MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 8, 2020, 9:30 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*
Jennifer Gates
Barry J. Goehler
Drake A. Hood
Meredith Holley
Hon. David E. Leith*
Hon. Thomas A. McHill*
Hon. Susie L. Norby*
Scott O'Donnell
Hon. Leslie Roberts
Tina Stupasky
Hon. Douglas L. Tookey*
Margurite Weeks
Hon. John A. Wolf*

Members Absent:

Hon. Norman R. Hill
Hon. Lynn R. Nakamoto
Shenoa L. Payne
Jeffrey S. Young

Guest:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

ORCP/Topics Discussed this Meeting	Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 4	Discovery	Discovery	ORCP 41		
ORCP 15	ORCP 7	ORCP 1	ORCP 43		
ORCP 23	ORCP 15	ORCP 4	ORCP 44		
ORCP 27	ORCP 23	ORCP 9	ORCP 45		
ORCP 32	ORCP 23/34C	ORCP 10	ORCP 46		
ORCP 55	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

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

II. Administrative Matters

A. Approval of January 11, 2020, Minutes

Ms. Gates asked if anyone had any corrections to the draft January 11, 2020, minutes (Appendix A). Ms. Nilsson explained that Judge McHill had e-mailed to let her know that he was, in fact, in attendance, although he was marked absent. Ms. Stupasky made a motion to amend the minutes to reflect Judge McHill's attendance and approve the minutes as amended. Mr. O'Donnell seconded the motion, which was approved unanimously by voice vote.

III. Old Business

A. Follow-Up on Suggestions from Survey

1. ORCP 4

Ms. Gates reminded the Council that it had received a comment regarding ORCP 4 G, which provides for personal jurisdiction over directors or officers of a domestic corporation where the lawsuit arises out of the conduct of such a defendant. Attorney Dallas DeLuca had asked why this cannot apply to members and partners in LLCs and partnerships. He thought that, even though there is a catch-all provision for personal jurisdiction in ORCP 4 L that would otherwise potentially rope those people in, it would be a good idea to add them to section G. Ms. Gates stated that she did a little research about whether courts have said that a partner or member is subject to personal jurisdiction, but she did not find an obvious answer. She asked whether the Council would like to set up a committee to look further into the issue.

Judge Peterson noted that Rule 4 is about personal jurisdiction. He stated that the Council had once amended Rule 4, only to have the Legislature later repeal that change as an overstep. He observed that the Council needs to be careful about this, because jurisdiction is a big deal. Ms. Gates noted that the Council has not changed this section since it was promulgated. Judge Roberts pointed out that personal jurisdiction has constitutional parameters too. For example, where the LLC, partnership, or corporation are different legal entities, it might well be beyond the constitutional reach to say that, because someone has a financial interest in an actor, and that actor acts, somehow the person who has the

financial interest is acting within that jurisdiction. Ms. Gates agreed, especially since some of those entities are set up purposely to provide protection from legal action. Judge Roberts stated that this type of situation may also involve people who are widely scattered and have never had any kind of interaction in Oregon.

Ms. Gates, Judge Peterson, Judge Roberts, and Mr. O'Donnell volunteered to form a committee if the Council agreed that one was warranted. Mr. Andersen suggested waiting for a tangible issue to come up before forming a committee. Mr. Goehler agreed. He stated that the fundamental question might be, if section L exists, why does the rule contain sections B through K; why not just have a personal jurisdiction rule that says that personal jurisdiction exists where it is consistent with the state and federal constitutions? Judge Peterson noted that having those sections does provide a convenient list for practitioners and, if practitioners had to go to section L every time, there would be more constitutional battles over jurisdiction. Mr. Goehler pointed out that the Constitution trumps ORCP 4 B through K, and one ultimately still must establish jurisdiction that is constitutional. He stated that this is a much bigger issue than adding a member of an LLC to the rule. Ms. Stupasky opined that section L takes care of the problem. Ms. Holley agreed that it should, and wondered whether anyone could think of a scenario where it would not. Judge Peterson stated that, if it were clear that LLCs and their members should be subject to jurisdiction under ORCP 4, practitioners might appreciate it being enumerated in Rule 4 as one of the items that is generally considered to pass a constitutional challenge. It is still rebuttable, of course. However, he agreed that section L is there so, unless it is truly obvious that partners and members should added under section G, it may be best to leave well enough alone.

Ms. Gates stated that it is not obvious because there do not appear to be any affirmative, direct statements by Oregon courts that members of an LLC or partners in a partnership are necessarily subject to personal jurisdiction without looking at an analysis of the specific facts of each case. Ms. Holley asked whether that makes it a substantive issue. Ms. Gates stated that she is wary of the proposal because it is not the Council's place to decide personal jurisdiction for a whole class.

The Council agreed not to form a committee. Ms. Gates stated that she would communicate to Mr. DeLuca that the issue may be substantive, and that it is better to have an actual fact situation to use in the analysis of whether a change is appropriate.

B. Committee Reports

1. ORCP 7

Ms. Weeks apologized for not having language ready for the Council, but she was called away to a family emergency. She stated that the committee is still in the drafting phase. She anticipates that the committee will meet shortly after this Council meeting and, by the next Council meeting, should have a full draft with language and forms embedded.

2. ORCP 15

Judge Peterson explained that, last biennium, he had put together a table of deadlines within the rules and that he was going to send that to the Rule 15 committee to be included in its report. He first wanted to review it and do a new layout, but ran out of time. The Rule 15 committee meeting was then cancelled, so the committee's final report will be delayed. The language that the Council agreed on at the last meeting, however, is available for the Council's review (Appendix B). He asked if anyone has any questions or concerns about that language.

