legal problems. Single parents were 1.7 times more likely to have an issue in this area.

Most Highly Reported Aging and Disability-Related Legal Problems



Percent of households that reported having someone over 65 or having someone with a disability that experienced each aging or disability-related problem.

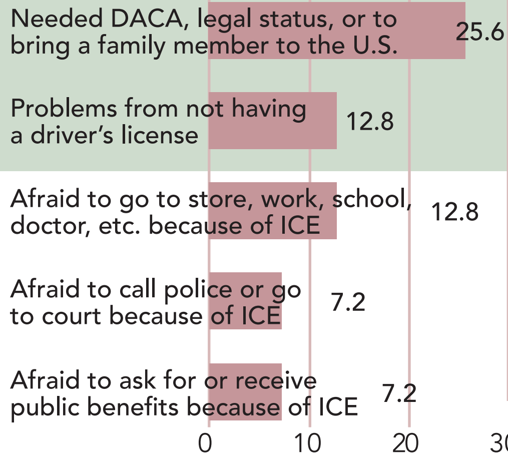
Immigration

As the survey was being conducted, US immigration policy was undergoing significant changes, with an impact on thousands of Oregonians. The immigration section of the survey was designed to determine the need for formal immigration help and the need for legal information to reduce fear experienced by foreign-born individuals.

Although only 4% of all survey participants directly experienced an immigration-related legal issue, immigration problems were the most harmful of any legal problem to participants' lives. 13% of households had at least one person born outside of the US, and immigration legal issues were common in these households. For foreign-born households, immigration legal problems were as common as rental housing problems were to the overall low-income population. It is also worth noting that there is a likelihood that under-reporting may be taking place as a result of fear of being identified as an immigrant.

12.8% of foreign-born households feared participating in the activities of daily life—work, shopping, school, seeking medical help—because of Immigration and Customs Enforcement.

Most Highly Reported Immigration Law Problems



Percent of households that reported having a foreign-born individual that experienced each immigration-related problem.

One in three foreign-born study participants had at least one immigration legal problem in their household.

50% of foreign-born/Latinx and foreign-born/Spanish-speaking participants had at least one immigration legal problem in their household.

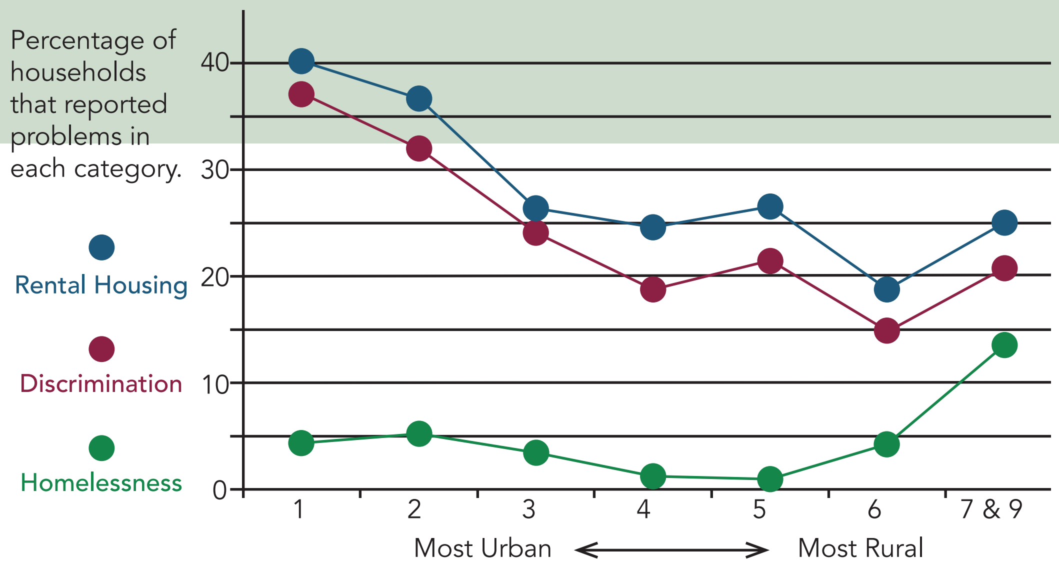
Four in five households with a foreign-born individual of African descent (from anywhere in the world) had at least one immigration legal problem in their household.

