MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 11, 2020, 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*
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva*
Barry J. Goehler
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. Douglas L. Tookey
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Jennifer Gates
Hon. Norman R. Hill
Meredith Holley
Hon. David E. Leith
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	Discovery	Discovery	ORCP 43		
ORCP 23 C/34	ORCP 7	ORCP 1	ORCP 44		
ORCP 27	ORCP 15	ORCP 4	ORCP 45		
ORCP 31	ORCP 23	ORCP 9	ORCP 46		
ORCP 32	ORCP 23/34C	ORCP 10	ORCP 47		
ORCP 57	ORCP 27/GAL	ORCP 17	ORCP 54		
	ORCP 55	ORCP 22	ORCP 62		
	ORCP 57	ORCP 36	ORCP 69		
		ORCP 39	ORCP 79		
		ORCP 41			

I. Call to Order

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

II. Administrative Matters

A. Approval of December 14, 2019, Minutes

Mr. Crowley asked if anyone had corrections or changes to the draft December 14, 2019, minutes (Appendix A). Hearing none, he called for a motion to approve the minutes. Judge Bailey moved to approve the December 14, 2019, minutes; Judge Wolf seconded the motion, which was approved unanimously by voice vote.

III. Old Business

A. Follow-Up on Suggestions from Survey

1. ORCP 4

Judge Peterson stated that he was aware that Ms. Gates had called attorney Dallas DeLuca for more information on his comment regarding Rule 4. Mr. DeLuca stated that he could not recall the specifics of his comment. Mr. DeLuca was going to think about Rule 4 further and let the Council know of any specific suggestions for improvement.

2. ORCP 31

Judge Peterson informed the Council that he had successfully communicated with attorney Mark Cottle, who had raised concerns regarding ORCP 31 (Appendix B), Oregon's interpleader rule. Mr. Cottle's situation was that his client, an elderly person receiving Social Security Income (SSI), had money deposited into his bank account through fraud and was going to lose his SSI benefits because the wrongful deposits placed him over the asset limit. His client deposited money representing the wrongful deposits into court, but his client was not the plaintiff. Ms. Payne stated that she was confused as to the details and wondered whether his client was the defendant because someone interpleaded them in.

Judge Peterson stated that he had compared Rule 31 to Federal Rule of Civil Procedure (FRCP) 22 on interpleader, which is short and succinct. Unlike the federal rule, Oregon's rule also allows the interpleading party to get out of the case, and provides for attorney fees for the interpleading plaintiff as well. Judge Peterson stated that he did not have an opinion on whether or not it should. He

noted that, while Oregon's rule does allow interpleader to be used by both plaintiffs and defendants, it gives procedural advantages to plaintiffs that are not provided to defendants.

Mr. Goehler also expressed confusion. He stated that the rule refers to the plaintiff as the interpleading party who files the complaint in interpleader. He noted that he has used the interpleader rule in the insurance coverage context where there is one policy with multiple claimants, and his insurance client is paying out the entire policy limit but does not know who is the correct claimant, so he puts the funds into the court as the plaintiff and serves all of the main claimants and moves to get out of the case. He stated that the plaintiff in interpleader is always the person with the bucket of money. Judge Roberts posited a situation where a potential claimant sues an insurance company by counterclaim, thereby making the claimant the counterclaim plaintiff. She stated that the attorney fee provision bothers her because the right to attorney fees is substantive. It is also bothersome because there are circumstances where a party might interplead, but that party might not be blameless. However, the attorney fee provision puts them in a position to get attorney fees because they received money they knew was not theirs and decided to lie low until they were caught. This is unfair. Judge Roberts opined that the Council should not be casual about saying that the plaintiff is always entitled to attorney fees when a plaintiff might not have taken the initiative they should have. She stated that it seems that there should at least be some discretion as to whether that is appropriate.

Judge Peterson observed that the rule says "shall," which seems a little odd. He stated that it seems troubling that a party would be awarded attorney fees, even if that party is not blameless. However, in this case, the elderly person appeared to be blameless. Ms. Payne pointed out that it appears that the rule did not prohibit Mr. Cottle's client from getting fees. Judge Roberts agreed and stated that the court seems to have dealt with it as if he were the plaintiff. Mr. Andersen stated that he could not think of a situation in which anyone interpleads other than a plaintiff who has money that does not belong to them and wants to turn it in to the court. Mr. Goehler noted that the attorney fee provision is nice because, since the attorney fees and costs come out of the funds deposited with the court, and it is a dwindling pie, the longer the plaintiff stays in, the smaller the portion of pie will be left for the claimants. Thus, it provides incentive for other parties to not oppose the removal of the plaintiff from the case and to focus on dealing with the funds.

Mr. Goehler explained that, as a defense lawyer, he has encountered situations where the plaintiff sues his client but lien holders or the Department of Human Services are also involved. When the plaintiff receives an award, his client deposits

funds with the court and walks away. This is not an interpleader; it is a deposit of judgment funds, so that the plaintiff and whoever is claiming a stake in the money can deal with it with the court.

Judge Peterson observed that Rule 31 does make interpleader available for plaintiffs and defendants. However, he pointed out that the last statement in section B is, "Upon hearing, the court may order the plaintiff discharged from liability as to property deposited or secured before determining the rights of the claimants thereto." It says "the plaintiff," but not "the defendant." He stated that it seems like blameless defendants and even less blameless defendants should be allowed to get out of the case if they take all of the money and deposit it. Mr. Young asked when a defendant would have blame in that situation, since the whole idea is that they are depositing the money so that people who have some kind of right, title, or interest in the money can appear and litigate their respective claims. If one does not have an interest, one should not appear. If the Council starts opening up attorney fees to defendants, how is the court going to determine which defendant has more of an ability to recover attorney fees than another defendant who is trying to assert a claim?

Judge Peterson noted that Judge Roberts has made the point that adding attorney fees for defendants may be beyond the Council's purview. However, he reiterated that the rule currently seems to limit the right to dismissal from the case to the plaintiff. He wondered whether defendants who are blameless and have deposited money into the court should be allowed to be dismissed because they do not have an interest in the case. Mr. Andersen asked when the defendant is ever going to be the one coming forward with the money. Judge Peterson stated that it would be with a counterclaim or a cross-claim. Mr. Goehler stated that he does not believe that Mr. Cottle was in an interpleader situation but, rather, a liability or some other situation. The situation he envisions is one where a plaintiff has claims from multiple claimants and interpleads the money, and one of the defendants has claims owed to one of the other defendants and wants to get out of the case, so they dump more money into the interpleader fund. So, it is only dealing with an interpleader action where the defendant would be one of the prospective claimants to the fund.

