MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 11, 2020, 9:30 a.m.
Zoom Teleconference/Video Conference
Originating at Lewis & Clark Law School, 10015 SW Terwilliger Blvd., Portland, Oregon

ATTENDANCE

Members Attending in Person:

Hon. Leslie Roberts

Members Attending by Teleconference or Video Conference:

Kelly L. Andersen
Troy S. Bundy
Kenneth C. Crowley
Jennifer Gates
Barry J. Goehler
Hon. Norman R. Hill
Meredith Holley
Drake A. Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Shenoa L. Payne
Tina Stupasky
Hon. Douglas L. Tookey
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Travis Eiva
Hon. R. Curtis Conover
Scott O'Donnell
Margurite Weeks

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 called the meeting to order at 9:35 a.m.

II. Administrative Matters

A. Approval of March 14, 2020, Minutes

Ms. Gates asked if any Council members had suggestions for corrections or changes to the draft March 14, 2020, minutes (Appendix A). Hearing none, she asked for a motion to approve the minutes. Mr. Crowley made a motion to approve the draft minutes. Ms. Stupasky seconded the motion, which was approved with no objections.

III. Old Business

A. Committee Reports

1. ORCP 7

Judge Wolf explained that a few committee members, including himself, Judge Leith, and Ms. Stupasky, had met to discuss the draft (Appendix B) that Judge Peterson had circulated to the committee following the last Council meeting. That draft attempted to address the issues that were raised by Council members at that meeting. He reminded the Council that the primary issue that the committee is addressing is the waiver of service–the voluntary attempt by a plaintiff to get the defendant to accept service in order to avoid the hassle of serving the defendant. If the defendant fails to waive service when asked, the defendant would end up paying the costs of service. Judge Wolf stated that he and Judge Leith had agreed that the draft presents a good framework for waiver, but that they suspect that there will be some issues with regard to the various timelines that are outlined. He stated that he was not certain that the committee could resolve those issues and asked for the Council's input.

Ms. Gates asked whether the committee had a unanimous recommendation for how much time should be granted. Judge Wolf reiterated that the entire committee had not been able to meet. He noted that Ms. Stupasky had expressed concern that the current draft runs time of service from the time the waiver is sent, as opposed to when it is signed. He also explained that Mr. Young had previously been fairly adamant that the defense bar would want the full 60 days, similar to the federal rule. Judge Wolf stated that he and Judge Leith are not as concerned about the timeline, since they do not practice and it is not much of an issue for them as long as it does not interfere with court calendars, which he does

not believe that the current draft does. He stated that he was not sure that changing the time to 60 days would cause a major issue for the court calendars either.

Mr. Young agreed that he is opposed to the shorter time frame and is strongly in favor of 60 days. He stated that 60 days gives the defendant the incentive to want to engage in the procedural process and that, without it, there is no added benefit. Being given 35 days instead of 30 days in which to respond to the complaint does not give much of an incentive for a defendant to want to waive service. He noted that he practices mainly in the area of medical malpractice, and he can always talk to his doctor clients about whether to accept or waive service, so this change would not personally affect him. However, it could be detrimental to other practitioners in the defense bar who have difficulty finding their clients and find that such a short time frame evaporates very quickly. He stated that he feels that a 35-day time frame to waive service is not really any different from the existing rule and, in that case, there is no need to change the existing rule.

Ms. Stupasky stated that she is strongly opposed to a 60-day time frame, but not terribly opposed to 45. She noted that, with either a 35 or 45-day time frame, defendants have incentive because they do not want to incur the costs or the attorney fees of being served, but she thinks that 60 days puts things out way too far. Mr. Crowley stated that he did not think that the State of Oregon would support a 35-day time frame, because it almost becomes a disincentive. He stated that, if a change were to be made, his personal preference is 60 days. He explained that the State frequently waives service in federal cases, and it works. However, he also stated that he believes that the ORCP are fine the way they are, because the same thing can currently be done by agreement under the existing rules.

Ms. Gates asked whether the committee had discussed whether there was some compromise between 35 and 60 days that members could agree to, or whether each side felt so strongly that there was no middle ground. Judge Wolf stated that the committee had discussed 45 days, but there was still some pushback that 60 days was the appropriate number. He noted that this is not a rule change that would have an impact on good practitioners but, rather, on problematic lawyers and difficult defendants. He stated that he could see the change being useful, whether 35 days or 60 days or somewhere in between, in some domestic relations cases where a defendant is intentionally attempting to dodge service and driving up the costs dramatically. Putting the burden of service costs on such defendants may cause them to behave themselves and, even if they do not waive service, at least may cause them to make themselves a little more amenable to the sheriff who is knocking on the door. Ms. Payne and Ms. Stupasky stated that they had no

problem with 45 days.

Judge Peterson noted that one improvement to the draft could be to include in the notice requirement language similar to that in ORCP 7(D)(4) to state that, if the plaintiff that knows the defendant is insured, the notice has to go to the defendant's insurance company as well as to the defendant.

Judge Peterson also explained his thoughts on timing in the waiver section of the draft. He noted that the cost of service is typically $45 in a case where people are not misbehaving, and the cost of attorney fees for collecting service costs would only be visited on someone who fought it, so the penalty for not accepting service is almost nothing in a typical case. If a defendant cannot make up their mind on accepting service within 21 days, the plaintiff would like to know that. So the question is, how long does the defendant get to make a decision on waiving service and, on the other end, how long do they get to file the response if they waive service? He stated that it seems to him that 60 days runs right into UTCR 7.020. From a plaintiffs' perspective, it seems like quite a long delay if it is 21 days to make the choice and then 60 days to get an answer, and there are probably not many plaintiffs interested in using such a waiver.

Ms. Payne asked whether there was a reason any defendant would need 21 days to decide to accept service, because that seems like an overly long amount of time to her. From the plaintiff's perspective, even waiting to know whether the other side is going to accept service can cause a delay, and sometimes the plaintiff just needs to jump in and serve. She wondered whether that 21-day time period is really necessary just to make a decision to accept service.

Mr. Andersen stated that he would not have a problem with 60 days, if the 21 days period were done away with. He pointed out that, once there is an acceptance of service, the pressure is off for plaintiffs to meet the statute of limitations by the 60-day relation back period in ORS 12.190. He explained that he is usually cooperative if defendants need more time to answer, but he is very opposed to granting a blanket 21 days for the defendant to decide whether or not to accept service. During those 21 days, plaintiffs are burning up that "golden" 60-day relation-back period. He noted that, in some cases, a plaintiff will need the entire 60 days to find a difficult-to-locate defendant. If a defendant were to say that they needed the entire 21 days to decide whether to accept service, he would just go ahead and serve. His suggestion would be to shorten the time period to seven days, if anything, but he was not even sure that there needed to be a time period for defendants to make that decision.