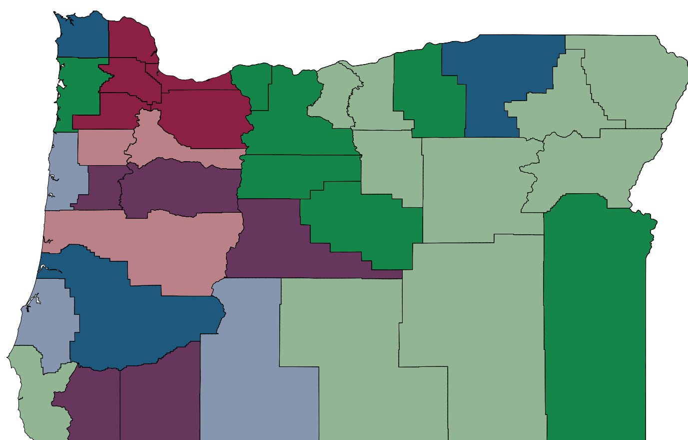
25.6% of foreign-born households needed help improving their immigration status: DACA, visa/citizenship, refugee status, etc.

Where You Live Makes a Difference

To highlight geographic differences, responses were categorized and compared based on the urbanization of the county they came from. Problems with rental housing and discrimination become more prevalent the more urban a county is. Homelessness strongly increased in prevalence as counties became more rural.

Effects of Geography on Legal Problems





Population Categories

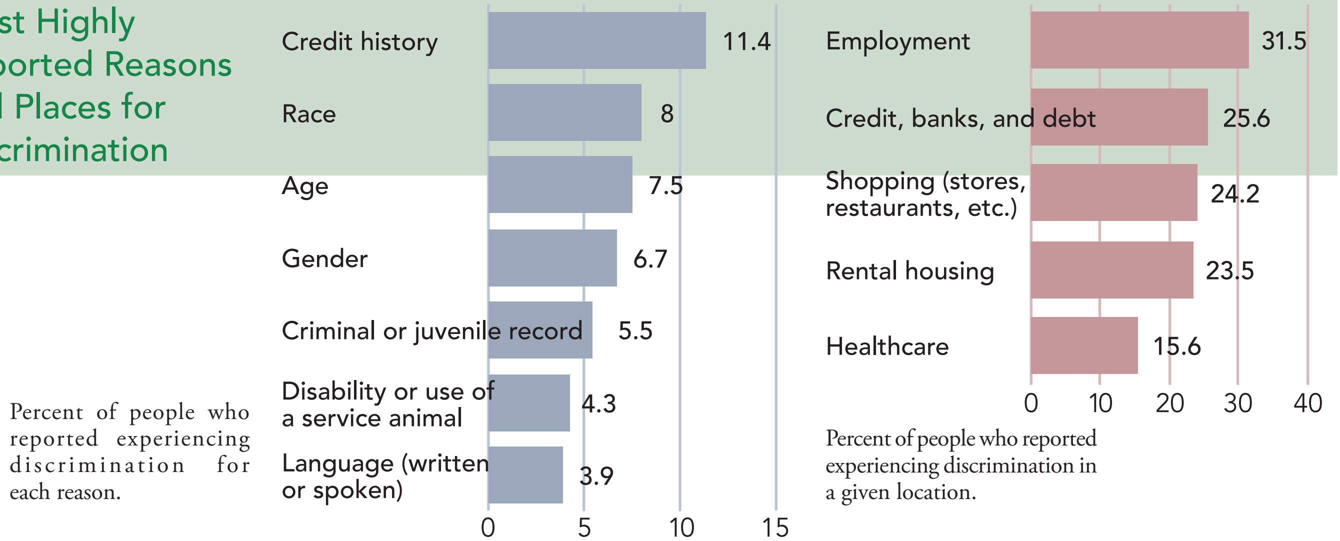
1	Metropolitan county with urban population > 1 million
2	Metropolitan county with urban population 250k to 1M
3	Metropolitan county with urban population under 250k
4	Urban population of 20,000 or more and adjacent to a metropolitan county
5	Urban population of 20,000 or more and not adjacent to a metropolitan county
6	Urban population 2,500 to 20,000 adjacent to a metropolitan county
7&9	< 20,000 Urban population not adjacent to an urban area