Judge Peterson posited a situation where an elderly person on SSI had money deposited into their account that came from five victims of fraud. If one or more victims sues the elderly person, the elderly person might wish to respond by interpleader. Mr. Goehler stated that you could confess judgment or file a separate interpleader action within that action. Judge Roberts noted that the person would still be the defendant. Mr. Goehler suggested that the person would be the plaintiff in a separate interpleader action. Judge Peterson pointed out that

the rule states that one can file a cross-claim or counterclaim in interpleader. Mr. Goehler countered that it has to be an interpleader action. If it is a regular liability or fraud case, it would not be an interpleader suit. He stated that this is a really narrow issue to a particular type of action. Mr. Andersen agreed that the plaintiff is always the one who deposits the money into the court.

Mr. Eiva discussed a situation in his practice that involved a denial of life insurance benefits. The insurance company ultimately decided they did not know who to give the benefits to, so they interpleaded the money while Mr. Eiva was preparing to file a breach of denial of insurance benefits case with the right to attorney fees in favor of his client, their beneficiary. The insurance company interpleaded the money in and, all of a sudden, the longer he kept the insurance company in with his counterclaim, the more likely it would be that his client would have to pay their attorney fees out of the insurance benefits. Mr. Eiva expressed frustration that the insurance company declined to do its job by figuring out who was the true beneficiary. He was entitled to attorney fees, but the interpleader got in the way of that. Rather than do their job, the insurance company got their attorney fees out of the policy and shrank the amount of funds available. Mr. Goehler asked what an insurance company should do if there are three or four other claimants, all making multiple claims against them. Mr. Eiva stated that perhaps they should interplead in that case, but stated that he did not believe that an insurance company should get to take money out of the pool because they are supposed to do their job and identify the appropriate beneficiary. Judge Roberts agreed that this is kind of troubling. She noted that, if the insurance company only had one claimant and that claimant sued and won, that single claimant would get attorney fees. She wondered why it should be different if there are multiple claimants. Judge Bailey pointed out that Mr. Eiva could have also sued the insurance company on a breach of contract on the same theory and, if he did, he would get to put the money back into the pie under the attorney fees provision.

Mr. Crowley asked if the Council wanted to examine the issue further. Judge Peterson stated that it seems like Mr. Goehler is suggesting that a defendant can only be involved if it is an existing interpleader action or if the defendant files a separate interpleader action; however, he believes that both the FRCP 22 and ORCP 31 A indicate that a defendant can transform the case into an interpleader action. Mr. Andersen stated that it is a separate action. Judge Peterson responded that the rule says that it can be done as a counterclaim. Judge Wolf quoted the rule: “A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim.” Mr. Goehler stated that this would not be an interpleader but, rather, a confession of judgment.

Judge Peterson posited that it appears that, if a defendant gets sued, they could file an interpleader counterclaim. Mr. Goehler stated that this would not be an interpleader but, rather, a confession of judgment and deposit the funds with the court. Judge Wolf pointed out that a defendant would be saying they owe the money to someone, maybe the plaintiff or maybe not, and that is not a confession of judgment. Mr. Goehler stated that, if it were not an interpleader action, the defendant that has multiple potential claimants within that action can confess judgment and deposit money with the court and say, "you all figure it out." So that does not have an attorney fee remedy as part of it because it is not an interpleader. It is only when they are within the interpleader action and there are claims between defendants that one of those defendants can say "I want out of this, I owe somebody this," and cross-claim and deposit the money. Judge Peterson questioned whether a defendant can confess judgment to the claim but not to any one defendant and assume the court will figure out which defendant you are confessing judgment to. It seems to him that this is interpleader. Mr. Goehler again asserted that it is not an action in interpleader. In Mr. Eiva's situation, if he had sued the insurance company first and the other claimants joined the lawsuit or a separate lawsuit was joined, the insurance company could confess judgment to both of them and deposit the money with the court and be able to walk away. It would not be an interpleader and they would not get attorney fees; they would be saying, "Look, we are liable here, but we are only liable to the extent of our obligation and we do not know who the correct claimant is."

Judge Roberts asked whether Mr. Goehler was stating that a defendant can only cross-claim for interpleader if the case has been initiated as an interpleader. Mr. Goehler stated that this is his understanding. Judge Roberts stated that this is not how she reads the rule, which says, "A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim." She stated that it is the multiple liability that allows the defendant to utilize interpleader, not the fact that an interpleader action has already been filed by someone else. Mr. Goehler stated that the context of the rule is interpleader so, because the rule previously talks about a plaintiff that initiates an interpleader, the only defendant it can be talking about in the context of the rule is the interpleader. Judge Roberts disagreed. Judge Bailey stated that, once an interpleader is filed and the filer says, "Here is the money, you guys go figure it out," that person is now the plaintiff in that scenario in section B for the purposes of the interpleader. So that is why the plaintiff can get money if they prevail. A person could be a defendant in the case itself, have liability, file the interpleader and then become the plaintiff for the purposes of the interpleader. The person who files the interpleader will always be the plaintiff.

Mr. Andersen stated that he could not find any cases interpreting Rule 31. To him, the rule means that the defendant can obtain funds deposited into court by the plaintiff. Judge Roberts opined that it means that a defendant can create an interpleader action by cross-claim or counterclaim because what is similar is the potential multiple and conflicting liability that is described above. She stated that she would think that it would very typically be a defensive thing. For example, if a defendant were sued by one claimant but, before the case could be settled informally, another potential claimant sued the defendant on the same claim, the defendant would now want to change that into an interpleader because there is now possible liability to multiple and conflicting claimants, so now the defendant obtains that same relief by filing a counterclaim in interpleader and joining the other known claimants. In the overall suit the defendant is the defendant, but the defendant is the plaintiff for the purpose of the interpleader.

Judge Peterson pointed out that FRCP 22(a)(2) states, "By a Defendant. A defendant exposed to similar liability may seek interpleader through a cross-claim or counterclaim." A defendant does not have to confess judgment but, rather, can use interpleader and become a counter plaintiff in the case. Mr. Hood stated that, if anything, maybe a clarification is needed to say that this is what it means to be an interpleader plaintiff. Judge Peterson stated that perhaps the rule could be changed to allow the counter-plaintiff to get discharged, but perhaps it is clear enough and perhaps that is the way it got worked out in Mr. Cottle's case.