Judge Roberts stated that there is a need to give defendants time to consult an attorney, particularly because most people who receive a request for waiver will not necessarily know what it means. She suggested that attorneys who are up against the statute of limitations would most likely not bother to request a waiver, but pointed out that this will be a small proportion of the cases filed, and having the waiver will be an advantage for others.

Ms. Payne wondered why an attorney would waste time trying to serve a defendant when they are up against the statute of limitations and know who opposing counsel is. She suggested that it would be more efficient to request a waiver. Judge Roberts pointed out that, in traffic accident cases, an attorney would scarcely know who the defendant is, let alone who opposing counsel is. Ms. Payne noted that, in many cases, an attorney does know who opposing counsel is. Judge Roberts stated that, in 95% of the cases she sees, people do not know each other. Ms. Payne noted that Mr. Andersen's point is valid in cases where an attorney knows opposing counsel–that the 21-day period is just an empty void that wastes time.

Judge Wolf pointed out that there is no reason that a plaintiff still could not reach out to counsel; they just would not be proceeding under section H and would not be able to get the automatic award of the costs of service if the defendant did not waive service. He stated that a plaintiff can still pick up the telephone and ask whether the defendant is willing to accept service and state that they need to know in seven days because the timelines are running. If the response is yes, the problem is solved. If the response is no, the plaintiff can then serve regularly or use the waiver process and give 21 days.

Judge Roberts stated that the status quo is that plaintiffs can request that a defendant accept service if they know opposing counsel, and that this amendment would not change that situation. However, this amendment is needed for cases where a plaintiff does not know opposing counsel well or at all. Mr. Young stated that, as a defense attorney who received a request for waiver of service, his first move would be to contact the defendant who he represents to make sure that he is authorized to accept service. His next question would be whether the defendant wants to waive service. His concern is not with the relatively small number of medical malpractice cases that get filed but, rather, the motor vehicle accident cases that make up the majority of civil cases. A lot of times, the drivers or the defendants cannot be easily located, and a lawyer really does need 21 or 30 days to locate them to have that conversation. It is not the decision but, rather, locating the defendant that eats up a lot of time.

Ms. Gates asked for clarification about the conjunction between the 21-day and 60-day time periods. She asked whether, if a defense attorney has 21 days to locate their client, the 60 are days still needed on the other end. Ms. Payne stated that her understanding is that the 60 days is not added on to the 21-day period but, rather, is from the time that the waiver is served. Judge Roberts agreed.

Ms. Gates asked for feedback on Judge Peterson's proposal to add a clause regarding notification to the defendant's insurance company. Mr. Andersen stated that he is in favor of keeping things as simple as possible. He opined that adding a layer of complexity or one more person creates the potential for litigation and mistake. Judge Peterson noted that the same provision already exists in subsection D(4) for motor vehicle cases where, if the insurance company is known, it must be included in the notice. He pointed out that this does not seem like it is another layer of complexity, because it is something that lawyers already know and routinely do on the kind of case on which this will most generally have an impact. Mr. Andersen conceded that it will have an impact on motor vehicle cases, not medical malpractice cases. Mr. Goehler stated that he believes that adding the notice to insurance companies is important. He stated that the whole issue with the 21 days is that it is only significant for getting the costs of service. If it is an insured case, the insurance company is going to be on the hook for those costs, and they have a chance to avoid that cost by getting the notice and getting counsel on board and accepting service. He opined that requiring notice to the insurance company will actually help with efficiency.

Mr. Crowley asked whether public entities are exempt from the waiver provision in the current draft. Judge Peterson stated that they are not. He noted that, for many practitioners, the waiver will not be necessary because the problem can be solved with a telephone call. He pointed out that the amendment is primarily directed toward bad actor attorneys and self-represented litigants who are fairly sophisticated. Mr. Crowley stated that he is opposed to the amendment to the extent that it deviates from the federal rule. He stated that he believes that it would work if it is consistent with the federal rule but, to the extent that it is not, it becomes a whole different sort of paradigm. Mr. Young noted that it would not be just different from the federal rule, but also different from every state that has adopted a waiver of service provision. He pointed out that, in most of those states, the defendant has 30 days from the date the request is sent to return the waiver and 60 days in which to respond to the complaint with an answer or motion. He noted that the shorter time frames in the current draft would be quite the departure from the federal rule, and reiterated that the federal rule does not apply to public bodies.

Ms. Payne pointed out that there are many instances where Oregon has not adopted the federal rules, because Oregon just operates differently. One of those ways is that Oregon has hard, one-year trial deadlines. She noted that the Council had previously discussed the concern that not getting the case started for 60 days would slow down the process. In Multnomah County, at least, it would be tough to meet the one-year deadline if the deadline were to be 60 days. She stated that the Council had also discussed the impact that responding 45 days after serving the complaint would have on discovery deadlines (rules 43 and 45). She stated that she was hoping that the committee would look at that impact and report to the Council. She stated that she would be comfortable with 45 days because it would alleviate those deadline concerns and not delay things too much.

Ms. Gates stated that it appears that the committee probably needs to meet again and respond to some of the Council's concerns. Judge Leith stated that his sense is that this issue may not be worth the effort, as the waiver or acceptance of service is already informally available for those who would like to use it now. He stated that there is not a need to have a rule to authorize it, and that the only purpose of an amendment would be if there is a carrot and a stick. He opined that the carrot and the stick in the proposed amendment are so trivial, at just a $45 service cost, that it is not worth the concern that the Council is giving it. He stated that the time for responding to the complaint is one of the least fought over issues encountered in litigation and that, if there is a need for an extension, it is routinely granted in the early stages. Mr. Goehler agreed.

Mr. Young stated that this would address Ms. Payne's concern as well. He asked why the Council would mess with something that is working fine, if the existing systems are geared toward timely resolution of disputes within the one-year time frame, and are already operating that way, just to avoid the $45 cost of service? Ms. Gates stated that she agreed although, in the type of litigation that she practices, people almost always have counsel who she can call and ask to agree to accept service. However, she stated that it seems like such a small gain just for that sliver of defendants who make things difficult. She opined that this seems like a lot of argument and lack of unanimity on something that is not going to affect very many people.

Judge Peterson explained that the issue is important in the office where Ms. Weeks, the committee chair who was not able to attend today's Council meeting, works, and that it will affect a lot of good practitioners. He pointed out that, while the cost of service is $45 in the typical case, in the instance of someone who has been evading service, costs can increase dramatically. This amendment would compensate the plaintiff for the fact that the defendant has been intransigent and hard to deal with. Judge Roberts agreed. Judge Peterson stated that he would be

reluctant to have the committee adjourn without at least one more meeting that included Ms. Weeks. He reminded the Council that the idea for waiver of service actually came from the Council's bar poll. He stated that the Council should also remain cognizant of the fact that its membership consists of diligent lawyers, but that there are many lawyers in Oregon who may not be quite as diligent.