Discrimination

The survey asked participants if they experienced discrimination in the prior 12 months and where and how that discrimination was experienced.

Although the type of discrimination asked about extended far beyond race and ethnicity, racial and ethnic minorities reported significantly more discrimination:

Most Highly Reported Reasons and Places for Discrimination



Percent of people who reported experiencing discrimination for each reason.

Percent of people who reported experiencing discrimination in a given location.

Thirty percent of all survey participants experienced at least one form of discrimination. Forty percent of Latinx individuals, 48% of Native Americans, and 51% of African Americans experienced discrimination. People with particular backgrounds also experience discrimination at elevated rates, including 38% of single parents and 51% of people with a criminal or juvenile record.

Systemic Discrimination

African Americans

Oregon's low-income racial and ethnic minorities disparately experience legal problems. The survey shows that in every legal area except one, African Americans experience higher rates of civil legal issues than non-African Americans. Additionally, African Americans reported stronger negative effects than non-African Americans from the civil legal problems stemming from rental housing, tribal membership, education, policing, discrimination, and family and abuse.

African Americans were:

2.3 times more likely to experience homelessness

2.1 times more likely to experience an education issue

1.8 times more likely to experience an issue with policing

1.6 times more likely to experience a rental housing issue

Homeownership was the only area where African Americans suffered legal problems at a lower rate than the general population. Explanations for this may include systemic racism and the historic prevention of homeownership by people of color in Oregon. Only 5.9% of African-American participants and 15.7% of Latinx participants own homes, compared to 24% of all participants.

Native Americans

Similar to African Americans, Native Americans experience many more civil legal problems. In 14 of the 17 categories surveyed, Native Americans experience problems at higher rates than non-Native Americans. Native Americans also experience more negative effects from problems connected to rental housing, aging and disability, health care, and family and abuse.

Native Americans were:

2.7 times more likely to experience a veteran status issue than non-Native Americans

1.9 times more likely to experience an elderly or disability-related issue

1.9 times more likely to experience a mobile home issue

1.5 times more likely to experience homelessness

1.5 times more likely to experience a health care issue

Latinx participants were:

15 times more likely to experience immigration issues than non-Latinx Oregonians

1.8 times more likely to experience homelessness

1.7 times more likely to experience an education issue

1.3 times more likely to experience rental issues

Asian Americans were:

2.6 times more likely to experience a homeownership issue than non-Asian Americans

2.4 times more likely to experience a veterans' issue

2.1 times more likely to experience an immigration issue

Latinx

Latinx participants did not experience issues as disparately as African Americans and Native Americans, but did experience higher rates of civil legal issues than non-Latinx individuals in 9 of 17 categories. With only 59% reporting a primary language of English, language can present a significant issue for Latinx individuals trying to find solutions in a legal system that operates in English. 53% of Latinx participants reported being foreign born, and of those who were foreign born, 48% reported an immigration issue in their household. Issues related to rental housing, healthcare, immigration, and discrimination had stronger negative effects for Latinx people.

