MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, March 14, 2020, 9:30 a.m.
Lewis & Clark Law School, 10015 SW Terwilliger Blvd., Portland, Oregon

ATTENDANCE

Members Attending in Person:

Jennifer Gates
Barry J. Goehler
Scott O'Donnell
Hon. Leslie Roberts

Members Attending by Teleconference or Video Conference:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Kenneth C. Crowley
Hon. Norman R. Hill
Meredith Holley
Hon. Thomas A. McHill
Hon. Susie L. Norby
Shenoa L. Payne
Tina Stupasky
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Travis Eiva
Hon. R. Curtis Conover
Drake A. Hood
Hon. David E. Leith
Hon. Lynn R. Nakamoto

Guest (By Conference):

Matt Shields, Oregon State Bar

Council Staff (In Person):

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

ORCP/Topics Discussed this Meeting	Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7	Discovery	Discovery	ORCP 41		
ORCP 21	ORCP 7	ORCP 1	ORCP 43		
ORCP 23	ORCP 15	ORCP 4	ORCP 44		
ORCP 23/34	ORCP 21/23	ORCP 9	ORCP 45		
ORCP 27	ORCP 23/34C	ORCP 10	ORCP 46		
ORCP 31	ORCP 27/GAL	ORCP 17	ORCP 47		
ORCP 55	ORCP 31	ORCP 22	ORCP 54		
ORCP 57	ORCP 55	ORCP 32	ORCP 62		
	ORCP 57	ORCP 36	ORCP 69		
		ORCP 39	ORCP 79		

I. Call to Order (Ms. Gates)

Ms. Gates called the meeting to order at 9:34 a.m. She thanked Council members for their flexibility with the change of the meeting to a largely virtual format in response to the COVID-19 pandemic and thanked those who had chosen to attend in person at the new location at Lewis and Clark Law School.

II. Administrative Matters

A. Approval of February 8, 2020, Minutes (Ms. Gates)

Ms. Gates asked if any Council members had suggestions for corrections or changes to the draft February 8, 2020, minutes (Appendix A). Hearing none, she asked for a motion to approve the minutes. Mr. O'Donnell made a motion to approve the draft minutes. Ms. Gates seconded the motion, which was approved with no objections.

III. Old Business

A. Committee Reports

1. ORCP 7

Ms. Weeks explained that the committee was submitting a draft amendment (Appendix B) with an expanded section H that adds a waiver of service provision that the Council had previously discussed. She stated that the committee had originally contemplated expanding the time for response by 15 days to keep within the current court schedule, but Mr. Young had let the committee know that the defense bar would likely be a little more receptive to 60 days, which is the timeline in the federal rule. However, the committee wanted to leave that open to discussion by the Council rather than come to a conclusion on its own. Ms. Weeks explained that the majority of the changes made to Rule 7 were in section H.

Ms. Payne asked whether there had been complaints from the bar that provoked this amendment. Ms. Weeks explained that she and several others on the Council seemed interested in adding this to Oregon's rule, similar to Federal Rule of Civil Procedure (FRCP) 4. In the practice in which she works, they frequently have a hard time serving defendants, particularly single-member LLCs, who often avoid service, and this drives up the cost of service for plaintiffs. Judge Peterson reminded the Council that the suggestion for this change had come to the Council in the biennial survey sent out to the bench and bar. He suggested that it might be popular with the domestic relations bar. Mr. Young stated that the committee had solicited input from various stakeholders, including the family law section.

Surprisingly, the feedback was more against this kind of change to the rule than in favor of it. The concern was the large number of litigants of modest means who file family law cases, because those litigants might not understand their role or their various responsibilities. Many times they will get service paperwork, a summons or petition, and it just adds one more thing to the stack that they will ignore or not know that they need to respond to. However, this new piece of paper carries the risk of exposure to attorney fees and costs of service.

Judge Peterson stated that this was a little surprising to him, as he assumed that the part of the family law bar that spends a lot of time chasing respondents would appreciate such a change. Mr. Anderson noted that, whether there is a rule change or not, any attorney representing a plaintiff can reach out to the defense and ask if they will accept service of summons. In medical malpractice cases, the defense will frequently accept service of summons because they do not want a process server going to the doctor's office. He noted that the option is available whether or not the Council adopts a rule to cover it. Mr. Goehler pointed out that the amendment would basically give an incentive plus penalties. His concern with penalties is that the request would go to a defendant but, in the insurance defense world, the individual defendant may or may not pass along that information to the insurance carrier. He stated that, if there are going to be penalties, he would suggest including a provision that, if the insurance company is known, they should get a copy of the request, similar to what is currently in ORS 20.080.

Judge Roberts suggested changing the word "must" to "may" in subsection H(2), to make it a little more flexible in the case of self-represented litigants who do not know what the implications are. Ms. Gates stated that she had the same comment and questions: whether the committee discussed what constitutes good cause, whether self-represented parties' ignorance would be good cause, and if the court could have flexibility instead of making the award mandatory. Judge Peterson stated that he has no objection to making it discretionary with the court, but he noted that the cost of service is a relatively small penalty and, if the respondent or defendant does not show up, the attorney fees for seeking that cost would be relatively minor. He stated that the "stick" in this case does not seem particularly onerous. In automobile cases, under Rule 7 D (4), if the insurance company is known, you have to serve the insurance company a copy. So, it is possible to include that kind of language here as well.

Mr. Crowley stated that, from the defense and Department of Justice perspective, they commonly will waive service. He stated that, if the Council wants to codify that in the rules, it would be nice if the rule were consistent with the federal rule and included the 60-day piece because that makes sense. He noted that the DOJ has been following the federal rule for a long time, and consistency would be nice.

Mr. Young stated that it is interesting that Mr. Crowley feels that way. He noted that the committee relied heavily on FRCP 4, and it appears that public bodies and agencies are specifically exempt from the waiver of service provision in that rule. He stated that he had made some changes to the initial draft of the amendment to Rule 7 that adopted the same mind set that public bodies are exempt from section H. Rule 7 also includes provisions for service in ships for maritime cases, and the amendment exempts those as well, because he believes that there is some common law provision that would relate to attachment of a vessel in maritime cases and things of that nature.

Judge Peterson pointed out that Rule 7 has provisions for service on minors and incompetent persons, and those are left out of the draft amendment. He noted that tenants of mail agents are included, which is kind of an attenuated thing, and he was not sure whether that fits, although one would assume that the agent will eventually pass on the documents to the defendant. Mr. Young explained that the purpose of omitting minors and incapacitated persons is that they would presumably not have the capacity to determine whether or not they can waive. He stated that it is not really a proper waiver if they do not have the mental capacity, for whatever reason, to sign and return the document. He stated that tenants of mail agents were intended to be omitted from the waiver of service rules, so leaving that in was probably inadvertent. Judge Peterson wondered whether FRCP 4's exemption for governmental defendants is a product of federalism or a cogent policy. He stated that it seems to him that many governmental defendants would be able to find someone to read the rule and respond appropriately, and he is not sure why they are excluded. Judge Norby stated that her thought is that this may be for smaller governmental agencies, because larger ones are not going to be a problem for the reasons that Mr. Crowley mentioned. One reason is that it can become more difficult for some municipal entities and those that do not have attorneys on staff.

Mr. Young stated that he had thought about including public bodies and public defendants, but that it makes sense to him to omit them because a lot of them have identified specific people who are authorized to be served or to accept service on behalf of the public body. However, he is open to discussion on the matter. Mr. Andersen stated that he tends to defer to the federal committee who presumably studied the issue and found a principled reason to omit public bodies. He stated that he would be reluctant to depart from that and that, on balance, the federal rule is a good rule that Oregon should adopt.

Judge Peterson asked about the proposed language in the new Duty to Avoid Unnecessary Expenses of Serving a Summons. He noted that the language has largely been taken from FRCP 4, but wondered why the penalty of paying the expenses of service is limited to defendants who fail to return a signed waiver of service requested by a plaintiff located in Oregon. Mr. Andersen and Ms. Stupasky stated that they think that it should not be limited to plaintiffs located in Oregon. Mr. Young asked whether Judge Peterson was suggesting deleting the language "located in Oregon." Judge Peterson stated that this is the idea, because he could not think of a good policy reason to give an out-of-state litigant less favorable terms if they want to pay filing fees and litigate here. Mr. Young agreed that this makes sense.

Judge Peterson noted that the entire waiver section seems a little disjointed because the rule tells all of the particulars and the notice forms kind of rehash that. He suggested that paragraph H(1)(c) could read, "a waiver in substantially the form specified in paragraph H(1)(g) of this rule" and then putting the entire form there rather than breaking the form into three parts. He suggested putting the notice of lawsuit and request for waiver at the top of the form, the waiver of service of summons in the middle of the form, and the duty to avoid unnecessary expenses at the end of the form. This way, there would be one document that explains what is needed, what to fill out, and the warning language.

Ms. Gates agreed that this is a good idea, since she missed those items the first time she read through it. Judge Roberts agreed that it is a good idea and wanted to particularly suggest the word "substantially," since she did not want to get into litigation about a minor variation in the notice or the waiver. Judge Peterson stated that this is a new animal. He noted that section G would help eliminate a lot of minor errors, but agreed that the word "substantially" is also a good idea. Judge Roberts pointed out that section G only refers to errors in the form of the summons, but not to the request for waiver. Judge Peterson noted that the Council would have to amend section G to fix it, but the word "substantially" does it here.

Mr. Young noted that one other point of discussion within the committee was whether to provide the defendant who agrees to sign the waiver of service 45 days, which was initially discussed, versus 60 days, which is provided in the federal rule and in various states that have an analogous rule that is modeled on the federal rule. If the Oregon rule were to give the defendant 45 days rather than 60, would that have an impact on the court calendar, given the edict from the Oregon Supreme Court that we shall endeavor to timely resolve disputes and litigation? He stated that, as a defense attorney, his concern is that giving 45 days instead of 60 days is not much of an incentive. Frankly, he would rather just reach out to the

plaintiff's lawyer and let them know they do not need to serve his client. His sense is that the waiver of service would not be used much. Judge Hill asked whether anyone has reached out to the Oregon Judicial Department to find out how such a change would affect their business processes as they move cases through with Uniform Trial Court Rule (UTCR) 7 notices. He remarked that the rule change would result in two different standards and that the court would not know if they have 60 days to respond, or less time. He stated that he would foresee a huge hassle for court staff in dealing with the many unrepresented litigants, and a further layer of complexity.

Judge Peterson noted that UTCR 7.020 talks about the timelines, and that he believes that the 60 days would still be well within the timeline of being threatened with dismissal for failure to prosecute. Judge Roberts stated that, if a plaintiff receives a notice of pending dismissal, they would ask for an extension of the UTCR 7.020 deadline and explain what they are doing. Judge Wolf stated that he believes that the first notice goes out on day 63 after filing, so it could be fairly close if the plaintiff does not serve promptly. However, they can easily submit a motion to the court that says that they are seeking a waiver of service and that they anticipate that the defendant will file their answer in the next few days and they should be fine.

Ms. Payne asked whether it would affect the 45-day rule for serving requests for production of documents. Judge Peterson stated that it would, and that the Council might have to amend Rule 45. Normally notice of the complaint would get served with the summons. This is an alternative way, and the complaint is delivered along with the waiver, so presumably you have notice of the complaint. Ms. Payne stated that it seems to her that there is other motivation to accept service besides just getting extra time. One motivation is that your client is not getting served with a summons, and it seems that this is why defendants have accepted service absent the existence of this rule in the past, as Mr. Andersen was saying earlier. She stated that, if the Council needs to do a 45-day timeline just to make the other rules work, there will still be other incentives. Ms. Gates stated that she understands that it is a slightly better incentive to choose 60 days but, if a lot of people are going to accept service by a phone call regardless and will not even use this process, 45 days versus 60 days would not even matter.

Mr. Goehler stated that penalty avoidance would be his motivation to accept service. He noted that a request for admissions is sometimes served along with a complaint, with 45 days to file the response to the request for admissions, which could be the first document filed by the defendant. He stated that his goal would be to get an answer filed before that response is due in order to raise any defenses. With 60 days to file an answer, but also a request for admissions

requiring a response within 45 days, the defendant would effectively have to file an answer in 45 days. He stated that this is a wrinkle that needs to get ironed out.

Mr. Young stated that one of his concerns with a shorter time frame is that there are situations where clients are difficult to locate. A 60-day time frame can run very quickly in those cases where, once the attorney is retained, they must locate the client, evaluate the claim, contact the client, and get authorization to accept service. He stated that, many times, plaintiffs' lawyers will have had the case for quite some time before they actually file the complaint. So, the difference between 45 and 60 days does not sound like that much of a difference to him. UTCR 7.020 already has procedural mechanisms in place to move cases along, such as the 28-day notice. So, he does not see that there is much impact with a 60-day timeline.

Ms. Stupasky suggested that, if a lawyer is running up against that issue, the answer is to not return the acceptance of service. She stated that a 60-day time frame would mean that a plaintiff would already be two months into having filed the lawsuit. Adding that 60 days to the 30 days afforded defendants in Rule 7, plus Rule 68's additional 10 days' notice that the plaintiff is going to take a default, plus factoring in getting depositions scheduled some time before trial, means that plaintiffs have less and less time to try to get onto defense counsels' already extraordinarily heavy calendars and get pre-trial matters finished in a timely manner. She stated that her concern is that more and more time just keeps getting added before the cases really get into litigation, and this is time that plaintiffs' lawyers no longer have. She advocated for a 45-day time frame. Ms. Gates stated that it seems to be the idea that, to add a waiver provision, the burden must be on the plaintiff to have another process to inform the court why the plaintiff is up against the 60-day time limit. She suggested that this defeats some of the efficiencies of having a waiver of service of provision in the first place. She stated that she would be more in favor of 45 days.

Judge Peterson stated that it seems to him that plaintiffs would want to know relatively early if they need to start sending a process server out. The draft amendment seems to allow the defendant to drag things out while the plaintiff is waiting and, if the defendant does not respond within 28 or 35 days (he suggested multiples of 7 days in keeping with the other timelines in the ORCP), the filing of the waiver would be too late because, at that point, the plaintiff may have spent the money to hire a process server and start looking for the defendant. He stated that it seems that the plaintiff would want to know relatively soon if the defendant is going to accept service or not, because the plaintiff could still have the problem of finding and serving the defendant. The plaintiff would like to be able to make that decision relatively early and not allow the defendant to delay signing the

waiver and cause the plaintiff to incur service costs while still wondering whether the defendant was going to accept service or not.

Mr. Andersen stated that the problem is even worse than Judge Peterson described because of Oregon's unique 60-day relation back statute [ORS 12.020(2)] for service of summons. He stated that the practice in his office is to not wait at all when they file a case but, rather, to begin service right away because there may be a defendant who has moved or is otherwise difficult to locate. He pointed out that it is very easy for those 60 days to go by. From a practical viewpoint, to request that a defendant accept service, he does not see anything in the proposal that says how long a plaintiff has to wait for the defendant to decide whether or not they will accept service. As a practical matter, he would not give the defendant more than a week before initiating service of the summons to be sure that it gets done. Ms. Stupasky stated that the 30-day time period is located in the waiver of the service of summons form as opposed to the actual rule. She opined that it would need to be in the actual rule. Judge Peterson agreed.

Judge Wolf pointed out that using the waiver is not mandatory but, rather, is an option. He stated that a plaintiff can just skip making the request and go ahead and get the defendant served. Judge Roberts noted that, if a plaintiff is up against the statute of limitations, they probably should not fuss around. Mr. Andersen stated that there is something to be said for systems. He opined that an attorney wants one system and no variation regardless of when the case is filed. It is important to have the same system so that there are no system errors caused by variations.

Judge Peterson noted another change in the draft amendment that had been requested by a process server in the Council's biennial survey. The change is to paragraph D(3)(h) regarding public bodies, and includes the following new language: "or by personal service upon any clerk on duty within the offices of an officer, director, managing agent, or attorney thereof." He originally had the impression that this was to make a change to an amendment that the Council had made a few years ago, but it appeared that this part of the rule had not been amended after the 1980s. He pointed out that Oregon has many different kinds of public bodies, some very large and some as small as a vector control district in Klamath County. The process server who made the suggestion seemed to suggest that the current requirement was not a big deal; he just wondered why they could not serve a clerk on duty. Judge Roberts suggested that the amendment seems to go much further than personal service on any clerk on duty in the offices of an officer, director, managing agent, or attorney. She stated that it would seem to suggest that, in a special service district where the directors do not work at the agency but, rather, are private citizens or volunteers, a dentist's personal office

receptionist could be served, which is crazy. Mr. Crowley agreed that such a change to the way the state is served to any clerk would be huge and would feel an awful lot like a substantive change. Judge Peterson noted that the state is covered in a separate section of the rule, but this section would cover the counties and cities, where there are probably a lot of clerks.

Mr. O'Donnell stated that his practice is almost exclusively medical malpractice and he does not know much about service rules, but he is concerned about unintended consequences with the emphasis on speedy trials, and that there may be issues that the Council has not fully thought out that may have unintended consequences.

Ms. Gates asked whether "clerk" is a known or defined term. Judge Peterson stated that the Council had previously made a change to corporate service because the term was unclear. He recalled that the suggestion for a change to paragraph D(3)(h) was from a process server who is not a lawyer, and that it was a somewhat tepid suggestion to make process servers' lives easier.

Ms. Gates stated that the committee has a lot of suggestions to consider and asked them to report back at the next Council meeting.

2. ORCP 15

Ms. Payne stated that the committee was proposing the same amendment as last month, but wanted to take an extra look at the proposal. The committee looked at the history of the rule to make sure that there were no concerns about the impact of the proposed rule. The consensus was that the proposal would clarify the rule and not make changes. The committee believes that the proposal is ready to be moved to the September publication docket if the Council agrees. Judge Peterson stated that, at the last Council meeting, there was discussion about whether the word "enlarge" should be changed to "expand." The committee looked at the history of the rule, and the word "enlarge" has been there since before Oregon was a state. He stated that it seems obvious that "enlarge" means to make bigger.

Ms. Gates asked the Council whether it wanted to move the proposed amendment to the publication docket for September. The Council agreed that this was appropriate.

3. ORCP 21/23

Ms. Gates explained that the committee was addressing an inquiry received by the Council that suggested that it was unfair that, when a plaintiff files a late amendment and changes something minor like increasing economic damages, a defendant sometimes files an answer that raises new substantive defenses that could have been raised earlier. One concern is that it wreaks havoc with the trial schedule. She stated that she had circulated a memo to Council members (Appendix C) that states that the committee is sympathetic to that concern; however, courts have the ability to address it, and one potential solution from the committee is to add to Rule 21's motion to strike language to make it clear that plaintiffs can move to strike those late-raised defenses. The committee has actually not finished its discussion because not every member was able to attend the last meeting. She stated that the committee would like to hear from the rest of the Council and integrate their comments into their later discussions.

Judge Peterson stated that his recollection was that Council members seemed to think that it is a little unfair to change the lawsuit at the last moment. He stated that Judge Roberts and some other judge members of Council had suggested that they cannot strike such an expanded defense filed just prior to the trial date just because it is not right, and there needs to be a rule. He stated that there had been discussion about changing Rule 23 or Rule 21 E, and that it looked like the committee had gone with adding the tools in Rule 21 E. Ms. Gates stated that the committee thought that it was better to not change Rule 23 to say that an answer cannot be filed but, rather, to leave it within the court's discretion that some component of that answer could be subject to a motion to strike. Judge Roberts stated that she would suggest being more precise in the phrase "any pleading or defense that is prejudicial to the moving party," because the word "prejudicial" does not really convey the idea. She suggested something like, "adds a new issue prior to trial or unduly delays trial," because everything that opposing parties do could be seen as prejudicial. Ms. Gates agreed and stated that the committee would discuss it more.

Ms. Payne stated that the committee had talked about not wanting to create a new standard for striking these sorts of late filings under this rule but, rather, wanted to refer back to the standard for amendments under Rule 23, because there is a body of case law as to what is prejudicial and what a court considers for amendments on the plaintiffs' side. She stated that the committee felt like that body of case law and those standards should be equally applied to late amendments to answers, so the committee is trying to just incorporate those standards into this motion to strike rule. So, without going into the details, the committee was just trying to reference the Rule 23 amendment standards. She

asked whether the Council had any thoughts about a good way to do that without creating a new, substantive standard. Ms. Gates also asked for input on whether anyone on the Council thinks that this is a bad idea.

Mr. Andersen asked a question regarding the proposed subsection 21 E(3) where it states, "Any pleading or defense the court determines is untimely or prejudicial to the moving party." He stated that this seems a little confusing to him, because is it the moving party who asked for the amendment in the first place? Or is it the moving party who is moving to strike the proposed amendment? He opined that it would be more clear without the words "to the moving party." Judge Roberts stated that the court can do this on its own motion, in which case there would not be any moving party. She also stated that the language reads "untimely or prejudicial," which suggests two different standards, so an amendment that is not deemed untimely could nevertheless be stricken for something that is undefined. She stated that she does not agree that prejudicial is defined under Rule 23 or that it has any content based on Rule 23 other than the timeliness of the motion and, if it is all a matter of timeliness, then it should not be timely *or* prejudicial. Ms. Gates stated that whether it needs to be both or just one or the other is part of the committee's discussions. She stated that it seems like it could be prejudicial and it is fine, as long as it is timely.

Mr. O'Donnell stated that he is a relatively new member, but the idea of putting language in Rule 21 that is meant to incorporate case law that has been decided under Rule 23 seems odd to him. He stated that he is not sure what the common practice is in drafting rules and how explicit that needs to be, but one idea would be to get rid of "untimely or prejudicial" and say "under the standards set forth under Rule 23." He stated that he does not think that this is a good idea, but he is just asking the question because he wants to make sure that everything is understood. Ms. Payne agreed that it likely should just say "under the standard for a motion to amend under Rule 23" but, since it is a motion to strike, it seems like that language needs to be finessed a little bit. Judge Peterson stated that it seems to him that subsection three is designed for a very specific purpose, which is late responses to late amendments. His suggestion would be for it to read "any claim or defense inserted in a pleading responsive to an amended pleading that the court determines is untimely or prejudicial." He stated that the words "claim or defense" ensures that it is even handed. The words "inserted in a pleading" are from subsection two and allow one to move to strike a new claim or a new defense, which makes it specific that the court is looking at this because one party amended their pleading and then the other party filed a great response to that amended pleading, adding new issues.

Mr. Andersen stated that Judge Peterson's change is a good start and makes the amendment much more clear. Ms. Stupasky stated that she hates to throw a monkey wrench into this, but it seems to her that the Council is trying to fix a situation where the plaintiff amends their complaint, either by motion or by agreement of the defense, and the court has found good cause to allow it because there is no prejudice or surprise, but all of a sudden the defense files a pleading that now denies liability just a few months before trial and the onus is now on the plaintiff to file a motion to strike. She stated that it appears that the Council is trying to fix a situation where the defense responds to a new pleading and amends the answer by completely changing the defense rather than tailoring the amended answer to respond to the specific change the plaintiff has made to the complaint. She suggested instead limiting the defense's ability to file that amended pleading such that the only changes they can make are whether they accept or deny that part of the new pleading. Or they could bring new affirmative defenses that are specific to that part of the new pleading instead of throwing a monkey wrench into it and making the plaintiff file a motion with the court two months before trial and put their liability case together while they are waiting for the court to rule because they do not know how the court is going to rule.

Ms. Gates stated that, from her personal perspective, Ms. Stupasky's suggestion is appealing. However, when she was researching the history of this issue, she found that, because the prior complaint becomes a nullity when the amended complaint is filed, there is not really an amended answer. It is actually a brand-new answer to a brand-new complaint. She stated that trying to figure out a way to prevent a defendant from filing the answer that they want to file seems impossible under the law, because it is a response to a brand-new complaint. She stated that she understands that the burden is on the plaintiff, but the committee's proposal seemed better than nothing. Mr. Andersen suggested that the amended answer is similar to examination of witnesses during trial, with direct examination, cross-examination, and redirect, which needs to be limited to the things brought up on cross-examination. He stated that, to him, it is the same principle. Mr. Andersen stated that he would agree with Judge Peterson's suggestion–if an amended pleading is filed, then the defense is limited to responding to the items raised in the amended pleading, which does not foreclose the defense from going to the court with its own motion, saying they have discovered new things and want to file an amended answer. He stated that he thinks the Council wants to protect against instances, for example, of the plaintiff wanting to amend the amount of non-economic damages just before trial and the defense coming in with an entirely new affirmative defense that has nothing to do with the increased number.

Judge Roberts noted that all the examples that have been raised are amendments just before trial, but nothing in the suggested language so limits it. So, even if it is a year before trial, the defendant cannot respond to a new complaint without asking for the court's permission? She stated that this seems to be a much more radical change than anything that inspired this particular amendment. Mr. Young agreed with Judge Roberts. He stated that the proposed change to the rule and what the Council is contemplating would have much broader implications. He stated that he could think of a number of possibilities where there could be amendments to the complaint during the course of the litigation with reasonable changes that need to be made to the defendant's answer in response. But the proposed change would mean that defendants would be confined to what was previously filed in a prior iteration of the answer. Mr. Young noted that Oregon law is that prior pleadings are evidence can be used on cross examination. He stated that he did not see a need for this change just to address one limited circumstance that can be taken up with the court just before trial.