Mr. Crowley asked if the Council had interest in exploring the issue further. Judge Roberts suggested that a committee be formed. Mr. Goehler, Mr. Eiva, and Justice Nakamoto volunteered to serve on the committee. Ms. Payne asked for clarification about what the committee would be exploring. She observed that, if it is giving another party attorney fees, that would be a substantive change. Mr. Eiva stated that he was thinking about exploring whether the court should have discretion in awarding fees to the interpleading plaintiff. Mr. Goehler stated that it is a research project. He noted that there is not a lot of Oregon case law on interpleader and suggested that the committee could look at federal cases and see how they are applying the federal rule. That may be helpful for the Council to see whether we need to leave it alone or clarify some part of it. Judge Peterson stated that, rather than mandating fees or making them discretionary, it would be helpful to make sure that the procedures are clearly even handed so that both plaintiffs and counter plaintiffs in interpleader can leave the suit and avoid additional attorney fees.

Judge Wolf noted that he did not want to add further confusion, but stated that section C does say that in any suit in interpleader filed by any party, the party fling the suit in interpleader shall be awarded reasonable attorney fees. It does not

necessarily say plaintiff, so a defendant who files in interpleader as a cross-claim might be entitled to attorney fees. He suggested that this might need to be clarified. Judge Roberts stated that it should be studied in any case. Mr. O'Donnell agreed that clarification would be helpful for those who do not use the rule very often. He stated that these fact scenarios are unusual, and it would be good to see how they could play out.

B. Committee Reports

1. ORCP 7

Mr. Young explained that the committee is still working on language for a draft amendment to Rule 7. Judge Peterson stated that this language is specifically related to waiver of service and making it easier to serve government entities. Judge Wolf noted that the language is not quite ready for public viewing.

2. ORCP 15

Ms. Payne reminded the Council that, at the last Council meeting, the committee had presented a proposed amendment in draft form. The committee then revised that amendment slightly (Appendix C). The first goal is to alert litigants and the bar that there is case law holding that Rule 15 D does not apply to specific rules, and that this is a malpractice trap. The language "except as prohibited by other rules" was not used because timelines that cannot be extended are not expressly identified in the rules, so the committee decided on, "except as otherwise prohibited by law." She explained that the lead line was also changed from "plead or do other act" because the rule applies to pleadings and motions.

Ms. Payne explained that the second goal was to expand the rule to include all motion practice, because the practice in Oregon has been to also allow extensions for responses and replies to motions. The final new change to section D is to replace the word "such" as part of the Council's ongoing quest to eliminate that word when it is unnecessary. She explained that the word "such" is often replaced with the word "any," but that did not really fit, so the committee chose the word "that." However, the committee is open to comments on this.

Ms. Payne noted that there was some thought that Rule 15 was supposed to be a catch-all rule to allow discretion for extensions on anything that other rules do not expressly allow. She stated that the committee did not make an amendment to allow that due to the possibility of unintended consequences. The amendment limits extensions to pleadings and motions at this time

Judge Bailey suggested the language "enlarging the time" instead of "enlarge such time." Mr. Goehler stated that he likes the word "that" because it refers back to the time limited by procedural rules. He opined that "the" is too ambiguous, and "any" opens it up to any time. Ms. Payne stated that, in this case, she likes the word "such" and that it seems appropriate. Judge Peterson agreed that there have been occasions when "such" has been retained. Ms. Nilsson noted that, when the word "such" refers back to a specific thing, it may be appropriate. Judge Roberts suggested that the word "that" would be better grammatically. Ms. Payne expressed concern that the word "that" does not accurately reflect the multiple timelines that are involved. Ms. Stupasky agreed. Judge Roberts disagreed.

Justice Nakamoto suggested that, for clarity, the words "enlarge the time limited by the procedural rules" could be used instead of "such time" or "that time." Mr. Goehler agreed that there would be no mistaking that meaning. Ms. Nilsson noted that clarity is a good thing.

Judge Wolf asked Judge Peterson if he had a chart listing which rules section D applies to and which it does not. Judge Peterson stated that he had compiled such a chart last biennium and that he believes that the chart includes all of the rules, but that he would need to review it. Judge Wolf wondered whether it was included in the Council's history. Ms. Nilsson stated that she could not recall whether the chart had been included in last biennium's minutes. Judge Peterson suggested that the committee could at least add the chart to its report. He stated that he would take another look at it and circulate it to the committee.

Judge Conover asked whether the language "by an order" is really necessary. He noted that the beginning of section D indicates that the court has the discretion to allow a motion after the time limited by the procedural rules. Ms. Payne explained that section D refers to two different things. Judge Peterson noted that one is asking for permission beforehand, and one is asking for forgiveness after the time has already run. He stated that this is also included in the change that the Council previously made at Rule 68 D(4)(d)(ii).

Mr. Crowley asked whether the Council has consensus on a draft amendment. Ms. Payne suggested, since the committee is going to meet one more time to review Judge Peterson's chart, that the committee bring back a clean draft with the edit to section D and report on the exceptions so that the Council can have final discussions and be ready to vote on the draft. The Council agreed.

3. ORCP 23

Ms. Payne gave a status update and explained that the next step is for committee members to check with the Oregon Trial Lawyers Association and the Oregon Association of Defense Counsel regarding this issue. The committee will report those results at the next meeting.

4. ORCP 23 C/34

Mr. Andersen stated that Ms. Payne had made a new suggestion for a change to ORS 12.190 (Appendix D) to solve the problem that occurs when a plaintiff files a lawsuit against a defendant who is deceased but does not discover the defendant's death until after the lawsuit is filed. He noted that the committee had previously proposed various solutions. It was initially felt that relation back would not work because one cannot relate back to a filing that was directed against a deceased person and now would be directed against a different entity – the deceased person's estate. However, he stated that, as Judge Roberts had pointed out, if the Legislature says that it relates back, it can relate back. This is ultimately a decision for the Legislature, not a rule change.

Ms. Payne stated that ORCP 23 has requirements for relation back, and that the Council might want to include the language "notwithstanding any other rule or statute." She asked whether the Legislature had enacted any part of ORCP 23, thereby making it a statute. Judge Roberts noted that the Legislature approves all of the ORCP. Ms. Payne asked whether this makes them statutes. Judge Peterson pointed out that the Council's enabling statute says that the Legislature has delegated the drafting rules to the Council, and that the Legislature can amend, reject, or repeal them, or do nothing. If the Legislature does nothing, by law, the rules become effective. Judge Peterson's suggestion, contrary to Justice Jack Landau's concurrence in *State v. Vanornum*, 354 Or 614, 629, 317 P3d 889 (2013), is that, because the Legislature has created this situation, it does not matter if the Legislature made an amendment to Rule 23 at one point and then the Council made a different amendment to it. Whether the Council or the Legislature put forth the last amendment, it is effective because the Legislature looked at it and at least tacitly approved it.