Mr. Hood expressed concern that the form of the notice does not state that a defendant in a motor vehicle should contact a lawyer or their insurance company. He stated that he could imagine an unsophisticated defendant reading it and signing it thinking that they need to do so because it seems to be some type of order from the court. His other concern is that it seems to raise an ethical issue because a plaintiff's attorney is essentially giving legal advice to a defendant, i.e., this is what is going to happen, and this is what you need to do to avoid fees. He suggested that the committee also look at those issues.

Judge Peterson stated that he liked the idea of adding language suggesting that the notice be given to an attorney or to contact an attorney if the defendant does not have one, similar to the language on the summons. He stated that he does not believe that the plaintiff's attorney would be giving advice to an unrepresented opponent, because it is a form that is set out in the rule. If an attorney were to try to explain to a defendant over the telephone what the form means, that would be running afoul of an ethical rule (Oregon Rule of Professional Conduct 4.3).

Judge Roberts followed up on Judge Peterson's comment about the significance of service costs. She pointed out that, where defendants are compliant, the service costs may be trivial. However, the waiver is really more for the situation where people are not compliant. She stated that she often sees plaintiffs make four or five different attempts at service, having their process servers show up multiple times and try other addresses, and end up finally having to serve by publication. Those costs can add up to well over $1,000.

Ms. Gates asked whether anyone on the committee objected to meeting again with Ms. Weeks present and talking about the issues raised by the Council. Judge Leith stated that he had no objection, but that he felt that the subject of the proposed amendment had sort of migrated. He stated that he did not necessarily see a connection between punishing an evasive defendant for evading service and a waiver provision. He stated that he believes that this should be punishable by shifting the cost of service, whether or not there was a request to waive service, and that could be accomplished by the rules, if the court does not already have adequate authority to shift those costs.

Ms. Payne agreed that there seemed to be two different issues at hand. She stated that, in every case where she has had to do service by publication, it is typically a case with a self-represented defendant, so there was never an opportunity where she could ask for service to be waived. The defendant evaded service from the beginning, so she did not know how this amendment would solve the problem of evasion of service and service costs, at least in her practice.

Judge Wolf stated that, under the proposed rule, a plaintiff would mail the unrepresented defendant the packet with the request to waive service right away, assuming the plaintiff had a valid mailing address for the defendant. Ms. Holley noted that, if a plaintiff had a valid mailing address, they could probably just serve the defendant.

Ms. Stupasky reminded Ms. Gates that Ms. Weeks had asked to step aside as the chair of the Rule 7 committee because of other time commitments. Mr. Young agreed to step in as chair and set up a committee meeting before the next Council meeting.

2. ORCP 23

Ms. Gates reminded the Council that the committee has been working on a potential solution to make it clear that a party can file a motion to strike portions of a responsive pleading that go beyond what was raised in an amended complaint or an amended counterclaim. She stated that committee members have had a fair amount of email discussion and that Judge Peterson had drafted some potential language (Appendix C). She noted that some committee members had contemplated whether the effort is feasible, based on some comments at the last Council meeting. She observed that there are some Council members who feel very strongly about only providing a very clean identification of the process of a motion to strike being available in this instance, and some who would like a lot of detail about standards or more specificity for the courts in ruling on such motions to strike. The committee plans to meet again next week.

Ms. Payne asked Ms. Gates to explain the research she had done regarding federal cases, because she thought that was helpful in the committee's deliberations. Ms. Gates stated that she had not found any Oregon cases that were directly on point, but that there is a fair amount of federal case law. In those federal cases, there is a divide on the issue, with some courts ruling that an answer to an amended complaint can cover any territory and others holding that the amended answer to the complaint, including counterclaims, can only address what is new in the amended complaint. In most of the latter cases, the mechanism to address material outside of the scope of the amended complaint was a motion to strike.

Ms Gates stated that, although there is a divide in the federal courts, she actually did not find very many cases adopting the view that one can assert new matters in response to an amended complaint. She stated that almost all of the cases actually recognized the limitation and required leave to amend if the defendant wanted to expand the answer to the amended complaint beyond what was changed in the amendment. Some of those cases relied on language in Rule 15 of the Federal Rules of Civil Procedure, which is similar to Oregon's Rule 15, and required that the response to the amended complaint should only respond to what was raised in the amended complaint. Other cases just set out the basic principle that an answer to an amended complaint can respond only to what was raised in the amended complaint. There was a fair amount of cases, so it definitely was not a novel issue in the federal courts.

Ms. Gates stated that the committee will also consider whether this is an issue of educating the bench and bar that there is an existing assumption that an amended responsive pleading cannot address issues not changed in the amended complaint, and that plaintiffs can move to strike such responsive pleadings using the same kinds of arguments that have been made in federal court or just general fairness arguments. On the other hand, as pointed out by Judge Peterson, this is a rare issue where everyone on the Council seems to recognize that the use of a procedure can result in unfairness, and perhaps the Council should try to address that.

Judge Peterson stated that his recollection was that Judge Roberts had previously stated that she did not now that she had a tool available to her if a plaintiff were to make a very technical amendment to a complaint and the defendant suddenly, for the first time, denies liability. He noted that, although there are a few federal district court cases construing the federal rule, there are no Oregon cases that substantiate that a plaintiff should be able to get this kind of relief. He asked Judge Roberts whether she felt that she has the tools to give relief if a plaintiff comes in and says that a defendant has gone too far and that it was unfair. Judge Roberts stated that she did not think that she had those tools, and opined that federal district court rulings that construe a different set of procedural rules than the ORCP mean nothing in Oregon. She stated that a defendant has an absolute right to file an answer to a complaint and, if the plaintiff wants to make their complaint vulnerable that way by amending it just before trial, then they will face the consequences.

Ms. Gates stated that this is one possible interpretation but, if it is the correct interpretation, she expressed concern that the Council would be doing something substantive by noting the right of a defendant to file an answer and creating the mechanism of a motion to strike. She asked whether the Council could have it

both ways and create an entirely new right to limit by motion what is in an answer to an amended complaint.

Judge Peterson stated that It seems to him that the Council would not be taking away the right to do something that the defendant wants to do but, rather, changing the procedure so that a defendant would have to ask permission to do it, just as the plaintiff does. He noted that plaintiffs' attorneys have indicated that this is the unfairness–that the plaintiff must ask permission to amend their complaint, but that the defendant has carte blanche to amend their answer. He stated that one issue that the Council grappled with at the last meeting was the word "prejudice" since, as Judge Roberts had pointed out, everything is going to be prejudicial to someone. He stated that some other, more quantifiable, criteria might be appropriate, such as whether the amendment would delay the trial or expand the scope.

Ms. Gates stated that it is clear that the committee has more work to do. She stated that any Council members who feel strongly about the issue should feel free to join the next committee meeting or email any committee member.