Ms. Stupasky stated that the changes seemed to accurately set out what the Council intended. Ms. Gates agreed. Judge Peterson stated that he believes that the new draft accurately captured the Council's discussion. Judge Leith wondered about using the term "enlarge" instead of "extend" in terms of being accessible. Judge Peterson pointed out that "enlarge" is used in other places in the rules, as well as in the federal rules. In his mind, it is a bit old fashioned. Judge Leith stated that it is archaic, but agreed that it is at least understood by lawyers. Judge Peterson noted that it is not like the word "forthwith": most people can at least understand that "enlarge" means "make bigger." Mr. Andersen pointed out that the word "extend" seems linear and "enlarge" is global, so "extend" is the more appropriate word. Mr. Goehler noted that the next words would also need to be changed in that case, because you extend a deadline but you enlarge the amount of time allowed. He stated that he leans toward keeping the language consistent with what already exists. Judge Peterson stated that the committee can take a look and that he would look at the federal rules to refresh his recollection of how predominant the word "enlarge" is. Judge Roberts stated that there is a lot of case law about granting additional time, so there are many cases that use the term "enlarge" and construe it, so she would hate to wade in there. Ms. Stupasky stated that Judge Roberts had a really good point. Judge Peterson stated that, if the Council changes the term, it might lead people to believe that it had a wider implication than a mere language change.

Ms. Gates asked why the term "the time limited by the procedural rules" is used rather than “time provided by the procedural rules.” Judge Peterson noted that this is existing language. Ms. Gates stated that she has no strong feelings about it, but that it is an odd way of phrasing it. Judge Peterson stated that the committee will take a look at why this language exists. He observed that it does convey the idea of time limits. Ms. Holley suggested that it might refer to the statute of limitations and that a deadline is a limitation.

3. ORCP 23

Ms. Gates reported that the committee had met and had done a fair amount of work. She reminded the Council that the committee is looking at the issue of whether a defendant should be allowed to respond to an amended complaint with an answer that raises new defenses that are not triggered by the amendment and that could have been made in the original answer. She stated that Mr. Bundy had reached out to the Oregon Association of Defense Counsel (OADC) and that she had reached out to the Oregon Trial Lawyers Association (OTLA), as well as to a defense lawyer that one of the OTLA lawyers suggested she should contact.

Ms. Gates explained that OTLA practitioners generically feel that allowing defendants to raise new defenses unrelated to the amendment seems unfair, especially in cases of punitive damages or correcting economic damages, which frequently happens late in the trial process. One plaintiffs’ lawyer e-mailed a long description of what happened in a case where brand new defenses were raised, the plaintiff tried to keep those defenses out, but the judge said that, under Rule 23, the judge did not think the court had any discretion to limit the answer in any way. Mr. Bundy heard from OADC members who acknowledged that this happens, but wondered what standard the Council could you come up with that would allow a court to decipher whether something was truly new or was triggered by what was in the amended complaint.

Ms. Gates stated that the committee also acknowledges that this issue can and does happen and that there seems to be some unfairness. The committee wondered whether judges have the discretion to limit the answer and, if they do, whether they know they have that discretion. The committee wanted to check in with the Council about it. Ms. Gates stated that the committee did not get to the point of whether language should be proposed or whether it is a judicial education issue.

Judge Leith stated that the issue may be coming up on appeal after last week, because he ruled in a case in a manner that was contrary to what the Multnomah County Circuit Court judge did in the case that Ms. Gates mentioned. He stated

that the plaintiff gave advance notice that they would be amending economic damages to bring them up to date at the time of trial. There was no surprise in the interlineation of the damage amount and, when the plaintiff sought to make that interlineation, the defense said they wanted to add comparative fault as an affirmative defense. Judge Leith ruled that it was too late, that the proposed defense amendment was unrelated to the plaintiff's amendment, and that it was a prejudicial surprise. Judge Leith stated that he thinks that the current rule gives the court discretion to do what he did. He stated that he does not know if that is a controversial view. Mr. Hood stated that, in his view, interlineation is a different circumstance than when a new theory or a new allegation of fault is added. Judge Leith noted that the rule equates interlineation with any other form of amendment in Rule 23 D; they are all just amended complaints. Judge Roberts agreed.

Ms. Stupasky pointed out that plaintiffs often change economic damages because, as people continue to get treated during the lawsuit, it is necessary to clean up the pleadings. Judge Norby agreed that this is conforming to the proof. Ms. Stupasky stated that it is a huge problem to think that a judge would then let the defense open up a new, unrelated defense. Mr. Hood stated that an amendment can be done to conform the evidence as well. Ms. Stupasky stated that, if the plaintiff offers evidence that will require such an amendment, the defendant can object to the evidence or the amendment. Mr. O'Donnell stated that, if a defendant files an amended answer with a new comparative fault defense in response to a plaintiff's amended complaint to add more damages, the plaintiff can move to strike that defense. Ms. Gates stated that the committee agreed that this would generally be the process to follow. She stated that Judge Leith had considered that process and decided that the defense amendment had come too late in the game, but the Multnomah County judge said he did not have the authority to prohibit the amended answer. Mr. O'Donnell opined that, if the Council is going to start modifying rules because a judge made a ruling that may have been substantive or incorrect, it is commencing a troublesome journey. Ms. Gates agreed that this should be the Council's general operating principle.