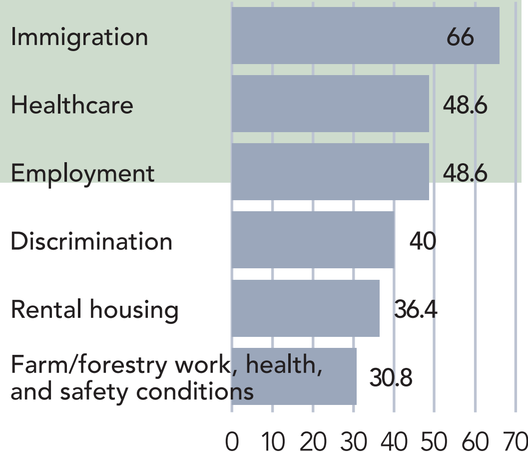
Asian American

Asian American participants experienced legal problems at lower rates across most issue areas. Asian Americans did have some issue areas that stood out, including homeownership, veterans' issues, and immigration issues. However, the most significant barrier to justice was not speaking English. Only 59% of low-income Asian Americans reported English as their primary language.

The Farmworker Experience

Farmworkers stated serious concerns about working conditions, including exposure to pesticides, unsanitary conditions, and substandard wages. A substantial number of workers reported not receiving overtime pay when due or rest breaks. With no access to affordable healthcare, the physical and psychological effects of these conditions worsened. Many workers feared retaliation from their supervisors and authorities for reporting failure to provide basic, safe working conditions.One of the most powerful themes from the survey was the high level of fear based on immigration status. These findings show an extremely vulnerable population who, for good reason, sees itself as isolated and separate from mainstream society.

Most Common Civil Legal Problems Reported by Farmworkers



Percent of farmworker households that experienced each legal problem area.

Barriers to Justice

People Do Not Know Where to Go For Help

More than half of the survey participants (52.8%) who experienced a legal problem looked for legal help. Only about half of participants (49%) had heard of legal aid. Just under a quarter of participants (23.9%) tried to get a lawyer to help them. Even fewer (15.8%) were successful in obtaining any kind of help from a lawyer, including simple legal advice. For participants who were able to obtain a lawyer, help came from three main sources: private attorneys, either paid or pro bono (49.5%); legal aid lawyers (26.7%); and other nonprofit lawyers (23.8%).

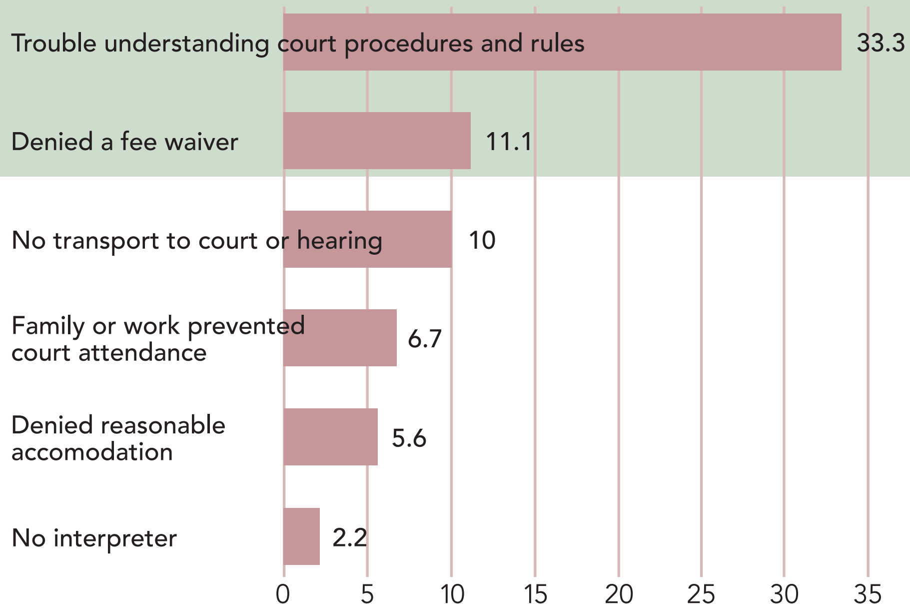
84.2% of people who needed a lawyer were unable to obtain one.