3. ORCP 23 C/34

Mr. Andersen explained that the draft before the Council (Appendix D) would be presented to the Legislature as a suggestion to correct the problem that now exists with the situation of a defendant who dies without the knowledge of the plaintiff, but the death is not discovered until after the complaint has been filed.

Ms. Payne noted that the suggested language change to ORS 12.090 states, "substitute the decedent's personal representative for the deceased defendant." However, she suggested that it should say, "for the deceased defendant's estate." Judge Roberts disagreed, because the whole problem is that the original complaint named a dead person, and there is no jurisdiction over a dead person. She noted that the personal representative is not being substituted for the estate. Ms. Payne clarified that she was pointing out that it would not be the personal representative for the deceased defendant that would be substituted but, rather, the personal representative for the deceased defendant's estate. Judge Norby suggested that both Judge Roberts and Ms. Payne were in agreement, but that Ms. Payne's original suggested language was modifying the wrong part of the sentence. After some discussion, Ms. Nilsson and Ms. Holley collaborated and came up with the language, "to substitute the personal representative of the defendant's estate in place of the deceased defendant."

Council members generally agreed with the suggested change. Mr. Andersen stated that he was in favor of leaving the language the way it was, as the Council had collaborated over the course of several months and had arrived at the existing language after a great deal of input. Judge Norby agreed that a lot of work had occurred, but felt that it was important to make sure that the language was correct. Mr. Andersen relented and agreed to the change.

Judge Peterson reminded the Council that this is different from the usual Council process because it is not a promulgation. He stated that it is his understanding from the Council's Oregon State Bar liaison, Matt Shields, that the Bar might be willing to carry this proposed statutory amendment as part of its legislative package that it submits to the Legislature, so the Council should probably vote on whether to ask the Bar to do that or otherwise to include it in the Council's transmittal letter. There were no objections from the Council to asking the Bar to include the report in its legislative package. If the Bar is unwilling to do so, or if it is unable to do so prior to the Council's submission of its transmittal letter, the Council will include the report in its transmittal letter to the Legislature.

4. ORCP 27/Guardians Ad Litem

Judge Peterson explained that, at the last Council meeting, he had noticed that the rewritten first sentence in section A of the prior draft amendment to Rule 27 had left out incapacitated and financially incapable persons. A change has been made to correct that in the current draft (Appendix E). He stated that he believes that the Council has looked at the rest of the changes to the rule extremely closely, and asked whether any Council members had any objections to the current draft language, or questions that they would like to have discussed. Hearing none, he suggested that the Council vote to move the draft to the September publication meeting agenda. The Council agreed unanimously.

Judge Norby thanked Council staff for their work on this draft amendment. Ms. Gates thanked Judge Norby for helping to convince the Council that the change was necessary.

5. ORCP 31

Mr. Goehler reminded the Council that, at the last meeting, the committee had presented two options and received feedback that the option with more specificity regarding factors for attorney fees was preferred. He stated that the other main comment from Council members was that the structure of the rule and the length of the first sentence were a bit confusing. He stated that the new draft (Appendix F) attempts to address that feedback. The first sentence is broken

up to be a little more manageable and make a little bit better sense. In terms of the attorney fee piece of it, there is a specific reference to ORS 20.075, along with the factors that are specific to an interpleader case. He stated that the committee was seeking the Council's comments in terms of anything that might have been missed or anything that might need to get tweaked.

Mr. Young asked what specific situation paragraph C(1)(a) is geared to address. He stated that this paragraph talks about a matter of equity if the party interpleading funds is involved in the dispute in a way that it should not be awarded attorney fees. He wondered whether it is talking about an unclean hands situation. Mr. Goehler agreed that it is accounting for the circumstance where one of the parties is the one that is doing something that sets up the dispute. He stated that the idea behind the interpleader, and the incentive of having attorney fees, is to aid a party that is stuck in the middle of a controversy with liability but does not necessarily know which claimant gets the interpleaded funds. This party ought to be able to interplead the funds, walk away from the dispute, and recover fees for having to do that. Under the current rule, the fees are mandatory, and everyone gets them, regardless of whether their hands are clean. Mr. Goehler stated that the idea of the amendment would be to make the attorney fees discretionary and to allow a judge to decide whether the party is in the category that the rule is designed for, or if they have done something that has set up the dispute and, therefore, attorney fees would not be appropriate.

Judge Peterson remarked that section C refers to ORS 20.075 and then lists other negative factors, rather than neutral factors. He pointed out that ORS 20.075 just lists factors that are either plus or minus, but the proposed amendment indicates that there are some factors that are absolute bars to getting attorney fees. He wondered whether that was intentional and whether it creates any ambiguity. Mr. Goehler stated that he did not believe that it creates any ambiguity, since the goal was to examine the existing body of law behind the award of attorney fees as captured under ORS 20.075 and, if that statute justifies fees, give the judge other factors to consider as well that might negate fees. He stated that this is why the construction was chosen, and that it makes sense in that context.

Ms. Payne asked whether there was any concern that the amendment would create substantive factors for awarding attorney fees rather than a procedural rule. Judge Norby noted that ORS 20.075(1)(h) uses the language, "such other factors as the court may consider appropriate under the circumstances of the case." She stated that the word, "may" makes the awarding of fees discretionary, and it appears to her that the new language would just be a delineation of some of those "other factors" in the statute. Mr. Goehler agreed, because the idea is a shift from compulsory fees in the current rule to discretionary fees that are

nonexclusive, and ORS 20.075 is nonexclusive. He noted that the extra pieces of the rule specify factors that are unique to an interpleader, so he believes that it dovetails nicely with the statute.

Ms. Payne expressed concern that taking away a right to fees and shifting it to a discretionary claim would be taking away a substantive right that the Council perhaps does not have the authority to do and, rather, would be the purview of the Legislature. Judge Norby pointed out that ORS 20.075(1) does not give a right to attorney fees but, rather, just gives factors for the court to use to determine whether or not a discretionary award of fees will be made. She stated that she therefore does not believe that there is a right to take away. She stated that she appreciates the way that the amendment is written, because she struggles with those catch-all subsections of statutes that are open ended and unclear. She stated that it is helpful to her when there is some guidance about what the catchall really means, because she is not always sure what should guide the exercise of her discretion. Ms. Payne observed that the proposed amendment would change the word “shall” to “may,” so, in the current rule, fees are mandatory. She pointed out that, under ORS 20.075, the court has discretion in the amount of fees to award, but no discretion to not award fees. With the proposed change, the court would have discretion to not award fees so, to her, the amendment would take away a substantive right. Judge Norby stated that she reads the word “shall” to mean that, if there are going to be attorney fees awarded, they shall be paid from the funds, not that there shall be fees awarded. However, she noted that she could be incorrect, since she has only ruled on a handful of interpleader cases. Ms. Payne stated that she rarely uses the rule either, and this is why she is asking.