Judge Roberts stated that this does not clarify things, since the suggestion would not be changing an ORCP but, rather, would be changing a statute. She stated that the question is whether the statute has to say within it that an ORCP does not apply when the statute does. She thinks that it is just intrinsic within the hierarchy of things and that it does not need to state this. Ms. Payne asked whether the court would look at the statute and the rule to see which one is more specific.

Judge Roberts asked how a statute could be less specific. Ms. Payne noted that Rule 23 C says that the claim has to arise out of the same facts. She observed that it would not hurt to say "notwithstanding any other provision of law." Judge Roberts stated that she has no doubt that it does not hurt anything, but that it would be odd. Ms. Payne allowed that the statute is more specific to death, so a court would probably find that it is more specific. Judge Tookey asked whether Ms. Payne's idea is to say "notwithstanding any other provision of law." Ms. Payne stated that this is her idea.

Judge Peterson stated that the proposed subsection (b) says "notwithstanding subsection (a)," but he wondered if it should say that, if a plaintiff sues a defendant but that it turns out that the defendant is now deceased, then the complaint relates back. Judge Roberts reminded him that the Council had discussed that and decided against it for fear of raising a discovery of the death issue to be litigated. Judge Peterson explained that he was trying to avoid the word "discover," but give the reason for the need to name the estate some context. Judge Roberts pointed out that the statute should probably say, "within 90 days after the action is filed," because the action is not "commenced" until it is served. Mr. Goehler asked whether the thought is that it will be discovered that the defendant is dead within that 90 day period. Ms. Payne stated that this is the thought. There will be 60 days to serve, and that is when a plaintiff should reasonably find out that the defendant is dead, and then there is an extra 30 days in case an estate needs to be opened to file against the personal representative.

Judge Peterson stated that the language does not seem to be clear that the plaintiff has sued the decedent and now is now amending to name the estate. Judge Wolf agreed. Judge Peterson suggested language such as, "after the complaint is filed against a deceased defendant." Ms. Payne suggested, "Notwithstanding subparagraph (a), if the action has been filed against a deceased defendant, within 90 days after the action is filed the party may amend to substitute the personal representative." Judge Bailey suggested, "A party may amend the pleading to substitute the personal representative as the real party in interest for the deceased defendant." Judge Wolf stated that this sounds like a plaintiff may be able to substitute the personal representative if the defendant dies within those 90 days as opposed to the issue at hand – the defendant was dead when the case was filed. Judge Bailey pointed out that subsection (a) provides the one year period following the defendant's death to commence an action against the personal representative. The proposed subsection (b) just says that a personal representative can be substituted for the named deceased defendant who could not be served because death had occurred before service.

Judge Roberts suggested: “If a complaint is filed against a defendant who is deceased, notwithstanding subparagraph (a), within 90 days after the action is filed, a party may amend the pleading to substitute the personal representative as the real party in interest. That amendment shall relate back to the date of the original pleading.”

Ms. Stupasky stated that she does not think this captures the scenario where the case is not filed against someone who is deceased when it is filed but dies before service can be effected. Mr. Goehler observed that this is somewhat like trying to work out a law school exam with multiple branches of scenarios. He stated that the first part of it deals with a defendant who dies before the expiration of the statute of limitations. However, what if the defendant is alive when the action is filed, the statute of limitations expires, and the defendant dies before service? The plaintiff cannot serve the deceased defendant and needs to have time to appoint a personal representative once they discover the death. He opined that the statute ought to give the same slush factor or plaintiffs will miss the statute of limitations in this scenario. Ms. Payne stated that the statute of limitations has been met because the case has been filed against the right person. Mr. Andersen pointed out that the plaintiff has not served the defendant. Mr. Goehler stated that the situation may never be encountered but, if it is, by limiting it to defendants who have already died, it is a trap. Judge Roberts suggested this language, “If a complaint is filed against a defendant who is deceased or dies before service is effected within 60 days after filing.”

Ms. Payne asked whether it is always 60 days. Judge Roberts stated that ORS 12.120 provides that actions are commenced at the time they are filed and served except that, if the complaint is filed within the statute of limitations and service is made within 60 days thereafter, then the action is commenced as of the time the complaint is filed. That is the magic of 60 days; the presumption is that this is prompt service. Ms. Payne suggested, “within the time provided by the procedural rules” instead of 60 days. Judge Roberts stated that there is no procedural rule that says that one must serve. She noted that a plaintiff could file a case and then serve it six months later but, in that case, it is commenced as of six months later.

Mr. Andersen suggested the following language: “if a complaint is filed against a person who dies before the statute of limitations or within 60 days after the lawsuit is filed, then notwithstanding subparagraph (a) within 90 days after the complaint is filed against a defendant who is deceased a party may amend the pleading to substitute the personal representative as the real party in interest for the deceased defendant. That amendment shall relate back to the date of the original pleading.”

Ms. Stupasky stated that she would need to see the language in writing to evaluate it. She posited a situation where a plaintiff files a case six months before the statute of limitations and, for some reason, does not serve the complaint and summons. She asked if the plaintiff attempting to effect service more than 90 days later and finding out that the defendant is now deceased would be barred because the statute is limited to 90 days overall. Mr. Andersen stated that, in theory, it does, but that he cannot imagine filing and waiting six months to serve. Ms. Stupasky pointed out that the reason the Council is suggesting this change is to eliminate a trap. She expressed concern that the Council should not set another trap and effectively limit the statute of limitations. She noted that the case could be re-filed if the statute of limitations has not expired. Judge Wolf stated that one could move to substitute and serve the estate if the statute of limitations had not expired. Ms. Stupasky again stated that she would need to read the suggested amendment. Judge Bailey pointed out that the change would just be for a situation where the statute of limitations has expired to make sure that relation back exists. If a plaintiff is still within the statute of limitations, they can move to amend and they are fine. He observed that, if a plaintiff waits too long to act, that is what the Professional Liability Fund is for. Judge Peterson noted that this suggested change is to bail out the prudent plaintiff who, through no fault of their own, finds out that the defendant has died. Ms. Stupasky stated that she just wanted to make sure that this is all that it does and that it does not limit anything else.

Judge Peterson suggested that the language in subsection (b) track the language in subsection (a), "before the expiration of time limited for its commencement." Mr. Young suggested using the language, "date the complaint is filed," because that is what is used in the relation back statute, ORS 12.020. Mr. Andersen suggested eliminating the second reference to "party who is deceased" because it is already used in the beginning. He suggested the following language: "If a complaint is filed against a person who dies before the time limited for commencement of the action or within 60 days after the action is filed, then notwithstanding subparagraph (a), within 90 days after the complaint is filed, a party may amend the pleading to substitute the personal representative as the real party in interest for the deceased defendant. That amendment shall relate back to the date the complaint was filed."