Ms. Stupasky stated that, just because the proposed amendment to Rule 21 E might effect a broad change does not mean that the Council should not touch it. To her, it is a matter of fairness and equity. She pointed out that, with her proposal, the defendant has the same burden as the plaintiff, but right now that does not exist because the plaintiff has to move to amend the complaint while the defendant does not have to move to amend the answer. Plaintiffs frequently move to amend the complaint to add medical bills because doctors are still treating plaintiffs as the trial date approaches, but that does not change the liability aspect of the case. So, if the defense wants to open up the liability aspect of it, they should have to move to amend their answer as well.

Ms. Payne stated that the middle ground that the committee is trying to come up with is not to make a carte blanche rule that the defendant will always have to make a motion but, rather, if the amendments that a defendant comes up with are either late or prejudicial to the plaintiff in some way, there is a mechanism for the plaintiff to go to the court and to seek to strike those allegations. She stated that she believes that this is a good compromise because it still allows the defendant to put forward amendments that the defense wants to file, and the Council is not going to be able to pass a rule that takes that right away from them. However, if the Council can adopt some sort of mechanism similar to that applying to amendments made by plaintiffs, where the court can decide whether amendments are too late or causing too much prejudice at that point in the process, that would be a good thing to include in Rule 21 E.

Mr. Young reiterated that he has concerns with the broader implications. For example, with the word “untimely,” the Council is contemplating a radical change

to the pleadings that occurs in the weeks or days leading up to the trial, or even during the course of the trial. However, ORCP 15 requires that a responsive pleading be filed within 10 days after an amendment. Technically, if an answer to an amended complaint is not filed within 10 days, it is untimely on the 11th day. And the proposed rule change gives the plaintiff the ability to move to strike that answer. Ms. Payne stated that this is certainly not the purpose of what the committee is trying to put forward. The concept is to try to give the court the same standard that a plaintiff would have to meet in moving to amend their complaint. She stated that she did not believe that a judge would say that it was untimely in Mr. Young's situation and not allow an amendment. She noted that this is not a final draft and that it is still under discussion. The committee's goal is to put forth an amendment that would allow an even standard for both plaintiffs and defendants, not place a heavier standard on any party.

Judge Roberts suggested that it would be good if the final language actually says what the Council has been talking about as the problem, rather than using vague words that merely suggest that problem to the Council but that, to others, may have a different connotation. She stated that she understands the problem to be amendments that substantially change the issues shortly before a scheduled trial such that it is prejudicial to the other party, and that is what the rule should say. Mr. Andersen disagreed. He stated that the Council would have to define what "shortly" means, which is difficult. He also pointed out that sometimes surprise amendments can come up after depositions have been completed and, to flesh out that new defense, an attorney would have to go back and re-depose the defendant or certain witnesses. He stated that he does not believe that one time standard can be imposed on this to solve the problem, because it can arise at any time.

Ms. Gates stated that some members of the committee believe that "untimely" and "prejudicial" both need to be there and that it could not just be one without the other. She reiterated that the idea is to even the playing field and not to restrict or deny anyone's existing rights or put greater burdens on any party. Judge Norby stated that she liked the phrase better with the conjunctive "and" rather than the disjunctive "or." She wondered why the disjunctive was chosen. Ms. Payne stated that she had looked at the case law on Rule 23 and there are four factors that the court considers in allowing amendments, including timeliness and whether it is prejudicial, and those are disjunctive. She stated that she was not sure that the Council would want to list the other two factors in the rule. She thanked the Council for their helpful comments and stated that the committee would take them all under consideration.

Judge Peterson stated that he is sympathetic with Ms. Stupasky's desire to somehow restrict the response to the amended pleading. However, he is not certain how that would be possible, since the person who has an amended pleading served on them has a right and a duty to file response. He stated that it does not seem possible for the Council to allow the plaintiff to ask the judge to somehow say that the answer went over the line. He stated that the committee's proposal to amend Rule 21 E may be a good way to give the judge a tool, if the Council can figure out the best way to do it, to have a response called into question and have some sort of criteria for determining whether it crosses a line.

Mr. Goehler addressed Judge Roberts' concern about the "untimely and prejudicial" language by suggesting the language from Rule 23, "contrary to the interests of justice," and then referencing Rule 23. He stated that this might get the Council out of the business of trying to list out all of the different factors.

Ms. Gates thanked the Council for its input. She stated that the committee would meet again and report back at the next Council meeting.

4. ORCP 23 C/34

Mr. Andersen explained that the committee had presented its final report at the last Council meeting, but that Judge Peterson had pointed out that, since the Council was sending the recommendation to the Legislature, it might be better to frame the suggestion as a way to protect members of the public from not being able to pursue their claims when the defendant has died unexpectedly and this was unknown to the plaintiff. He stated that Judge Peterson had revised the report to reflect this (Appendix D). Judge Peterson agreed with Mr. Anderson's explanation that his changes were to de-emphasize that the change would also protect attorneys from a malpractice trap. He stated that there is already a policy that claims survive a party's death, but the fact of that death kind of operates arbitrarily and capriciously when the defendant dies and the death is not known to the plaintiff. He stated that he also made some minor changes to the suggested statutory language. In the first line, he added the words, "expiration of" before "the time limited for commencing to the action." He also added the word "decedent" before "personal representative," to make it clear that it is not just any personal representative who can be substituted. He had a question for the Council about whether the phrase "real party in interest" was needed, because this is a different concept. He instead suggested, "substitute the decedent's personal representative for the deceased defendant." The Council agreed that this was a good idea. Judge Peterson stated that Ms. Nilsson could have a final version with those changes ready for the next Council meeting.

Mr. Shields stated that he had shared Judge Peterson's draft with the Oregon State Bar's Estate Planning Section the previous week to see if they had any concerns about it. He stated that they were basically fine with it, but wanted to be sure that the new statute does not get drafted in a way that would imply any ability to reopen a probate once it has been closed. He pointed out that there is no reason one would normally want to do that, but they just had some nervousness around that. He stated that the section did not have a specific concern with the language that is being proposed but, rather, just a conceptual concern that something could appear in the statute that would imply any ability to reopen a probate once it has been closed. Mr. Shields mentioned that, in terms of process, if the Council would like the Bar to introduce this concept with the other bills they introduce at the next session, that is probably fine, and the Bar would need to know by April 1. If the Council later decides that it does not want the Bar to introduce it, it should let him know at the next meeting and he can pull the plug on it. There will also be a meeting at the end of April with the Board of Bar Governors and a Council member would need to appear at that meeting

Judge Peterson pointed out that one of the two cases mentioned in the final report, *Wheeler v. Williams* [136 Or App 1, *rev. den*., 322 Or 362 (1995)], had a small estate that had closed. He stated that he was not sure exactly what would happen in that case, but stated that he was not sure that it would be a tragedy if the estate was reopened, because he has never done one. Mr. Shields stated that he thought that the reason it would be a tragedy is that estate planners would basically feel like they could never close an estate in less than two years because they would have to wait for the hypothetical possibility that somebody might show up later with a lawsuit. The problem is that, when the estate is closed, the money is all gone. Judge Norby stated that there have been a lot of recent changes, especially in the area of small estate proceedings, that have resulted in a lot of questions in probate court about whether they have to reopen small estates and other kinds of probate cases, so she thinks that is a really sensitive issue right now and those changes are having an unexpected impact. Mr. Shields stated that, if a bill was put forward that allowed estates to be reopened, there would be a lot of opposition from lawyers that practiced in that area and there would be a good chance that it would kill the bill.

Mr. Bundy stated that he believes that, sometimes, it is not a matter of whether there is any money in the estate but, rather, whether the defendant had insurance at the time of their death. He noted that the carrier may be liable for that money, but the decedent's personal representative needs to be named as the defendant, and he thinks that is what will happen most of the time in this kind of case. Judge Roberts stated that she wanted everyone to understand that there is nothing in the proposal that would allow or disallow reopening the estate, because the

statute of limitations is supposed to be followed right now; the proposal is not a change to the law. She stated that the question is, rather, what happens if a lawsuit is filed and there is no issue of a defendant's death affecting the statute of limitations. The plaintiff is entitled to file that case. Whatever the consequences to the estate people, that is what happens and, if they need to keep their estates open longer because they did not know it could happen, that is not the fault of the change in the law. So all the change in the law would do is change the impact on the lawsuit of doing what is supposed to happen right now. Mr. Shields agreed.

5. ORCP 27/Guardians Ad Litem

Judge Norby stated that she believes that this is the final version (Appendix E) of the language that has been so carefully devised by staff. She stated that she thought that the committee had completed its work by ceding to the wisdom of the greater Council, and then staff came up with language based on some Council conversations and that language had been honed in the last couple of meetings with the addition of just a couple of words at the last meeting. She stated that she has been deferring to Judge Peterson and Ms. Nilsson, who have been doing the good work of getting everyone's thoughts down on paper in a way that makes sense.

Judge Peterson stated that, sometimes, when one reads over a text again after some time has passed, one finds something that needs to be changed. In the proposed new sentence in section A, he realized that the language, "a party who has a guardian or conservator or who is an unemancipated minor," does not cover people who are otherwise incapacitated or financially incapable as described in section B. He suggested changing the language to read, "a party who has a guardian or conservator or who is a person described in section B of this rule" to make it inclusive of all three categories of people who would need a guardian ad litem. Council members agreed.

Ms. Nilsson reminded the Council that, further on in the same sentence, the words, "that is," followed by a comma, had already been added at the suggestion of Judge Leith at the last Council meeting.

Ms. Gates asked the staff to prepare a final version of the proposed amendment for the next Council meeting. Judge Norby expressed continuing gratitude to Judge Peterson and Ms. Nilsson for continuing to parse out the changes, and noted that it turned out to be a little more complex than was perhaps anticipated.

6. ORCP 31

Mr. Goehler reminded the Council that ORCP 31 is the interpleader statute and that the committee is looking at the way that the current rule has mandatory attorney fees for an interpleader, but it only applies to plaintiffs who file the interpleader action. However, interpleader actions can happen in a defensive posture as well. He stated that he came up with a couple of proposals: one to make attorney fees applicable to counterclaims and cross-claims in interpleader, and another to make attorney fees permissive rather than mandatory. Included with the materials from the committee for the meeting (Appendix F) is an article that Justice Nakamoto circulated to committee members that is a really good summary of interpleader in all jurisdictions. While Oregon has fees by rule, most jurisdictions have fees by case law as a matter of equity, and the article talks about some of those factors.

Mr. Goehler stated that the committee's first option included a small housekeeping matter in taking out the words "suit or" to comply with ORCP 2 and bring the rule up to date. Language was added to include counterclaims and cross-claims as well as original interpleader actions, and the language was changed from "the party filing suit" to "the party interpleading funds." The second option changes the language from "shall be awarded a reasonable attorney fee," to "may be awarded a reasonable attorney fee." The idea behind that is, once there is a permissive fee, the factors under ORS 20.075 for awarding fees are triggered. A lot of those factors are the same factors that are in the case law where looking at awarding fees is a matter of equity. Mr. Goehler stated that option two has basically the same structure in terms of counterclaims and cross-claims, but adds subsections C(1) through C(3) that list the main factors. He stated that he is partial to option number one because number two's factors may be restrictive and those issues have not been addressed by the courts yet, so that change may create some uncertainty. Mr. Goehler asked the Council for feedback on the committee's work.

Judge Roberts stated that she is not terribly opposed to either option and that, given a choice between the two, she prefers number two only because loading the word "may" with the assumption that the litigants and the judge are going to burrow into the case law and find the relevant statutes and do all of the necessary research to be familiar with these standards is kind of unrealistic. She stated that she prefers rules that are sort of self contained and have their standards within them. Mr. Goehler noted that the rule would not be referring to interpleader rules from other jurisdictions. He stated that, whenever you have a permissive attorney fee statute, what basically happens is that the attorney would file a motion or petition for attorney fees and part of the requirement is to go through the ORS 20.075 factors. That is what the committee's thought was–by using the term,

"may," the interpleading attorney will need to cite and list the factors as part of their petition. That has been his experience in dealing with permissive attorney fee petitions. Judge Roberts pointed out that, when you are a good lawyer, you assume that all of the other lawyers are good lawyers. However, judges get a very different perspective.

Judge Peterson stated that he was unsure as to whether the Council can change the fee provisions. If it can, he prefers option two, but he would perhaps be explicit and cite ORS 20.075. However, there are factors included that are not a part of ORS 20.075, such as the suggested C(2) and C(3):

> C(2) The party interpleading funds was not subject to multiple litigation
>
> C(3) The interpleader was not in the interests of justice and did not further resolution of the dispute

He stated that it seems like it is a separate round to say "you do not get fees." He also stated that he was troubled by the proposed C(1) that takes it out to equity. He noted that, at the last Council meeting, there was discussion about really innocent stakeholders versus stakeholders who got caught and are not blameless. He suggested language such as, "the party interpleading funds involved in the dispute is substantially at fault," or another way to indicate that they were somehow part of the problem and should not be rewarded for interpleading. He pointed out that the Council had required listing of ORS 20.075 factors in Rule 68, because people would file their statement of costs and they would just say, "I deserve the money," with no explanation. He stated that he would not mind referring to ORS 20.075 in Rule 31.

Mr. Andersen expressed concern that the first sentence in the existing rule is very long. He wondered whether it could be broken down into several sentences, or at least punctuated in a manner that makes for easier reading. Mr. Goehler stated that the committee was trying to make the minimum changes on the existing rule. However, he noted that the existing rule is rather lengthy, so the committee can attempt to create bite-sized pieces.

Judge Peterson noted that the Council had spent a lot of time talking about what an interpleader is, and both of the suggestions from the committee make it much more clear that, whether the action is filed as an interpleader action or whether it becomes one as a result of a counterclaim or a cross-claim, it can all happen in one lawsuit and a person does not have to be a plaintiff to be awarded fees.

Mr. Goehler stated that the committee would look at the issues that the Council had raised and report back at the next meeting.

7. ORCP 55

Mr. O'Donnell explained that Judge Peterson had drafted some proposed language (Appendix G) that the committee had not yet had a chance to review. He asked Judge Peterson to explain his suggestions. Judge Peterson reminded the Council that Judge Norby had done a complete rewrite of the structure of Rule 55 last biennium, and that the thought was that, once the rule was in a more clear form, it could be reexamined to see if any other tweaks needed to be made. He explained that he is suggesting three changes to the rule. The first is based on the suggestion the Council received from Judge Marilyn Litzenberger regarding the problem that some witnesses who receive subpoenas have with not knowing how to raise with the court that they are unable to come to trial. His suggestion is that it would say on the subpoena that the recipient may file a motion to quash or modify the subpoena and serve it on the party seeking the appearance and on the presiding judge of the court. He stated that he is not sure that presiding judges in the various counties will be happy about it, but one of the concerns that the committee raised in one of its meetings was to not make the procedure to avoid appearing too easy. If all the person has to do is to file a piece of paper, it may discourage attendance. Having to serve the paper on the presiding judge as well as the subpoenaing party might have the opposite effect.

Ms. Gates stated that perhaps she is not very optimistic about human nature, but she feels like there is the category of people who are going to be unhappy but generally comply, and then there is the category of people who are not going to comply nor serve a paper on the judge or anyone else. Judge Peterson pointed out that the second category of people would be subject to contempt. Judge Roberts stated that she is very sympathetic to the objective, but she still thinks that including procedures that have no function except to be more burdensome is a little illicit. Judge Peterson stated that he is sensitive to that, but the committee did not want to make it seem like the witness just had a hall pass.

Judge Peterson stated that he came up with his second suggestion as he was pondering a situation that occurred several years ago. A judge in an eastern Oregon county with a correctional facility in his jurisdiction had inmates sending out subpoenas without any fees, and recipients were contacting the court to see if their attendance was required. Judge Peterson's thought was to simply include language in the subpoena that states that, if the fee is not tendered when the witness is served, then the witness does not have to appear. He noted that he learned that public defenders who serve subpoenas do not tender the fee with the

subpoena but, rather, state that the witness can get a check later. The public defenders do use Rule 55, so that would be an issue that would need to be addressed.

Judge Peterson's final suggestion was adding something akin to Illinois Supreme Court Rule 237 that addresses subpoenas to parties. In a normal world, the other side could stipulate to the party's attendance and it would not be a problem. However, there are a lot of self-represented litigants. He noted that it would be the same document, a subpoena, but with no fee requirement, and the subpoenaed party would not have to be located and could be served under Rule 9. He stated that it just seems like a more civilized way of doing litigation.

Mr. O'Donnell stated that the committee would look more closely at Judge Peterson's suggestions and come back with more information for the Council at the next meeting.

8. ORCP 57

Ms. Holley stated that the committee had crafted preliminary draft language for the Council's review (Appendix H). She stated that the language mirrors Washington's Rule 37, but did not include the specifics of the presumptions that many on the committee found objectionable. She explained that Justice Nakamoto was attending an Oregon Supreme Court Council on Inclusion and Fairness meeting, where she planned to discuss this proposed language and ask for feedback. The committee wanted to get some language to the Council for its feedback as well. The committee does have some concerns that this change implicates substantive rights, particularly of criminal defendants. While the change would likely be positive, in that it would create more fairness, the committee thinks that many stakeholders will have strong opinions and that the Council should get input from those groups or that the Legislature should be the one to make any change. She stated that she believes that there is still a lot of work to do.

Judge Bailey stated that Ms. Holley has done a good job and that he appreciates her work on this. His concern is that this is a very sensitive issue and what the Council promulgates becomes the rule if the Legislature does not act on it. He expressed concern that certain people will be surprised when such a change just shows up versus allowing the Legislature to hold hearings and allow people to appear and be heard.

Ms. Holley explained that the current rule prohibits peremptory challenges based on race, ethnicity, or sex. The rule further requires that, if a party believes that a peremptory challenge was made for an improper reason, that party has to present

a prima facie case before the judge before the burden even shifts to the other side to state a non-biased reason. The proposed change would remove the presumption that the challenge was for a proper reason so that the court or a party can raise an objection by citation to the rule and have the court just consider the totality of the circumstances without the obligation to present a prima facie case. She stated that the reason to make a change like this is that, in *State v. Curry*, 298 Or App 377 (2019), the defense attorney objected under *Batson v. Kentucky,* 476 U.S. 79 (1986), and the prosecutor basically got offended by the implication that he was a racist, after which the court reprimanded the prosecutor. The current rule assumes that challenges are non biased, so it creates the implication that, if a party makes a *Batson* challenge, they are accusing the other person of intentional bias. Washington's Rule 37, and the committee's draft, acknowledge implicit bias and basically make it clear that, if one raises this kind of objection to a peremptory challenge based on bias, one is not accusing the other person of being an intentional racist. One is just saying that this is something that we all acknowledge happens. It has the tendency to make it a lot easier to make a challenge based on bias, which is potentially a good thing, but also has the tendency to implicate substantive rights.

Ms. Gates asked what substantive right is impacted. Ms. Holley explained that it is the right to have a fair jury, or even the right of a person to be on a jury panel and not be excluded based on their race or sex. Judge Roberts stated that she was a little startled at the way the draft is structured; basically the judge is not deciding if the judge thinks that bias plays a part but, rather, the judge is deciding whether any reasonable person thinks that it might have something to do with bias. She stated that the draft rule would basically require the person making a peremptory challenge to prove beyond a reasonable doubt that these factors had nothing to do with the challenge. She pointed out that this is an extremely high standard, and it seems to her to impinge upon the rights of parties to play a part in the selection of jurors. She stated that she was thinking more of a defendant who happens to be black and is anxious to have a few black peers on the jury, so they are using their peremptory challenges for that purpose. She noted that this clearly would be prohibited under the draft rule, even though the reason is not prejudice against people who are not of color but, rather, the desire to have a jury that is reasonably diverse. Since there is no requirement to make any prima facie case, and every juror has some sex and some ethnicity and some race, it does not matter who you are and who they are; one can always say, "tell me about why you are using the peremptory challenge and prove beyond a reasonable doubt it has nothing to do with any of these factors." To her, that just seems to be an incursion on the rights of parties, mostly criminal defendants, in selecting a diverse jury, even though that was not the intent. Ms. Holley agreed that the draft as written has the potential to backfire in this way.

Mr. O'Donnell asked whether there is a counterpart to Rule 57 in criminal law. Ms. Holley stated that criminal courts follow Rule 57. Judge Wolf explained that there is a statute that expressly applies it to criminal cases.

Judge Peterson stated that he noticed that the new subsection D(4)(e) is trying to make it clear that there are implicit institutional unconscious biases, and maybe it is good to get those out, but the language does not seem to be neutral. He suggested changing the words "is aware," to "is deemed to be aware." He also suggested changing "have resulted," to "may result" and striking the words, "in Oregon state." He stated that the intent seems to be to say that it is known that there are biases out there and they could impact juror selection and it is wrong to be using those biases to weight the jury, but it does not seem like the Council should say that it has been happening a lot. That does not seem even. Ms. Gates agreed, because the draft language makes it sound like it is the role of the objective observer to correct historical wrongs rather than to evaluate the circumstances.

Judge Bailey stated that he has a real issue with the objective observer because ultimately it is the judge who makes the decision. He asked whether the judge has to say that they are not an objective observer or they are not sure what an objective observer is? He stated that it is the judge under the U.S. Constitution and *Batson* who has to make these decisions. Ms. Holley stated that she thinks that the purpose of that provision is to say that the issue is not just intentional bias. Judge Bailey replied that judges know that. If somebody is making a *Batson* challenge for the wrong reasons, it is a judge that makes this call, and the objective observer language is not necessary. Judge Roberts opined that the proposed change is taking discretion away from the judge, because a judge could believe that bias had nothing to do with the challenge, but also know that some hypothetical person might conceivably think so, and feel that they have to rule that the challenge was biased because there is somebody else out in the universe who might think it was wrong. Ms. Payne observed that there are reasonable person standards under the law that are not personal to the judge. Judge Norby stated that, with reasonable person standards, the judge is being asked to apply them to other people like police officers, so judges are looking at whether some third party, looked at by the arguably objective judge, acted as a reasonable person would act. There are not reasonable person standards that judges apply to themselves as judges.

Ms. Gates stated that, whatever happens with the use of the objective observer standard, it is important to keep language somewhere in the rule that recognizes that the rule is not talking about intentional discrimination alone and definitely includes implicit, institutional, unconscious bias. Judge Roberts agreed, but stated that it is still the judge who will be making a decision, not some hypothetical

person who is making a decision for the judge. Judge Bailey stated that there is nothing wrong with a preamble that says that it is understood that unconscious bias has created issues; however, he thinks that the objective observer language makes it difficult. Ms. Holley suggested replacing the language in D(4)(a) of the existing rule, “Courts shall presume that a peremptory challenge does not violate this paragraph,” with something like, “courts have recognized that unconscious implicit institutional bias may impact. . . .”

Judge Hill stated that he was struggling to understand the need for what appears to be a political statement in a rule of civil procedure. Ms. Holley stated that the issue that the Council is trying to address is the issue that happened in the *Curry* case where the prosecutor accused the defense attorney of calling him a racist and said that it was improper to make a *Batson* challenge. Judge Hill asked why the Council would change a rule to account for somebody's hurt feelings. Ms. Holley stated that the language that says that courts presume a peremptory challenge does not violate this paragraph states that implicit bias does not exist and that must be an intentional bias. Judge Hill stated that he understands that Ms. Holley is saying that the problem with the rule is that it creates a presumption in favor of the peremptory challenge, and that, in Ms. Holley’s view, the Council needs to remove that presumption. He stated that he does not necessarily have a problem with that. However, he is struggling with why the draft rule seems to do a whole lot more than just remove that presumption.

Judge Wolf stated that, in part, the reason is that the Court of Appeals in the *Curry* case suggested that the Council should look at the rule and take a look at the Washington rule. Judge Hill reiterated that he has no problem looking at the rule but, rather, that the draft presented by the committee has a whole lot of language and processes that do significantly more than simply remove the presumption. If the problem is the presumption, then let's talk about removing the presumption without opening this can of worms. His concern with the draft is that it does not just remove the presumption but that it creates a new presumption that the challenge was for an improper purpose, or that somebody with a particular viewpoint might conclude that it was for an improper purpose.

Judge Norby pointed out that judges have relied a lot on that presumption throughout the years, so even just removing it is quite a monumental thing. She asked what they are left with. Is it a mess where no judge knows exactly what to do in the absence of a presumption, or will the Council try to create some sort of framework? She agreed that the framework that is being suggested at this point may not be perfect, but asked whether there is something else that can be crafted so that judges know how to fill that vacuum without a chaotic response that is different on every bench. Judge Hill stated that it is best left to the sound

discretion of the trial judge, which has worked for the past 100 years. His concern is that, as we continue to restrain the discretion that we give trial judges, we underestimate the complexity of the individual cases that come in front of us, and he thinks that we do the law a disservice when we do that.