Mr. Goehler stated that he believes that the Council can make this change because the right to fees, if any, was created solely by Rule 31. He stated that Justice Nakamoto had researched the common law and found that fees are based on equity, and there is no right beyond that. The right to mandatory fees was only created by the rule, and amending the rule should be within the Council's authority. Judge Peterson did some quick research and discovered that Rule 31 was created by the Council out of whole cloth, so it likely did create the right to fees and the Council can modify that right.

Judge Leith stated that he shared Judge Peterson’s concern about the way the subsection C(1) factors are constructed. He stated that he appreciates that the amendment is trying to provide discretion. However, he expressed concern that, as the draft is constructed, it may, in fact, be removing discretion to award fees in certain cases. Judge Norby agreed that the way the language is phrased is a little bit confusing.

After some discussion, Justice Nakamoto crafted the following language to replace the language in question in the draft amendment:

> In determining whether to deny or to award in whole or in part a requested amount of attorney fees, the court shall consider the factors provided by ORS 20.075 and the following additional factors:
>
> C(1)(a) whether, as a matter of equity, the party interpleading funds is involved in the dispute in a way that it should not be awarded attorney fees as a result of the dispute;
>
> C(1)(b) whether the party interpleading funds was not subject to multiple litigation; or
>
> C(1)(c) whether the interpleader was not in the interests of justice and did not further resolution of the dispute.

Judge Peterson also suggested replacing the word "shall," with the word "will," since there is a growing movement to use more concrete, less ambiguous words in legal drafting.

Ms. Gates asked that the committee consider all of the Council's feedback and return with a new draft at the next Council meeting.

6. ORCP 55

Judge Norby explained that she and Judge Peterson had been trying to refine some proposed language over the last week and a half (Appendix G). Judge Peterson reminded the Council that a suggestion from Judge Marilyn Litzenberger was to find a way to help non-parties deal with objecting to a subpoena, since they sometimes ignore them and the rule does not give any guidance. He stated that he had also added language to address what should happen if someone received a subpoena without a fee, because the court gets calls asking what to do if a fee is not received.

Judge Norby noted out that, last biennium, the Council had decided to limit the reorganization of the rule to merely reflect what was already in the rule. During the reorganization process, it was discovered that there was a process for objecting to a subpoena, but only to a subpoena for production of documents, not

for a subpoena for to appear and testify. The decision was made to revisit that problem this biennium, so that change is reflected here.

Judge Peterson stated that the third change is a pet project of his, which is to make it easier to get a party to appear if they have already appeared in the action. He stated that the language is largely borrowed from Illinois Supreme Court Rule 237, which allows a party to be subpoenaed without being served personally and without having fees tendered to them. He stated that Mr. O'Donnell had found a rule in Washington (CR 43) with a similar kind of provision, although he stated that he prefers the way the committee's draft is written, as it indicates that the subpoena should specify in the form that fees need to be tendered and that the person subpoenaed may object. He stated that the objections were kind of inconsistent both with regard to objections and motions to quash or to modify, and they only related to requests for production.

In summary, Judge Peterson stated that subsection A(7) has been completely rewritten to make objections and motions to quash and to modify applicable both to subpoenas for documents and, also, to subpoenas for appearances. There are some timelines in there, and those are policy decisions that the Council should discuss. The main idea is to make it clear that, if a person gets a subpoena and simply cannot comply with it, there is a procedure to address that. He stated that it seems to him that one of the advantages is that the person receiving the subpoena is required to let the person who has served the subpoena know that they are objecting or they have to serve the subpoenaing party with a motion to modify or to quash, and that will be helpful to the party that served the subpoena.

Judge Peterson stated that, after reorganizing the rule and taking out the redundancies, it appears that there is no provision for fees when a party organization (paragraph B(2)(d)) is subpoenaed for deposition, so that change has also been made. Some other language has also been clarified to make it more uniform from section to section in the rule, without any attempt to change the operation or intent of the rule.

Judge Norby asked whether any Council members had input on the suggested changes to add subparagraph A(1)(a)(v) to the rule. She noted that this change creates of an obligation on the part of someone who is issuing a subpoena to include language notifying the recipient that they have a right to fees and mileage. It provides that the subpoena form also has to indicate that there is the ability to move to quash or to modify. Mr. Crowley asked for clarification that this change would require that every civil lawyer in the state change the form of their subpoenas and, if they do not, they are going to be in technical violation. Judge Norby and Judge Peterson stated that this is correct. Mr. Crowley suggested that

the Council might get some objection to that. Judge Peterson observed that changes in the law often make work for lawyers. He noted that there was discussion at the last Council meeting about perhaps suggesting a form to the UTCR committee. He stated that Rule 55 is used not only in civil actions, but in administrative actions. Since it is used rather widely, he expressed concern about embedding a form in the rule, such as the form that is included in Rule 7.

Ms. Payne asked what the goal is behind letting people know about their rights under the rule. She expressed concern that it would just encourage people, particularly self-represented individuals, to move to quash subpoenas or not show up for trial, even if they really should be obligated to appear. Judge Roberts observed that people often do not comply with subpoenas and, in many cases, they may have a perfectly good explanation for why they could not attend. She opined that it would save everyone a great deal of grief if people knew how to express that rather than simply absenting themselves.

Mr. Andersen also expressed concern that this draft amendment might encourage people to not comply with a subpoena. Judge Norby stated that her first reaction was similar, and that she was not enthusiastic about the amendment at first. However, she remembered that, pre *Miranda* rights, the concern was that telling defendants what their rights are would lead to them exercising those rights and not talking to the police. Everyone thought that ignorance was better back in the day, but then a policy decision was made that maybe people should know what their rights are, before they give them up. She stated that there might be a corollary implication that most subpoenas do not go to lawyers, but to regular people who do not know the rules or their rights. She agreed with Judge Roberts that people fail to appear simply because they do not know what to do, and this amendment at least tells them that there is something they can do. She believes that, with the law, people expect there to be a process, but they just do not know how to figure it out. On the one hand, she is reluctant, and perhaps everyone on the Council is similarly reluctant, to make a big change and do something that has never been done before, like notifying people of rights that lawyers may benefit from them not knowing about. But she also thinks that, when it is articulated that way, it is a little embarrassing to have lawyers serving people with documents that do not notify them of their rights. This is what caused her to shift her position, although she is still somewhat on the fence.

Judge Peterson stated that it is helpful to know, when you subpoena someone to appear, whether they are going to appear. With this change, they are obligated to put you on notice if they choose not to obey the subpoena. It would also seem to make it easier for the court to determine what to do when that person does not appear and does not communicate anything.

Mr. Crowley stated that he just wanted to make it clear that this change is kind of a big deal that will affect pretty much everyone who is practicing. However, he generally supports the idea for the reasons that Judge Norby mentioned. Ms. Gates asked whether, when the Council makes a change like this, it notifies anyone or creates any forms. Judge Norby stated that the committee had discussed that any potential forms should be created by the UTCR Committee.. The Council could potentially write the UTCR Committee a letter asking them to look at the amended rule and think about providing a form.