Key findings from survey participants who attempted to address their own legal problems found that: 1) white Caucasians researched legal issues at 1.5 times the rate of people of color; 2) those with internet access researched issues at 1.4 times the rate of those without the internet; and, 3) people with a bachelor's degree researched at 1.2 times the rate of those with less education. Participants who were the least likely to look for help, and arguably the least likely to know that help exists, were members of the Latinx community, particularly Spanish speakers. Latinx participants researched legal issues at 66% the rate of others, and Spanish speakers researched at 33% the rate of others.

People with Court Hearings Have Trouble Accessing the Legal System

Approximately 10% of participants had a civil or family court hearing in the previous year. Low-income participants reported several barriers to meaningfully participating in the hearing process. The largest barrier was understanding the rules and procedures in court, with more than one in three people reporting this problem. It is hard for court participants to feel a sense of just treatment when they are struggling to simply understand what is going on.

Most Highly Reported Problems Accessing the Courts



Percent of people reporting each problem with court access.

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When People are Denied Access to Justice, Their Faith in the Legal System Erodes

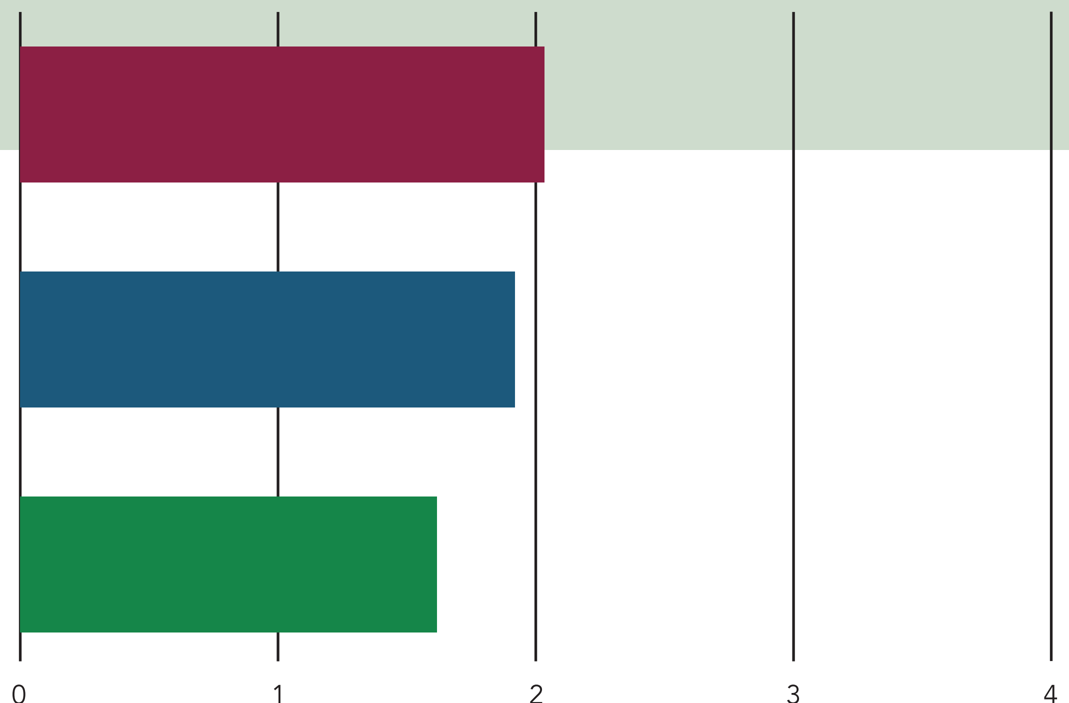
There are costs and consequences to administering a system of justice that denies large segments of the population the ability to assert and defend their core legal rights. When someone needs an attorney and cannot obtain one, they are forced to navigate a complicated civil justice system on their own. The results are most often detrimental to the people involved. This leads to cynicism and distrust of the system, as well as a likelihood that even those with a strong chance of successfully resolving their issue will choose not to engage with the system.