Ms. Gates stated that she does not see the draft change as creating a new presumption in the opposite direction so much as just requiring an explicit statement of the reason for exercise of the challenge, which she thinks is totally appropriate. She stated that she thinks that perhaps judges have not seen this as something they can take the initiative on in the past, but this has never been acceptable. Something that explicitly requires a party to articulate its reason should be not problematic for that party, because if its reason for the challenge is something other than race, gender, or ethnicity, it should not be an issue. Leaving it to a judge to raise it on their own and not specifically having a procedure is not going to fix the problem, and it is not necessarily a judge's problem to fix.

Mr. Goehler stated that he had looked at the *Curry* case and the request from the court was saying that Washington has a concrete set of rules to help a judge know when the presumption has been rebutted. So if we are going to address that request, leaving it in the judge's discretion is the exact opposite of that. Maybe instead of looking at the objective observer language in Washington's Rule 37, maybe Oregon's rule should list some nonexclusive factors as stated in the Washington rule. Ms. Holley stated that this whole conversation illustrates to her that there will be strong disagreements and that this needs to be done in a thoughtful, considerate way where the criminal bar has input on what the rule looks like. She asked Judge Peterson whether he had thoughts about how the committee can better get input from the criminal bar and who else should be contacted.

Judge Peterson stated that, at the beginning of the conversation, someone had suggested leaving this change to the Legislature. He opined that the Council is better qualified to make changes to the ORCP than the Legislature. The Council cannot make substantive changes, but a good part of the committee's work so far has been to say how you go about it. He stated that having draft language to run by the various organizations for prosecuting attorneys and defense attorneys is helpful, because it makes abstract ideas more concrete. It would also be helpful to mention that it was suggested by the Court of Appeals that the Council consider making a change.

Judge Hill stated that he would strongly support a rule change that set out factors for the court to look at, but is strongly opposed to factors framed the way the draft rule reads regarding society's unconscious biases, because he feels that this

is not neutral language and that it will inflame the discussion. He stated that he does not see that language as necessary to achieve the common objective. He also raised the concern that he is not sure that it is appropriate for the court to raise the issue sua sponte, as that may not be fair to a defendant. For example, a defendant may not be objecting to a peremptory challenge because they were happy to get rid of a juror. Does the Council really want to create a situation where a judge involves themselves in that process and makes the defendant keep that juror even though the defendant did not want the juror? Mr. Andersen agreed with Judge Hill that the court should not be meddling in jury selection. He stated that it should be left up to the attorneys to raise the issue.

Judge Bailey stated that he appreciated Judge Peterson indicating that the Council may be the better body to deal with this issue; however, he expressed concern that this is a political issue and may be better dealt with by the Legislature, who is better equipped to handle public hearings. He also expressed concern with listing factors in the rule, as he found Washington's criteria to be offensive and stereotypical of certain minority groups.

Ms. Holley stated that the committee had considered going back to *Batson*, looking at what Oregon and federal cases have found to be biased; however, case law does change, so the rule would need to be continually amended as case law evolves. Mr. Crowley stated that he suspects that the district attorneys and the criminal defense bar would have a lot to say about this issue, and he is curious about their thoughts. He stated that he would like to know what those other groups think before the Council gets much deeper into this. Ms. Gates agreed that the committee should set up a meeting and invite stakeholders to solicit their feedback.

Ms. Gates asked Ms. Holley what the basis was for the committee's decision not to articulate some of the factors that Washington listed in their rule. Ms. Holley replied that Judge Bailey felt really strongly that they had the tendency to be stereotypical and, when the committee considered further, the thought was that stereotypes can change and evolve. What courts have found to be biased has changed and evolved, and the committee felt that listing specific presumptions would put the Council in a position of needing to revisit the rule quite often to update what courts have found to be presumptively biased.

Ms. Payne stated that, in the past, the Council has sometimes created a broader workgroup to look at certain rules. She suggested inviting a larger group from other portions of the bar that would have an interest in the rule to get their input before presenting a new draft to the full Council. Ms. Holley stated that Justice Nakamoto had noted that, when Rule 57 was originally amended to include

section D, there was a full legislative task force that investigated it. She stated that her understanding is that the rule has been more of a legislative consideration in the past, so that is where the committee has had some hesitation of whether to pass this on to the Legislature or to continue with a workgroup. Judge Peterson noted that there are more lawyers on the Council than in the entire Legislature. If any of the changes being considered become substantive, the Council would have to defer to the Legislature, but he would much prefer setting up a workgroup to include expertise from outside the Council.

Judge Roberts stated that she agreed with Judge Peterson as to the Council's expertise versus the Legislature's. She did express concern about what could be conceived by an objective observer to be a substantive change in the parties' right to participate in the selection of the jury. Looking at the specifics that are listed in the Washington rule, she wondered whether she could even grant motions for cause as a judge. She pointed out that it is really hard to draft a rule that comprehends all of the variations. She stated that she is troubled by tinkering on this degree of detail with questions that come up in a whole universe of different configurations in decisions that affect the constitutional right to have a jury of one's peers. She stated that it is troubling. Ms. Holley stated that she could see a scenario where a juror might state that their heritage causes them to believe a particular thing about a particular gender or race. If she could not exclude that person from the jury, she could see that affecting the rights of her client.

Judge Bailey stated that there is a new body research coming out to suggest that *Batson* challenges have not really had that much impact. The research is indicating that, perhaps, the reason that there are not more people of color on Oregon juries has nothing to do with the challenges but, rather, who is in the panel in the first place. Oregon uses drivers' licenses and voter rolls to choose jurors, and some minorities may not be well represented in those groups. Oregon also does not pay jurors very much, and that excludes certain socioeconomic groups. Translators are not offered either, which excludes certain groups. Judge Bailey suggested that, if the Council sends this issue to the Legislative, the greater issue would be examined as well, and other things may get changed that could have a greater impact to broaden and diversify juror panels. Judge Norby suggested that both the Council and the Legislature could end up working on the issue. In an immediate sense, she noted that the Council could, for example, amend the rule to include Judge Hill's suggested list of factors for a judge to consider. In the long term, the Legislature could deal with the broader issues.

Ms. Gates asked Council members whether they would prefer the Council to continue working on the issue or whether they would like to send the issue to the Legislature right away. The consensus of the Council was to continue working on

the issue but to bring in a workgroup. The decision was also made not to publish or promulgate any changes to Rule 57 this biennium.

IV. New Business

No new business was raised.

V. Adjournment

Ms. Gates adjourned the meeting at 12:10 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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

SUMMONS

RULE 7

A Definitions. For purposes of this rule, "plaintiff" shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint.

B Issuance. Any time after the action is commenced, plaintiff or plaintiff's attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summonses under section E of this rule. A summons is issued when subscribed by plaintiff or an active member of the Oregon State Bar.

C Contents, time for response, and required notices.

C(1) **Contents.** The summons shall contain:

C(1)(a) **Title.** The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C(1)(b) **Direction to defendant.** A direction to the defendant requiring defendant to appear and defend within the time required by subsection C(2) of this rule and a notification to defendant that, in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C(1)(c) **Subscription; post office address.** A subscription by the plaintiff or by an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

C(2) **Time for response.** If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subparagraph D(6)(a)(i) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-1

first publication. If the defendant waives service of the summons and complaint pursuant to Rule 7 H, the defendant shall appear and defend within the frame permitted by Rule 7 H.

C(3) **Notice to party served.**

C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph C(3)(b) or C(3)(c) of this rule, shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiff's attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff. If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

_____

C(3)(b) **Service for counterclaim or cross-claim.** A summons to join a party to respond to a counterclaim or a cross-claim pursuant to Rule 22 D(1) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-2

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion," a "reply" to a counterclaim, or an "answer" to a cross-claim. The "motion," "reply," or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant. If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

_____

C(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

_____

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees may be entered against you, as provided by the agreement to which defendant alleges you are a party. You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-3

attorney, proof of service on the defendant. If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

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D Manner of service.

D(1) **Notice required.** Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of true copies of the summons and the complaint upon defendant or an agent of defendant authorized to receive process; substituted service by leaving true copies of the summons and the complaint at a person's dwelling house or usual place of abode; office service by leaving true copies of the summons and the complaint with a person who is apparently in charge of an office; service by mail; or service by publication.

D(2) **Service methods.**

D(2)(a) **Personal service.** Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) **Substituted service.** Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-4

be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon the mailing.

D(2)(c) **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at that office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or any other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon the mailing.

D(2)(d) **Service by mail.**

D(2)(d)(i) **Generally.** When service by mail is required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested. For purposes of this paragraph, "first class mail" does not include certified, registered, or express mail, return receipt requested, or any other form of mail that may delay or hinder actual delivery of mail to the addressee.

D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant, or other person authorized by appointment or law, signs a receipt for the mailing, or 3 days

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-5

after the mailing if mailed to an address within the state, or 7 days after the mailing if mailed to an address outside the state, whichever first occurs.

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

D(3)(a)(i) **Generally.** Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to the defendant or other person authorized by appointment or law to receive service of summons on behalf of the defendant, by substituted service, or by office service. Service may also be made upon an individual defendant or other person authorized to receive service to whom neither subparagraph D(3)(a)(ii) nor D(3)(a)(iii) of this rule applies by a mailing made in accordance with paragraph D(2)(d) of this rule provided the defendant or other person authorized to receive service signs a receipt for the certified, registered, or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

D(3)(a)(ii) **Minors.** Upon a minor under 14 years of age, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the minor; and additionally upon the minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor, or with whom the minor resides, or in whose service the minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iii) **Incapacitated persons.** Upon a person who is incapacitated or is financially incapable, as both terms are defined by ORS 125.005, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the person and, also, upon the conservator of the person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iv) **Tenant of a mail agent.** Upon an individual defendant who is a "tenant" of a "mail agent" within the meaning of ORS 646A.340, by delivering true copies of the summons and the complaint

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-6

to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

D(3)(a)(iv)(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

D(3)(a)(iv)(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint. Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

D(3)(b) **Corporations including, but not limited to, professional corporations and cooperatives.** Upon a domestic or foreign corporation:

D(3)(b)(i) **Primary service method.** By personal service or office service upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) **Alternatives.** If a registered agent, officer, or director cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(b)(ii)(A) by substituted service upon the registered agent, officer, or director;

D(3)(b)(ii)(B) by personal service on any clerk or agent of the corporation who may be found in the county where the action is filed;

D(3)(b)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-7

corporation, if any, as shown by the records on file in the office of the Secretary of State; or, if the corporation is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(b)(ii)(D) upon the Secretary of State in the manner provided in ORS 60.121 or 60.731.

D(3)(c) **Limited liability companies.** Upon a limited liability company:

D(3)(c)(i) **Primary service method.** By personal service or office service upon a registered agent, manager, or (for a member managed limited liability company) member of a limited liability company; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(c)(ii) **Alternatives.** If a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(c)(ii)(A) by substituted service upon the registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

D(3)(c)(ii)(B) by personal service on any clerk or agent of the limited liability company who may be found in the county where the action is filed;

D(3)(c)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited liability company, as shown by the records on file in the office of the Secretary of State; or, if the limited liability company is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited liability company; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-8

D(3)(c)(ii)(D) upon the Secretary of State in the manner provided in ORS 63.121.

D(3)(d) **Limited partnerships.** Upon a domestic or foreign limited partnership:

D(3)(d)(i) **Primary service method.** By personal service or office service upon a registered agent or a general partner of a limited partnership; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(d)(ii) **Alternatives.** If a registered agent or a general partner of a limited partnership cannot be found in the county where the action is filed, true copies of the summons and the complaint may be served:

D(3)(d)(ii)(A) by substituted service upon the registered agent or general partner of a limited partnership;

D(3)(d)(ii)(B) by personal service on any clerk or agent of the limited partnership who may be found in the county where the action is filed;

D(3)(d)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited partnership, as shown by the records on file in the office of the Secretary of State; or, if the limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited partnership; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(d)(ii)(D) upon the Secretary of State in the manner provided in ORS 70.040 or 70.045.

D(3)(e) **General partnerships and limited liability partnerships.** Upon any general partnership or limited liability partnership by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership or limited liability partnership.

D(3)(f) **Other unincorporated associations subject to suit under a common name.** Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) **State.** Upon the state, by personal service upon the Attorney General or by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(h) **Public bodies.** Upon any county; incorporated city; school district; or other public corporation, commission, board, or agency by personal service or office service upon an officer, director, managing agent, or attorney thereof, or by personal service upon any clerk on duty within the offices of an officer, director, managing agent, or attorney thereof.

D(3)(i) **Vessel owners and charterers.** Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in the owner's or charterer's employment or any agent authorized by the owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law of this state if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection D(3) of this rule except service by mail pursuant to

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-10

subparagraph D(3)(a)(i) of this rule and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph D(2)(d) of this rule addressed to that defendant at:

D(4)(a)(i)(A) any residence address provided by that defendant at the scene of the accident;

D(4)(a)(i)(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

D(4)(a)(i)(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by part D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule that reasonably might result in actual notice to that defendant. Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule is made. If the mailing required by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not know of any address other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.

D(4)(a)(ii) Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph D(4)(a)(i) of this rule may be recovered as provided in Rule 68.

D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph D(4)(a)(i) of this rule are as provided in Rule 69 E.

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-11

D(4)(b) **Notification of change of address.** Any person who; while operating a motor vehicle upon the roads, highways, streets, or premises open to the public as defined by law of this state; is involved in any accident, collision, or other event giving rise to liability shall forthwith notify the Department of Transportation of any change of the person's address occurring within 3 years after the accident, collision, or event.

D(5) **Service in foreign country.** When service is to be effected upon a party in a foreign country, it is also sufficient if service of true copies of the summons and the complaint is made in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases service shall be reasonably calculated to give actual notice.

D(6) **Court order for service by other method.** When it appears that service is not possible under any method otherwise specified in these rules or other rule or statute, then a motion supported by affidavit or declaration may be filed to request a discretionary court order to allow alternative service by any method or combination of methods that, under the circumstances, is most reasonably calculated to apprise the defendant of the existence and pendency of the action. If the court orders alternative service and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff must mail true copies of the summons and the complaint to the defendant at that address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know, and with reasonable diligence cannot ascertain, the current address of any defendant, the plaintiff must mail true copies of the summons and the complaint by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and with reasonable diligence cannot ascertain, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-12

D(6)(a) **Non-electronic alternative service.** Non-electronic forms of alternative service may include, but are not limited to, publication of summons; mailing without publication to a specified post office address of the defendant by first class mail as well as either by certified, registered, or express mail with return receipt requested; or posting at specified locations. The court may specify a response time in accordance with subsection C(2) of this rule.

D(6)(a)(i) **Alternative service by publication.** In addition to the contents of a summons as described in section C of this rule, a published summons must also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in subsection C(3) of this rule must state: "The motion or answer or reply must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons must also contain the date of the first publication of the summons.

D(6)(a)(i)(A) **Where published.** An order for publication must direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. The summons must be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county in which the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff must so state in the affidavit or declaration required by paragraph D(6) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county in which the action is commenced.

D(6)(a)(ii) **Alternative service by posting.** The court may order service by posting true copies of the summons and complaint at a designated location in the courthouse where the action is commenced and at any other location that the affidavit or declaration required by subsection D(6) of this rule indicates that the posting might reasonably result in actual notice to the defendant.

D(6)(b) **Electronic alternative service.** Electronic forms of alternative service may include, but are not limited to: e-mail; text message; facsimile transmission as defined in Rule 9 F; or posting to a social media account. The affidavit or declaration filed with a motion for electronic alternative service must include: verification that diligent inquiry revealed that the defendant's residence address, mailing address, and place of employment are unlikely to accomplish service; the reason that plaintiff believes the defendant has recently sent and received transmissions from the specific e-mail address or telephone or facsimile number, or maintains an active social media account on the specific platform the plaintiff asks to use; and facts that indicate the intended recipient is likely to personally receive the electronic transmission. The certificate of service must verify compliance with subparagraph D(6)(b)(i) and subparagraph D(6)(b)(ii) of this rule. An amended certificate of service must be filed if it later becomes evident that the intended recipient did not personally receive the electronic transmission.

D(6)(b)(i) **Content of electronic transmissions.** If the court allows service by a specific electronic method, the case name, case number, and name of the court in which the action is pending must be prominently positioned where it is most likely to be read first. For e-mail service, those details must appear in the subject line. For text message service, they must appear in the first line of the first text. For facsimile service, they must appear at the top of the first page. For posting to a social media account, they must appear in the top lines of the posting.

D(6)(b)(ii) **Format of electronic transmissions.** If the court allows alternative service by an electronic method, the summons, complaint, and any other documents must be attached in a file format that is capable of showing a true copy of the original document. When an electronic method is incapable of transferring transmissions that exceed a certain size, the plaintiff must not exceed those express size limitations. If the size of the attachments exceeds the limitations of any electronic method allowed, then multiple sequential transmissions may be sent immediately after the initial transmission to complete service.

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-14

D(6)(c) **Unknown heirs or persons.** If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in Rule 20 I and J, the action will proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of the commencement of the action, and who are served by publication, will be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action had been brought against those defendants by name.

D(6)(d) **Defending before or after judgment.** A defendant against whom service pursuant to this subsection is ordered or that defendant's representatives, on application and sufficient cause shown, at any time before judgment will be allowed to defend the action. A defendant against whom service pursuant to this subsection is ordered or that defendant's representatives may, upon good cause shown and upon any terms that may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on that judgment, to a purchaser in good faith, will not be affected thereby.

D(6)(e) **Defendant who cannot be served.** Within the meaning of this subsection, a defendant cannot be served with summons by any method authorized by subsection D(3) of this rule if service pursuant to subparagraph D(4)(a)(i) of this rule is not applicable, the plaintiff attempted service of summons by all of the methods authorized by subsection D(3) of this rule, and the plaintiff was unable to complete service; or if the plaintiff knew that service by these methods could not be accomplished. E **By whom served; compensation.** A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is neither a party to the action, corporate or otherwise, nor any party's officer, director, employee, or attorney, except as provided in ORS 180.260. However, service pursuant to subparagraph D(2)(d)(i), as well as the mailings

specified in paragraphs D(2)(b) and D(2)(c) and part D(3)(a)(iv)(B) of this rule, may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F **Return; proof of service.**

F(1) **Return of summons.** The summons shall be promptly returned to the clerk with whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by first class mail.

F(2) **Proof of service.** Proof of service of summons or mailing may be made as follows:

F(2)(a) **Service other than publication.** Service other than publication shall be proved by:

F(2)(a)(i) **Certificate of service when summons not served by sheriff or deputy.** If the summons is not served by a sheriff or a sheriff's deputy, the certificate of the server indicating: the specific documents that were served; the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom true copies of the summons and the complaint were left or describe in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate may be made by the person completing the mailing or the attorney for any party and shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff or a sheriff's deputy, the sheriff's or deputy's certificate of service indicating: the specific documents that were served; the time, place, and manner of service; and, if defendant is not personally served, when, where,

and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(b) **Publication.** Service by publication shall be proved by an affidavit or by a declaration.

F(2)(b)(i) A publication by affidavit shall be in substantially the following form:

_____

Affidavit of Publication

State of Oregon)

) ss.

County of)

I,_____ , being first duly sworn, depose and say that I am the _____ (here set forth the title or job description of the person making the affidavit), of the _____, a newspaper of general circulation published at in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this _____day of _____, 2_____.

_____

Notary Public for Oregon

My commission expires _____ day of _____, 2___.

_____

F(2)(b)(ii) A publication by declaration shall be in substantially the following form:

_____

Declaration of Publication

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-17

State of Oregon)

) ss.

County of)

I, _____, say that I am the _____ (here set forth the title or job description of the person making the declaration), of the _____, a newspaper of general circulation published at in the aforesaid county and state; that I know from my personal knowledge that the _____, a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published). I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

_____

_____ day of _____, 2 _____.

_____

F(2)(c) **Making and certifying affidavit.** The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting in that capacity by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of that person shall be affixed to the affidavit. The signature of the notary or other official, when so attested by the affixing of the official seal, if any, of that person, shall be prima facie evidence of authority to make and certify the affidavit.

F(2)(d) **Form of certificate, affidavit, or declaration.** A certificate, affidavit, or declaration containing proof of service may be made upon the summons or as a separate document attached to the summons.

F(3) **Written admission.** In any case proof may be made by written admission of the defendant.

F(4) **Failure to make proof; validity of service.** If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G **Disregard of error; actual notice.** Failure to comply with provisions of this rule relating to the form of a summons, issuance of a summons, or who may serve a summons shall not affect the validity of service of that summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency of the action. The court may allow amendment to a summons, affidavit, declaration, or certificate of service of summons. The court shall disregard any error in the content of a summons that does not materially prejudice the substantive rights of the party against whom the summons was issued. If service is made in any manner complying with subsection D(1) of this rule, the court shall also disregard any error in the service of a summons that does not violate the due process rights of the party against whom the summons was issued.

H **Waiving service.**

H(1) **Requesting a waiver.** A defendant that is subject to service under Rule 7 D(3)(a)(i), (a)(iv), and (b) through (f) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must:

H(1)(a) be in writing and be addressed:

H(1)(a)(i) to the individual defendant; or

H(1)(a)(ii) for a defendant subject to service under Rule 7 D(3)(b) through (f), to a registered agent or any other person who is authorized under this rule to receive service of process;

H(1)(b) name the court where the complaint was filed;

H(1)(c) be accompanied by a copy of the complaint, 2 copies of the waiver in the following form, and a prepaid means for returning the form:

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-19

WAIVER OF THE SERVICE OF SUMMONS

TO: [NAME], Counsel for Plaintiff(s)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 7 within 60 days from [DATE], the date when this request was sent.

[DATE] [SIGNATURE OF ATTORNEY OR UNREPRESENTED PARTY]

[PRINTED NAME]

[ADDRESS]

[EMAIL ADDRESS]

[TELEPHONE NUMBER]

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 7 of the Oregon Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who fails to return a signed waiver of service requested by a plaintiff located in Oregon will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-20

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 7 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

H(1)(d) inform the defendant of the consequences of waiving and not waiving service;

H(1)(e) state the date when the request is sent;

H(1)(f) give the defendant a reasonable time of at least 30 days after the request was sent to return the waiver; and

H(1)(g) be sent by first class mail or other reliable means, in the following form:

NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS

To: [NAME OF THE DEFENDANT OR – IF THE DEFENDANT IS SUBJECT TO SERVICE UNDER RULE 7 D(3)(b) through (f) – A REGISTERED AGENT OR ANY OTHER PERSON WHO IS AUTHORIZED UNDER THIS RULE TO RECEIVE SERVICE OF PROCESS]

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Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-21

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within ____ days (*give at least 30 days*) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and will have 60 days from the date this notice is sent (see the date below) to answer the complaint.

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you and I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid necessary expenses.

I certify this request is being sent to you on the date below.

Date: [DATE] [SIGNATURE OF THE ATTORNEY OR UNREPRESENTED PARTY]

[PRINTED NAME]

[ADDRESS]

[EMAIL ADDRESS]

[TELEPHONE NUMBER]

H(2) **Failure to waive.** If a defendant fails, without good cause, to sign and return a waiver requested by a plaintiff, the court must impose on the defendant:

Council on Court Procedures
March 14, 2020, Meeting
Appendix B-22

H(2)(a) the expenses later incurred in making service; and

H(2)(b) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

H(3) **Time to answer after a waiver.** A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent.

H(4) **Results of filing a waiver.** When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of the filing of the waiver.

H(5) **Jurisdiction and venue not waived.** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

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TO: Council on Court Procedures

FROM: Rule 23 Committee

DATE: March 12, 2020

The Council tasked the Rule 23 Committee with evaluating a comment expressing concern about unfairness in the circumstance where a plaintiff amends a complaint close to trial to make minor changes and the answer in response to the amendment raises entirely new defenses that could have been raised earlier and were not triggered by the amendment (e.g. an amendment to add punitive damages or change the amount of economic damages results in a newly raised defense of comparative fault). These new defenses may require changing the trial date and entail significant added time and expense for parties and the court.

The Committee recognizes the potential for unfairness and believes that resolution is and should remain in the court's discretion. The Committee concluded that the best way to clarify that a potential remedy exists via a motion to strike is to add the following underlined language to ORCP 21E:

> **E Motion to strike.** 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: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; (3) any pleading or defense that the court determines is untimely or prejudicial to the moving party under the standards for permitting amendments to pleadings under Rule 23.

We chose this language because (1) we thought timeliness alone would create a vague standard; and (2) there is existing caselaw based on the standards for permitting amendments under Rule 23 that is helpful in determining whether a late answer or defense should be allowed, including the nature of the proposed amendment, the prejudice, if any, to the opposing party, the timing of the proposed amendments, and the colorable merit of the proposed amendment. See, e.g., *Ramsey v. Thompson*, 162 Or App 139, 144 (1999). These same considerations would be helpful considerations in determining a motion to strike a late defense.