Ms. Payne asked whether the Council could vote to move each separate part of the rule forward to the publication agenda for September separately. Ms. Gates agreed that this was a good idea. The Council voted to move the language in subparagraph A(1)(a)(v) to the September agenda.

Judge Norby explained that paragraph A(7)(a) addresses objecting to a subpoena to appear. She noted that the following paragraph, A(7)(b), was merely renumbered to reflect the addition of the new language in the previous paragraph. Mr. Crowley stated that he believes that the time frame should be the same whether it is a subpoena to appear or a subpoena to produce documents, so he would suggest 14 days for both of them. Judge Norby stated that the committee had originally used 14 days, but the concern was that sometimes a witness is subpoenaed to appear during the course of a trial with production. Those subpoenas tend to be served in advance and there tends to be more time for the potential objection but, if someone is being subpoenaed today for an appearance tomorrow and the trial started yesterday, it would be difficult to have that timeline. Mr. Crowley agreed with that, but stated that he felt that the second part of the timeline addresses that in an appropriate way: “not later than seven days after service of the subpoena and, in any case, no less than one judicial day prior to the date specified in the subpoena.” He stated that it is kind of like a two part timeline, and he would just have the outside remain 14 days because subpoenas are often also used for depositions.

Judge Norby noted that there are many trials that are on a shorter timeline to begin with, like immediate danger cases, protective orders, and restraining orders, all of which have to happen within 14 to 30 days depending on the urgency of the matter. She stated that she took the seven days from another state’s rule, but it was kind of a hybrid because there is not a lot of production in short timeline hearings but there are a lot of subpoenas to appear. She stated that she is indifferent about seven versus 14 days. Mr. Crowley stated that, at the Department of Justice, there are a lot of short timeline subpoenas, and that is why he thinks that keeping one judicial day in the rule makes a lot of sense. But, for

those subpoenas where there is not that urgency, he does not see any reason to have a shortened time to respond. He opined that leaving it at 14 days like other subpoenas works perfectly.

Mr. Andersen asked whether having a category for trial subpoenas would be helpful, in addition to the existing categories of general subpoenas and subpoenas for production. He stated that, for trial subpoenas, even the seven days seems inappropriate. He recalled a case where something went sideways at trial and he needed a witness that he did not think he would need, and that witness did not appear. It was crucial that the jury know why the witness did not appear, so the process server came in and testified. The process server had to explain that he had served a subpoena on the witness. Ms. Gates stated that, If there was a different category for subpoenas for trial, she would not care about the 14 days. She stated that she was basing her preference for seven days more on the idea of the trial or any short-term issues. Judge Norby disagreed with the idea of a separate category for trial subpoenas. She stated that it does not make sense to start expanding the rule when we can cover the same question for objections.

Judge Wolf stated that, in Mr. Andersen's circumstance, if he realized he needed a witness that he did not think he needed and served them two days before they needed to appear, the witness would still have to file any objection within one judicial day of getting the subpoena, so seven or 14 days would not have any impact on them at all. He stated that the seven or 14 days would only come into play when a lawyer realizes that they need the witness well ahead of time and serves the witness, and it is just a matter of how close to trial the person subpoenaed has in which to file their objection or motion to quash. He stated that this is why he prefers 14 days, since lawyers who are on top of it will get everybody served and it gives a witness two weeks before trial to file a motion if they have an objection. This gives the court that much more time to deal with the issue before the trial date. Judge Norby agreed that seven days is not a lot of time for the court to hear motions. Mr. Crowley explained that, if the subpoena is served well in advance of the time for testimony, the attorney often will not even get the subpoena within seven days because it will sit on someone's desk. The Council agreed to change the timeline from seven to 14 days.

Judge Norby stated that the final suggested change was to subsection B(5), that would allow subpoenaing parties without paying fees and mileage. Mr. Goehler stated that he likes the change and that it does what Washington does with a trial notice to have testimony by one of the parties. Judge Norby stated that the committee had looked at the Washington rule. Judge Peterson explained that this addition is likely not for sophisticated, learned practitioners but, rather, for cases where you do not know the other side or the other side is unrepresented. He

stated that it strikes him as odd to have to send a process server out at this stage of the game to try to find someone who may be evading service. If they are in the case, they are in the case, and they can be served with a subpoena pursuant to Rule 9 and instead of Rule 7.

Hearing no comments to this suggested amendment, Ms. Gates asked whether there were any objections to approving the entire draft amendment to Rule 55 to be placed on the September publication agenda. The Council agreed to place the amendment on the September agenda.

7. ORCP 57

Ms. Holley stated that the committee has been working on putting together a comprehensive workgroup with outside stakeholders. The committee has struggled with trying to define the scope of the workgroup; is the intent to try to construct a proposed draft amendment to Rule 57, or to create language to suggest to the Legislature? She explained that, if the intent is to create a draft amendment, the conclusion of the committee is that it will not happen this biennium. She stated that many Council members have concerns that amendments to the rule may have an impact on substantive rights. She noted that there is a question of whether just doing the base level change of removing the presumption of non bias in the first section of the rule, which is a fairly small change compared to other changes the committee has been considering, might even have an impact on substantive rights.

Ms. Payne stated that she believes that it is a good idea to have a wide variety of experienced people with input on this issue, even if the decision ends up being to send a proposal to the Legislature. She stated that it seems like the process should start with the Council and the Council's unique ability to put a lot of time into a thoughtful proposal. Ms. Gates agreed that, even if the conclusion is that a change would be substantive, gathering outside perspectives to create a well-informed proposal is worth it.

Judge Roberts stated that her recollection from the last meeting was that the decision was to not submit any rule changes this biennium on this topic. She proposed that the workgroup has the time to decide for itself what it wants to do. Justice Nakamoto pointed out that, during this time of working from home and people having child care and other responsibilities, the committee thought that it might not be a good time to try to bother people with this new workgroup. Ms. Holley noted that a lot of judges are also dealing with handling changes in court schedules and additional responsibilities related to that.

Judge Peterson stated that he recognizes that the Council will not be able to accomplish something this biennium, but he was trying to light a fire under the committee to have some kind of draft language prepared. He stated that, to him, it is helpful to have policy thoughts reduced to writing so that, when it is time to meet with the larger workgroup, some of the heavy lifting will have already been done and the workgroup will have something to look at to help them determine, for example, whether the change would be procedural or substantive.

Ms. Holley stated that her understanding was that she would email proposed workgroup members the current Oregon rule, the full Washington rule, and the proposal that the committee presented to the Council at the last meeting. She stated that she thought that the disagreement at the last Council meeting about the committee's proposal was helpful, and noted that groups on both the plaintiffs' and the defense sides might disagree. Ms Gates suggested also including the most recent Council minutes, or a link to the minutes, as that might give potential workgroup members some insight into what has been discussed.