Judge Tookey asked whether the information sent to the Legislature will include a description of the problem. Judge Peterson stated that it will. Mr. Crowley suggested that the committee meet one more time to look at the language and make sure it is satisfactory, and talk about how to present it to the Legislature. Judge Peterson asked Ms. Nilsson to send a copy of the new language to the committee. She agreed to do so.

5. ORCP 27/Guardians Ad Litem

Judge Peterson stated that the Council had three versions of proposed amendments for its consideration (Appendix E). He noted that the Council has had fairly robust discussions about Rule 27 in past Council meetings. He stated that all three versions include includes changes to the title of the rule and some lead lines. They also make more clear that the rule applies to unemancipated minors and, in section B, that appointment of the guardian ad litem (GAL) is mandatory. Draft A contains a slightly rewritten sentence in section A that tracks the lead line in terms of the order. It also gives a description of what a GAL is (has the authority to act on behalf of that party in that action and for the purposes of that litigation). Draft B also includes the rewritten sentence in section A, but it instead includes a parenthetical describing a GAL (competent adult who acts in the party's interests in the action and for the purposes of the litigation). Draft C makes no attempt to describe a GAL.

Judge Peterson reiterated that the Council has had a lot of discussion about this. He explained that, when he practiced years ago in a southern Oregon county and had a GAL appointed, the clerk of the court sent him a request a year later asking for his guardian report. So, it is clear that it is not just self-represented litigants who are confused about what a GAL is. He reminded the Council that the original suggestion regarding GALs came to the Council from the Law and Policy Work Group of the Oregon Judicial Department. That group had actually asked the Council to replace the phrase because it was confusing. He stated that it would be impossible to replace the phrase, which is included throughout the Oregon Revised Statutes and in statutes and rules throughout the United States. However, it is up to the Council whether it wants to somehow clarify the meaning.

Ms. Nilsson explained that Draft A and Draft B are staff suggestions that she and Judge Peterson had crafted after the last Council meeting. The description of a GAL in Draft A came from Judge Roberts' attempt at a definition at the last Council meeting. The description in Draft B was taken partially from the parenthetical that Judge Norby had previously written and partially from Ms. Nilsson's idea of what a GAL is from her understanding as a lay person. Ms. Nilsson stated that the drafts are there for the Council's consideration. She stated that she understands that there are Council members who feel strongly that a GAL should not be defined at all, because the term is self-explanatory. She stated that, if she did not work in the legal profession, she would not understand what a GAL is, and that she feels for the self-represented litigants who cannot get lawyers and who are trying to interpret these rules on their own. She stated that she does understand the

concept of not wanting to change the rules solely for the purpose of making the rules understandable for people who have not gone to law school, and she is sensitive to that balance.

Mr. Goehler stated that he does not actually think that the staff drafts change anything as they are written. He stated that, as he reads the drafts, they are done in a way that is not defining, creating, or scoping all of the duties of a GAL but, rather, just are explanatory. There are other obligations for a GAL, but the draft language just says that this is what a GAL is and this is the minimum that we expect for the rule.

Ms. Payne observed that the very last part of the new language in Draft A says "appointed by the court in which the action is brought," but she noted that there are circumstances where the action is not brought in the same court in which the guardian or conservator has been appointed. Judge Roberts stated that the language to which Ms. Payne refers applies only to the GAL. Judge Norby noted that the comma placement in Draft A may make the language appear to apply to other parts of the sentence. Ms. Payne asked whether this could be more clear if it were a separate sentence. She stated that she was worried about someone reading the rule and thinking that they have to appoint the guardian or conservator in the same court. Judge Norby noted that the rule was originally written that way, with just a comma that separates it. To avoid the problem, Judge Roberts suggested changing the beginning of the sentence in both Draft A and Draft B to read, "In any action, a party who has a guardian or conservator...."

Judge Peterson asked whether any Council members preferred the description of a GAL from Draft A or Draft B. Judge Roberts stated that she preferred Draft B, as it seems slimmed down and reads better, but she does not feel strongly about it. Mr. Goehler stated that he likes Draft B better too. This was the Council's general consensus.

Judge Norby thanked Judge Peterson and Ms. Nilsson for putting so much effort into these staff suggestions. Judge Peterson stated that staff will bring Draft B back to the Council in clean, final form next month. Mr. Crowley asked whether the Council would review that refined Draft B as a proposal for publication at the next meeting. Judge Peterson agreed.

6. ORCP 32

Mr. Crowley reminded the Council that this issue was brought to the Council's attention by the Department of Justice and it regards class action settlements by a single plaintiff in cases where the class has not yet been certified. Rule 32 D

requires court approval as well as notice to the class. The federal rule was similar to Oregon's rule in this regard until 2003, but no longer contains the class notice requirement. The concern that was raised is that the language in Rule 32 D is a disincentive to settlement. Mr. Crowley stated that the committee took a first look at the issue and that Ms. Gates provided some background information, including an article from New York, which had a similar state rule. The article expressed similar concerns, including that New York's rule could lead to more class action lawsuits.

Mr. Crowley stated that the committee is not sure how Rule 32 is affecting the Oregon bar or whether it is an isolated incident. Committee members will talk to constituency groups over the next month and come back with a report at the next meeting.

Judge Peterson noted that the Council has occasionally formed work groups where non-Council members have been brought in to provide additional perspectives. He stated that this is something the committee might consider. Mr. Crowley stated that the first step is to poll constituency groups, but a work group might be a possibility further down the line.

7. ORCP 55

Mr. O'Donnell stated that the committee has not yet met, but should have a meeting within the next week and a half. He reminded the Council that the committee was formed to investigate a question raised by Judge Marilyn Litzenberger about the manner in which an unrepresented witness can quickly and not necessarily formally get before a judge to be heard about a trial subpoena. He noted that he has had some informal discussion about other ideas on Rule 55 with Mr. Eiva, but some of those may be substantive law issues. Judge Peterson stated that he had also submitted an issue to the committee. He asked that Mr. O'Donnell copy the committee on the issues that he and Mr. Eiva had discussed. Mr. O'Donnell agreed to do so.

8. ORCP 57

Judge Wolf stated that the committee had begun to look at Rule 57 regarding discrimination in jury selection, in significant part due to the Court of Appeals ruling in *State v. Curry*, 298 Or App 377 (2019). He stated that Judge Tookey had sent to the committee a report on the Washington work group that put together that state's new rule. He explained that Ms. Holley had found six states that specifically prohibit discrimination in jury selection, either by rule or by statute, but the rest rely on case law. Washington is the only state that has a procedural

method for how to analyze it.