Mr. O'Donnell stated that motions to amend to add significant damages sometimes can be objectionable if the case is close to trial but, for most personal injury defense attorneys, the idea of attempting to add a new defense that is unrelated to the reason that the complaint is being amended does not make sense. Mr. Crowley stated that a defense lawyer may discover new defenses as the case goes along but, the closer the trial is, adding those defenses is at that lawyer's peril. The judge will determine whether there is prejudice and the lawyer may not get to assert a valid defense because they waited too long. Ms. Stupasky asked whether the defense attorneys in the room are saying that the judge has

discretion to prohibit the defense from adding a new defense that is unrelated to the plaintiff's amendment. In the abstract, Mr. O'Donnell stated that he would agree, if there were a factual scenario where the only plaintiff's change is the amount of damages, adding a comparative fault defense with no other reasoning other than it is a response to the non-economic damages increase is objectionable. However, there could be a scenario where something has happened in discovery or information has come to light that was not otherwise available, so he hates to be categorical. Ms. Holley stated that Mr. O'Donnell's scenario goes to the merits of the defense, not to the issue of whether judges have discretion. Mr. O'Donnell stated that he assumes that judges do have discretion.

Mr. Goehler took the position that judges do not have the discretion to prohibit the answer, but stated that such a defense amendment is something that can be moved against. Case law going way back holds that, once the amended pleading has been filed, all prior pleadings are a nullity. So, the plaintiff is starting from scratch and the defense ought to be able to answer this brand new pleading in whatever form it chooses. Mr. Goehler emphasized that, even though just one number may have changed on it, it is still legally a new pleading. If the plaintiff feels that there is prejudice, the plaintiff can move against it. He stated that plaintiffs need to understand that amendments may open the door, and perhaps an amendment to make $100,000 into $110,000 might not be worth it because, if the defense wants to raise a new substantive defense, the plaintiff may have to file a motion to strike the new defense and the proximity to trial means it might get denied. Ms. Holley stated that this assumes that the judge would have discretion to consider a motion. Mr. Goehler stated that it would be after the answer is filed; not necessarily a motion to strike, but a motion to dismiss. Ms. Stupasky asked about a situation where a plaintiff moves to amend the complaint to reflect a new damage amount before the trial begins, and the defense has been admitting liability the whole time but now denies liability because they have the right to file a new answer. She asked whether the plaintiff can object to the defense filing a new answer at that point, or whether the judge has to allow the amended answer and plaintiff has to move to strike it. Mr. Goehler stated that there are other issues with that, including estoppel. Judge Peterson wondered how the judge would have the right to deny an amended answer, since an amended response may be filed as a matter of course.

Mr. Eiva stated that he believes that, any time a plaintiff moves to amend a complaint, they are asking for permission to change the issues before the court, and the court is granting leave to amend as requested. That leave to amend limits the answer, and the answer can be amended only in relation to the plaintiff's amendments. The court is exercising its discretion granting leave to file a particular amendment. Mr. Eiva stated that, every time the plaintiff moves to amend the

complaint, the court is not inviting the defense do whatever the heck they want. Ultimately, defendants and plaintiffs have exactly the same rights. Everyone can move to amend substantively what they are bringing into the case. Under *Franke v. ODFW*, 166 Or App 660, 669, 2 P3d 921 (2000), every time that happens, the court has the duty to grant that motion for leave to amend unless there is undue prejudice. The court is granting leave to amend related to a particular issue. Mr. Eiva opined that the answer cannot go outside of the amended part of the complaint; the idea that a small amendment right before trial can change every potential issue with regard to defenses is ridiculous. He stated that, if the Council needs to clarify this, it should. He noted that every party has the same authority to move to amend to change the substance of the claim or the defense and has the same standard before the court on whether leave to amend should be granted.

Mr. Bundy countered that Mr. Eiva's positions were directly contradictory; that the plaintiff has the right to do whatever they want with the complaint, but the defendant does not have the right to do so with the answer. Mr. Eiva disagreed. He stated that both the plaintiff and the defendant have the same authority: the motion for leave to amend. He noted that the defendant is free to respond as appropriate to the plaintiff's amendments. However, for the defendant to do something totally new without getting permission from anyone is a problem. Mr. Bundy pointed out that the defendant must preserve their record. Practically, a defendant does not go to the court and ask for permission to file an amended answer after the plaintiff files an amended pleading. The defendant files the amended answer and the plaintiff can object to it for whatever reason they want. Mr. Bundy stated that, under Rule 23 B, either party is allowed to amend during the trial at the court's discretion. Mr. Eiva asked what the procedure would be for a motion to strike an amended answer. He stated that the argument would have to come up beforehand if the decision is for leave to amend. He stated that the way to deal with this fairly, since each party has the same rights, is for each party to ask the court if they want to bring in a new issue.

Judge Norby stated that she feels like there is a fundamental difference between numbers and theory, with numbers being more associated with the prayer and theories being more associated with the whole structure of the questions that the facts will inform. She stated that it seems to her that a change in a number that everyone is accepting is just fundamentally different than changing the entire structure of the questions before the jury. Mr. Eiva agreed and stated that this is why a party asks the court for leave to amend, because the court is making a decision about what additional issues are going to be added to the case. Mr. Hood pointed out that even changing the numbers can be a huge substantive issue that can implicate things like coverage. His experience is that, when it comes close to the trial, the economic damages are typically going to be revised downward unless

someone wants to insert a claim like future incapacity. It is the non-economic damages that are potentially used as leverage to try to force settlement. Judge Norby stated that this is a question that would inform the decision on whether to change the numbers, but it is not whether numbers are tied to theories of law. Mr. Hood stated that this may be why the rules seem to allow an answer to an amended complaint.