We discussed the possibility of using “undue prejudice” instead of prejudice but Rule 23 (and the rest of the rules) uses only "prejudice." We want to avoid creating new or substantive standards apart from that already in Rule 23. Both parties should freely be given leave to raise new claims or defenses, pursuant to the court's discretion, absent the prejudice standard in Rule 23. Since the courts are defining what "prejudice" means under Rule 23 and other rules, adding "unduly" to the word prejudice could create a new substantive standard.

We also considered whether the standard should be “untimely *and* unduly prejudicial”, since most amended pleadings will always be prejudicial. We have not completed that discussion nor has everyone on the Committee had an opportunity to comment on the proposed language, so while we look forward to feedback from the Council, we are not yet making a recommendation.

OREGON COUNCIL ON COURT PROCEDURES
FINAL REPORT ON ORCP 23 AND ORCP 34

Oregon has made a policy choice that civil legal claims against persons who have died, and such claims that could have been pursued by persons who are now deceased, survive to some degree the death of the would-be defendant or plaintiff. *See* ORS 12.190.

However, in a specific set of cases, there are two classes of victims of tortious conduct or other wrongdoing—those cases in which a victim can recover for the defendant's wrongful acts and those cases where the victim cannot. That specific set of cases is comprised of civil actions where the defendant dies before the statute of limitations expires but the fact of the defendant's death is unknown to the victim. As a matter of policy, ORS 12.190(2) extends the period during which the victim can sue for one year after the death of the defendant. Further, application of ORS 12.190(2) has the effect of allowing the lawsuit to be filed after the applicable statute of limitations has expired, so long as the case is filed within one year of the defendant's death.

If the defendant has died, the victim is authorized to sue the defendant's personal representative. However, if the victim is not aware that the defendant died and files suit against the defendant, some victims, but not all, will be able to recover. If, after commencing the lawsuit, the victim learns of the defendant's death and is able to amend the case to name the defendant's personal representative as the defendant, and to obtain service of the summons and amended complaint on that personal representative, the victim can recover. In fact, ORS 12.020(2) affords the victim 60 days after the case is filed to effect service, even if the date of service occurs after the statute of limitations has expired. However, if the fact of the defendant's death remains unknown to the victim until after the statute of limitations expires, no matter how meritorious the claim, that victim has no remedy.

As a practical matter, the discovery of the defendant's death will occur during the 60-day period ORS 12.020(2) allows for service of the summons and complaint. Of course, this problem could be avoided: 1) by filing the case and attempting service well before the statute of limitations expires; or 2) by keeping close tabs on the health of the defendant. However, for a number of reasons, victims may be unaware of the applicable statute of limitations or may not obtain legal representation until near the end of the statute of limitations period. In addition to leaving some victims with no remedy for the harm inflicted by the defendant, the statutory gap creates malpractice liability for the victim's attorney who agrees to represent the victim without knowledge of the defendant's health or whereabouts.

Two appellate cases illustrate the problem. In *Wheeler v. Williams*, 136 Or App 1, *rev. den*., 322 Or 362 (1995), the plaintiff, Rolana Wheeler, was injured on April 3, 1991. Ms. Wheeler filed her lawsuit against the defendant, Ira Williams, on March 31, 1993, not knowing that Mr. Williams had died on April 26, 1992 (11 months earlier) and that a small estate had been opened and closed shortly after Mr. Williams' death. After the 2-year statute of limitations had expired, Ms. Wheeler attempted to substitute the personal representative of Mr. Williams' estate,

Council on Court Procedures
March 14, 2020, Meeting
Appendix D-1

suggesting that this was merely an amended complaint under ORCP 23 C and, therefore, the amended complaint should relate back to the date that the original complaint had been filed. The *Wheeler* court ruled that, even if the small estate had not already been closed when the case was filed, the personal representative was a different entity from Mr. Williams. Therefore, the amendment to name Mr. Williams' personal representative as the defendant did not relate back to the date of the filing of the original complaint and the case was properly dismissed, having been filed after the statute of limitations expired.

In *Worthington v Estate of Davis*, 250 Or App 755 (2012), the plaintiff, Peggy Worthington, was injured in a collision on December 10, 2007. Ms. Worthington filed suit on December 9, 2009, not realizing that the other driver, Milton Davis, had died in September of 2008, 14 months earlier. As in *Wheeler*, Ms. Worthington attempted to amend the complaint to substitute a personal representative in place of the decedent. Ms. Worthington argued that the amendment was simply a correction of a name, allowable under ORCP 23 C. The *Worthington* Court distinguished between misnaming a party (a "misnomer"), that enjoys the benefit of the "relation back" doctrine, and suing the wrong party (a "misidentification"), that does not. In finding that Ms. Worthington had originally sued a deceased person, the Court ruled that she had not incorrectly named an existing defendant; she was attempting to amend her complaint to name a new party. The amendment to substitute the personal representative for the decedent would not save the case.

Although a fix of this statutory gap appears to be wonkishly procedural, the Council determined that potential amendments to ORCP 23 (amended pleadings) or ORCP 34 (substitution of parties) were not available. The Council's enabling statutes, specifically ORS 1.735(1), define the Council's authority to "…promulgate rules governing pleading, practice and procedure…which shall not abridge, enlarge or modify the substantive rights of any litigant." Statutes of limitations are unquestionably substantive rights. Therefore, the problem identified here requires a legislative fix. Therefore, the Council has decided to recommend to the Legislative Assembly an amendment to ORS 12.190 to remedy this problem.

In working through possible solutions, the Council intentionally avoided injecting into any proposal the concept of "discovery" of the defendant's death. If the statute includes "learns of" or "learns of or with reasonable diligence would have discovered," the stage is set for litigation over whether the plaintiff did know or should have known of the defendant's death, a litigation path that will increase the cost of litigation with no discernable benefit. The Council considered numerous proposals and debated the ease and efficacy of different approaches. Since the Council is merely suggesting a legislative solution, it modestly includes the following proposed amendment 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 expiration of 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 decedent's personal representative as the real party in interest for the deceased defendant. That amendment shall relate back to the date the complaint was filed.

[*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 (that is, a competent adult who acts in the party's interests in and for the purposes of the action) 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

Council on Court Procedures
March 14, 2020, Meeting
Appendix E-1

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.

Council on Court Procedures
March 14, 2020, Meeting
Appendix E-2

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

Council on Court Procedures
March 14, 2020, Meeting
Appendix E-3

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.

ORCP 31. Interpleader

Option 1:

C Attorney fees. In any [*suit or*] action or for any cross-claim or counterclaim in interpleader filed pursuant to this rule by any party other than a party who has been compensated for acting as a surety with respect to the funds or property interpled, the party [*filing the suit or action in interpleader*] interpleading funds [*shall*] may be awarded a reasonable attorney fee in addition to costs and disbursements upon the court ordering that the funds or property interpled be deposited with the court, secured or otherwise preserved and that the party [*filing the suit or action in interpleader*] interpleading funds be discharged from liability as to the funds or property. The attorney fees awarded shall be assessed against and paid from the funds or property ordered interpled by the court.

Option 2:

C Attorney fees. In any [*suit or*] action in interpleader filed pursuant to this rule or where an interpleader cross-claim or counterclaim is made by any party other than a party who has been compensated for acting as a surety with respect to the funds or property interpled, the party [*filing the suit or action in interpleader*] interpleading funds shall, except as provided in C(1) through C(3) below, be awarded a reasonable attorney fee in addition to costs and disbursements upon the court ordering that the funds or property interpled be deposited with the court, secured or otherwise preserved and that the party [*filing the suit or action in interpleader*] interpleading funds be discharged from liability as to the funds or property. The attorney fees awarded shall be assessed against and paid from the funds or property ordered interpled by the court. Attorney fees may not be awarded if:

C(1) The party interpleading funds is involved in the dispute in a way that it should not as a matter of equity be awarded attorney fees as a result of the dispute;

C(2) The party interpleading funds was not subject to multiple litigation; or,

C(3) The interpleader was not in the interests of justice and did not further resolution of the dispute.

BAYLOR
LAW REVIEW

VOLUME 34 FALL, 1982 NUMBER 4

REFORMING INTERPLEADER: THE NEED FOR CONSISTENCY IN AWARDING ATTORNEYS' FEES

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An individual holding money payable to another encounters a problem when two or more persons assert conflicting claims to the money. Payment of the fund to one claimant exposes the stakeholder to litigation by the others, and multiple liability may result. Interpleader is a procedure through which the stakeholder may deposit the fund with a court, join all adverse claimants in a single suit, and avoid this harsh possibility.[1]

A stakeholder may bring an interpleader action by initiating the litigation as a plaintiff or by responding in ongoing litigation in which it is a defendant.[2] If all of the adverse claimants are citizens of the same state, the action may be brought in the courts of that state. If they are not all citizens of the same state, the problem of acquiring jurisdiction in state court over the nonresident claimants is resolved by the federal interpleader statute.[3] This statute gives federal district courts jurisdiction over the subject matter of any interpleader action involving a fund of $500 or more when two or more adverse claimants have diverse citizenship. In an action under the federal statute, there is nationwide jurisdiction over the

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**The views expressed herein are those of the author, and they do not necessarily reflect the position of Penn Mutual Life Ins. Co.

[1]Chafee, *Modernizing Interpleader*, 30 YALE L.J. 814, 814-19 (1921).

[2]*See infra* text accompanying notes 121-25. The procedural difference, however, may go beyond the difference between filing a complaint and filing a counterclaim. In Pennsylvania, for example, interpleader may be brought at law only by a defendant. Rules 2301 through 2325 (Pa. R. Civ. P. 2301-25) provide only for interpleader by defendants, and rule 2318 (Pa. R. Civ. P. 2318) provides that they are the exclusive method of interpleader in any action at law, but that they are in addition to, and not in lieu of, the right to file a complaint for interpleader in equity. Consequently, a stakeholder wishing to initiate an interpleader action as plaintiff in Pennsylvania must do so in equity. A stakeholder may also bring an interpleader action by intervening in litigation between claimants over the right to funds held by the stakeholder. 3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 22.14[1], n.3 (2d ed. 1982).

[3]28 U.S.C. § 1335 (1976).

person of the claimants for service of process.[4]

The action may also be brought in federal court if all of the adverse claimants are citizens of the same state provided the stakeholder is not a citizen of that state. An interpleader action may be brought in federal court under rule 22[5] if there is diversity between the stakeholder and all of the claimants.[6] However, the amount in controversy for an action under rule 22 must exceed $10,000.[7]

Venue in an action under the federal interpleader rule lies in the district in which all of the plaintiffs reside, the district in which all of the defendants reside, or the district in which the claim arose; conversely, an action under the federal interpleader statute must be brought in a district in which one of the claimants resides.[8] Although the rules appear to give the stakeholder a wide range of venue choices, in practice, the stakeholder's choices are strictly limited. With only a few exceptions, process in an action under the federal interpleader rule must be served personally upon the claimants within the boundaries of the state in which the district court sits.[9] Therefore, in most cases, an action may be brought under the federal rule only if all the claimants can be found in the same state, and the action must be brought in that state.

In an interpleader action, the court first determines whether the stakeholder is entitled to interpleader relief. Upon making that determination, the court normally orders the stakeholder to deposit the fund (or give a bond in lieu of deposit) if the stakeholder has not done so already.[10] Also, the court orders the claimants to interplead, enjoins the claimants from bringing or continuing any action against the stakeholder, and discharges the stakeholder from the proceeding and from further liability concerning the fund. The court then determines the merits of the adverse claims.[11]

The interpleader procedure is a useful one. In addition to protecting the stakeholder against the harassment of multiple lawsuits and the threat of multiple liability, interpleader helps the claimants by eliminating the need for a search for, and execution upon, the debtor's assets.[12] Further, it helps the courts by resolving many potential lawsuits in a single proceeding.[13]

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[4]28 U.S.C. § 2361 (1976).

[5]FED. R. CIV. P. 22.

[6]3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 22.04[2.-1].

[7]*Id.*

[8]*Id.* at ¶ 22.04[2.-3].

[9]*Id.* at ¶ 22.04[2.-2].

[10]If the action is brought under the federal statute, deposit or bond is a prerequisite to obtaining interpleader jurisdiction. 28 U.S.C. § 1335 (1976); 3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 22.10.

[11]3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 22.14[1].

[12]Chafee, *The Federal Interpleader Act of 1936*, 45 YALE L.J. 963, 964 (1936).

[13]3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 22.02[1] at 22-4.

In spite of the advantages of interpleader, a stakeholder might be tempted to avoid the expense of even a single lawsuit by attempting to determine the rightful claimant itself. The stakeholder might then pay the claimant it chose and hope to convince the other claimants that the other claims were unsound. Such an election would hurt the rightful claimant if the stakeholder chose wrongly. It could also burden the courts with multiple lawsuits if two or more rejected claimants were not convinced that their claims were invalid. The resulting litigation would hurt the stakeholder as well. To avoid these results, and to encourage the use of interpleader when it is needed, the general rule developed that the stakeholder's fees should be paid from the fund.

Despite this general rule, both state and federal courts have created numerous exceptions, many of which are inconsistent with the rationale behind the general rule. Some of the exceptions are appropriate, but many are not. Some courts have acknowledged the validity of the general rule allowing fees, but, in attempting to apply exceptions to the general rule, have ignored the reasons for awarding fees. As a result, many decisions denying fees, although accepting the general rule, give reasons for the denials that contradict the reasons for the general rule. The courts should take more care to avoid such contradictions by remembering and applying the reasons for awarding fees. Consistency in determining whether to award fees would give better guidance to stakeholders faced with conflicting claims, and it would avoid unnecessarily discouraging the use of interpleader.[14]

I. The General Rule

Although the federal interpleader statute does not expressly provide for payment of attorneys' fees to stakeholders, the weight of authority in the federal courts is that such awards are permissible.[15] This practice is obvi-

[14]Because of its benefits, the use of interpleader should be encouraged rather than discouraged. "There has been a consistent judicial trend encouraging the use of interpleader and joinder of parties. As a matter of judicial administration, we think these policies should be effectuated whenever appropriate." Johnson v. All State Roofing & Paving Co., 557 P.2d 770, 773-74 (Alaska 1976).

[15]Authority for such awards may be found in the opinions of federal courts in the following jurisdictions: Alabama, Hoover, Inc. v. McCullough Indus., 351 F. Supp. 1023 (S.D. Ala. 1972); Arizona, Home Ins. Co. v. Burns, 474 F.2d 1001 (9th Cir. 1973); Arkansas, Equifax, Inc. v. Luster, 463 F. Supp. 352 (E.D. Ark. 1978); California, Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., 306 F.2d 188 (9th Cir. 1962); Colorado, Equitable Life Assurance Soc'y of the United States v. Rose, 248 F. Supp. 937 (D. Colo. 1965); Connecticut, Klebanoff v. Mutual Life Ins. Co., 246 F. Supp. 935 (D. Conn. 1965), *rev'd and remanded on other grounds*, 362 F.2d 975 (2d Cir. 1966); Florida, Farmers Reliance Ins. Co. v. Miami Rug Co., 227 F. Supp. 187 (S.D. Fla. 1963); Georgia, James Talcott, Inc. v. Allahabad Bank, Ltd., 444 F.2d 451 (5th Cir. 1971); Idaho, Treinies v. Sunshine Mining Co., 99 F.2d 651 (9th Cir. 1938); Illinois, Minnesota Mut. Life Ins. Co. v. Gustafson, 415 F. Supp. 615 (N.D. Ill. 1976); Indiana, Youngstown Sheet & Tube Co. v. Patterson-Emerson-Com-

ously contrary to the "American rule" that each party must bear his own attorneys' fees absent a statute to the contrary.[16] However, the American rule has consistently been held inapplicable when it would interfere with the power of a court of equity to permit a party preserving a fund for the benefit of himself and others to recover attorneys' fees from the fund.[17] This exception clearly applies to interpleader; thus, no statutory provision for fees is necessary.[18]

Most state courts permit such fee awards in state interpleader actions,[19]

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stock, 227 F. Supp. 208 (N.D. Ind. 1963); Iowa, Community School Dist. v. Employers Mut. Cas. Co., 194 F. Supp. 733 (N.D. Iowa 1961); Kansas, Equitable Life Ins. Co. v. Dinoff, 72 F. Supp. 723 (D. Kan. 1947); Louisiana, Gulf Oil Corp. v. Olivier, 412 F.2d 938 (5th Cir. 1969); Maryland, Aetna Life Ins. Co. v. Outlaw, 411 F. Supp. 824 (D. Md. 1976); Massachusetts, United Coop. Farmers v. Aksila, 156 F. Supp. 118 (D. Mass. 1957); Michigan, Equitable Life Assurance Soc'y of the United States v. McClelland, 85 F. Supp. 688 (W.D. Mich. 1949); Minnesota, Equitable Life Assurance Soc'y of the United States v. Miller, 229 F. Supp. 1018 (D. Minn. 1964); Mississippi, Chevron Oil Co. v. Clark, 291 F. Supp. 552 (S.D. Miss. 1968); Missouri, Beaufort Transfer Co. v. Fischer Trucking Co., 357 F. Supp. 662 (E.D. Mo. 1973); Montana, Mutual of Omaha Ins. Co. v. Walsh, 395 F. Supp. 1219 (D. Mont. 1975); Nebraska, Prudential Ins. Co. of America v. Tomes, 45 F. Supp. 353 (D. Neb. 1942); New Jersey, United States v. Wilson, 333 F.2d 147 (3d Cir. 1964); New York, Skandia Am. Reinsurance Corp. v. Schenck, 441 F. Supp. 715 (S.D.N.Y. 1977); Ohio, Lindoefer v. J. C. Penney Co., 244 F. Supp. 175 (N.D. Ohio, 1965); Oklahoma, United States Fidelity & Guar. Co. v. Sidwell, 525 F.2d 472 (10th Cir. 1975); Oregon, United States Fidelity & Guar. Co. v. Long, 214 F. Supp. 307 (D. Or. 1963); Pennsylvania, Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l Bank, 372 F. Supp. 1027 (E.D. Pa. 1974), *aff'd*, 510 F.2d 970 (3d Cir. 1975); Rhode Island, Narragansett Bay Gardens, Inc. v. Grant Constr. Co., 176 F. Supp. 451 (D.R.I. 1959); South Carolina, Texas Co. v. Xavier, 54 F. Supp. 722 (E.D.S.C. 1944); Tennessee, Paul Revere Life Ins. Co. v. Riddle, 222 F. Supp. 867 (E.D. Tenn. 1963); Texas, Hernandez v. Home Sav. Ass'n, 411 F. Supp. 858 (N.D. Tex. 1976); Virginia, Manufacturers Life Ins. Co. v. Johnson, 385 F. Supp. 852 (E.D. Va. 1974); Virgin Islands, Callwood v. Virgin Islands Nat'l Bank, 221 F.2d 770 (3d Cir. 1955); West Virginia, Provident Life & Accident Ins. Co. v. Dotson, 93 F. Supp. 538 (S.D. W. Va. 1950); and Wisconsin, Mutual Life Ins. Co. v. Haskett, No. 77-C-687 (E.D. Wisc. Dec. 27, 1977).

[16]Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

[17]*Id.* at 247-58.

[18]Minnesota Mut. Life Ins. Co. v. Gustafson, 415 F. Supp. 615; Lincoln Income Life Ins. Co. v. Harrison, 71 F.R.D. 27 (W.D. Okla. 1976); Skandia Am. Reinsurance Corp. v. Schenck, 441 F. Supp. 715.

[19]The states in which attorneys' fees may be awarded to the stakeholder in state courts are: Alabama, Sheehan v. Liberty Mut. Fire Ins. Co., 288 Ala. 137, 258 So. 2d 719 (1972); Alaska, Johnston v. All State Roofing & Paving Co., 557 P.2d 770 (Alaska 1976); Arkansas, Cluck v. Mack, 253 Ark. 769, 489 S.W.2d 8 (1973); California, Sweeney v. McClaran, 58 Cal. App. 3d 824, 130 Cal. Rptr. 205 (1976); Colorado, Liebhardt v. Avison, 123 Colo. 338, 229 P.2d 933 (1951); Connecticut, Franklin Constr. Co. v. F & M. Concrete Constr. Co., 35 Conn. Sup. 79, 396 A.2d 510 (1978); Delaware, Everitt v. Everitt, 37 Del. Ch. 512, 146 A.2d 388 (1958); Florida, Nat'l Life Ins. Co. v. Southeast First Nat'l Bank, 361 So. 2d 432 (Fla. Ct. App. 1978); Georgia, Blaylock v. Georgia Mut. Ins. Co., 239 Ga. 462, 238 S.E.2d 105 (1977); Hawaii, Manufacturers Life Ins. Co. v. Von Hamm-Young Co., 34 Haw. 288 (1937); Idaho, Furness v. Park, 98 Idaho 617, 579 P.2d 854 (1977); Kansas, Club Exch. Corp. v. Searing, 222 Kan. 659, 567 P.2d 1353 (1977); Maine, First Nat'l Bank v. Reynolds, 127 Me. 340, 143 A. 266 (1928); Maryland, Aetna Life Ins. Co. v. Outlaw, 411 F. Supp. 824 (D. Md. 1976); Massachusetts, Chartrand v. Chartrand, 295 Mass. 293, 3 N.E.2d 828 (1936); Michigan, GRP, Ltd. v. United States Aviation Underwriters, Inc., 70 Mich. App. 671, 247 N.W.2d 583 (1976); Mississippi, Hartford Accident & Indem. Co. v. Natchez Inv.

although at least six jurisdictions expressly deny them: the District of Columbia,[20] Illinois,[21] Kentucky,[22] Louisiana,[23] Nevada,[24] and North Carolina.[25] This divergence from the general rule creates a special problem for federal courts entertaining federal interpleader actions in one of those jurisdictions: does the familiar rule of *Erie R.R. Co. v. Tompkins*[26] require the federal court to follow the state practice and refuse to permit an award of attorneys' fees? There exists considerable confusion in the cases, which frequently fail to mention state law or simply conclude that the result would be the same under either state or federal law.[27] As the federal district court for the District of Maryland candidly noted in *Aetna Life Insurance Co. v. Outlaw*,[28] "the question of whether the allowance in interpleader actions of attorneys' fees and costs is to be predetermined by federal equitable principles or by state law under *Erie* . . . remains unresolved."[29]

Of the six jurisdictions denying attorneys' fees, only in North Carolina does a federal court feel bound by *Erie* to apply the state rule. In *Metropolitan Life Insurance Co. v. Jordan*,[30] the court said that as a matter of comity and in the interest of uniformity it would follow state practice. Other courts have emphasized the fact that an interpleader action is based upon diversity of citizenship,[31] but such statements are not accurate if the action is brought under the federal interpleader statute rather

Co., 161 Miss. 198, 135 So. 497 (1931), Maryland Cas. Co. v. Sauter, 377 F. Supp. 68 (N.D. Miss. 1974); Missouri, General Am. Life Ins. Co. v. Wiest, 567 S.W.2d 341 (Mo. App. 1978); Montana, First Nat'l Bank v. Garner, 173 Mont. 195, 567 P.2d 40 (1977); New Hampshire, Manchester Fed. Sav. & Loan Ass'n v. Emery-Waterhouse Co., 102 N.H. 233, 153 A.2d 918 (1959); New Jersey, Washington Constr. Co. v. United States, 75 N.J. Super. 536, 183 A.2d 496 (1962); New York, Metropolitan Life Ins. Co. v. Brody, 228 N.Y.S.2d 312 (Sup. Ct. 1962); Ohio, Csohan v. United Benefit Life Ins. Co., 33 Ohio Op. 2d 361, 200 N.E.2d 345 (Ohio Ct. App. 1964); Oregon, Gresham State Bank v. O & K Constr. Co., 231 Or. 106, 370 P.2d 726 (1962); Pennsylvania, Penn. Mut. Life Ins. Co. v. Gaston, 89 Pa. D. & C. 306 (1954); Rhode Island, Combined Ins. Co. of Am. v. Salisbury, 101 R.I. 448, 224 A.2d 383 (1966); Tennessee, LaRue v. Anderson County, 194 Tenn. 525, 253 S.W.2d 736 (1952); Texas, Holmquist v. Occidental Life Ins. Co. of Cal., 536 S.W.2d 434 (Tex. Civ. App.—Houston [14th Dist] 1976, writ ref'd n.r.e.); Utah, Capson v. Brisbois, 592 P.2d 583 (Utah 1979); Virginia, Pettus v. Hendricks, 113 Va. 326, 74 S.E. 191 (1912); Washington, Osawa v. Onishi, 33 Wash. 2d 546, 206 P.2d 498 (1949); and West Virginia, Union Mut. Life Ins. Co. v. Lindamood, 108 W. Va. 594, 152 S.E. 321 (1930).

[20]Continental Trust Co. v. Corbin, 80 F. Supp. 394 (D.C. Sup. 1924).