IV. New Business

A. Pandemic-Related Delays in Court Schedule/Impact on the ORCP

Ms. Gates stated that a last-minute agenda item was raised by Mr. Crowley, who is serving on a committee that is involved with helping the Judicial Department adjust court schedules to the new normal that COVID-19 has brought.

Mr. Crowley stated that he had been invited to participate on a committee through the Oregon Judicial Department (OJD) that was set up to advise Chief Justice Martha Walters on the emergency orders that she has been working on. He noted that, at this point, two of those emergency orders had been finalized and the Chief is currently working on a third. He stated that he thought that it would be good to talk to the Council about this particular order, because it includes language that extends court timelines that have an impact on discovery and motion practice. He stated that he feels that there are still things that lawyers can do in their work despite social distancing and, by extending deadlines in the ORCP in particular, there will be an impact on whether lawyers will be able to get much accomplished in their cases. He stated that the idea in the draft Chief Justice Order (CJO) is to extend deadlines through the current emergency plus 60 days. If that is applied across the board, for example, to discovery responses, responses to motions to dismiss, or other motions, that will bring things to a halt because those responses will become voluntary. Then, when the crisis is over, there will be a huge backlog of issues for the courts and for practitioners. Mr. Crowley wondered if there is any way the Council could or should be involved.

Ms. Gates suggested that, if it were left up to parties to request extensions of timelines, as opposed to ordering extensions for all parties, so many parties would request them that it is probably better to just do it by a global order. Mr. Crowley stated that he was just wondering whether that broad of an order was needed when it comes to things that, at least in his practice, lawyers are still able to do. He stated that he does not know if a lot of people are in the same situation.

Justice Nakamoto asked whether everyone on the Council had seen that part of the proposed CJO. She read it out loud:

> All statutory or court rule time periods or time requirements are suspended during the period of this statewide emergency and for 60 days after the emergency has been terminated.

Justice Nakamoto noted that there are some provisions that have a safety valve so that a party can move to set a specific time period and a court can rule that, in that case, the party has to complete some required action by a certain time.

Ms. Payne stated that she would have concerns about that proposed order. She stated that her county has postponed motions through the until June, and it is difficult to move any cases. She stated that she does not understand, for example, why the courts cannot hold telephonic hearings. She stated that, if there is a reason why a party would need an extension, it should be liberally granted. However, there is so much that lawyers can continue to do when working from home, and to stop everything for the length of the emergency plus 60 days is particularly detrimental to some of her clients who have disabilities and health issues. She stated that she has major concerns about the impact that a blanket extension will have on vulnerable parties, not just in civil cases, but for other parties who are not going to get justice during that time. Ms. Holley stated that she generally agrees with the concept of liberally granting remedies for self-represented litigants who do not know to request an extension ahead of time. However, she stated that a blanket hold has a real impact on the cases of most of her clients.

Judge Roberts pointed out that the Chief Justice's orders have gone through numerous drafts and were the product of consultation among the courts. She noted that the Multnomah County court is decimated because there are a lot of staff who are in vulnerable classes and they cannot and should not come into work, so they have been ordered not to. In addition, Multnomah County cannot hold telephone hearings because a record cannot be made. She stated that transcripts of telephone testimony are often unintelligible and worthless. In Multnomah County, criminal cases with hard constitutional deadlines, Family Abuse Prevention Act orders, and immediate emergency orders are moving forward in front of the younger judges who are able to come to the courthouse and practice social distancing. However, there is a broad range of normal

activity that there simply is not the capacity to accomplish. She explained that the reason for the additional 60 days in the CJO is that, once the emergency passes, there will be a tremendous backlog of not only civil cases, but criminal cases, which are, in fact, the vast majority of the work that the courts do. The courts will be working hard just to get through the postponed criminal matters. With all sympathy for the civil plaintiffs, this is what is paralyzing the courts.

Judge Peterson stated that, even if the courts could figure out how to make a record with a telephone hearing, Oregon court proceedings have to be open to the public. He stated that the Council has made its meetings open to the public by telling people in the announcement that they can join a video or teleconference, but that is another piece of the puzzle for the courts. He stated that he fully agrees that it seems like a request for production of documents could be responded to pursuant to the rules, but the Chief Justice has a lot of balls in the air. He explained that the Chief Justice has received a lot of input from a lot of people, including judge Wolf, Mr. Crowley, and himself, and perhaps others on the Council. He stated that he is not happy with all parts of the CJO, and that he suspects that nobody is, but there are a lot of considerations.

Judge McHill explained that he is the presiding judge in Linn County. He stated that the presiding judges have a teleconference with the Chief Justice and the trial court administrators twice a week where they spend time talking about these issues and trying to operate under the CJO as it was amended. He echoed Judge Roberts' comments with regard to the tremendous amount of juggling that courts have to do. In Linn County, there are five judges, three of whom are in the high-risk category and, therefore, are not able to travel to court. He stated that they are continually working on ways to set up court appearances, and making progress. The OJD has adopted the WebEx platform within the last two weeks and is making great strides in setting up a system to do a lot more remotely but, as Judge Roberts pointed out, the focus right now is trying to determine what to do with criminal cases that have constitutional and statutory timelines, as well as trying to serve other essential services that are defined by the CJO. From a technological basis, the courts are really working on it. He stated that he thinks that lawyers will be seeing more and more opportunities to do remote business. Chief Justice Martha Walters is tremendously interested in what all lawyers think, and that is why she set up these various committees.

Ms. Payne stated that she does understand those issues and that she really appreciates that Chief Justice Walters has heard from a lot of stakeholders. She stated that she was just expressing concern from the perspective of her clients, who are going to feel the impact of this, but she knows that everyone is feeling that impact and that priorities must be set. Judge McHill urged Ms. Payne to keep making comments so that lawyers and judges in Oregon can figure out together how they are going to get through this crisis. He noted that many people are worried about the backlog of cases that is developing.

Judge Norby stated that one of the places where there is the most leeway or flexibility is probate and guardianship, and that is where a lot of vulnerable clients have cases. She stated that those judges who do probate and guardianship cases in Clackamas County have been allowed some flexibility, if a party reaches out to the court and articulates the reasons that a situation needs to be addressed sooner rather than later, due to the vulnerability of clients. She stated that she believes that the CJO allows this sort of flexibility in other counties as well. She suggested that, if lawyers have any cases that fall in that area, they should definitely articulate that to the presiding judge in whatever court they are in. Justice Nakamoto encouraged practitioners to come to agreements on their cases with opposing counsel about what is possible to go forward despite the restricted court access.