Judge Peterson brought the issue back to procedures. He stated that there must be permission from the court to file an amendment. The previous pleading, by all of Oregon case history, is a nullity; it has been completely subsumed by the amended pleading. The defense has a right, as a matter of law, to file a response to that amended pleading, and should not have to ask permission to file a responsive pleading. Mr. Eiva agreed that the defense has a right to file a responsive pleading, but only to respond to the issues that changed. He stated that the defense would be undercutting what the court is doing when it allows an amended pleading on a topic area. Mr. O'Donnell stated that, procedurally, a plaintiff moves to amend the complaint and the judge cannot make an advisory ruling saying to the defense that they can only answer in a way that the judge believes is relevant. The court does not have that power. Mr. Eiva agreed. Mr. O'Donnell stated that, for example, if the defense files a new answer with a new comparative fault defense on the day before trial, the plaintiff can move to strike and remove that defense from the pleading. Mr. Eiva asked what grounds a plaintiff would have to strike. Mr. O'Donnell replied that the plaintiff could argue that it is not timely or that it is prejudicial.

Judge Roberts stated that she was not sure that she sees in the rules anywhere where a defense can be struck on the ground that it strikes the court as being too late. If there is no rule that says that a defendant must raise a defense any time sooner than the fact that the complaint is amended, she wondered how a judge would have the authority to say that they do not like that answer or that it interferes with the scheduling of the trial. She opined that nothing in the rules as they stand gives a judge that kind of discretion and that she could not recall seeing it happen in the last 13 years. She observed that changes to the numbers usually take place at the beginning or end of the trial and they typically have already been discussed by the parties. She has not seen anyone rush in at the last minute and say that they are going to raise a completely new case and, if they did, the answer is to send it back to the presiding judge to get a new trial date. She pointed out that trial dates are no more carved in stone than anything else.

Ms. Gates summarized that some non-judge Council members feel that this judicial discretion exists, and that two judge members of the Council hold different opinions; one believes that discretion is inherent and one does not. Judge Leith stated that it seemed to him that the argument is really over the form of the appropriate motion that the court should be considering to essentially limit the amended responsive pleading. He noted that there seemed to be general agreement that there would be defenses that would be too late and prejudicially surprising in an amendment and that there was some discretion of the court to supervise the scope of the amendment, whether by limiting the amendment itself or by responding to a motion to strike some part of the amended answer. He observed that, if that is what the disagreement is, the Council does not necessarily have an issue that requires it to make a decision, because the Court of Appeals can tell the Council what it determines the procedure to be. In his case, he just did not allow comparative fault to be added. If the Court of Appeals wants to say that what it really thinks happened is that the court struck the amendment, that will be instructive and the Council can take that and go forward with it. He felt there is nothing for the Council to worry about if the only question is what the correct form of the motion is.

Mr. Bundy suggested that perhaps the problem is not ORCP 23 but, rather, ORCP 21 E, which addresses motions to strike and what a judge can consider in striking an amendment. He stated that ORCP 23 says that a pleading may be amended by a party once as a matter of course before a responsive pleading is served. There is no limitation that says that a defendant can only amend the answer to respond particularly to the new allegations contained within the amended complaint. He disagreed with such an interpretation. However, throughout the last 25 years of practice, he has understood that he cannot substantively change his answer right before trial. He stated that he has amended an answer before trial pursuant to an amended complaint and the judge said in a motion in limine that it was too late to add a defense, with the caveat that, if the plaintiff went down that road during the trial, an amendment under Rule 23 B would be considered. He agreed with Judge Roberts that there is no right under Rule 21 to a motion to strike, so perhaps it is best to consider what can be done under Rule 21 in addressing an amended pleading that would be allowed at the prejudice of another party.

Judge Roberts pointed out that a party does not have to move to file an amended answer after an amended complaint has been filed. Under Rule 15 C, the party *must* respond to an amended pleading. There is not only a right, but an obligation, to file an amended answer. Since there is no requirement to move to file the amended answer, the court does not have the opportunity to condition the filing of the answer. The original pleading to which the defendant had already answered is wiped out; there is only an amended complaint, and the defendant has a right to

file an answer to a complaint.

Judge Peterson asked, if a plaintiff filed a late motion to amend the damages, could that plaintiff get leave as part of the plaintiff's motion for leave to amend to restrict the amended answer such that the new answer must be limited to new material in the complaint. As a judge, he would have to weigh whether to allow such a restriction. Part of his consideration would also include whether his decision would impact future cases. Judge Roberts stated that the parties would have to agree. She stated that no one has an inherent right to amend the complaint on the eve of trial. If they choose to do so, there are downsides to that choice.

Mr. O'Donnell cited Rule 21 E:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: . . . (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading.

He wondered why someone could not use the "irrelevant" portion of that section as a mechanism by which to strike a newly added defense. Judge Roberts countered that defenses are inherently relevant. Mr. O'Donnell opined that a comparative fault defense is irrelevant at some point in the case if the defendant has failed to raise it. Judge Peterson disagreed. Ms. Stupasky stated that Rule 21 E does not cover this problem as written. Mr. Goehler pointed out the 1946 Oregon Supreme Court case *Frangos v. Edmunds*, 179 Or 577, 173 P2d 596 (1946), which held that the court has the independent power to strike any portions of pleadings regardless of statute. Judge Roberts asked what the scope of that discretion is. She stated that a judge may have power, but that judge cannot use it arbitrarily. She wondered what the basis would be on which a judge could do that. Mr. Goehler stated that he was looking to the powers of equity. Judge Roberts pointed out that even equity is bound by the law. Mr. Goehler observed that, with an answer, there are also due process concerns like the opportunity to respond.