[21]Ralston Purina Co. v. Killam, 10 Ill. App. 3d 397, 293 N.E.2d 750 (1973).

[22]Ohio Cas. Ins. Co. v. Berger, 311 F. Supp. 840 (E.D. Ky. 1970).

[23]Crabtree v. Hibernia Bank & Trust Co., 127 So. 2d 782 (La. Ct. App. 1961).

[24]Mooney v. Newton, 43 Nev. 441, 187 P. 721 (1920).

[25]Supreme Lodge Knights of Honor v. Selby, 153 N.C. 203, 69 S.E. 51 (1910).

[26]304 U.S. 64 (1938).

[27]7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1719 (1972).

[28]411 F. Supp. 824 (D. Md. 1976).

[29]*Id.* at 825.

[30]211 F. Supp. 842 (W.D.N.C. 1963).

[31]*E.g.*, Ohio Cas. Ins. Co. v. Berger, 311 F. Supp. 840; Aetna Life Ins. Co. v. Johnson, 206 F. Supp. 63 (N.D. Ill. 1962).

than under rule 22.

Conversely, federal courts in three of the "no fees" jurisdictions – Louisiana, Illinois, and Kentucky – have rejected the applicability of *Erie*. In *Perkins State Bank v. Connolly*,[32] the Fifth Circuit concluded that Louisiana's refusal to allow fee awards to stakeholders "interferes with the protective purpose of the interpleader statute"[33] and, therefore, does not bind the federal courts. Similarly, in *Minnesota Mutual Life Insurance Co. v. Gustafson*,[34] the Northern District of Illinois, in overruling earlier decisions that *Erie* compelled adherence to state law,[35] concluded that "application of a different federal standard will not frustrate the policies underlying *Erie* . . ."[36] The Eastern District of Kentucky has also overruled earlier precedent, at least inferentially. In *Metropolitan Life Insurance Co.* v. Prater,[37] the court concluded that an award of attorneys' fees rested within the court's discretion, without citing a previous decision of that court holding that *Erie* mandated application of state law.[38]

The view that *Erie* does not apply in these circumstances is sound. As the Supreme Court has explained, the "twin aims" of the *Erie* rule are "discouragement of forum-shopping and avoidance of inequitable administration of the laws."[39] Most federal statutory interpleader actions could not be brought in state court because of personal jurisdiction difficulties, and, consequently, a federal rule for attorneys' fees that varies from state law will not encourage forum shopping or lead to different results in the two forums. Further, the interpleader statute itself represents a federal policy decision to provide a forum for stakeholders when no state forum is available, and state interpleader rules should not govern such a uniquely federal proceeding.[40] Thus, federal courts in the District of Columbia and Nevada should follow the general rule recognized in federal courts – that fees may be awarded to a stakeholder – rather than considering themselves bound by the local opinions to the contrary. Also, in those states

[32]632 F.2d 1306 (5th Cir. 1980).

[33]*Id.* at 1311.

[34]415 F. Supp. 615 (N.D. Ill. 1976).

[35]Aetna Life Ins. Co. v. Johnson, 206 F. Supp. 63 (N.D. Ill. 1962).

[36]415 F. Supp. at 617.

[37]508 F. Supp. 667, 669 (E.D. Ky. 1981). The court relied upon a Louisiana case, Gulf Oil Corp. v. Olivier, 412 F.2d 938 (5th Cir. 1969), in which the Fifth Circuit held that federal courts ordinarily award attorneys' fees to the disinterested stakeholder despite the fact that Louisiana state courts deny such fees. The court reasserted its position in *Prater* by awarding fees to the stakeholder in Penn Mutual Life Ins. Co. v. Charlesworth, No. 80-7 (E.D. Ky. Oct. 19, 1982).

[38]Ohio Cas. Ins. Co. v. Berger, 311 F. Supp. 840 (E.D. Ky. 1970).

[39]Hanna v. Plumer, 380 U.S. 460, 468 (1965).

[40]Minnesota Mutual Life Ins. Co. v. Gustafson, 415 F. Supp. at 617. The commentators agree. *See, e.g.*, 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1719 (1972); 6 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 54.77(2); Rall & Sfikas, *Costs, Attorneys' Fees and Required Diversity in Federal Interpleader Suits on Life Insurance Policies*, 2 FORUM 208 (1967); *see also* Bank of China v. Wells Fargo Bank & Union Trust Co., 209 F.2d 467 (9th Cir. 1953); Klebanoff v. Mutual Life Ins. Co., 246 F. Supp. 935 (D. Conn. 1965), *rev'd on other grounds*

in which neither local nor federal courts have established any rule concerning fees, the federal courts should feel free to apply the federal rule without attempting to predict what the state courts would do upon considering the question.[41]

The case for applying federal law is not as compelling if the interpleader action is brought under rule 22 of the Federal Rules of Civil Procedure and the diversity statute, 28 U.S.C. § 1332. Like the interpleader statute, rule 22 is silent on the question of costs and fees.[42] Since the rule requires diversity between the stakeholder and all claimants, a federal court may have jurisdiction even though all claimants are of the same state[43]—a situation in which state interpleader might also be invoked. Accordingly, forum shopping is a more likely possibility in actions brought under rule 22 than under the interpleader statute. Nonetheless, the federal courts should apply their own policy in a rule 22 proceeding as well, for awarding attorneys' fees is not determinative of the outcome of the proceeding—a major concern of *Erie*—either in terms of availability of the interpleader or the adjudication of the dispute between the claimants.[44]

II. Reasons For Awarding Fees

Although courts and commentators have expressed the reasons for awarding fees to stakeholders in many different ways, the reasons may be summarized as follows: (1) The stakeholder is not involved in the dispute, either in its origin or its outcome, in such a way that it should suffer expenses as a result of the dispute; (2) One should not have to pay to avoid the harassment of multiple litigation; and (3) The stakeholder provides valuable services by interpleading.

Some courts have stated that since the stakeholder is not responsible for the creation of the dispute, it should not be required to incur expenses.[45] As Professor Moore said, "[t]he retention of counsel has in all likeli-

362 F.2d 975 (2d Cir. 1966).

[41]*See* Equitable Life Ins. Soc'y v. Miller, 229 F. Supp. 1018 (court awarded attorneys' fees to stakeholder despite no indication in reported cases that Minnesota awarded such fees).

[42]Had the Supreme Court added an attorneys' fee provision when it promulgated rule 22, such a provision would govern despite state law to the contrary. *See* Hanna v. Plumer, 380 U.S. 460 (when federal rule and state rule are in direct conflict, federal rule will control if it is procedural or if it falls within "the uncertain area between substance and procedure" and is "rationally capable of classification as either.") It has been suggested that rule 54(d), which gives the federal courts the power to tax costs in actions arising under the rules, is sufficient to support an award of attorneys' fees in a rule 22 proceeding, even though the usual concept of costs does not include attorneys' fees. *See* Bank of China v. Wells Fargo Bank & Union Trust Co., 209 F.2d 467, 476-77.

[43]3A J. Moore, Moore's Federal Practice ¶ 22.04 (2-1).

[44]*See* 7 C. Wright & A. Miller, Federal Practice And Procedure § 1719 (1972); 3A J. Moore, Moore's Federal Practice ¶ 22.16(2).

[45]Companion Life Ins. Co. v. Schaffer, 442 F. Supp. 826 (S.D.N.Y. 1977); Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l. Bank, 372 F. Supp. 1027 (E.D. Pa. 1974); Aetna Life Ins. Co. v. Harley, 365 F. Supp. 1210 (N.D. Ga. 1973); Coppage v. Insurance Co. of

hood been necessitated not because of the stakeholder's wrongdoing but rather because he is the mutual target in a dispute which is not of his own making."[46]

The stakeholder's lack of concern for the outcome has also been given as a reason for awarding fees.[47] In *Greenberg v. Equitable Life Assurance Society*,[48] the Minnesota federal district court held that "[w]here the mere holder of a disputed fund has no interest in the fund, but is only interested in seeing that the proper party receives the funds, the expenses of establishing the proper recipient obviously should not be borne by the stakeholder."[49]

The same argument has been made by identifying the stakeholder as a fiduciary. The New Jersey Supreme Court has held that "a stakeholder who interpleads the fund is allowed the expenses of the interpleader itself because as a fiduciary he is entitled to be reimbursed for the costs of handling the res."[50]

Courts have also held that one should not have to pay to avoid the harassment of multiple litigation. That conclusion is widely cited as a reason for awarding fees. It has been relied on in the Eighth[51] and the Ninth Circuits[52] and in state and federal courts in New York,[53] Alabama,[54] Connecticut,[55] Maryland,[56] and Utah.[57]

The conclusions that one not involved in either the origin or the outcome of a dispute should not suffer expenses as a result of the dispute and that one should not pay to avoid the harassment of multiple litigation are presented by the courts as self-evidently equitable. But beyond the obvious fairness of the rationale that the innocent should not be made to suffer lies a practical reason for those conclusions. A stakeholder having no interest in the dispute has no ability to avoid litigation expenses by participating in settlement. A stakeholder, unlike most parties in liti-

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N. America, 263 F. Supp. 98 (D. Md. 1967); Massachusetts Bonding & Ins. Co. v. Antonelli Const. Co., 173 F. Supp. 391 (D. Mass. 1959); Travelers Ins. Co. v. Walden, 160 F. Supp. 845 (M.D. Ala. 1958); Bisgeier v. Prudential Ins. Co. of Am., 2 Misc. 2d 857, 150 N.Y.S.2d 625 (Sup. Ct. 1956); Pettus v. Hendricks, 113 Va. 326, 74 S.E. 191 (1912).

[46]3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 22.16[2], at 22-170.

[47]Companion Life Ins. Co. v. Schaffer, 442 F. Supp. 826 (S.D.N.Y. 1977); Greenberg v. Equitable Life Assurance Soc'y, 167 F. Supp. 112.

[48]167 F. Supp. 112 (D. Minn. 1958).

[49]*Id.* at 118.

[50]Sunset Beach Amusement Corp. v. Belk, 33 N.J. 162, 162 A.2d 834, 838 (1960).

[51]New York Life Ins. Co. v. Miller, 139 F. 2d 657 (8th Cir. 1944).

[52]Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., 306 F.2d 188.

[53]Bisgeier v. Prudential Ins. Co. of Am., 2 Misc. 2d 857, 150 N.Y.S.2d 625.

[54]Travelers Ins. Co. v. Walden, 160 F. Supp. 845 (M.D. Ala. 1958).

[55]Klebanoff v. Mutual Life Ins. Co., 246 F. Supp. 935 (D. Conn. 1965), *rev'd and remanded on other grounds*, 362 F.2d 975 (2d Cir. 1966).

[56]Aetna Life Ins. Co. v. Outlaw, 411 F. Supp. 824.

[57]Capson v. Brisbois, 592 P.2d 583 (Utah 1979).

[58]Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., 306 F.2d 188; Coppage v.

gation, is helpless to do other than to stand by and absorb the expense of litigation that it does not want but cannot avoid.

Many courts have awarded fees to the stakeholder not only because it is caught in the middle of a dispute among others, but also because it helps resolve the dispute by interpleading. These courts have held that the stakeholder is entitled to payment of its fees because by depositing the fund in court and interpleading the claimants it protects the fund,[58] provides the prevailing claimant with a procedure that allows immediate satisfaction without the need for execution proceedings,[59] helps the claimants by expeditiously resolving the dispute in one forum,[60] and helps the judicial process by bringing all claimants into one forum and by avoiding duplicative claims.[61] Thus, the stakeholder is entitled to fees because of its active involvement in the litigation, as well as because of its passive lack of involvement in the dispute leading to litigation.

III. Reasons For Not Awarding Fees

Despite the reasons for the general rule, courts often find reasons to deny requests for fees. The reasons for refusing to allow a stakeholder to recover its fees from the fund are: (1) It caused the dispute; (2) It had an interest in the outcome of the dispute; (3) It acted in bad faith; (4) It received only one meritorious claim; (5) It failed to initiate the interpleader action; (6) It delayed in filing the interpleader action; (7) It earned interest from having the use of the fund; (8) It benefitted from the interpleader action; (9) Its ordinary course of business included such disputes; and (10) It interpleaded a small fund.[62] Some of these reasons are consistent with the policy underlying general rule, but most are not. These reasons will now be analyzed in detail.

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nsurance Co. of N. Am., 263 F. Supp. 98; Klebanoff v. Mutual Life Ins. Co., 246 F. Supp. 135; Terry v. Supreme Forest Woodman Circle, 21 F. Supp. 158 (D. Tenn. 1926).

[59]Coppage v. Ins. Co. of N. America, 263 F. Supp. 98; Capson v. Brisbois, 592 P.2d 583 Utah 1979).

[60]Companion Life Ins. Co. v. Schaffer, 442 F. Supp. 826; Aetna Life Ins. Co. v. Outlaw, 111 F. Supp. 824; Coppage v. Ins. Co. of N. America, 263 F. Supp. 98; Capson v. Brisbois, 592 P.2d 583.

[61]Pennsylvania Fire Ins. Co. v. American Airlines, Inc., 184 F. Supp. 145 (E.D.N.Y. 1960); Capson v. Brisbois, 592 P.2d 583.

[62]A stakeholder also will not be awarded its fees from the fund if the award of fees would reduce the fund to the extent that a federal tax lien could not be satisfied. *See, e.g.*, Campagna-Turano Bakery, Inc. v. United States, 632 F. 2d 39 (7th Cir. 1980); 3A J. Moore, Moore's Federal Practice ¶ 22.16[2] at 22-183 to 22-186. The reason for the rule is that "[w]ere the court thus to invade any portion of the interpleader fund impressed with a federal tax lien, it would be improperly awarding to the stakeholder a priority of lien over that of the government, despite the fact that the stakeholder's claim was 'inchoate' when the government lien attached." *Id.* at 22-184. Since that rule recognizes that a tax lien has priority over the claim of the stakeholder for fees rather than denying that the stakeholder has any basis for a claim for fees, it is not included in the list of exceptions to the general rule acknowledging the validity of stakeholders' claims for fees.

A. *Cause of the Dispute*

If the stakeholder caused the dispute requiring interpleader, it may be denied an award of fees from the fund. The stakeholder need not cause the dispute intentionally to jeopardize its claim to fees in the subsequent interpleader action; inadvertently causing the dispute will prevent recovery of fees.

In *Bandura v. Fidelity & Guaranty Life Insurance Co.*,[63] the court denied the insurer's request for attorney's fees because the insurer's "inattention to the instructions of the insured and its clerical error in the issuance of the Certificate of Insurance contrary to the clear instructions of the insured on his application for insurance was the cause of this litigation."[64] The insured's instructions were that the beneficiaries would be his wife and his father with his wife receiving two-thirds and his father one-third. However, when the insurer issued the certificate of insurance, it indicated on the certificate that the wife alone was the beneficiary. This inconsistency resulted in conflicting claims from the father and the wife for one-third of the proceeds.

Similarly, in *Companion Life Insurance Co. v. Schaffer*,[65] the beneficiary designation in an application for a life insurance policy was altered before the application was submitted to the insured in order to change the insured's uncle from a contingent beneficiary, who would receive the proceeds only if the wife did not receive them, to a co-beneficiary who would share the proceeds equally with the wife. The uncle was also the insurance agent who sold the insured the policy. The insurer questioned the beneficiary designation, but it directed the inquiry to the agent-beneficiary. When the insured died his wife claimed the entire proceeds, asserting that the alteration was not in the insured's handwriting nor initialled by him. Before the matter was adjudicated, the insurer moved for discharge from any liability and for recovery of its costs and attorneys' fees. The court stated that "in light of the position [the agent] occupied as a designated beneficiary and the apparent alteration, [it was] uncomfortable with the procedures employed by [the insurer] to insure that the policy was written in accordance with the wishes of the insured."[66] The court deferred decision on the issue of attorneys' fees and costs until the parties had addressed the issue of the insurer's duty concerning the designation, since the insurer may have been responsible in part for the litigation.

Even carelessness by an agent of the stakeholder can result in denial of fees to the stakeholder. Two West Virginia cases, one state action and one federal action, are illustrative. In *Union Mutual Life Insurance Co.*

[63] 443 F. Supp. 829 (W.D. Pa. 1978).
[64] *Id.* at 833.
[65] 442 F. Supp. 826 (S.D.N.Y. 1977).
[66] *Id.* at 829-30.

v. Lindamood,[67] an insurer brought an interpleader action to resolve conflicting claims to the proceeds of a life insurance policy. The insured wrote to the agent for the insurer directing that the beneficiary of his policy be changed from his mother to his wife, and he applied for a loan on the policy. The agent promptly replied concerning the loan, but he failed to respond to the request to change the beneficiary. The insured died without any request to change the beneficiary having been forwarded to the insurer's home office. Both the mother and the wife claimed the proceeds. The supreme court held that the trial court was justified in refusing to allow an attorney's fee to the insurer, since "this litigation . . . is chargeable to the plaintiff through the fault of its state agent."[68] A similar result was reached in *Provident Life & Accident Insurance Co. v. Dotson*,[69] in which agents for a life insurer failed to change the beneficiary—despite two requests from the insured to do so.

Other examples of stakeholders' carelessness that caused disputes leading to interpleader and that consequently prevented the stakeholders from recovering their fees include an insurer's drafting an ambiguous policy[70] and a bank's use of less than prudent banking practices in handling an account.[71]

Denying fees to a stakeholder who caused the dispute is consistent with the reasons for awarding fees. Even if the dispute were caused by carelessness, rather than by intent, the fact that the stakeholder originated the dispute makes the stakeholder ineligible to collect its fees. Also, the stakeholder should not be rewarded for bringing an interpleader action that would not have been necessary but for the stakeholder's behavior.

B. *Interest In Outcome*

Some courts have denied the stakeholder fees from the fund because the stakeholder was interested in the outcome of the dispute. Fees have been denied for reasons ranging from the stakeholder's displaying favoritism among the claimants to the stakeholder's having a substantial economic interest in the fund.

An indirect interest that has prevented an award of fees is siding with one claimant to the fund against another claimant. In *United States Fidelity & Guaranty Co. v. Long*,[72] a surety on warehouseman's bonds brought an interpleader action seeking judicial construction of the bonds and declaratory relief as to its liability. The defendants were the warehouseman to whom the bonds were issued and depositors of grain with the ware-

[67]108 W. Va. 594, 152 S.E. 321 (1930).
[68]152 S.E. at 323.
[69]93 F. Supp. 538 (S.D.W. Va. 1950).
[70]Kurz v. New York Life Ins. Co., 168 So. 2d 564 (Fla. Dist. Ct. App. 1964).
[71]First Nat'l Bank v. Garner, 173 Mont. 195, 567 P.2d 40 (1977).
[72]214 F. Supp. 307 (D. Or. 1963).

houseman. Rather than assuming the role of disinterested stakeholder, the surety actively opposed the claims of the depositors throughout the litigation. The court denied the surety's request for attorneys' fees out of the fund, since "the position of the plaintiff has been completely and unalterably opposed to the contentions of the defendants."[73] Similarly, in *Phillips Petroleum Co. v. Hazelwood*,[74] fees were denied to a stakeholder who actively took a position supporting one claimant and opposing another.

A more direct interest that has prevented an award of fees is involvement with one of the claimants in a dispute over a separate matter that is related to the subject of the interpleader. In *First National Bank v. Garner*,[75] a dispute over checks drawn on a bank account between the depositor and the liquidator for the depositor led the bank to interplead. The Montana Supreme Court denied attorneys' fees to the bank because, among other reasons, the bank had an interest in the outcome, since it was involved in a related dispute with the liquidator for the depositor concerning previous withdrawals from the account.

The most direct interest that a stakeholder can have in the outcome of a dispute over a fund is an economic interest in the fund. Asserting a claim to part of the fund prevented an award of fees in *Beaufort Transfer Co. v. Fischer Trucking Co.*[76] The court denied attorneys' fees to the stakeholder, a buyer of motor carrier operating rights, because its claim to a portion of the fund made it "not a mere disinterested stakeholder."[77]

Precipitous payment of a claim gave the stakeholder an economic interest in the fund that destroyed its disinterested status and prevented an award of fees in *Metropolitan Life Insurance Co. v. Enright*.[78] The stakeholder, a life insurer, paid part of the proceeds to one claimant, and a second claimant sought payment of more than remained. In the litigation that followed, the insurer attempted to recover enough of the amount it had paid to rebuild the fund to the amount sought by the second claimant. The court refused its request for fees stating that the insurer was "more than a mere stakeholder."[79] The court did not explain that conclusion, but it apparently considered the stakeholder's payment to give the stakeholder an economic interest in the outcome of the litigation, since it exposed the stakeholder to double liability in the event of recovery by the second claimant.

In both *Beaufort Transfer* and *Enright*, a claim against only part of the fund led to denial of all of the stakeholder's fees. The better approach is to deny only part of the fees of a stakeholder who claims only part of

[73] *Id.* at 319.
[74] 534 F. 2d 61 (5th Cir. 1976).
[75] 173 Mont. 195, 567 P.2d 40 (1977).
[76] 357 F. Supp. 662 (E.D. Mo. 1973).
[77] *Id.* at 671.
[78] 231 F. Supp. 275 (S.D. Cal. 1964).
[79] *Id.* at 278.

the fund. Many courts have held that a stakeholder's claiming a part of the fund should prevent its recovering fees incurred in asserting that claim, but they have not allowed that claim to deprive the stakeholder of all of the fees that it incurred in the interpleader action. These courts have considered the amount claimed by the stakeholder to be separate from the rest of the case; consequently, they have awarded a proper proportion of the fees for the part of the case in which the stakeholder had no direct interest.[80]

Denying fees to a stakeholder to the extent of its economic interest in the fund is consistent with the reasons for the general rule of awarding fees. One reason for the general rule is that fees should be awarded to a stakeholder who has no interest in the outcome of the dispute. Also, a stakeholder with an economic interest in the fund is neither an innocent bystander nor unable to avoid litigation by participating in settlement.

However, denying fees to a stakeholder who merely sides with one of the claimants, without having an economic interest in that claimant's success, is not consistent with the reasons for the general rule. Merely volunteering an opinion about whose claim is superior or even supporting one claimant in the dispute, without an economic interest in the outcome, should not be considered such an interest in the outcome as should prevent an award of fees. Without an economic interest, the stakeholder is unable to participate in settlement and should not have to pay to avoid the harassment of multiple litigation. Also, the stakeholder's expression of a preference does not lessen the value of the services it performs. Fees should be awarded to such a stakeholder so long as its intrusion into the dispute does not amount to bad faith.

C. *Bad Faith*

Bad faith on the part of the stakeholder will prevent its recovering fees. An example of such bad faith by a stakeholder is the misrepresenting of facts that are basic to determining entitlement to the fund.

In *Aetna Life Insurance Co. v. Bowen*,[81] a life insurer brought an inter-

[80]Hartford Fire Ins. Co. v. Professional Men's Inv., Inc., 337 F.2d 1011 (3d Cir. 1964); Schirmer Stevedoring Co. v. Seaboard Stevedoring Corp., 306 F.2d 188; Equifax, Inc. v. Luster, 463 F. Supp. 352 (E.D. Ark., 1978), *aff'd sub nom*, Arkansas Natural Gas v. Luster, 604 F.2d 31 (8th Cir. 1979), *cert. denied*, 445 U.S. 916 (1980); Massachusetts Mut. Life Ins. Co. v. Central Penn Nat'l Bank, 372 F. Supp. 1027 (E.D. Pa. 1974); Emco Ins. Co. v. Frankford Trust Co., 352 F. Supp. 130 (E.D. Pa. 1972); Klebanoff v. Mutual Life Ins. Co., 246 F. Supp. 935, *rev'd and remanded on other grounds*, 362 F.2d 975; Tollett v. Phoenix Assurance Co., 147 F. Supp. 597 (W.D. Ark. 1956); Aetna Life Ins. Co. v. DuRoure, 123 F. Supp. 736 (S.D.N.Y. 1954); Aetna Ins. Co. v. Dickler, 100 F. Supp. 875 (S.D.N.Y. 1951); Roosevelt Fed. Sav. & Loan Ass'n v. First Nat'l Bank, 614 S.W.2d 289 (Mo. Ct. App. 1981); National Cold Storage Co. v. Tiya Caviar Co., 52 Misc.2d 289, 276 N.Y.S.2d 57 (Sup. Ct. 1966).

[81]308 F. Supp. 1394 (W.D. Mo. 1969).

pleader action to resolve a dispute between the insured's widow, the insured's former wife, and the children of the insured by his former marriage over the effect of a stipulation incorporated in a divorce decree concerning the beneficiaries of a policy. The insurer moved for summary judgment and requested reasonable attorney's fees. One of the claimants resisted the motion, contending that the insurer had misrepresented the provisions of the stipulation and decree and had misrepresented the date of execution of the designation of beneficiary card. Noting that "good faith is a requirement for the recovery of attorneys' fees in interpleader cases,"[82] the court held that the claimant's allegations had raised genuine issues of fact with regard to the insurer's good faith and denied the insurer's motion for summary judgment.