To get a sense of how well the civil legal system provides low-income Oregonians with a feeling of justice, participants were asked in three different ways to rank how often the courts and the civil legal system provide fair results. In the rankings, zero represented the lowest frequency of providing justice and four represented the highest.

On average, participants felt that the civil legal system treated people fairly "some of the time," and that the civil legal system could help solve problems slightly less than "some of the time." Participants were least likely to feel the courts could help protect them and their rights, agreeing that only "rarely" to "some of the time" was this true.

Perceived Fairness of the Civil Legal System

0 = "Not at all"
1 = "Rarely"
2 = "Some of the time"
3 = "Most of the time"
4 = "All of the time"



■ How often do you think you or your family, friends, or neighbors are treated fairly by the civil legal system?

■ How often do you think the civil legal system can help you, your family, friends, or neighbors solve the problems identified in the survey?

■ How often do you think you or your family, friends, or neighbors can use the courts to protect yourself/themselves and your/their rights?

The Solution

Increased Access to Legal Aid is the Best Way to Meet the Legal Needs of Low-Income Oregonians

When Oregonians who are struggling to make ends meet lack legal representation, they are effectively shut out of the justice system. To the average person, our legal system is a maze. That is why lawyers are trained to guide their clients through the system. Civil legal aid is a lifeline–it is there to protect people with nowhere else to turn.

Legal aid provides:

- Free civil legal representation to low-income people
- Brochures, court forms, and self-help materials to help people navigate the justice system
- A website with accessible legal information available to all Oregonians
- Legal help and representation that helps stabilize families and prevent a further slide into poverty

We must do better than meeting 15% of the civil legal needs of the poor. The biggest obstacle to legal aid playing a greater role in the community's solutions to systemic poverty is legal aid having the financial resources to reach more families when they need legal help. Oregon's legal aid programs increase fairness in the justice system, empower individuals, and eliminate many of the barriers that block families living in poverty from gaining financial stability. Legal aid is deeply connected to the communities it serves, with established programs and diverse community partnerships to reach people in need.

Oregon's legal aid programs help more than 28,500 low-income and elderly Oregonians each year. Legal aid offices are located in 17communities and they serve all 36 Oregon counties. Simply put, when legal aid gets involved, the lives of clients and the welfare of communities improve.

Breaking Through Barriers to Justice

According to national standards set by the American Bar Association, the "minimally adequate" level of staffing for legal aid is two legal aid lawyers for every 10,000 poor people. In Oregon we have two legal aid lawyers for every 14,000 poor people. We must recommit ourselves to

Justice Protects

Clara and Diego

Clara found legal aid after being severely injured by Rafe, her partner of 25 years. He came home drunk and started destroying the walls. He flew into a rage when Clara finally said "enough is enough." Concerned neighbors called 911 and watched as Clara was transported to the hospital with internal bleeding, a broken arm, and irreversible back and neck injuries. Despite years of horror, Clara only sought help when she saw how Rafe's abuse was affecting her adult daughter and her young son, Diego. Legal aid helped Clara gain full custody of Diego and resolve over $15,000 of misdirected medical bills. They also helped her assume the mortgage that Rafe refused to pay after he moved out, collecting evidence to show that Clara had been contributing all along, although Rafe's was the only name on the loan documents. After suffering at Rafe's hands for decades, Clara credits her legal aid lawyer's patience and skill for giving her the confidence she needed to overcome fear, stand up for her rights, and regain safety. She explained that her lawyer would say, "You can do this. Don't panic. Just come along when you can." Clara and her son Diego are an inspiration, as is the legal aid lawyer who is helping her navigate this long journey.

the reasonable and necessary goal of providing "minimum access to justice." The 2014 Oregon Taskforce on Legal Aid Funding, which included elected officials and leaders in the legal community, concluded that we need to double the resources for Oregon's legal aid programs in order to have minimally adequate access to justice.