Ms. Holley asked for clarification about the fundamental issue: 1) whether defendants are able to include a new substantive defense in their answer that they would not otherwise be able to file on motion just because it is an amended answer to an amended complaint; or 2) whether defendants can file a substantive response that the plaintiff can then object to as if the defense was filing a motion

for leave to amend. Judge Roberts pointed out that, if a plaintiff is allowed to file an amended complaint, everything else disappears, so the amended complaint effectively becomes the first complaint. So, Ms. Holley's first question becomes whether a defendant can file an answer, which is a question that answers itself. Ms. Holley clarified her question: if the Council is talking about the discretion of the court to consider the new defenses raised, is it considering an amended responsive pleading differently than when a defendant, on their own motion, realizes there is new evidence and makes a motion to amend their original answer? Judge Roberts stated that the defendant filing its own motion is a different issue, and that the court can rule on that motion based on many things, including whether it happens right before trial. But she reiterated that there is not any motion the defendant has to file to allow them to respond to an amended complaint in the first place.

Ms. Holley asked whether, if the Council says that the defendant can only respond to the new issues raised in an amended complaint, the defendant then could file a motion to add the substantive issues. She wondered whether the Council is treating these as two different scenarios. Judge Roberts stated that they are two different scenarios. She wondered how it could even be determined what the new issues are, and opined that these situations do not happen often. She posited a situation where a plaintiff sues for $1,500 in damages but, a few days before trial, amends the complaint to increase the amount to $1 million. For some reason, the court allows it. Would anyone argue that the defense is not allowed to defend differently what is now a completely different lawsuit? How can one tell what are and are not the issues? She pointed out that the scenario involves just a change in dollars; more complex changes might make it even more difficult to determine the new issues.

Judge Leith stated that, in his case, the original claim was $80,000 economic and $150,000 non-economic damages, but the evidence was not going to support that level of economic damages, so the plaintiff was interlineating downward to $50,000 and $150,000. The plaintiff notified the defense well in advance that they were going to do that. Under Rule 23 D, interlineation is a brand new pleading, so the defense answered the amended complaint and added comparative fault as a defense. That seemed obviously wrong, so Judge Leith did not allow it. Judge Roberts stated that what seems obviously wrong is that the plaintiff bothered to amend their pleading. She wondered why anyone ever does that when they can simply tell the other side that they will only argue to the jury for $50,000. Ms. Stupasky explained that it has always been the practice to amend the complaint.

Ms. Gates stated that she does not read section D as saying that an interlineation is an amended complaint. She reads it as saying that an amended complaint is one

thing and an interlineation is another.

Ms. Holley asked, whether the plaintiff raises a new substantive issue by amendment or not, if the defendant gets to respond and raise all of the issues that they want, is the Council saying that the plaintiff is potentially prohibited from objecting to those new defense issues because the court does not have discretion to consider an objection? She asked why the court would not have discretion to consider an objection. Ms. Stupasky stated that this would be especially important if it is clearly unfair. Judge Roberts asked whether the objection would be merely that the defense is new. Ms. Holley stated that it could be any objection. Judge Roberts noted that this would be an objection to a motion to amend. She asked whether there is a rule that says a party can ask to strike something because they do not like it.

Mr. Andersen stated that he can think of four ways that the issue comes up: 1) a stipulated amendment; 2) a plaintiff moving to amend and the defense objecting; 3) the defendant moving to amend its answer without the plaintiff having changed its pleading at all; and 4) after the court grants to the plaintiff the right to amend, the defendant files an answer and the plaintiff moves to strike. He stated that he could not think of any rule the Council could craft that would address all four situations and empower a judge with discretion in those varied scenarios. He stated that he thinks that the behavior of the defendant in Judge Leith's example is wrong, but he does not know how to craft a rule that addresses it, other than to say that the Council should always look to conserve the resources of the court and of the attorney. To craft an amendment that requires parties to go through a separate motion procedure wastes the court's and the attorney's resources. He reiterated that he did not know of a way to craft a rule that addresses all four scenarios. Ms. Stupasky suggested that she could think of a way to craft such a rule.

Mr. Eiva stated that he did not know if the Council would ever be able to draft an amendment to fix this issue. He agreed with Judge Roberts' interpretation of the rule and observed that there is an advantage to the defendant to be used in the right case at the right time. He opined that it would be difficult to change such an advantage because of the makeup of the Council. At the same time, he thinks that a change could be made to Rule 23 A by simply adding language such as, "The defendants will then reply to the amended answer and the defense is allowed to address any changes in the pleading within the amended answer." He stated that this puts the onus on the defendant with regard to changing their answer at any time by just filing a motion for leave to amend the same way that a plaintiff has to in order to change any issues in the plaintiff's case. Ms. Gates asked whether Mr. Eiva meant to refer to the "amended complaint" rather than the "amended

answer.” Mr. Eiva stated that he meant to suggest that this should apply to all parties, perhaps with a sentence such as, "All parties on whom the amended pleading are served are entitled to file an amended answer that responds to the changes in the pleading." Mr. Andersen stated that, in that situation, if the defendant wanted to expand the answer, they could move to do so and that would get rid of the element of surprise. Mr. Eiva stated that new language could even say that, to the extent that the defendant wants to make an amendment to the answer, or even not to respond, the defendant must move for leave to amend.