Judge Wolf stated that he had sent the committee draft language that incorporates some information from the opinion from *Curry*. He noted that some portions of the Washington General Rule 37 are substantive, but his idea is that the committee can look at the procedural portions and see whether any of them would be something Oregon should adopt. The committee will meet again and hopefully have some language for the Council's review at the next meeting.

Judge Wolf noted that the Washington rule lists a group of presumptively bad excuses for exercising a peremptory challenge, which is probably a substantive change that the ORCP would not be able to incorporate. Judge Bailey stated that he was offended by many of the things on that list. He opined that presuming that certain minority groups have all had certain experiences is racist. Mr. Goehler wondered whether the rule actually perpetuates such stereotypes by naming those topics. Judge Bailey stated that he also has grave concerns that the Washington rule does not allow an attorney to even ask whether a potential juror has had contact with the police. Judge Wolf pointed out that this list is part of why portions of the Washington rule are substantive, and he stated that his preference is to leave it in the trial judge's hands.

IV. New Business

A. ORCP 55 Inquiry

Judge Peterson referred the Council to an inquiry from a legal software company called Aderant (Appendix F) regarding Rule 55. Apparently the company feels that the 2017-2019 biennium amendment of Rule 55 does not make clear the triggering event for calculating the time period for production of documents pursuant to a summons. Judge Peterson stated that he feels that the date of receipt and the date of service are the same day. The date of issuance of the summons is irrelevant as the 14 days for responding clearly refers to how much time the recipient has to respond. If the 14 days started on the date of issuance, the subpoenaing party could hold the signed subpoena for 13 days before service, therefore affording the recipient only one day in which to respond. He stated that the Rule 55 committee can second guess if he is incorrect, but he feels that the rule as rewritten seems clear. Mr. O'Donnell stated that the Rule 55 committee would look more closely to make sure that this is the case.

V. Adjournment

Mr. Crowley adjourned the meeting at 11:14 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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	Discovery	Discovery	ORCP 41		
ORCP 23 C/34	ORCP 7	ORCP 1	ORCP 43		
ORCP 27/Guardians Ad Litem	ORCP 15	ORCP 4	ORCP 44		
ORCP 32	ORCP 23	ORCP 9	ORCP 45		
ORCP 58	ORCP 23/34C	ORCP 10	ORCP 46		
	ORCP 27/GAL	ORCP 17	ORCP 47		
	ORCP 55	ORCP 22	ORCP 54		
	ORCP 57	ORCP 32	ORCP 62		
		ORCP 36	ORCP 69		
		ORCP 39	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

Shari Nilsson <nilsson@lclark.edu>

Fwd: ORCP 31 (Interpleader)

Mark Peterson <mpeterso@lclark.edu> Sat, Jan 4, 2020 at 12:39 PM
To: Shari Nilsson <nilsson@lclark.edu>

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Mark A. Peterson
Executive Director
Council on Court Procedures
Clinical Professor of Law
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(503) 768-6505

---------- Forwarded message ---------
From: <mark@moc-law.com>
Date: Mon, Dec 30, 2019 at 7:54 AM
Subject: RE: ORCP 31 (Interpleader)
To: Mark Peterson <mpeterso@lclark.edu>

Mark:

I remember the case, we had some internet fraud and a disabled person's account was used to deposit the money gained by the fraud.

Everyone agreed the money needed to go back from where it came.

However, the interpleader grants attorney fees to whomever interpleads the money into court. Why? We had to work around that big issue. There needs to be a means of "friendly" interpleader. We had to interplead it because the Federal Government claimed that the money was his and cut him off from receiving SSI. By court order we were able to interplead the money, hopefully to restore his SSI.

Additionally ORCP 31 B states "Any party or amount involved as to which the Plaintiff admits liability." Why is it limited to the plaintiff? In my case it was the defendant. Additionally at the end it says "Upon hearing, the court may order the plaintiff discharged from liability as to property deposited or secured before determining the rights of the claimants thereto."

It seems to me that instead of focusing on "Plaintiff" the focus should be upon the party depositing the money.

If there is an ongoing suit and plaintiff X sues Defendants Y and Z, and Y just wants to deposit the money and let X and Z fight it out, the way the rule is read, the procedure applies plaintiff's not defendants. We had to work through this with the Judge and the Judge just simply ignored the word plaintiff.

ORCP 31 A and B seem to presuppose Plaintiff, when it should be party neutral. That is my suggestion.

Mark O. Cottle - Attorney

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From: Mark Peterson <mpeterso@lclark.edu>
Sent: Friday, December 27, 2019 6:45 PM
To: mark@moc-law.com
Subject: ORCP 31 (Interpleader)

Mark,

Council on Court Procedures
January 11, 2020, Meeting
Appendix B-2

You responded to the Council on Court Procedures' biennial survey of the OSB in August. You indicated that ORCP 31 is confusing and could be improved. I left a voicemail for you on or about December 4 to follow up regarding your concerns relating to Rule 31. The Council works on a biennial schedule and it is now that suggestions for improvements to the ORCP are under consideration for referral to a committee for potential amendments. Can you provide any insight as to how Rule 31 is failing to serve litigants and lawyers or, more specifically, how the rule can be improved? The Council will next be meeting on January 11, 2020. I have been assigned to explore your concerns. In order to receive consideration this biennium, it is important that I hear from you prior to the January 11 meeting.

You may respond by email or, if a short conversation would be more effective, please call me on my cell phone (503-54407022) as the office telephone works primarily for leaving voicemails; as a small agency, office hours are limited.

Thanks,

Mark

--

Mark A. Peterson

Executive Director

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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.*] file and serve pleadings and motions. [*The*] **Except as otherwise prohibited by law, 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*] **that** time.

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Appendix C-1

ORS 12.190. Effect of Death

(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) **(a)** 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.

(b) Notwithstanding subparagraph (a), within 90 days after the action is commenced, a party may amend the pleading to substitute the personal representative as the real party in interest. That amendment shall relate back to the date of the original pleading.

[*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*.] **A party to any action who has a guardian or a conservator or who is an unemancipated minor shall appear in that action either through their guardian, through their conservator, or through a guardian ad litem, appointed by the court in which that action is brought, who has the authority to act on behalf of that party in that action and for the purposes of that litigation.** 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*] **an unemancipated** 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

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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 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person; or

B(4) when the defendant or respondent is a person who is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, 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, if the application is not so filed, upon application of any party other than the person.