Denying fees due to the stakeholder's bad faith may also resemble denying fees due to the stakeholder's interest in the outcome. Some instances of bad faith are extreme cases of the stakeholder's abandoning an impartial stance and asserting its interest inappropriately. *Edwards v. Metropolitan Life Insurance Co.*[83] is an example of bad faith as an improper assertion of the stakeholder's interest.

The problems that led to interpleader in *Edwards* began when an insurer denied a death claim on the basis of a misrepresentation in the application for the policy. The beneficiary retained attorneys to whom she agreed to pay a fee of 40% of any recovery. The dispute was settled upon the insurer's agreeing to pay a compromise amount, but before payment of the settlement amount, the beneficiary complained to the county bar association concerning the contingent fee arrangement. The dispute was resolved by the bar association in favor of the attorneys. Nonetheless, in light of the dispute, the insurer required an express assignment from the beneficiary to the attorneys of 40% of the settlement amount, and the insurer required the attorneys to agree to the insurer's preparing one check to the beneficiary for her portion of the settlement amount and one check jointly to the beneficiary and the attorneys for the attorneys' fees. The beneficiary gave the insurer the assignment, and the attorneys agreed to the manner of payment. The beneficiary then told the insurer that it should not honor the assignment, alleging that she had been coerced into signing the assignment. The insurer did not advise the attorneys of that communication from the beneficiary, rather it allowed the attorneys to secure court approval of the settlement and mark the case settled. Then, despite its knowledge that the beneficiary would not endorse the check for the attorneys' fees, the insurer nonetheless sent a check to the beneficiary for her portion of the settlement amount. The beneficiary then sued the insurer for the remaining amount, that is, the check for the attorneys' fees.

[82] *Id.* at 1397.
[83] 215 Pa. Super. 390, 259 A.2d 183 (1969).

The insurer interpleaded the attorneys.

In the interpleader action, the insurer requested attorneys' fees, and the trial court awarded it fees in the amount of $500. On appeal, the superior court noted that the allowance of attorneys' fees to the stakeholder in an interpleader action was authorized by Pennsylvania statute,[84] but it held that fees should not have been awarded to the insurer since it had acted in bad faith to protect its own interests in the matter.

The court's comments on the insurer's behavior include the following:

> When Metropolitan permitted Johnsons to secure court approval of the settlement and to have the docket marked settled and discontinued and a certificate to that effect forwarded to it, without divulging to the Johnsons that claimant, their client, had communicated directly with Metropolitan's counsel that she would not honor any assignment made by her, Metropolitan at that point, if not before, became a partial participant in the controversy. . . . Metropolitan's lack of impartiality in the matter is clearly demonstrated by the fact that it regarded communications to it by Johnson's client as privileged communications, and refused to divulge any information with regard thereto. . . .
>
> Metropolitan seeks to justify its actions on the ground that it was effectuating company policy by attempting to get into the hands of the beneficiary under a family policy as much of the proceeds thereof as possible, while at the same time arguing it had no interest in the fund. However, regardless of the motives that prompted the Company into so actively participating in behalf of claimant, its actions in this case constituted unjustifiable interference with the client-attorney relationship that existed between claimant and the Johnsons. Its failure to notify the Johnsons about claimant's communication was an act of bad faith on the part of Metropolitan which cannot be absolved by indications of intent to benefit the beneficiary. . . .
>
> . . . .
>
> It is clear from the record that rather than conciliate the dispute between claimant and her lawyers, Metropolitan acted in an unusual and partisan fashion, working to effectuate a payment to claimant that would by-pass the Johnsons in their rightful role of attorneys for claimant. We do not condone such action.[85]

Denying fees due to bad faith is clearly justifiable. A stakeholder's bad faith often contributes to the creation of the dispute or arises out of the stakeholder's interest in the outcome of the dispute. Also, one acting in bad faith has no standing to complain of harassment, and one acting in

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[84] PA. STAT. ANN. tit. 12, § 583 (Purdon). That statute was repealed effective June 27, 1979. A stakeholder's right to attorneys' fees in Pennsylvania is now codified at 42 PA. CONS. STAT. ANN. § 2503(4) (Purdon).

[85] 259 A.2d at 188-89.

bad faith should be punished rather than rewarded.[86] However, courts should be careful to avoid characterizing as bad faith a display of interest in the dispute, or an error in judgment in managing the dispute, in order to justify a predisposition to deny fees to the stakeholder.

D. *Single Meritorious Claim*

Some courts have denied fees to stakeholders upon finding that the stakeholder received only one claim to the fund. Further, some have denied fees upon finding that, although more than one claim was made, only one was meritorious.

In some cases, stakeholders have brought interpleader actions in anticipation of adverse claims that never developed. For example, in *Badeau v. National Life & Accident Insurance Co.*,[87] the funeral director who had buried the insured claimed the life insurance proceeds pursuant to an ex parte order from the probate court awarding the policy to the funeral director as a creditor. However, the insurer refused to pay the proceeds to the funeral director asserting that it believed the named beneficiary to be alive. The funeral director sued the insurer, and the insurer interpleaded the named beneficiary, effecting service on her by publication. However, the named beneficiary failed to appear at trial. The court denied the insurer's request for attorneys' fees noting that "[t]he pleading and defendant's other conduct indicate clearly that defendant did not know whether . . . [the named beneficiary] was alive, and had no available evidence or knowledge indicating that she was still alive."[88]

A similar result was reached in *Coppage v. Insurance Co. of North America*.[89] The receiver for an insolvent insurance company made claims against two reinsurance companies that owed money to the insolvent insurer. Although no one except the receiver had asserted any claim against either insurer, both reinsurers claimed to be "apprehensive in good faith" of multiple and vexatious claims being asserted by insurance commissioners in the other states in which the insolvent insurer did business. The receiver sued the reinsurers who in turn asserted counter-claims for interpleader against the receiver and against the insurance commissioners. Everyone but the receiver filed disclaimers or defaulted. The court denied the reinsurers' request for attorneys' fees stating that:

> [T]heir unjustified fears have required counsel for plaintiff to expend a considerable amount of time on the case, for which they

[86]Denying fees to a party guilty of bad faith is particularly appropriate considering that a party guilty of bad faith may be required to pay the other parties' fees. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59; F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129 (1974); Vaughan v. Atkinson, 369 U.S. 527, 530-31 (1962).

[87]305 S.W.2d 876 (Mo. Ct. App. 1957).

[88]*Id.* at 879.

[89]263 F. Supp. 98 (D. Md. 1967).

> will have to be compensated. To require the claimants against the receivership estate of Chesapeake also to bear the fee of defendants will be unjust, and is not required or warranted by the law of Maryland or Federal law, whichever may be applicable.[90]

In *Coppage*, however, the court left open the possibility that fees could be awarded even if only one claim was made, provided the stakeholder had good reason to believe another claim might be made. It denied fees in the case because it concluded that the stakeholder's fears of adverse claims were "unjustified" and "without substance." The court held that the absence of adverse claims "is a factor which should be considered" in deciding whether to award fees, but is not "necessarily fatal" to a claim for fees, citing Professor Moore's statement that "[i]t is sufficient to warrant interpleader relief that the stakeholder have a bona fide fear of adverse claims."[91]

Fees were also denied upon the defaulting of the persons allegedly asserting conflicting claims in *American United Life Insurance Co. v. Luckman*.[92] In *Luckman*, however, unlike *Badeau* and *Coppage*, the stakeholder asserted that those persons who ultimately defaulted had made claims and had actually threatened litigation. Consequently, under the test applied in *Coppage*, fees should have been awarded. Apparently the court in *Luckman* was influenced less by the absence of conflicting claimants than by its judgment that any conflicting claims that might be asserted lacked merit. The court noted that "there is no allegation as to the basis for the claim made by these claimants,"[93] and it concluded that "[t]here was in fact no doubt as to the beneficiaries."[94]

Indeed, in many cases, even though the stakeholder received more than one claim, the courts have refused to award fees or have severely limited the amount of fees awarded[95] upon concluding that only one of the claims had merit. In *Lockridge v. Brockman*,[96] the federal court for the Northern District of Indiana denied the stakeholder's request for fees having concluded that "there is no question but that the trustee in bankruptcy is entitled to the fund as against the claims of Interstate and Midland."[97] The court acknowledged that a stakeholder has a right to interpleader "for the

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[90] *Id.* at 101.
[91] *Id.* at 100, 101.
[92] 21 F. Supp. 39 (S.D. Cal. 1937).
[93] *Id.* at 40.
[94] *Id.* at 41.
[95] In United Coop. Farmers v. Aksila, 156 F. Supp. 118 (D. Mass. 1957), the federal district court for Massachusetts awarded only a portion of the fees sought rather than denying them completely. However, the amount awarded was so small and was such a small percentage of the actual attorneys' fees that the court's action was tantamount to denying fees entirely. Holding that "it was hornbook law" that the adverse claim lacked merit, the court awarded only $50 out of total fees of $1,600.
[96] 137 F. Supp. 383 (N.D. Ind. 1956).
[97] *Id.* at 385.

purpose of ridding himself of vexation and expense of resisting adverse claims even though he believes that only one of them is meritorious," but it decided that "if a plaintiff desires such relief . . . where the law is as clear as it is in this matter he will have to pay the cost incident thereto."[98]

In denying fees due to lack of merit of conflicting claims, courts must be careful not to engage in using hindsight, after trial of the facts of a case, to second guess a stakeholder. In *Givens v. Girard Life Insurance Co. of America*,[99] the Dallas Court of Appeals observed:

> [O]ur hindsight ought not to deprive the company of its right to interplead. The remedy of interpleader would be of little value if it were unavailable to a stakeholder who is later found not to be liable to one of the claimants, since the existence of that liability is the very matter which the interpleader action is brought to determine.

The courts generally attempt to avoid use of hindsight by limiting denial of fees to those cases in which the stakeholder could have discovered before interpleading that only one claim was meritorious if it had conducted only "the slightest" investigation. In *General American Life Insurance Co. v. Wiest*,[100] an insured originally named his second wife as beneficiary of his group life insurance company. Subsequently, the insurer received a change of beneficiary form dated two days before the insured's death designating the insured's first wife as beneficiary. The later form was signed only by the designated beneficiary and not by the insured. The insurer filed a petition for interpleader alleging that claims had been asserted by the first wife, the second wife, and the administrator of the insured's estate. The first wife subsequently withdrew any claim to the proceeds. The trial court sustained the second wife's motion for summary judgment of dismissal of the insurer's petition for interpleader. On appeal, the court of appeals held that the insurer had a right to interpleader, since,

> [I]n this case the two claims were supported by beneficiary designation forms. This information plus the fact that the two claimants were or had been related to the insured and thus within the realm of probable beneficiaries are sufficient to create a reasonable doubt as to which claimant is entitled to the insurance proceeds.[101]

Nonetheless, the court noted in a footnote that "even though the petitioning party is entitled to interpleader, the trial court may find after a hearing that there is no justification for awarding attorney's fees and costs and thereby avoid diminishing the fund."[102] In making that observation, the

[98] *Id.*
[99] 480 S.W.2d 421, 429 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).
[100] 567 S.W.2d 341 (Mo. Ct. App. 1978).
[101] *Id.* at 345.
[102] *Id.* at n.1.

appellate court stated as follows:

> We do not believe the trial court should *automatically* award attorney's fees and costs in all cases. For example, in *Aetna Life Insurance Co. v. Harley* . . . the court was convinced that had the petitioning party conducted the slightest investigation of the claims upon the insurance proceeds, it could only have concluded that one of the claims was without merit and, under those specific circumstances, could find no justification in taxing the fund for attorney's fees and costs.[103]

Aetna Life Insurance Co. v. Harley,[104] cited by the court above, involved a life insurance policy under which the insured designated his beneficiary as "Shirley L. Harley . . . relationship: wife." Shirley L. Harley claimed the proceeds pursuant to the designation. Brenda S. Harley, the insured's first wife, also claimed the proceeds contending that the insured's marriage to Shirley, the insured's second wife, was a nullity since the insured had failed to secure a divorce from his first wife; further, she asserted that the insured had intended to designate Brenda as the beneficiary, since she was the insured's only lawful wife. The insurer then brought an action in interpleader to resolve the dispute between Shirley and Brenda.

The court found that Brenda's argument that the insured intended to designate her as the beneficiary was supported by "absolutely no evidence," and it observed that Brenda's argument that the reference to "wife" was a reference to Brenda was "incredible." The court further held that "well settled Georgia law provides that the beneficiary of a life insurance contract remains entitled to the proceeds thereunder regardless of whether the insured incorrectly described the beneficiary as his wife."[105]

Although the court held that the insurer acted in good faith in exercising its right as a stakeholder to institute an action in interpleader to avoid the vexation and expense of resisting the adverse claims, it held that the insurer was not entitled to attorneys' fees. In so holding, the court stated:

> [T]he court is convinced that had plaintiff conducted the slightest investigation of the claims upon the fund, it could only have concluded that Brenda's claim was without merit. . . . What scanty authority there is on point indicates that attorneys' fees and costs are properly denied where it is found that a stakeholder initiated the interpleader process upon the claim of the party entitled to the fund only to later discover the lack of merit in the claim of the adverse party."[106]

The *Harley* court cited *Paul Revere Life Insurance Co. v. Riddle*,[107] in which a life insurer interpleaded two persons asserting conflicting claims

[103] *Id.* at 345.
[104] 365 F. Supp. 1210 (N.D. Ga. 1973).
[105] *Id.* at 1212.
[106] *Id.* at 1215-16.
[107] 222 F. Supp. 867 (E.D. Tenn. 1963).

to insurance proceeds. One claimant relied upon the presumption that when two persons die as a result of the same accident it is presumed that they died simultaneously. The other claimant disputed the applicability of that presumption, although counsel for that claimant admitted at the pre-trial conference that "there was not a scintilla of evidence available to his client to overcome such presumption."[108] The court stated:

> This Court is of the opinion that more than a cursory investigation of the facts by the plaintiffs in this action would have resulted in its reasonable conclusion that the airplane accident, in which the insured and the named beneficiary in its insurance contract died, was of such nature that nothing but simultaneous death of those persons could have been reasonably presumed. Thus, the Court is of the further opinion that the plaintiff was never in any real danger of double liability under its contract. . . .
> . . . The plaintiff then lacked cause to anticipate that the interpleader fund would be impressed with the costs and expenses of the interpleading action. The plaintiff had a right as a stakeholder, acting in good faith, to maintain this action in interpleader to avoid the vexation and expense of resisting the adverse claims, even though its officials believed only one of them was meritorious . . . but that right did not include a further right to impress the fund with the expense of interpleading it.[109]

The stakeholder's response to an unmeritorious claim also led to denial of fees in *Kurz v. New York Life Insurance Co.*[110] In *Kurz*, the insurer went beyond accepting both claims at face value and determined that one of the claims lacked merit. Nonetheless, it refused to pay the meritorious claim until it received a release from the other claimant. When litigation ensued, the court held that the insurer was obligated to pay "the recognized rightful beneficiary," and denied attorneys' fees to the insurer. In fact, the court awarded attorneys' fees against the insurer to the claimant with the meritorious claim.

Denying fees is easily justified if a stakeholder interpleads other parties because it fears that conflicting claims will be asserted if the fear is unfounded and the stakeholder had sufficient time to confirm or deny its fear. In the absence of a dispute, the stakeholder is not exposed to multiple litigation, and the stakeholder performs no valuable services in bringing an interpleader action.

However, the stakeholder should be allowed time to determine whether suspected conflicting claims actually exist.[111] If a claimant sues a stake-

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[108] *Id.* at 868.

[109] *Id.*

[110] 168 So. 2d 564 (Fla. Dist. Ct. App. 1964).

[111] Some claimants have argued that their claims should be heard in court without delay regardless of whether the stakeholder has had an opportunity to ascertain the existence of conflicting claims. But the stakeholder must be allowed time for a proper investigation. Aet-

holder before the stakeholder has had an opportunity to search for other possible claimants or to ask other possible claimants whether they intend to assert claims, then the stakeholder should be encouraged to find out whether other claims exist by interpleading other possible claimants. Making attorneys' fees available to the stakeholder in those circumstances would be consistent with the reasons for awarding fees to stakeholders, since the stakeholder faces a realistic threat of multiple litigation until it has had an opportunity to determine that other possible claimants cannot be located or that they do not wish to assert claims.[112] Also, the stakeholder is deprived of the opportunity to provide valuable services through interpleader if it is deprived of the opportunity to determine whether other claims will be asserted. The advantages of interpleader should not be lost because of the impatience of a claimant.

Furthermore, fees should not be denied if a dispute does exist, even though one of the claims is not meritorious. If multiple claims are asserted, regardless of their merits, the stakeholder is exposed to the harassment of multiple litigation.[113] The courts recognized the exposure in both *Harley* and *Riddle*, but they ignored the rule that fees should be awarded so that the stakeholder need not pay to avoid the harassment of multiple litigation. Also, since multiple claims pose the threat of multiple litigation regardless of the merit of the claims, the stakeholder's bringing an interpleader action still helps the claimants and the judicial system by bringing all claimants into one forum.

E. *Failure to Initiate*

As noted earlier, an interpleader action may be brought as an original lawsuit or a stakeholder may bring it after being sued by a claimant. A few opinions suggest that fees should not be awarded when the stakeholder does not bring the interpleader action initially.

In *Chartrand v. Chartrand*,[114] the Massachusetts Supreme Judicial Court noted that "the insurer did not take the initiative in filing a bill of inter-

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na Life Ins. Co. v. Outlaw, 411 F. Supp. 824 (D. Md. 1976).

[112] *Cf.* the holding in *Coppage*, 263 F. Supp. 98, *supra* notes 89 through 91, that a stakeholder may be awarded its attorneys' fees even if an anticipated adverse claim is not made, provided the stakeholder had good reason to anticipate an adverse claim.

[113] The federal district court for the Western District of Arkansas awarded fees in Tollett v. Phoenix Assurance Co., 147 F. Supp. 597, stating:

> While Mr. M. M. Tollett's claim to a portion of the policy proceeds has turned out to be without merit, that is not of controlling importance. The Federal Interpleader act, 28 U.S.C.A. § 1335, which is a remedial statute and to be liberally construed, was designed not only to protect stakeholders from double or multiple liability but also to protect them from the trouble and expense of double or multiple litigation.

Id. at 605.

[114] 295 Mass. 293, 3 N.E.2d 828 (1936).

pleader" in holding that the trial judge had not abused his discretion in refusing to award fees to the stakeholder. In *Drummond Title Co. v. Weinroth*,[115] the Florida Supreme Court held that a stakeholder that brought an interpleader action only after it was first sued by one of the claimants was not entitled to attorneys' fees since "the decree of interpleader is sought by claimant for his own protection."[116] In *Bandura v. Fidelity and Guaranty Life Insurance Co.*,[117] the federal court for the Western District of Pennsylvania gave as one of its reasons for denying attorneys' fees the fact that "the defendant insurance company did not initiate this action in this court as an interpleader action in the first instance," rather "suit was brought against it in the state court and after removal to this court, it joined a third party defendant and asserted an interpleader cause of action."[118] And in *Mutual of Omaha Insurance Co. v. Dolby*,[119] the Eastern District of Pennsylvania cited *Bandura* in denying fees to a stakeholder that brought an interpleader action as a counterclaim and added that the stakeholder "received a clear and immediate benefit in this litigation from its attorneys' endeavors."[120]

This basis for denying fees has been repudiated in other opinions. The consideration of that issue in *Bandura* overlooked an earlier contrary holding by the same court in *Shrepic v. Metropolitan Life Insurance Co.*[121] In *Shrepic*, the court held that,

> [T]he fact that the defendant company in a situation like the present did not bring the interpleader action initially, but only after suit was entered against it by one of the claimants, does not seem to be a differentiating factor insofar as it affects its right to counsel fees. The Pennsylvania Interpleader Act, 12 Pa. P.S. 581 . . ., as well as Rule 22, Fed. Rules Civ. Proc., 28 U.S.C.A., plainly contemplate an interpleader initiated by a defendant.[122]

Similarly, in *Coppage v. Insurance Co. of North America*,[123] the federal court for the District of Maryland held that "the fact that interpleader was instituted by way of a counterclaim rather than by an original action

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[115]77 So. 2d 606 (Fla. 1955).

[116]*Id.* at 610. The court's reasoning is unsound. Protection for the stakeholder does not distinguish interpleading by way of answer from interpleading by way of complaint, since the stakeholder is as well protected by initiating the action as by interpleading in response to a lawsuit brought by another. Furthermore, protecting the stakeholder against multiple litigation and multiple liability is one of the primary purposes of interpleader. The stakeholder's receiving such protection should be seen as an inherent benefit of interpleader rather than a reason for denying fees to the stakeholder.

[117]443 F. Supp. 829 (W.D. Pa. 1978).

[118]*Id.* at 833.

[119]531 F. Supp. 511 (E.D. Pa. 1982).

[120]*Id.* at 517.

[121]120 F. Supp. 650 (W.D. Pa. 1954).

[122]*Id.* at 652.

[123]263 F. Supp. 98 (D. Md. 1967).

is not fatal to a claim for costs and fees."[124] Further, the United States Court of Appeals for the Second Circuit was emphatic in denying that failure to initiate the interpleader was an issue in determining the availability of attorneys' fees. In *A/S Krediit Pank v. Chase Manhattan Bank*,[125] the Second Circuit held that the claim that the stakeholder was not entitled to attorney fees because it did not institute the interpleader action until after it had been sued was "not even colorable."

All of the reasons for awarding attorneys' fees are equally sound whether the stakeholder brings the interpleader action before or after being sued by one of the claimants. In the situation in which the stakeholder brings the interpleader action after having been sued, the dispute is still not of the stakeholder's making, the stakeholder still has no interest in which claimant ultimately receives the fund, the stakeholder still faces the harassment of multiple litigation, the stakeholder still safeguards the fund by depositing it into court, the stakeholder still promotes litigation that will expeditiously resolve the dispute among the claimants, the stakeholder still helps the prevailing claimant by initiating a proceeding in which execution proceedings are not necessary, and the stakeholder still helps the judicial process by bringing all claimants into one forum and avoiding multiple litigation. To argue that the stakeholder is not entitled to fees because it benefits by avoiding multiple litigation, as the court did in *Dolby*, is to ignore the fact that one of the reasons for the general rule allowing fees is that the stakeholder should not have to pay to avoid multiple litigation.[126] Furthermore, a stakeholder that initiates litigation enjoys the same benefit from interpleader as one that counterclaims.

Thus, to make a distinction between the stakeholder's bringing the interpleader action before being sued and bringing it after being sued is to ignore the reasoning behind awarding attorneys' fees to stakeholders. The question of who initiates the action is of no practical significance and should not affect decisions as to awards of attorneys' fees.

Delay In Bringing Action

In denying fees, some courts have relied upon a stakeholder's delay in filing an interpleader action once conflicting claims to the fund have been received. But the courts' combining delay with other reasons for denying fees indicates the weakness of delay as a reason for denying fees, and there is substantial authority holding that delay is beneficial in some circumstances.

In *John Hancock Mutual Life Insurance Co. v. Doran*,[127] the stakehold-

[124] *Id.* at 100.
[125] 303 F.2d 648 (2d Cir. 1962).
[126] *See infra* text accompanying notes 156 through 158.
[127] 138 F. Supp. 47 (S.D.N.Y. 1956).

er delayed ten months after the filing of adverse claims to the proceeds before filing the interpleader. The insurer stated that it delayed because of the absence of a guardian of the property of an infant claimant. However, the court noted that it would have been possible for the insurer to institute the interpleader action and to have the court appoint a guardian ad litem for the infant. The court further concluded that the stakeholder had failed to use ordinary diligence to determine that one of the claims lacked merit. Although it conceded that the stakeholder was entitled to bring an interpleader action even if it believed only one claim had merit, the court held that in such circumstances, the action must be brought promptly. Consequently, the court held that "this delay removes the company sufficiently from its role of innocent stakeholder to deny it any award of attorney's fees or costs from the fund."[128] Therefore, it is important to note that *Doran* does not hold that all delay will prevent awards of fees, rather it holds that delay in cases involving a *single meritorious claim* will prevent the awarding of fees.

Delay was also cited as a reason for denying a request for fees in *New York life Insurance Co. v. Bidoggia.*[129] The insured died on June 28, 1925, the claimant brought suit in state court on November 14, 1925, and the insurer subsequently brought the interpleader action in federal court on December 12, 1925. The court held that since the policy was small, with proceeds amounting to only $1,000, and since the insurer's delay resulted in the claimant's incurring the expense of bringing the suit in state court, then the claimant should not be required to pay the insurer's attorneys' fees by having the fees paid out of the fund in addition to paying its own attorneys' fees and costs in the interpleader action in federal district court and in the state court action. As in *Doran*, mere delay was not the sole reason for denying fees. The size of the fund was also influential in leading the *Bidoggia* court to deny fees to the stakeholder.