Mr. Bundy stated Mr. Eiva’s solution seems unwieldy. He noted that parties would be arguing about whether the amendment relates to the other amendment. Mr. Eiva stated that the court would make a decision pretty quickly. Mr. Bundy pointed out that this would just put parties back in court arguing. He suggested that it would be easier to add “untimely” as a reason to strike under ORCP 21 E. This would give the court clear authority to rule on whether something is timely. He observed that, most of the time, the plaintiff and defense are not surprised by any amendments that occur. He stated that parties would have to have a pretty contentious relationship for the issue to even arise. He opined that the vehicle should be a Rule 21 motion to strike. Judge Roberts agreed that this could work.

Judge Leith suggested sending the issue back to the committee and including Mr. Bundy’s suggestion as part of the conversation. Mr. Goehler noted that the conversation had touched on interlineation. He stated that he reads the rule to say that interlineation is not an amended pleading, and it is only the filing of an amended pleading that triggers the right to respond under Rule 15. Judge Roberts disagreed and pointed out that Rule 23 D says that amendments, whether by interlineation or not, are amendments. Mr. Goehler stated that the filing of an amended pleading is what triggers the right and duty to file a responsive pleading. He would take the position that, in the case of interlineation, a defendant does not have a right to amend an answer. Judge Roberts disagreed. She pointed out the language in Rule 23 D: “When any pleading is amended before trial, mere clerical errors excepted, it shall be done by filing a new pleading, to be called the amended pleading, or by interlineation, deletion, or otherwise.” Mr. Shields stated that this language is confusing. Mr. Goehler suggested that the issue should be explored. He noted that the language talks about the filing of a new pleading, to be called the amended pleading, but then talks about something other than what is called an amended pleading. Then the language goes on to talk about “such amended pleading,” which seems to be referring to the whole section. If nothing else, the Council should look at this confusing language and how courts have interpreted that. Does an interlineation give a right to a response? Judge Peterson suggested that the Council could possibly re-craft section D because it says “such amended pleading shall be complete in itself,” which seems to really refer to

issuing a new document. Judge Roberts pointed out that the "such amended pleading" refers to the amendment no matter what method by which it is done.

Mr. O'Donnell raised one last issue: that of a plaintiff who wants to amend the economic damages down at trial. He opined that a judge clearly has the discretion to rule on that and that there is no right to any response or any amended answer at that time, since it is during trial. For example, the plaintiff moves at trial to conform to the evidence to reduce the amount of economic damages and the court grants the motion; this does not give the defense the right to now put on evidence of comparative fault. Judge Roberts stated that she was at a loss as to why anyone would amend their pleading in this manner during the trial when all they have to say is, "Don't give me that money."

Ms. Gates stated that the committee would discuss whether the issue should be addressed as better language in section D. She stated that the committee will also go back and think about the larger issue of judicial discretion regarding the content of an answer and whether that kind of defense can go forward.

4. ORCP 23 C/34

Mr. Anderson referred the Council to the committee's final report (Appendix C). He stated that the committee had nothing to add, and noted that the Council as a whole had arrived at the suggested statutory language for the Legislature. Judge Peterson apologized to Mr. Andersen and stated that he had intended to send some suggestions to him regarding the report, but had neglected to do so before the Council meeting. He suggested that, since this will not be a Council promulgation, the language of the report should reflect the problem not as a malpractice trap but, rather, as a poor policy that allows certain people who have been harmed by a tortfeasor to go penniless because of the untimely death of the tortfeasor, whereas, if the victim had learned at a different time that the tortfeasor had died, they would be able to recover. He stated that he is reluctant to put off finalizing the report again, but that he would rather change the slant to protecting victims rather than protecting lawyers. Mr. Anderson stated that he has no problem with that. Judge Peterson stated that he would send his suggestions to the committee.

5. ORCP 27/Guardians Ad Litem

Judge Peterson explained that the draft before the Council (Appendix D) incorporated the changes discussed at the last Council meeting. These changes make the rule more accurate, including adding the word "unemancipated" before "minor," and adding the term "guardian ad litem" to the first lead line. The first

sentence in section A was also rewritten and then re-drafted at the last Council meeting. The Council wanted to take a look at its final language one more time to make sure that it was correct.

Ms. Gates asked about the phrase “in the action and for the purposes of the litigation.” She wondered whether these two terms mean different things and stated that “for the purposes of the litigation” seems broader. Judge Norby stated that there are many circumstances in which a guardian would serve for the purposes of the litigation, but including “in the action” refers to a guardian ad litem, who can serve in that action only for purposes of the litigation. If it only said “for purposes of the litigation” it could encompass all sorts of guardians, such as probate and formal guardians, but the limitation “in the action” only applies to the guardian ad litem.

Judge Leith observed that he was not familiar with the substantive law regarding emancipated v. unemancipated minors. He asked whether it has been confirmed that an emancipated minor does not need a guardian ad litem. Mr. Goehler stated that this is correct, and that ORS 419B.552 allows emancipated minors to file lawsuits. Judge Leith asked, if the parenthetical is intended as an explanation or definition, whether the phrase could indicate that by using the words, “that is” to make it clear. Judge Peterson noted that the parenthetical is intended to be a description rather than a definition. Mr. Goehler suggested changing the language to, "in and for the purposes of the litigation." Judge Peterson suggested using the word “action” instead of “litigation,” because the guardian ad litem is appointed for a specific case. Ms. Nilsson noted that the language in the existing rule uses the word “action.” The Council agreed on, “(that is, a competent adult who acts in the party’s interests in and for the purposes of the action).” Ms. Nilsson stated that she would make the agreed-upon changes and bring a new draft for the Council’s review at the March meeting.