C Discretionary appointment of guardian ad litem for a party with a disability. When a person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of seeking appointment of guardian ad litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor, is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is given pursuant to section E of this rule; however, the appointment shall be reviewed by the court if an objection is received as specified in subsection F(2) or F(3) of this rule.

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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

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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.

[*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*.] **A party to any action who has a guardian or a conservator or who is an unemancipated minor shall appear in that action either through their guardian, through their conservator, or through a guardian ad litem (competent adult who acts in the party's interests in the action and for the purposes of the litigation) appointed by the court in which that 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*] **an unemancipated** 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

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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 incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person; or

B(4) when the defendant or respondent is a person who is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, 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, if the application is not so filed, upon application of any party other than the person.

C Discretionary appointment of guardian ad litem for a party with a disability. When a person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of seeking appointment of guardian ad litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor, is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is given pursuant to section E of this rule; however, the appointment shall be reviewed by the court if an objection is received as specified in subsection F(2) or F(3) of this rule.

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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

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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.

[*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. 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*] **an unemancipated** 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

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incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person; or

B(4) when the defendant or respondent is a person who is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, 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, if the application is not so filed, upon application of any party other than the person.

C Discretionary appointment of guardian ad litem for a party with a disability. When a person with a disability, as defined in ORS 124.005, is a party to an action, the person may appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule upon motion and one or more supporting affidavits or declarations establishing that the appointment would assist the person in prosecuting or defending the action.

D Method of seeking appointment of guardian ad litem. A person seeking appointment of a guardian ad litem shall do so by filing a motion and seeking an order in the proceeding in which the guardian ad litem is sought. The motion shall be supported by one or more affidavits or declarations that contain facts sufficient to prove by a preponderance of the evidence that the party on whose behalf the motion is filed is a minor, is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, or is a person with a disability, as defined in ORS 124.005. The court may appoint a suitable person as a guardian ad litem before notice is given pursuant to section E of this rule; however, the appointment shall be reviewed by the court if an objection is received as specified in subsection F(2) or F(3) of this rule.

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.

Oregon Council on Court Procedure

Rule 32/Class Action Committee

January 9, 2020 – Meeting Report

Members Participating: Ken Crowley (Chair), Hon. Norm Hill , Hon. Doug Tookey, and Jennifer Gates. The meeting was held by phone conference, and began with a review of question presented at the last Council meeting.

As reflected in the minutes for the last Council meeting, the question was brought forward from the Department of Justice and arose out of a recent class action lawsuit involving the state.

Question presented: Under Rule 32 D, if a settlement is reached prior to class certification, it is still necessary to obtain court approval and notify the perspective class. This requirement can be a disincentive to early settlement. The federal rule once had similar language, but since 2003, it has no longer had the requirement. The committee has been charged with taking a look and whether a similar change to the ORCPs should be made.

Prior to the meeting, Jennifer Gates circulated some background materials, including an article discussing similar concerns about state rules of procedure in New York. Copy attached. The article identified additional concerns arise from the requirement for court approval and class notice prior to certification, including the fear that it would lead to further class action lawsuits, and result in a greater drain on judicial resources.

On the conference call, the committee members first reviewed the ORCP and similar FRCP, and discussed the question presented to the committee. Once the question had been explored, the committee reached consensus that we needed more info from members of the bar to know whether the concerned raised is an isolated issue or has broader implications.

The plan is to reach out to bar constituencies to find out if there are others who have been frustrated by the issue, and whether there is support for a change. We hope to report back on that at the next Council meeting.

Fox Rothschild LLP
ATTORNEYS AT LAW

Publications

Creating Complications: Notice Requirements for Resolving Putative Class Actions

ASSOCIATED PEOPLE

Glenn S. Grindlinger

February 23, 2018 – Articles
New York Law Journal
By Glenn S. Grindlinger

On Dec. 12, 2017, the New York Court of Appeals issued a seminal decision that will change the landscape of class action litigation. In *Desrosiers v. Perry Ellis Menswear*, Nos. 121 and 122, 2017 WL 6327106 (N.Y. Dec. 12, 2017,) the Court of Appeals held that under CPLR §908, upon the dismissal, discontinuance or settlement of any class or putative class action, notice must be given to class members in such manner as the court dictates. This means that even if a class is not certified, the parties must inform class or putative class members that the case has been resolved. Not only is this likely to confuse individuals who might not know about the litigation nor be bound by its results, but it also will allow unscrupulous plaintiffs' attorney to solicit potential clients and tax already precious judicial resources.

Background

Desrosiers arose from two separate cases concerning CPLR §908, which states that "[a] class action shall not be dismissed, discontinued or compromised without the approval of the court [and that] [n]otice of the proposed dismissal, discontinuance or compromise shall be given to all members of the class in such manner as the court directs." The main issue in both cases was whether CPLR §908 applies only to cases that have been certified as a class action or if it also applied to putative class actions where a court has not made the determination of whether the case is appropriate for class action status.

In the first case, *Desrosiers v. Perry Ellis Menswear*, plaintiff worked for defendant as an unpaid intern. See id. at *1. The plaintiff commenced a class action lawsuit against the defendant alleging that he and other similarly situated individuals were owed minimum wages. See id. One month after the case was filed, Perry Ellis sent an offer of compromise to plaintiff, which was accepted. See id. During the pendency of the case, plaintiff never moved to certify any proposed class. See id. A few months later, Perry Ellis moved to dismiss the complaint, which plaintiff did not oppose. Instead, plaintiff cross-moved to send notice to proposed class members about the case's resolution pursuant to CPLR 908. The Supreme Court dismissed the case and denied plaintiff's motion. See id. Plaintiff appealed to the Appellate Division.

Following its 1982 decision in *Avena v. Ford Motor Co.*,85 A.D.2d 149 (1st Dep't 1982), the First Department reversed. The First Department held in *Avena* that CPLR §908 requires notice to be given to class members when a class action is settled even if the class was never certified. See id. at 151. Accordingly, in *Desrosiers*, the First Department followed its prior holding in *Avena* and noted that CPLR §908 notice to putative class members is "particularly important under the present circumstances, where the limitations period could run on putative class members' cases

Securities made a settlement offer of plaintiff's individual claims, which plaintiff accepted. See id. Again, the defendant moved to dismiss the lawsuit and plaintiff cross-moved to send notice to putative class members under CPLR §908.