However, a stakeholder is entitled to a reasonable time to investigate the circumstances surrounding a claim. The Maryland Federal District Court awarded a life insurer its fees of $725 and costs of $79.32 in *Aetna Life Insurance Co. v. Outlaw*[130] even though 21 months had elapsed between the time it learned of the insured's death and the time it brought the interpleader action, since the court found that the insurer had acted in good faith in investigating the claim and in attempting to obtain a release from one of the claimants.

The stakeholder's delaying litigation may not only be acceptable, it may be preferable. In particular, delay may be beneficial in increasing the likelihood of amicable settlement and thus in avoiding the expense of litiga-

[128] *Id.* at 50.
[129] 15 F.2d 126 (D. Idaho 1926).
[130] 411 F. Supp. 824 (D. Md. 1976).

tion.[131]

In *Equitable Life Assurance Society v. Hughes*,[132] the former wife of the insured under a life insurance policy claimed the proceeds as designated beneficiary, and the widow of the insured also claimed the proceeds. The widow asserted that the insured's divorce from his former wife in and of itself divested the former wife of all rights in the policy, that a property settlement agreement divested all rights in the policy, and that the insured had taken action prior to his death to remove the former wife as beneficiary. The insurer attempted to get the claimants to resolve their dispute, and when that attempt failed, interpleader resulted.

The claimants asserted that the insurer was not entitled to attorneys' fees because of delay in filing its bill of interpleader. In rejecting that argument, the court stated:

> While it is true that Equitable could have filed its bill immediately upon being advised of the conflicting claims, and while it is true that it did not file this action until August, 1956, whereas proof of death had been furnished by Mrs. Edna M. Hughes in March of that year, there is no evidence that the company was guilty of any vexatious delay or bad faith; on the other hand the record affirmatively shows that the company was trying to get the two claimants to come to some amicable settlement. . . . Moreover . . . it is not always to the best interest of the claimants to the proceeds of an insurance policy for an interpleader suit to be filed too quickly, particularly in view of the fact that when an insurer does interplead, the fund may be charged with the cost and with an attorney's fee, which might be avoided by the insurer's waiting a reasonable time before filing its bill. . . .[133]

Delay, in itself, should not prevent the awarding of fees, since it does not detract from the reasons for awarding fees. Some cases of delay may involve bad faith. But in those cases, it is the bad faith that justifies denying fees not the mere fact of delay. To the contrary, delay is beneficial, and it should be encouraged in those cases in which it enhances the chances of amicable settlements and in those cases in which it allows the stakeholder time to investigate to determine what claims exist.[134]

G. *Use Of The Fund*

Some courts have refused to award fees to stakeholders who earned interest from having had the use of the fund for a period of time. In *Beaufort Transfer Co. v. Fischer Trucking Co.*,[135] the United States District

[131]Tollett v. Phoenix Assurance Co., 147 F. Supp. 597 (W.D. Ark. 1957).
[132]152 F. Supp. 187 (E.D. Ark. 1957).
[133]*Id.* at 197.
[134]*See supra* text accompanying note 111.
[135]357 F. Supp. 662 (E.D. Mo. 1973).

Court for the Eastern District of Missouri denied attorneys' fees to the buyer of motor carrier operating rights, which had brought the interpleader action, since plaintiff had the use and benefit of the fund for one year until the fund was paid into the registry of the court. The Eastern District of Louisiana similarly denied fees to an oil company because it had had the use of the fund in *Continental Casualty Co. v. Associated Pipe & Supply Co.*[136] Further, in *First National Bank v. Garner*,[137] the Montana Supreme Court refused fees to the stakeholder bank because, among other reasons, the bank resisted requests that it transfer the funds from its custody, and it paid no interest on the funds during the period that it held the funds so that "for this period it had the use of this money interest free to invest as it saw fit."[138]

Use of the fund also led the Alabama Supreme Court to deny some of the stakeholder's fees in *Air Movers of America, Inc. v. State National Bank*.[139] That interpleader action was brought by a bank to determine who was authorized to draw on a corporation's account at the bank and who was entitled to negotiate two cashier's checks that had already been issued by the bank on that account. The appellate court upheld the trial court's award of $7,500 to the bank for services of the bank's attorneys in the trial court proceedings. The bank also asked for additional attorneys' fees for services rendered by its attorneys in the appeal, which fees the court denied. The court noted that when the bank initially filed its bill of interpleader, it delivered the cashier's checks to the court rather than depositing with the court the amount of money represented by the cashier's checks. As a result, during the ten months between the filing of the bill of interpleader and the eventual payment of the money into court, the bank enjoyed the use of the funds represented by the checks which, at the rate of 6% per year, would have amounted to $2,500 in interest.

However, not all courts agree that earning interest compensates the stakeholder for its expenses. In *Aetna Life Insurance Co. v. DuRoure*,[140] the federal court for the Southern District of New York held that the stakeholder was entitled to both interest earned on the fund and attorneys' fees and costs.[141] Regarding interest on the fund, the court stated:

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[136]310 F. Supp. 1207 (E.D. La. 1969).

[137]173 Mont. 195, 567 P.2d 40 (1977).

[138]173 Mont. at 198, 567 P.2d at 43.

[139]293 Ala. 312, 302 So. 2d 517 (1974).

[140]123 F. Supp. 736 (S.D.N.Y. 1954).

[141]A year and a half later, in John Hancock Mut. Life Ins. Co. v. Doran, 138 F. Supp. 47 (S.D.N.Y. 1956), the same court denied fees to an insurer because of delay in bringing the interpleader and awarded interest against the insurer, because it "had the use of this fund for almost one year after it became aware of the nature and the character of the adverse claims involved." *Id.* at 50. The court justified its decision in a footnote as follows:

> I am aware of the fact that the Company bases its insurance rates on a system which relies upon its not paying all claims promptly and its continuing to receive

> Nor should the insurance companies be charged with the interest which the fund has presumably earned in their hands. The theory of such a charge would be that they ought not to be allowed to profit from the misfortune of the person entitled to the fund who was delayed in obtaining it because of unfounded claims made by others. That theory, however, overlooks the fact that interest is not ordinarily payable on insurance benefits and that the insurance companies, in calculating their premiums, take into account the fact that the benefits will always be payable at a date more or less later than the actual accrual of liability. Cases of long custody of the fund like this make up for the cases where payment is made within twenty-four hours. If one were to say that the postponement of payment here was so excessive as to entitle the beneficiaries to the interest earned, one would have to say that at some point interest would cease to be part of the contemplated earnings of the insurance company and become a windfall. That, however, is contrary to my hypothesis that every nonculpable delay is within the contemplation of the insurance company in establishing its premium rates.[142]

Similarly, in *Equitable Life Assurance Society of United States v. Miller*,[143] the district court of Minnesota held that the stakeholder was entitled to interest earned on the fund, fees, and costs. The court stated that a stakeholder faced with conflicting claims should interplead promptly and questioned the stakeholder's delay of one and one-half years in interpleading.[144] Nonetheless, the court allowed the stakeholder to retain the interest it earned on the fund concluding that: "While the plaintiff had the use of the proceeds during the negotiation period, it did not agree to pay interest on this amount. . . . It would seem improper to charge the

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> interest on the invested fund without liability over. But this basis should not include situations where the Company presents no adequate reason for its delay and where it does not even make a clear showing that both adverse claims have substance.

Id. The court distinguished *DeRoure*, holding that the stakeholder before it was guilty of culpable delay. The culpability resulted from the stakeholder's failing to use ordinary diligence to ascertain that one claim lacked merit, and instead bringing the interpleader action "as a convenient escape from duty." The court acknowledged that the stakeholder was entitled to bring the action even if the stakeholder believed that only one of the claims was meritorious, but the court held that the stakeholder had an obligation to do so promptly. The court's disapproval of the stakeholder's earning interest from delaying interpleader even though one of the claims was without substance and its emphasis on culpability suggest that the court believed the stakeholder may have been guilty of prolonging the dispute intentionally for the purpose of earning interest from the use of the fund. Clearly the stakeholder should not be allowed to benefit from such behavior.

[142]123 F. Supp. at 740-41.

[143]229 F. Supp. 1018 (D. Minn. 1964).

[144]Unlike *Garner*, 173 Mont. 195, 567 P.2d 40 (in which the stakeholder resisted requests that it transfer the funds), in *Miller*, the stakeholder waited to bring the interpleader action "because counsel for the rival claimants requested this forbearance in order to have time to attempt to work out a settlement." 229 F. Supp. at 1021.

insurer with interest it never contracted to pay."[145]

The earning of interest should not affect the determination of whether fees should be awarded. The earning of interest does not give the stakeholder an interest in the outcome of the dispute unless it leads a stakeholder to attempt to prolong the dispute in order to earn more interest. In that event, the stakeholder should not be awarded its fees; however, it should not be denied its fees because interest was earned, rather it should be denied its fees because of bad faith.[146]

Also, the earning of interest does not alter the fact that a stakeholder should not be required to pay to avoid the harassment of multiple litigation, nor does it diminish the benefits provided by the stakeholder's bringing the interpleader action. It has been suggested that the earning of interest in some cases adequately reimburses the stakeholder for its expenses.[147] However, the stakeholder's right to keep the interest earned on the fund, rather than paying it out to the person ultimately receiving the fund, is established by the contract giving it control of the fund and is obtained in return for consideration given by the stakeholder in making the contract. The court cannot give the stakeholder something that it already is entitled to in an effort to reimburse it for undeserved expenses.

H. *Benefit to Stakeholder*

Some federal courts have recently limited fees, or denied them entirely, and given as their reason the fact that the stakeholder benefits from interpleader. Such was the rationale of the United States District Court for the Western District of Pennsylvania in *Shrepic v. Metropolitan Life Insurance Co.*[148] In *Shrepic*, the court limited the award of attorneys' fees to the stakeholder to $100 because of the simplicity of the interpleader proceeding. In so holding, the court also noted that "the insurance company . . . receives substantial benefits from the use of this equitable procedure."[149]

Further, in *Fidelity and Casualty Co. v. Levic*,[150] the same court limited

[145]*Id.* at 1022.

[146]*Cf. Doran*, 138 F. Supp. 47, and *Garner*, 173 Mont. 195, 567 P.2d 40. In *Garner*, the claimants asserted that "the bank's reason for not filing an interpleader was to keep the funds as a deposit in its bank as long as possible." 173 Mont. at 197, 567 P.2d at 42. The court found that the bank had resisted transfer of the funds from its custody and, after discussing the bank's having had the use of the funds, denied the bank's request for fees. However, the court characterized the bank's behavior as "not disinterested" rather than in bad faith. *Id.* at 196, 567 P.2d at 43.

[147]Continental Cas. Co. v. Associated Pipe & Supply Co., 310 F. Supp. 1207. After finding that plaintiff, Texaco, was not a true stakeholder, the court concluded "[i]n addition, Texaco has had the use and benefit of the funds over the past several years and in any event this is ample compensation to them." 310 F. Supp. at 1214.

[148]120 F. Supp. 650 (W.D. Pa. 1954).

[149]*Id.* at 653.

[150]222 F. Supp. 131 (W.D. Pa. 1963).

the award to $150 due to the ease with which the action could be brought, and it noted that "the insurance company will be relieved of vexation and the expense of resisting a multiplicity of law suits in widely separated jurisdictions, will avoid erroneous election, and will be discharged from all liability on account of the policy involved."[151]

Federal courts in Mississippi and Tennessee have gone even further and have refused to award any fees to the stakeholder because interpleader benefits the stakeholder. In *Maryland Casualty Co. v. Sauter*,[152] an automobile liability insurer that received claims far exceeding the limitations of coverage under the policy brought an interpleader action to determine an equitable distribution of the proceeds among the several claimants. The court denied the insurer's request for attorneys' fees finding that the insurer had an interest that was served by the interpleader proceedings. The court described that interest as follows: "The plaintiff is relieved of a perplexing and delicate problem. Oftentimes the several claimants are dissatisfied with the action taken by an automobile liability carrier in disbursing such a fund. Litigation is likely to follow."[153]

In *Western Life Insurance Co. v. Nanney*,[154] a life insurance company brought an interpleader action to resolve conflicting claims asserted by the insured's wife, who claimed the proceeds as primary beneficiary, and the insured's children, who claimed the proceeds as contingent beneficiaries. The contingent beneficiaries alleged that the primary beneficiary was prohibited from receiving the proceeds because she had intentionally and wrongfully killed the insured. The court denied the insurer's request for attorneys' fees, stating:

> This plaintiff had a . . . self-serving interest here, *viz.*: it is required to pay the proceeds of the life insurance policy to either the initial beneficiary or the secondary beneficiaries. If it paid such proceeds to the wrong beneficiary, it could conceivably be compelled to pay the sum twice. By obtaining a court adjudication, it negates this risk."[155]

The above opinions do not suggest that the stakeholders had promoted their own interests to the detriment of the interests of the claimants. Instead, they object to the awarding of fees to the stakeholder because the stakeholder benefits by avoiding multiple litigation. Yet one of the rea-

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[151] *Id.* at 133.

[152] 377 F. Supp. 68 (N.D. Miss. 1974).

[153] *Id.* at 70-71.

[154] 290 F. Supp. 687 (E.D. Tenn. 1968).

[155] *Id.* at 688. The court also noted in a footnote that the insurer's attorney claimed that his services "were reasonably worth $1,000 to $1,500, although all he did was research, prepare and file the interpleading complaint!" *Id.* at 688, n.2. The court's using an exclamation point suggests that it may have been offended by the size of the attorneys' fees requested, which may have influenced the court in concluding that the stakeholder should not recover its fees from the fund.

sons for the general rule that fees should be awarded is that the stakeholder should not have to pay to avoid the harassment of multiple litigation.[156] Since avoiding multiple litigation is a benefit inherent in interpleader that all stakeholders enjoy, to deny fees on that basis is to deny that fees should ever be awarded to stakeholders. Yet none of those cases explicitly states an intention to abandon the general rule. Furthermore, to deny fees to a party solely because it benefitted from the proceedings is to ignore the fact that the "common benefit" exception to the "American rule" governing awards of fees assumes that the party to whom fees are awarded will benefit from the proceeding. The United States Supreme Court described the "common benefit" exception in *Alyeska Pipeline Service Co. v. Wilderness Society*[157] by stating that it provides that the court may award fees to "a party preserving or recovering a fund for the benefit of others in addition to himself."[158] The possibility that the stakeholder benefits from interpleader should not prevent the stakeholder from recovering its fees out of the fund.

I. *Ordinary Course of Doing Business*

Some federal courts have recently carved out another exception to the general rule that is similar to the exception applied because the stakeholder benefits. These courts stated that although fees are generally available to stakeholders, they should be denied if the court considers the dispute giving rise to the interpleader to be part of the stakeholder's ordinary course of doing business.

This exception arose due to substantial distortion of an opinion of the United States Court of Appeals for the Second Circuit. In *Travelers Indemnity Co. v. Israel*,[159] the Second Circuit upheld the Southern District of New York in denying attorneys' fees to fire insurers who had brought an interpleader action to resolve numerous claims to the proceeds. The court stated that it was "not impressed with the notion that whenever a minor problem arises in the payment of insurance policies, insurers may, as a matter of course, transfer a part of their ordinary cost of doing busi-

[156] *See supra* notes 49 through 56. According to Professor Moore, one of the reasons for enacting the federal interpleader statute was to protect the stakeholder, and fulfillment of that purpose requires that fees should be available to the stakeholder. He states:

> The statute was at the time of its enactment demonstrating a response to the felt need to protect a class of stakeholder against the possibility of onerous and unfair litigation and liability. . . . It is fully consistent with the protective policy – if not dictated by it – that the federal court . . . be empowered to further that protective policy by awarding in appropriate circumstances reasonable recompense to the stakeholder for his counsel fees.

3A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 2216[2] at 22-181.

[157] 421 U.S. 240 (1975).

[158] 421 U.S. at 257.

[159] 354 F.2d 488 (2d Cir. 1965).

ness to their insureds by bringing an action for interpleader."[160] The court did not describe the various claims to the proceeds or otherwise explain why the problem that had arisen in that case was "a minor problem."

Perhaps because of the Second Circuit's failure to give such an explanation, two subsequent opinions that purported to follow *Israel* overlooked the distinction between minor problems and other problems. The result was an exception that fees should not be awarded if the dispute is part of the stakeholder's ordinary course of business. To support this new exception, the courts erroneously relied on *Israel.*

One of the opinions adopting this exception was handed down by the Eastern District of New York. The case of *Fidelity & Deposit Co. v. A to Z Equipment Corp.*[161] involved a bond issued in connection with a contract between a ship repair company and the United States of America. The ship repair company was adjudicated a bankrupt, and the surety instituted an interpleader action to determine how the amount of the bond would be distributed among the 114 unpaid subcontractors. The court held that the surety should not be awarded attorneys' fees from the fund stating that "the ordinary costs of the plaintiff in transacting its business may not be taxed to the parties insured."[162] The court cited *Travelers Indemnity Co. v. Israel* for authority.

The other opinion following this view was delivered by the Eastern District of Virginia. The case of *Metropolitan Life Insurance Co. v. Holding*[163] involved life insurance proceeds that were to be paid to the widow of the insured, or if there were no widow, then to the children of the insured. The woman who claimed the proceeds believed that she was the wife of the insured until after the insured's death when she discovered that the insured's divorce from his previous wife had not been granted until a month after the marriage ceremony between the claimant and the insured. The insured also believed, throughout his life, that the second marriage was effective. Because of doubts about the effectiveness of the second marriage, the insurer brought the interpleader action to determine whether the insured had left a widow. The court concluded that a common-law marriage existed, and the proceeds were payable to the woman claiming them as the insured's widow. The court denied the insurer's claim for attorneys' fees stating: "This Court, in line with the reasoning of the Second Circuit in Travelers Indemnity Company v. Israel . . . concludes that the filing of this interpleader proceeding by the insurance carrier was a part of its ordinary course of doing business."[164]

Six years after the *Holding* decision, the Eastern District of Virginia again

[160]Id. at 490.
[161]258 F. Supp. 862 (E.D.N.Y. 1966).
[162]*Id.* at 863.
[163]293 F. Supp. 854 (E.D. Va. 1968).
[164]*Id.* at 858.

considered *Israel*, but this time it honored the Second Circuit's emphasis on minor problems. In *Manufacturers Life Insurance Co. v. Johnson*,[165] the court construed *Israel's* reference to minor problems to be a reference to problems involving "a 'minor' danger of multiple claimants."[166] That construction is consistent with the rule that fees should not be awarded to a stakeholder bringing an interpleader action in the absence of more than one claim.

A year and a half later, the Northern District of Illinois gave *Israel's* term "minor problem" a different meaning. In *Minnesota Mutual Life Insurance Co. v. Gustafson*,[167] the court concluded that "[a]lthough Judge Friendly did not define what he meant by 'minor problem,' it is evident from the nature of the case, that disputed claims that arise in the ordinary course of business fall into that category."[168] However, that court failed to provide any further justification for its construction of *Israel*. The court mentioned *Johnson*, but avoided discussing *Johnson's* different construction of *Israel*. Perhaps because it recognized the weakness in its "ordinary course of business" argument, the court attempted to bolster its denial of fees by arguing in addition that fees should be denied if the interpleader benefits the stakeholder, citing *Fidelity & Casualty Co. v. Levic*.[169] The court held as follows:

> [A]ttorneys' fees should not be granted to the stakeholder as a matter of course in interpleader actions concerning the proceeds of insurance policies. Although it is true that an interpleader action benefits both claimants and the courts by promoting expeditious resolution of the controversy in one forum, the chief beneficiary of an interpleader action is the insurance company. An inevitable and normal risk of the insurance business is the possibility of conflicting claims to the proceeds of a policy. An interpleader action relieves the company of this risk by eliminating the potential harassment and expense of a multiplicity of claims and suits. Furthermore, it discharges the company from all liability in regard to the fund. It thus seems unreasonable to award an insurance company fees for bringing an action which is primarily in its own self interest.
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> We conclude, therefore, that, when an insurance company brings an interpleader action concerning disputed claims of a kind that usually arise in the course of its business, fees should not be granted to its counsel. On the other hand, if the case involves disputes which do not ordinarily rise in the course of the insurance

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[165]385 F. Supp. 852 (E.D. Va. 1974).
[166]*Id.* at 854.
[167]415 F. Supp. 615 (N.D. Ill. 1976).
[168]*Id.* at 618.
[169]222 F. Supp. 131 (W.D. Pa. 1963); *see supra* text accompanying notes 150-51.

business, such fees may be allowable.[170]

The *Gustafson* court's denying fees on such questionable grounds as benefit to the stakeholder and ordinary course of business may be explained by the fact that the court had concluded that although Illinois law prohibits awarding fees to stakeholders, the *Erie* doctrine does not require the federal court to follow the state rule.[171] Perhaps the court felt torn between the federal rule that fees should be awarded and the Illinois rule that they should not. The court may have attempted to avoid awarding fees while still appearing to follow the general rule as expressed by the federal courts. Although the court may appear upon superficial examination to have relied on rules that are merely exceptions to the general rule, closer examination shows that those rules upon which it relied are in fact contradictions to the general rule.

Gustafson has been cited by the Southern District of New York in *Companion Life Insurance Co. v. Schaffer*.[172] *Schaffer* involved a question of the authenticity of a beneficiary change that benefitted the insured's uncle, who was also the insurance agent. The court deferred decision on awarding fees until it could be determined whether the insurer had fulfilled its duty to protect the interest of the insured.[173] The court also justified its deferring decision on the issue of attorneys' fees as follows, citing *Israel, A to Z Equipment*, and *Gustafson:*

> [I]n cases in which the claims are of the type that arise in the ordinary course of business, fees should not be granted perfunctorily. Such is a cost of doing business which should not be transferred by invoking interpleader. . . . Conflicting claims to the proceeds of a policy are inevitable and normal risks of the insurance business. Interpleader relieves the insurance company of multiple suits and eventuates in its discharge. Accordingly, the action is brought primarily in the company's own self-interest.[174]

Schaffer has been followed by the Eastern District of Pennsylvania,[175] and *Gustafson* has been followed by the Eastern District of Wisconsin.[176]

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[170]415 F. Supp. at 618-19.

[171]*See supra* notes 34-36 and accompanying text.

[172]442 F. Supp. 826 (S.D.N.Y. 1977).

[173]*See supra* text accompanying notes 65-66.

[174]422 F. Supp. at 830. Although opinions denying fees because the disputes are part of the stakeholder's ordinary course of doing business focus on insurers, denying fees to insurers because of the nature of their business is contrary to the weight of authority. That fees may be awarded to insurers as stakeholders is well-established and continues to be recognized in both state and federal courts. *See, e.g.*, Home Ins. Co. v. Burns, 474 F.2d 1001 (9th Cir. 1973); Aetna Life Ins. v. Outlaw, 411 F. Supp. 824 (D. Md. 1976); National Life Ins. Co. v. Southeast First Nat'l Bank, 361 So. 2d 432 (Fla. Dist. Ct. App. 1978); Soha v. West, 637 P.2d 1185 (Mont. 1981); Holmequist v. Occidental Life Ins. Co. of Cal., 536 S.W.2d 434 (Tex. Civ. App.—Houston [14th Dist] 1976, writ ref'd n.r.e.).

[175]Mutual of Omaha Ins. Co. v. Dolby, 531 F. Supp. 511 (E.D. Pa. 1982).

[176]Metropolitan Life Ins. Co. v. Kwicinski, 78 F.R.D. 235 (E.D. Wis. 1978); Metropolitan

Those courts accepted the *Gustafson* rule at face value without examining either the reasons for the general rule allowing fees or the questionable origins of the Gustafson rule.

One recent case cited *Gustafson*, but actually followed *Johnson's* construction of *Israel's* reference to minor problems. In *Prudential Property & Casualty Co. v. Baton Rouge Bank & Trust Co.*,[177] the Middle District of Georgia stated the rule to be that fees should not be awarded when "the claims to the fund are of the type that arise in the ordinary course of business and are not difficult to resolve."[178] In support of that rule, the court cited *Johnson*, *Israel*, *Schaffer*, and *Gustafson*. It also cited *Aetna Life Insurance Co. v. Harley*,[179] in which the court had refused to award fees because only one meritorious claim had been made. Apparently it believed that the *Harley* case could have been resolved without litigation. After stating that rule, the court in *Baton Rouge Bank & Trust Co.* declined to award routinely incurred fees because "the claims of the five judgment creditors being undisputed were not difficult to resolve."[180] This opinion may persuade the federal courts that are inclined to follow the course of business exception to return to the *Johnson* approach, which is more compatible with the reasons for the general rule allowing fees.