What Can I Do?

What Can Oregon Leaders do to Address the Civil Legal Needs of Vulnerable Oregonians? Take Action!

When we say the Pledge of Allegiance, we close with "justice for all." We need programs like civil legal aid to ensure that the very principle our country's founders envisioned remains alive: justice for all, not just for the few who can afford it.

Educate

Talk about the importance of access to justice. Let people know that civil legal aid is there for those who need help. Share this report. The information in this report is not widely known and it is hard to solve problems that no one is talking about. Let's amplify the conversation.

Speak Up

Oregon has broad bipartisan support for legal aid at the local, state, and federal levels. As a community, let's continue our sustained focus on a fair and accessible legal system–a system where our neighbors can know their rights and get the help they need.

Fund Legal Aid

Legal aid is a state, federal, and private partnership. Legal aid receives funding from the State of Oregon, the federal government (Legal Services Corporation), private foundations, Interest on Lawyer Trust Accounts (Oregon Law Foundation), and private donations (Campaign for Equal Justice). The single best way to increase access to justice is to help us create more legal aid attorney positions.

Justice Heals

Noelle and Poppy

Noelle's daughter Poppy was born with Apert's Syndrome, a rare and complex condition that caused her fingers to be fused together. For Poppy to have full use of her hands, she needed very specialized reconstructive surgery. Noelle connected with a surgeon in Boston who specializes in this type of surgery and who was confident that he could give Poppy ten working fingers. But Noelle's health plan provider denied the request to use this specialist, citing the cost, and insisted that Noelle use a local surgeon. None of the experienced hand surgeons in Oregon felt confident that they could give Poppy ten fingers. The cycle of requests, denials, and appeals for Poppy's essential surgery went on for three years, despite the Boston specialist waiving his fees to make the surgery less expensive. Noelle desperately wanted Poppy to have ten working fingers before she began kindergarten, and time was running out. Luckily, Noelle found legal aid, and they began working on the next appeal together. Having an attorney step in to ask questions, request documents, and review processes made all the difference. Just before the appeal hearing, the health plan changed course and gave full permission for the surgery on the East Coast. Now Poppy is thriving with ten fully functional fingers, just in time to start school. To celebrate the one-year anniversary of the surgery, Noelle and Poppy threw a "birthday party" for Poppy's hands and invited their legal aid lawyer to join the celebration.

Justice Unifies

A Vulnerable Community

Legal aid received a call from two community partners about the same problem: a housing complex where the tenants were suffering because the apartments were unsanitary and unsafe. Legal aid met the clients at their homes, and found that there were 8 units in this complex that all had similar problems suggesting that the landlord had not kept up on repairs: extensive mold around exterior walls of most rooms; water damage from leaking toilets; rusted heaters and ovens; leaking fridges; filthy old carpets; and extensive cockroach and spider infestation.

The families did not ask for help or complain to their landlord because they didn't know that they had a right to live in a safe home with a basic standard of livable repair. They were all refugees—an ethnic minority that was persecuted in their own country that fled to the United States for safety. For most of these clients, their only experience with anything like a landlord-tenant relationship was being in a refugee camp. Some feared that they would be attacked or killed if they complained to the landlord, and none felt they could afford to live anywhere else. Legal aid tried to work with the landlord. However, the landlord's disregard for the tenants seemed deliberate—they did not step up and do the right thing, even when they were advised of their responsibilities. Legal aid then filed suit against the landlord and reached a settlement prior to court. The families immediately got some relief from these unacceptable conditions. There is still a long road ahead for them to acclimate and to feel safe, but positive steps have started—with legal aid's help, their voices were heard and their rights respected.