The Supreme Court granted both motions. See *Vasquez v. National Sec.*, 48 Misc.3d 597, 601, 9 N.Y.S.3d 836 (Sup. Ct., N.Y. Cty. 2015). National Securities appealed and the First Department, relying on its decision in *Avena*, upheld the Supreme Court's order. See *Vasquez v. National Sec.*, 139 A.D.3d 503 (1st Dep't 2016). The *Desrosiers* and *Vazquez* cases were then consolidated by the Court of Appeals for review.

The Court of Appeals' Decision

In *Desrosiers*, the Court of Appeals held that the notice provisions of CPLR §908 apply to both certified and putative class actions. See *Desrosiers*, 2017 WL 6327106, *2. In reaching this conclusion, the Court of Appeals relied on three arguments. First, the court held that the language of CPLR §908 was ambiguous as to whether it applied to putative class actions or only certified class actions. See id. However, the court noted that the language of CPLR §908 uses the term "class action" rather than "maintained as a class action," which is used elsewhere in CPLR article 9. See id. Furthermore, the legislature did not limit CPLR §908's notice provisions to only those individuals who are members of "a certified class" or "all members of the class who would be bound" by the resolution of the action. In addition, when the legislature enacted CPLR §908, various groups recommended that the notice provision of CPLR §908 apply only to certified class action, which the legislature appeared to have rejected. See id. at *2-*3. Thus, the court found that the legislature intended for CPLR §908 to apply to both certified and putative class actions.

Second, the court reviewed Federal Rule of Civil Procedure (FRCP) 23 upon which CPLR article 9 was modeled. See id. at *2-3. At the time CPLR §908 was enacted, FRCP 23(e) stated "[a] class action shall not be dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Former Fed. R. Civ. P. 23(e). According to the court, prior to the 2003 amendments to FRCP 23, the majority of Federal Courts of Appeals held that FRCP 23(e) applied to both putative class actions and certified class actions. See *Desrosiers*, 2017 WL 6327106, *3. Because the former FRCP 23(e) and CPLR §908 are virtually identical and a majority of courts held that the old version of FRCP 23(e) applied pre-certification, the court held that CPLR §908 also applies pre-certification. See id.

Third, the court relied on the First Department's decision in *Avena*. The court stated that *Avena* was the only appellate-level decision to address the issue of whether CPLR §908 applies pre-certification. See id. at *4. The court noted that *Avena* was issued 35 years ago and the legislature never amended CPLR §908 or otherwise expressed its disapproval of *Avena*, which "'is indicative that the legislative intent has been correctly ascertained.'" See id. (quoting *Matter of Knight-Ridder Broadcasting v. Greenberg*, 70 N.Y.2d 151, 157 (1987)). Accordingly, the court held that CPLR §908 applies to both putative and certified class actions cases.

Ramifications

Desrosiers will have far-reaching implications for New York class action litigation. Indeed, the ramifications are likely to be three-fold. First, New York is likely to see an increase in class action litigation filed in state court. *Desrosiers* provides an incentive for plaintiffs' attorneys to file their cases as class actions regardless of their merits. Upon resolution, plaintiffs' attorneys can move to send notice to the putative class, which, in effect, provides them with free advertising and court-endorsed solicitation. While ethical rules, cost of sending such notices, and the threat of sanctions may dissuade some members of the plaintiffs' bar from pursuing this route, certainly a subset of the plaintiff's bar will seek to expand their practices by filing such actions.

Second, *Desrosiers* will require greater judicial resources to administer CPLR §908's notice requirements. Prior to *Desrosiers*, courts only got involved in reviewing, approving, and endorsing notice to class members once a class was certified or settled on a class-wide basis. Now, courts

to the putative class under CPLR §908 look like? Defendants will likely want the notice to be short and contain limited information. On the other hand, plaintiff's counsel would want the notice to contain detailed information about the complaint's allegations in the hope that putative class members will contact counsel.

Further, there will be arguments over who is part of the putative class required to receive the notice. How does the court define a putative class member when the court has not certified a class? What information must be provided in the notice order? Who bears the costs of producing the class list, which in consumer class action may be very costly to create? The courts will have to get involved in such minutia further taxing already precious judicial resources.

Third, *Desrosiers* may make settlements of class actions more difficult. Indeed, under *Desrosiers*, notice must be sent upon the disposition of any putative class action. Therefore, defendants may want to wait until after the court rules on plaintiff's motion for class certification before engaging in settlement discussions. If the plaintiff loses the motion, the defendant knows that it can resolve the allegations without having to send notice. Further, if it settles or compromises the case before a determination of a class certification motion, the defendant will likely have to inform all putative class members about the settlement increasing the likelihood of copycat cases. Thus, there is an incentive for defendant to delay settlement negotiations until the court rules on plaintiff's class certification motion, which wastes resources of both the parties and the court.

Conclusion

Desrosiers is an important decision that will significantly impact class action litigators. Indeed, it might be years before attorneys are fully aware of all of the ramifications of *Desrosiers* and its requirement that parties send notice to putative class members whenever a putative class action is dismissed, discontinued or compromised. Nevertheless, unless the legislature amends CPLR §908 to conform to the current version of FRCP 23(e), it is almost certain that *Desrosiers* will increase the number of class actions filed in the New York State court system and will drain precious judicial resources.

Shari Nilsson <nilsson@lclark.edu>

ORCP 55 Question

1 message

Victoria Katz <victoria.katz@aderant.com> Thu, Jan 9, 2020 at 1:30 PM
To: "mpeterso@lclark.edu" <mpeterso@lclark.edu>, "nilsson@lclark.edu" <nilsson@lclark.edu>

Dear Mr. Peterson and Ms. Nilsson,

We are writing in the hopes you might be able to provide us some clarification regarding ORCP 55, as amended effective 1/1/20. Specifically, we are looking for information about ORCP 55C(3)(b) regarding the time permitted by subpoena for production of required document or things.

Prior to the 1/1/20 amendments, ORCP 55D(1) stated, "In addition, a subpoena shall not require production less than 14 days from the date of service upon the person required to produce and permit inspection, unless the court orders a shorter period." [Emphasis added.]

Following the 1/1/20 amendments, ORCP 55C(3)(b) says, "The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time." [Emphasis added.]

Although the 14-day time period is the same in the two rules, ORCP 55C(3)(b) does not set forth a triggering event for calculating this time period. Is the 14 days to be calculated from the date of service of the subpoena, as before, or perhaps from the date of receipt of the subpoena or the date of the subpoena itself?

Aderant CompuLaw is a software-based court rules publisher providing deadline information to many law firms practicing in the Oregon State Courts. Thus, we would greatly appreciate any information you are able to provide us regarding this matter.

Thank you in advance for your time and consideration.

Sincerely,

Victoria Katz
Senior Rules Attorney

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