Similarly, in *Penn Mutual Life Insurance Co. v. Charlesworth*,[181] the Kentucky federal court awarded attorneys' fees to an insurer from a fund that consisted of death claim proceeds. The court distinguished *Israel* on the basis that "the case *sub judice* involves a substantial likelihood of multiple liability for the plaintiff. Both the defendant Charlesworth and the defendant Mayse have answered and asserted their conflicting claims to the proceeds of insurance policies on the life of the deceased. . . ."[182]

Furthermore, not all courts that have considered the course of business argument have adopted it. In *Klebanoff v. Mutual Life Insurance Co.*,[183] the claimants asserted that the stakeholder should not be awarded fees because, among other things, it "reasonably could have foreseen suits of this nature arising as a result of the business in which it is engaged."[184] The court awarded fees observing that the stakeholder had benefitted the claimants by preventing dissipation of the fund and that it should not have to pay to guard itself against the harassment of multiple litigation. Oth-

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Life Ins. Co. v. Harris, 446 F. Supp. 936 (E.D. Wis. 1978); Mutual Life Ins. Co. of N.Y. v. Haskett, No. 77-C-687 (E.D. Wis. Dec. 27, 1977).

[177]537 F. Supp. 1147 (M.D. Ga. 1982).

[178]*Id.* at 1150.

[179]*Supra* note 104.

[180]537 F. Supp. at 1151.

[181]No. 80-7 (E.D. Ky. Oct. 19, 1982).

[182]*Id.*, slip op. at 2.

[183]246 F. Supp. 935 (D. Conn. 1965), *rev'd and remanded on other grounds*, 362 F.2d 975 (2d Cir. 1966).

[184]246 F. Supp. at 949.

erwise, the court did not comment on the course of business argument.

Nothing in the reasoning behind the general rule awarding fees supports the argument that fees should be denied if the court considers the dispute to be part of the stakeholder's ordinary course of doing business. The course of the stakeholder's business does not make the stakeholder responsible for the dispute nor interested in its outcome, it does not reduce the threat of multiple litigation, and it does not diminish the value of the services performed by a stakeholder who brings an interpleader action.

J. *Small Fund*

The final exception to the general rule has arisen from the refusal of some courts to award fees from small funds. In *New York Life Insurance Co. v. Bidoggia*,[185] the court cited the small size of the fund, amounting to only $1,000, in addition to the stakeholder's delay, in denying attorneys' fees to the stakeholder.

Similarly, in *Capson v. Brisbois*,[186] a prospective purchaser of real estate deposited $1,000 with a realty company as earnest money in connection with its agreement to purchase real estate. The sale fell through, and both the prospective purchaser and the prospective seller of the real estate demanded the $1,000 deposit from the realty company. Consequently, the realty company brought an interpleader action. Although the court acknowledged that attorneys' fees were usually recoverable by a party who properly brings an interpleader action, it held that fees were not recoverable if the stakeholder had caused the conflicting claims, if the stakeholder was not disinterested, or if the stakeholder wrongfully delayed or withheld payment when no real danger of double liability existed. There was no evidence that the realty company had contested or delayed payment of the fund. Nonetheless, the court held that "it would be inequitable to tax the prevailing claimants for Tracy Realty's costs and fees."[187] The court did not explain the basis for its conclusion that an award of fees would be inequitable, but its conclusion may have been based upon the fact that the realty company had requested an award of attorneys' fees in the amount of $385, and only $1,000 was in dispute.

Although these two cases each involved a fund of only $1,000, larger funds have been considered too small to justify an award of fees if the fees were a significant portion of the fund. In *Manufacturer's Life Insurance Co. v. Johnson*,[188] the life insurance proceeds in question amounted to $7,000, and the insured's fees amounted to $1,250. The court stated that "considering the size of the fund, and the fact that Mrs. Johnson has

[185] 15 F.2d 127 (D. Idaho 1926).
[186] 592 P.2d 583 (Utah 1979).
[187] *Id.* at 585.
[188] 385 F. Supp. 852 (E.D. Va. 1974).

herself incurred attorneys' fees in defending the action, it would seem most equitable that each party be charged their individual counsel fees."[189]

While some courts have refused to award any fees because the funds were small, others have awarded limited fees for the same reason. In *Equitable Life Insurance Society v. Hughes*,[190] the insured's former wife claimed the proceeds of a life insurance policy as the designated beneficiary, but the widow of the insured also claimed the proceeds relying on the divorce, the property settlement agreement, and an alleged attempt to change the beneficiary. After finding that the insurer's delay in filing the bill of interpleader did not prevent an award of fees, the court held that

> "the amount of the proceeds of the policy also has a bearing on the size of the fee to be awarded, and while counsel for Equitable has been required to do quite a bit of work in this case, we feel that under all of the circumstances here present, and in view of the fact that the fund involved is less than $2,000, said fund should not be charged with a fee in excess of $200, and such sum will be awarded."[191]

Similarly, in *Prudential Insurance Co. of America v. Tomes*,[192] the court awarded attorneys' fees to the insurer that brought the interpleader action, but it awarded only $75.00, since the fund amounted to $1,064.38. The court observed that "the fee is probably inadequate but the fund available for its payment is small."[193] A similar rationale was followed by the federal court for the Southern District of New York in *Metropolitan Life Insurance Co. v. Dunne*.[194] In *Dunne*, the court limited the award "in view of the modest amount at stake." However, the court was more generous to the stakeholder than the court was in *Tomes*, as it awarded $100 out of a fund of $604.52.

Some courts have attempted to justify limiting the size of awards by noting the ease of the litigation as well as the desire to avoid depleting a small fund. In *Hunter v. Federal Life Insurance Co.*,[195] the Eighth Circuit affirmed an award of $300 in attorneys' fees to the stakeholder, and it stated:

> The remedy of interpleader should, of course, be a simple, speedy, efficient and economical remedy. Under ordinary circumstances there would be no justification for seriously depleting the fund deposited in court by a stakeholder through the allowance of large fees to his counsel. The institution of a suit in interpleader, in-

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[189] *Id.* at 854.
[190] 152 F. Supp. 187 (E.D. Ark. 1957).
[191] *Id.* at 197.
[192] 45 F. Supp. 353 (D. Neb. 1942).
[193] *Id.* at 356.
[194] 2 F. Supp. 165 (S.D.N.Y. 1931).
[195] 111 F.2d 551 (8th Cir. 1940).

> cluding the depositing of the fund in the registry of the court and the procuring of an order of discharge of the stakeholder from further liability, does not usually involve any great amount of skill, labor or responsibility, and, while a completely disinterested stakeholder should not ordinarily be out of pocket for the necessary expenses and attorney's fees incurred by him, the amount allowed for such fees should be modest.[196]

In spite of the court's emphasis on the usual ease of bringing an interpleader action, its concern about "seriously depleting the fund" suggests that the size of the fund also influenced the court to limit the size of the award. The fund in that case amounted to $5,000.

In *Fidelity & Casualty Co. v. Levic*,[197] the court awarded to the stakeholder only $150 of its total attorneys fees of $540. The court explained its result only by stating that $150 was "a fair and reasonable sum" to be paid to the stakeholder "in the circumstances."[198] The circumstances mentioned by the court arose when the stakeholder, a life insurance company, brought the interpleader action, because it expected certain relatives of the insured to assert a claim as heirs-at-law; however, the insurer did not state how the heirs-at-law might have a claim to the proceeds. When the action was brought, the relatives denied that they were heirs-at-law, and they denied that they wished to claim the proceeds. In discussing the lack of a conflicting claim, the court did not mention that the interpleader may have been unnecessary. Rather, the court turned the issue on the ease with which the action could be tried and, therefore, the simplicity of the action in terms of determining an appropriate attorneys' fee. Also, the court noted that "the insurance company's right to costs must be balanced against the true beneficiary's right to the full amount of the policy."[199] Thus, the relatively small amount of the fund, $7,500, may have influenced the court in awarding only a portion of the attorneys' fees to the stakeholder.

The court in *Equitable Life Assurance Society of United States v. Miller*[200] reached a similar result. *Miller* involved life insurance proceeds of $7,225.00; the stakeholder-insurer requested fees of $500. The court awarded only $200, "since the expenditure of time involved is not great and the fund limited."[201]

Refusing to award fees because of the size of the fund is inconsistent with the reasoning behind the general rule that fees should be awarded. The size of the fund does not make the stakeholder any more interested

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[196] *Id.* at 557.
[197] 222 F. Supp. 131 (W.D. Pa. 1963).
[198] *Id.* at 133.
[199] *Id.*
[200] 229 F. Supp. 1018 (D. Minn. 1964).
[201] *Id.* at 1021.

in the dispute, does not alleviate the harassment of multiple litigation, and does not detract from the services the stakeholder performs. It may be justifiable to limit the size of awards from small funds so that the funds will not be substantially reduced by the fees,[202] but fees should not be completely denied merely because of the size of the fund.

IV. Conclusion

As noted earlier, the general rule is that fees may be awarded to a stakeholder. Of the several exceptions to that rule, a few are consistent with the reasons given for the general rule, but most are not.

The consistent exceptions deny fees if the stakeholder caused the dispute, if the stakeholder had an economic interest in the fund, or if the stakeholder acted in bad faith. It is also appropriate to deny fees if only one claim was asserted to the fund and if the stakeholder had an oppor-

[202]Some decisions have limited the size of awards without regard to the size of the fund. In National Life & Accident Ins. Co. v. Bruce, 309 F. Supp. 1314 (W.D. Mo. 1970), the court ignored the size of the funds in the two cases before it and limited the awards solely because "the interpleader actions involved expenditure of minimal time and effort." *Id.* at 1315. One case involved a $20,000 life insurance policy and a request for fees for the stakeholder's attorneys of $750. The other case involved a $4,000 policy and a request for fees of $1,580. Even though one fund was five times the size of the other, the court awarded fees of $250 in each case. Similarly, in Equifax, Inc. v. Luster, 463 F. Supp. 352 (E.D. Ark. 1978), although the fund amounted to $50,000, the court held that "the amount of the fee should be modest, both in view of the relatively routine services involved and in order not to deplete the fund, which belongs to the claimants, not to the stakeholder." *Id.* at 357. The court awarded a fee of $250, without revealing the amount requested. And in Warner v. Florida Bank & Trust Co., 160 F.2d 766 (5th Cir. 1947), an award was reduced because "the bill of interpleader is not complicated." However, unlike the $250 awards in *Bruce* and *Luster*, the final award was $5,000, having been reduced from $7,500. *Id.* at 773. *See also* John Hancock Mut. Life Ins. Co. v. Doran, 138 F. Supp. 47; Shrepic v. Metropolitan Life Ins. Co., 120 F. Supp. 650 (W.D. Pa. 1954).

It is appropriate for the courts, in awarding fees, to consider the difficulty of the task. But that is not the only consideration. In addition, "[t]he extent of the allowance, if any, depends on the value of the service rendered by the attorney to the court and to the other parties involved." United States Fidelity & Guar. Co. v. Long, 214 F. Supp. 307, 319 (D. Or. 1963). Interpleader has substantial value to both the courts and the claimants in the absence of the stakeholder's causing the dispute, acting in bad faith, or bringing the action prematurely. Failure to consider that value results in a distorted award.

Courts must also keep in mind that, although interpleader actions are normally simple, some may be complex, so each request for fees must be examined closely on its own merits. In Lindoerfer v. J. C. Penney Co., 244 F. Supp. 175 (N.D. Ohio 1965), the court awarded $1,250, noting that "the facts in the cases cited do not appear to have involved the extensive and difficult problems that intervened in this action between the filing of the motion for interpleader, and the allowance of the motion." *Id.* at 177. And in Clarkson Co. v. Shaheen, 533 F. Supp. 905 (S.D.N.Y. 1982), in which the stakeholder was required, in addition to filing an interpleader complaint, to answer a turnover petition and an order to show cause, to reply to a counterclaim, to obtain an order to show cause why a state action should not be stayed, to secure an injunction staying the state action, to participate in discovery, to participate in pretrial conferences, and to appear in court both on a petition for mandamus and upon trial of the case, the court granted the stakeholder's request for fees for 110 hours in the total amount of $10,000.

tunity to determine that only one claim existed before interpleading. No justification exists for the exceptions denying fees because the stakeholder sided with one of the claimants, only one of the conflicting claims proved to be meritorious, the stakeholder failed to initiate the interpleader action, the stakeholder delayed in bringing the interpleader action, the stakeholder earned interest from the use of the fund, the stakeholder benefitted from bringing action, the dispute arose in the ordinary course of the stakeholder's business, or the fund was small.

Because of the inconsistencies noted, a stakeholder requesting fees should give the court its reasons for asking for fees with appropriate citations. It is not enough to cite authorities holding that, in general, fees may be awarded in that jurisdiction. The court must also be reminded of the reasons for awarding fees. In addition to increasing the stakeholder's chances of recovering fees, the overall rationale of awarding fees should lead the courts to consider the law of interpleader thoroughly and should discourage them from making decisions that are based on superficial analyses and that contradict the precedents on which they purport to rely. Further, if stakeholders fail to present the issue properly, the courts should take the initiative of examining the question in depth so that a consistent and constructive doctrine of awarding fees in interpleader can develop.

SUBPOENA

RULE 55

A Generally: form and contents; originating court; who may issue; who may serve; proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) General requirements. A subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule 38 C;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number; [*and*]

A(1)(a)(iv) command the person to whom the subpoena is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(A) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in the person's possession, custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(C) produce records of confidential health information for inspection and copying as provided in section D of this rule[.]**;**

A(1)(a)(v) state that the appearance of the person to whom the subpoena is directed cannot be required unless the fees and mileage specified in paragraph A(6)(b) of this rule are delivered at the time of service of the subpoena; and

A(1)(a)(vi) state that, if the subpoena requires the person to whom the subpoena is directed to appear and testify, that person may file and serve a motion to quash or to modify the subpoena on the party seeking the appearance, and on the presiding judge of the court

that issued the subpoena, within seven (7) days of service of the subpoena, and at least one (1) judicial day prior to the deadline set for the appearance and testimony.

A(2) Originating court. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38 C, a subpoena may be issued by the court in the county in which the witness is to be examined.

A(3) Who may issue.

A(3)(a) Attorney of record. An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) Clerk of court. The clerk of the court in which the action is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

A(3)(c) Clerk of court for foreign depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the court in the county in which the witness is to be examined.

A(3)(d) Judge, justice, or other authorized officer.

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, a justice, or an authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) Who may serve. A subpoena may be served by a party, the party's attorney, or any other person who is 18 years of age or older.

A(5) Proof of service. Proving service of a subpoena is done in the same way as provided

in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

A(6)(b) Witness appearance contingent on fee payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. At the end of each day's attendance, a witness may demand payment of legal witness fees and mileage for the next day. If the fees and mileage are not paid on demand, the witness is not obligated to return.

A(6)(c) Deposition subpoena; place where witness can be required to attend or to produce things.

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) Nonresidents. A nonresident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

A(6)(d) Obedience to subpoena. A witness must obey a subpoena. Disobedience or a refusal to be sworn or to answer as a witness may be punished as contempt by the court or by the judge who issued the subpoena or before whom the action is pending. At a hearing or trial, if a witness who is a party disobeys a subpoena, or refuses to be sworn or to answer as a witness, that party's complaint, answer, or other pleading may be stricken.

A(7) Recipient's option to object, to move to quash, or to move to modify subpoena for production. A person who is not subpoenaed to appear, but who is commanded to produce and permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule, may object, or move to quash or move to modify the subpoena, as provided as follows.

A(7)(a) Written objection; timing. A written objection may be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

A(7)(a)(i) Scope. The written objection may be to all or to only part of the command to produce.

A(7)(a)(ii) Objection suspends obligation to produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

A(7)(b) Motion to quash or to modify. A motion to quash or to modify the command for production must be served and filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of production.

A(8) Scope of discovery. Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44.

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, and prisoners.

B(1) Permissible purposes of subpoena. A subpoena may require appearance in court or out of court, including:

B(1)(a) Civil actions. A subpoena may be issued to require attendance before a court, or at the trial of an issue therein, or upon the taking of a deposition in an action pending therein.

B(1)(b) Foreign depositions. Any foreign deposition under Rule 38 C presided over by any person authorized by Rule 38 C to take witness testimony, or by any officer empowered by the laws of the United States to take testimony; or

B(1)(c) Administrative and other proceedings. Any administrative or other proceeding presided over by a judge, justice or other officer authorized to administer oaths or to take testimony in any matter under the laws of this state.

B(2) Service of subpoenas requiring the appearance or testimony of individuals or nonparty organizations; payment of fees. Unless otherwise provided in this rule, a copy of the subpoena must be served sufficiently in advance to allow the witness a reasonable time for preparation and travel to the place required.

B(2)(a) Service of subpoenas on parties. To require the appearance of a party, including an officer, director, or member of a party, to the action who has appeared in the case, the subpoena may be served as provided in Rule 9 B and payment of fees and mileage as specified in paragraph A(6)(b) of this rule are not required. A subpoena issued pursuant to this subparagraph may require production of original documents and things previously produced during discovery.

[*B(2)(a)*] B(2)(b) Service on an individual 14 years of age or older. If the witness is 14 years of age or older, the subpoena must be personally delivered to the witness, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

[*B(2)(b)*] B(2)(c) Service on an individual under 14 years of age. If the witness is under 14 years of age, the subpoena must be personally delivered to the witness's parent, guardian, or guardian ad litem, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or

not.

[*B(2)(c)*] B(2)(d) Service on individuals waiving personal service. If the witness waives personal service, the subpoena may be mailed to the witness, but mail service is valid only if all of the following circumstances exist:

[*B(2)(c)(i)*] B(2)(d)(i) Witness agreement. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that the witness agreed to appear and testify if subpoenaed;

[*B(2)(c)(ii)*] B(2)(d)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory arrangements with the witness to ensure the payment of fees and mileage, or the witness expressly declined payment; and

[*B(2)(c)(iii)*] B(2)(d)(iii) Signed mail receipt. The subpoena was mailed more [*the*] **than** 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt more than 3 days before the date to appear and testify.

[*B(2)(d)*] B(2)(e) Service of a deposition subpoena on a nonparty organization pursuant to Rule 39 C(6). A subpoena naming a nonparty organization as a deponent must be delivered in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

B(3) Service of a subpoena requiring appearance of a peace officer in a professional capacity.

B(3)(a) Personal service on a peace officer. A subpoena directed to a peace officer in a professional capacity may be served by personal service of a copy, along with one day's attendance fee and mileage as allowed by law, unless the peace officer expressly declines payment.

B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a peace officer in a professional capacity may be served by substitute service of a copy, along with one

day's attendance fee and mileage as allowed by law, on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge at least 10 days before the date the peace officer is required to attend, provided that the peace officer is currently employed by the law enforcement agency and is present in this state at the time the agency is served.

B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law enforcement agency means the Oregon State Police, a county sheriff's department, a city police department, or a municipal police department.

B(3)(b)(ii) Law enforcement agency obligations.

B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

B(3)(b)(ii)(B) Ensuring actual notice or reporting otherwise. When a peace officer is subpoenaed by substitute service under paragraph B(3)(b) of this rule, the agency must make a good faith effort to give the peace officer actual notice of the time, date, and location identified in the subpoena for the appearance. If the law enforcement agency is unable to notify the peace officer, then the agency must promptly report this inability to the court. The court may postpone the matter to allow the peace officer to be personally served.

B(4) Service of subpoena requiring the appearance and testimony of prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena on a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

C Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule.

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

C(2) When mail service allowed. A copy of a subpoena for production that does not contain a command to appear and testify may be served by mail.

C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of a subpoena issued solely to command production or inspection prior to a deposition, hearing, or trial must do the following:

C(3)(a) Advance notice to parties. The subpoena must be served on all parties to the action who are not in default at least 7 days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the court orders less time;

C(3)(b) Time for production. The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time; and

C(3)(c) Originals or true copies. The subpoena must specify whether originals or true copies will satisfy the subpoena.

D Subpoenas for documents and things containing confidential health information ("CHI").

D(1) Application of this section; "confidential health information" defined. This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means information collected from a person

by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) Qualified protective orders. A qualified protective order means a court order that prohibits the parties from using or disclosing CHI for any purpose other than the litigation for which the information is produced, and that, at the end of the litigation, requires the return of all CHI to the original custodian, including all copies made, or the destruction of all CHI.

D(3) Compliance with state and federal law. A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

D(4) Conditions on service of subpoena.

D(4)(a) Qualified protective order; declaration or affidavit; contents. The party serving a subpoena for CHI must serve the custodian or other record keeper with either a qualified protective order or a declaration or affidavit together with supporting documentation that demonstrates:

D(4)(a)(i) Written notice. The party made a good faith attempt to provide the person whose CHI is sought, or the person's attorney, written notice that allowed 14 days after the date of the notice to object;

D(4)(a)(ii) Sufficiency. The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the person or the person's attorney to meaningfully object;

D(4)(a)(iii) Information regarding objections. The party must certify that either no written objection was made within 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

D(4)(a)(iv) Inspection requests. The party must certify that the person or the person's representative was or will be permitted, promptly on request, to inspect and copy any CHI received.

D(4)(b) Objections. Within 14 days from the date of a notice requesting CHI, the person whose CHI is being sought, or the person's attorney objecting to the subpoena, must respond in writing to the party issuing the notice, and state the reasons for each objection.

D(4)(c) Statement to secure personal attendance and production. The personal attendance of a custodian of records and the production of original CHI is required if the subpoena contains the following statement:

This subpoena requires a custodian of confidential health information to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D(8) is insufficient for this subpoena.

D(5) Mandatory privacy procedures for all records produced.

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) Enclosure in a sealed outer envelope; properly addressed. The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) Court. If the subpoena directs attendance in court, to the clerk of the court, or

to a judge;

D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a deposition or similar hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;

D(5)(b)(iii) Other hearings or miscellaneous proceedings. If the subpoena directs attendance at another hearing or another miscellaneous proceeding, to the officer or body conducting the hearing or proceeding at the officer's or body's official place of business; or

D(5)(b)(iv) If no hearing is scheduled. If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) Additional responsibilities of attorney or party receiving delivery of CHI.

D(6)(a) Service of a copy of subpoena on patient and all parties to the litigation. If the subpoena directs delivery of CHI to the attorney or party who issued the subpoena, then a copy of the subpoena must be served on the person whose CHI is sought, and on all other parties to the litigation who are not in default, not less than 14 days prior to service of the subpoena on the custodian or keeper of the records.

D(6)(b) Parties' right to inspect or obtain a copy of the CHI at own expense. Any party to the proceeding may inspect the CHI provided and may request a complete copy of the information. On request, the CHI must be promptly provided by the party who served the subpoena at the expense of the party who requested the copies.

D(7) Inspection of CHI delivered to court or other proceeding. After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the CHI may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise the copy must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The CHI must be opened in

the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. CHI that is not introduced in evidence or required as part of the record must be returned to the custodian who produced it.

D(8) Compliance by delivery only when no personal attendance is required.

D(8)(a) Mail or delivery by a nonparty, along with declaration. A custodian of CHI who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI subpoenaed within five days after the subpoena is received, along with a declaration that complies with paragraph D(8)(b) of this rule.

D(8)(b) Declaration of custodian of records when CHI produced. CHI that is produced when personal attendance of the custodian is not required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) Authority of declarant. The declarant is a duly authorized custodian of the records and has authority to certify records;

D(8)(b)(ii) True and complete copy. The copy produced is a true copy of all of the CHI responsive to the subpoena; and

D(8)(b)(iii) Proper preparation practices. Preparation of the copy of the CHI being produced was done:

D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of the entity subpoenaed or the declarant;

D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred to in the CHI.

D(8)(c) Declaration of custodian of records when not all CHI produced. When the custodian of records produces no CHI, or less information than requested, the custodian of records must specify this in the declaration. The custodian may only send CHI within the

custodian's custody.

D(8)(d) Multiple declarations allowed when necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) Designation of responsible party when multiple parties subpoena CHI. If more than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

D(10) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness fee and mileage for one day unless there has been agreement to the contrary.

D(4) **Challenge of peremptory challenge exercised on basis of race, ethnicity, or sex.**

D(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity, or sex. [*Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.*]

D(4)(b) **Objection.** If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge**. The court may also raise this objection on its own. The objection should be made by simple citation to this rule.** [*The objection must be made before the court excuses the juror. The objection*] **Further discussion of the objection** must be made outside of the presence of the jurors. **The objection must be made before the potential juror is excused, unless new information is discovered.** [*The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*]

D(4)(c) **Response. Upon objection to the exercise of a peremptory challenge pursuant to this rule, the party exercising the peremptory challenge must articulate the reasons the peremptory challenge has been exercised.** [*If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted*.]

D(4)(d) **Determination. The court should then evaluate the reasons given to justify the peremptory challenge in light of the totality of the circumstances. If the court determines that an objective observer could view race, ethnicity, or sex as a factor in the use of the peremptory challenge, then the peremptory challenge must be denied. The court need not find purposeful discrimination to deny the peremptory challenge. The court should explain its ruling on the record.** [*If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge*.]

D(4)(e) Nature of Objective Observer. For purposes of this rule, an objective observer is aware that implicit, institutional, and unconscious bias, in addition to purposeful discrimination have resulted in unfair exclusion of potential jurors in Oregon State.