6. ORCP 31

Mr. Goehler stated that the committee has not yet met. He explained that Justice Nakamoto had circulated an article on attorney fees in interpleader cases that was a good resource on the federal rules. In the federal rules, attorney fees are based on equity and there is judicial discretion, as opposed to ORCP 31, where they are mandatory. He stated that the committee will also look at some of the policy pieces on that.

Mr. Goehler explained that a plaintiff files an interpleader action, but a defendant in any action can also file an interpleader action, and there is case law to back that up. He stated that he was misinterpreting that at the last Council meeting. He noted that one question is whether the Council wants to make that crystal clear in the rule. Another question regards dismissal. The rule provides for a plaintiff to be dismissed in an interpleader action, but there is case law where a defendant was dismissed, even though that is not provided by rule. The last question regards fees. The rule provides that the party filing suit or action in interpleader shall be awarded fees but, in the case of another type of action where there is a claim for interpleader, is there some entitlement for fees and, if not, should there be? The committee needs to look into whether that change would be substantive, and whether it would be creating a whole new attorney fee requirement.

Mr. Goehler stated that the committee will report back to the Council at the next meeting.

7. ORCP 32

Mr. O'Donnell reminded the Council that it had a fairly lengthy discussion regarding Rule 32 at the last Council meeting. When settlements are proposed in class action lawsuits and the class has not yet been certified, under the Oregon rules, notification of the class is required, which is potentially expensive and an impediment to efficient settlement. The issue was raised by the Department of Justice. The idea was to reach out to the bar for more opinions. He was going to inquire more with the Department of Justice and Ms. Gates was going to reach out to the plaintiffs' bar.

Ms. Gates stated that she had contacted attorneys at Stoll Berne, widely considered to be the premiere class action firm in Oregon. Those attorneys thought that this issue does not come up very often, at least not in their practice. They also did not think that any plaintiffs' lawyer would risk his or her reputation by of selling out the rest of the class and secretly settling with the named representative. Their opinion was that a change is not needed. They did not necessarily think leaving the issue to the discretion fo the judge would be a problem either. Ms. Gates stated that she had also reached out to attorney John Dunbar, former head of the special litigation unit at the Department of Justice. He stated that he did not have the experience of this issue coming up and preventing a settlement when he was there. He also did not think having discretion rest with the court was a problem. She stated that the general opinion of members of the Oregon Trial Lawyers Association was that, if there is a right to notice, maybe the Council should not take that away without better justification.

Mr. Crowley explained that the committee had also reviewed a New York law review article that addressed a similar question. New York has many class action lawsuits, its rule is similar to Oregon's in the notice respect, and New York also has similar concerns. The question originally presented by the person who made the suggestion was whether the Oregon rule should look more like the federal rule, which does not include the requirement to notify the class about settlement until the class has been certified. The committee discussed the question of whether potential class members have due process rights. When we are talking about a complaint having been filed which is reportedly intended to be a class action but the class has not been certified, does that give potential class members due process rights?

Mr. Crowley stated that the question before the Council is whether the committee needs to go further. He stated that his feeling is that he doubts that the committee will find that this is a big issue. He noted that it came up in this one instance and was a concern for those dealing with it, but that it does not seem to be a widespread issue. Ms. Gates pointed out that, as opposed to other outreach she has done as a member of the Council, no one on either side seemed to have any passion to bring to the possibility of a change. Mr. Crowley observed that this issue may be more likely to come up in class actions involving employees and consumers. Even so, at least in his office, they are not seeing a lot of those issues. Ms. Gates stated that the committee did not come to a formal conclusion, but they will likely coalesce around doing nothing. She asked whether any Council members felt differently.

Judge Peterson stated that the Council relying on an attorney wanting to keep his or her good reputation is not the strongest reason not to make a change in the rule. With regard to the rights of a putative class, right now they are not plaintiffs. In every practical sense, they have no idea that they are potential plaintiffs, and they are not bound by a potential settlement, so he is not sure what rights they might have. Certainly, a judge could exercise judicial discretion to try to do something about the potential class members, but the potential expense of notifying people because it is required by the rule could dampen some settlements that could and should be done. Ms. Holley stated that, as a practical matter, if she were filing on behalf of a plaintiff who has their own rights, she would not make a motion to certify a class until there is some reason to do that. She stated that she was perhaps not understanding the problem.

Mr. Crowley observed that there are two types of potential class actions. The first is cases filed by lawyers who know what they are doing in class action situations. These are fairly serious matters and, when they are filed, the lawyers know that there is a potential class out there that will need to be notified. The second is cases

that should not have been filed as class actions in the first place, and those are the ones that should be resolved efficiently in the beginning, without having to notify anyone. Judge Roberts pointed out that some of those cases should not have been filed as class actions because the class is so impossible to determine, so it would be nearly impossible to notify that amorphous group of people. She noted that those people are not going to be bound by the settlement anyway, so they do not have an interest in being notified. Ms. Gates stated that their interest might be simply becoming aware that they have a potential claim.

Mr. Crowley stated that he is not sure that it is a big problem. He recommended disbanding the committee and taking no further action. The Council agreed.

8. ORCP 55

Mr. O'Donnell reported that the committee had met and discussed a few issues. One was Judge Marilyn Litzenberger's issue about non-represented individuals who get served with a trial or deposition subpoena and not having information about what to do, but wanting to do the right thing and let the court know that they cannot appear. The concern is that these non-parties may not have enough information or understanding based on the current rule to make an appropriate decision. Mr. O'Donnell explained that, in his experience, the thought has always been that the issuing party has an obligation to work with the witness, advise the trial judge about any issues, and figure out a way to deal with it. He admitted, however, that sometimes that does not happen. He stated that he had someone in his office look at other states to see what information is provided to witnesses. Utah has a detailed informational statement given to witnesses that specifically details their rights, including the right to move to quash. Most other states simply have a compilation of what the rule says or a reference to the rule. He stated that he is not sure how helpful that is, but at least it is something. The committee is still in the discussion phase, but is leaning toward making a suggestion to the courts about including form language in subpoenas that would provide some guidance, rather than a rule change.

Mr. O'Donnell explained that the committee had also talked about an issue that Judge Peterson had raised regarding the potential for a stipulation among parties agreeing that a client will be available at trial without the need for a subpoena. Judge Peterson stated that Illinois has a procedure for this. He noted that, occasionally, you are expecting the other side to be there and you want to call them as an adverse witness. In Oregon, you have to subpoena them. In small or contentious cases, you have to pay the person who is the adverse party the witness fee and find them for service of a subpoena. In a normal universe, you would call the opposing attorney and ask for a stipulation, but it seems that we

should be able to serve the subpoena in the ORCP 9 sense without a witness fee. He stated that it seems odd that there is someone who has wronged you and is evading service, but you have to find them, serve them, and pay them a fee. Judge Roberts observed that this would be a procedure like noticing the adverse party to trial, like to a deposition. Mr. Goehler stated that this is the practice in Washington state: serving a notice of trial appearance on the attorney. He opined that the Council could add a notice procedure, since that is purely procedural.

Mr. Hood noted that sometimes, in automobile defense cases, the defense attorney cannot find their own client. Judge Peterson noted that the plaintiff would have the benefit of saying they noticed the defendant to be there, they were not there, and therefore anything the plaintiff would be asking them should be construed against them. Mr. Goehler suggested filing an objection if you get a notice to appear for a client who is missing in action, and that would usually be done informally. Mr. Hood observed that it is usually to the plaintiff's advantage if the defendant is not there.

Mr. O'Donnell stated that the committee would meet again to look further into these issues.

9. ORCP 57

Ms. Holley reported that the committee is drafting language for a proposed amendment, but they are not quite ready to present it to the Council. Judge Wolf proposed language, Ms. Holley made suggestions to conform more with Oregon's rule because *State v. Curry*, 298 Or App 377 (2019) is specifically addressed to the race issue but Oregon's rule also deals with issues of sex. Ms. Holley noted that Justice Nakamoto had asked the committee to hold off because she wanted to propose alternative language that is more in line with Washington's rule but that does not get into the specifics in quite the same way. The committee hopes to have draft language available at the next Council meeting.

Ms. Holley pointed out that Justice Nakamoto had said that this amendment is very important and has potential ramifications and, if it is done incorrectly, could make the situation worse. She suggested that it might be better to be thoughtful rather than hasty. Judge Peterson observed that, given that the Court of Appeals seemed to use the *Curry* opinion to ask the Council to make a change, he would prefer to both make the amendment in this biennium and do it thoughtfully and correctly. Ms. Holley stated that this is the committee's hope, and there has not been a lot of contention in the committee. She felt that it is possible.

IV. New Business

No new business was raised.

V. Adjournment

Judge Peterson reminded the Council that there are four meetings remaining until the Council takes a brief hiatus in July and August of 2020. He suggested that each committee chair call a meeting within a week of this Council meeting so that any proposals for rule amendments can be submitted to Ms. Nilsson in a timely manner so that she can put them into Council format.

Ms. Gates adjourned the meeting at 11:19 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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. 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
Hon. Thomas A. McHill
Margurite Weeks

Guest:

Matt Shields, Oregon State Bar

Council Staff:

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

*Appeared by teleconference

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

I. Call to Order

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

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 time*] **the time limited by the procedural rules**.

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FINAL REPORT ON ORCP 23 AND 34

During meetings of the Council of Court Procedures in March 2018, in November and December 2019, and in January 2020, the Council addressed the malpractice trap that occurs when a defendant dies within the statute of limitations but the plaintiff is unaware of the death until after the statute has passed. The discovery of death usually occurs during the 60 day period allowed for service of summons under ORS 12.020 (2).

There is no reasonable way for a plaintiff to avoid this trap, except by filing and attempting to serve well before the statute of limitations. This is not always an option, since sometimes plaintiffs come to an attorney just before the expiration of the statute and many attorneys do not know of the trap until they are caught in it.

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

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

When this Council first studied this problem in March 2018, we examined ORCP 23 (dealing with amended pleadings) and ORCP 34 (dealing with substitution of parties) as possible ways to fix this problem, but concluded that intended changes

in these Rules would substantively change the law, which would be beyond the powers of the Council. We thus agree to recommend a statutory change to the Legislature.

After many drafts of potential ways to solve the problem legislatively, the Council recommends the following change to ORS 12.190:

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

(2) **(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) 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.

The Council recommends this statutory change as the least cumbersome and most effective way to eliminate a hidden and sometimes unavoidable malpractice trap.

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[*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*.] **In any action, a party 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

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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.