Mr. Young asked, with respect to the current CJO that is being worked on right now, if there also consideration to postpone civil trials statewide to a post-August 1 date similar to what Multnomah County has done already, because of the anticipated backlog of work. Mr. Crowley stated that he did not know the answer to that question. He stated that he had the impression that the same kind of suspension of dates would apply to trial settings and in-person events.

Ms. Gates asked Mr. Crowley whether he was hoping for any action by the Council on this topic, or whether he just wanted to receive the Council's feedback that he could relay to the Chief Justice. He stated that he was not aware that the Council had provided any direct input to the Chief Justice on the matter, and he thought it would be helpful for him to hear what Council members had to say on the topic to inform his input on the committee. Judge Wolf stated that he has been chairing one of the committees for about a month, and his impression is that the Chief Justice has a lot of fire hoses directed at her right now with information and comments. He asked anyone on the Council who has input to direct it through Mr. Crowley or himself.

Ms. Payne stated that other states' CJOs have encouraged circuit courts to hold telephonic or other hearings. She stated that she is sympathetic to Judge Roberts' concerns but, if there is any technological possibility of having motions heard, rather than just a blanket prohibition on hearing anything, she thinks it would be a good thing. Even if the parties need to move and show good cause, or provide their own court reporter, she believes that it would help keep the backlog less daunting. Ms. Payne also suggested that it might be helpful to ask for volunteers to sit as pro tem judges to help with civil motions being heard remotely. She stated that she sits on her county's judicial selection committee, and the committee could perhaps try to fast track these volunteers through the process during this emergency time. Judge Roberts stated that a record would still need to be made. Judge Wolf noted that there are some judges who have plenty of time on their calendars if they could just have staff in the building to help them get things done. He stated that the main impediment to holding a hearing in most counties is the

absence of staff, so pro tem judges would not necessarily be helpful. Judge McHill agreed. He stated that his county currently does not even have enough laptop computers for everyone who is able to work from home to do so. However, he stated that he is really excited about the possibility of, in the near future, setting up a situation where there is no court staff in the courtroom, but a hearing can take place with public access. However, that is quite a big onion that to peel.

Ms. Gates thanked the Council for the thoughtful discussion. She stated that it is helpful for practitioners to hear this level of detail about what is going on behind the closed doors of the courts, and helpful for the courts to hear the worries of practitioners.

V. Adjournment

Ms. Gates adjourned the meeting at 12:09 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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 ORCP 21 ORCP 23 ORCP 23/34 ORCP 27 ORCP 31 ORCP 55 ORCP 57	Discovery ORCP 7 ORCP 15 ORCP 21/23 ORCP 23/34C ORCP 27/GAL ORCP 31 ORCP 55 ORCP 57	Discovery ORCP 1 ORCP 4 ORCP 9 ORCP 10 ORCP 17 ORCP 22 ORCP 32 ORCP 36 ORCP 39	ORCP 41 ORCP 43 ORCP 44 ORCP 45 ORCP 46 ORCP 47 ORCP 54 ORCP 62 ORCP 69 ORCP 79		

I. Call to Order (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

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 first publication. **If the defendant waives service of the**

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summons and complaint pursuant to section H of this rule, the defendant shall appear and defend within the frame permitted by section H of this rule.

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:

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 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.

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 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 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 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 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

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.

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 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.

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.

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.

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

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 subject to service under subparagraph D(3)(a)(i) or paragraphs D(3)(b) through D(3)(f) of this rule has a duty to avoid unnecessary expenses of serving the summons and complaint. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of the summons and complaint. The notice and request to waive service must:

H(1)(a) be in writing and be addressed to the individual defendant or, for a defendant subject to service under paragraphs D(3)(b) through D(3)(f) of this rule, to a registered agent or any other person who is authorized under this rule to receive service of the summons;

H(1)(b) be substantially in the form specified in subsection H(6) of this rule;

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

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

H(1)(e) give the defendant a reasonable time of at least 21 days after the request was sent to return the waiver;

H(1)(f) be accompanied by a copy of the complaint, two (2) copies of a waiver substantially in the form specified in subsection H(7) of this rule, and a prepaid means for returning the waiver; and

H(1)(g) be sent by first class mail or other reliable means.

H(2) Time to answer after a waiver. A defendant who, before being served with a summons and complaint, timely returns a waiver need not serve an answer or motion responsive to the complaint until 35 days after the request was sent.

H(3) Jurisdiction and venue not waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

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) 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:

H(5)(a) the reasonable expenses later incurred in making service; and

H(5)(b) the reasonable expenses, including attorney fees, of any motion required to collect those service expenses.

H(6) Form of notice and request to waive service of a summons. The notice and request to waive service of a summons must include the caption of the lawsuit as specified in Rule 16 A and be in a form substantially as follows:

_____

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

To: [NAME OF THE DEFENDANT OR A REGISTERED AGENT OR ANY OTHER PERSON AUTHORIZED UNDER THIS RULE TO RECEIVE SERVICE OF A SUMMONS AND COMPLAINT]

Why are you getting this?

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

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 by _____, 2020,

which is at least 21 days from the date shown below, 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 35 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]

DUTY TO AVOID UNNECESSARY EXPENSES OF SERVING A SUMMONS

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

"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 to service of a summons.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion responsive to the complaint on the plaintiff as provided in Rule 7 C 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(7) Form of waiver. The waiver must include the caption of the lawsuit as specified in Rule 16 A and be in a form substantially as follows:

_____

WAIVER OF THE SERVICE OF SUMMONS

TO: [NAME], Plaintiff or Plaintiff's Attorney

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 waiver to you.

I, or the entity I represent, agree to avoid 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 this lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or to service of the summons.

I also understand that I, or the entity I represent, must file and serve an answer or a motion responsive to the complaint as provided in Rule 7 C within 21 days from _____, 20___, the date when this request was sent.

[DATE] **[SIGNATURE OF DEFENDANT'S ATTORNEY OR DEFENDANT]**

[PRINTED NAME]

[ADDRESS]

[EMAIL ADDRESS]

[TELEPHONE NUMBER]

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

[*A How presented.* *Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry*

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of judgment.]

A How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, with the exception of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule.

A(1) The following defenses may, at the option of the pleader, be made by motion to dismiss:

A(1)(a) lack of jurisdiction over the subject matter;

A(1)(b) lack of jurisdiction over the person;

A(1)(c) that there is another action pending between the same parties for the same cause;

A(1)(d) that plaintiff has not the legal capacity to sue;

A(1)(e) insufficiency of summons or process or insufficiency of service of summons or process;

A(1)(f) that the party asserting the claim is not the real party in interest;

A(1)(g) failure to join a party under Rule 29;

A(1)(h) failure to state ultimate facts sufficient to constitute a claim; and

A(1)(i) that the pleading shows that the action has not been commenced within the time limited by statute.

A(2) A motion to dismiss making any of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(g) of this rule, the facts constituting such

defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense described in paragraph A(1)(c) of this rule, the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment.

B Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C Preliminary hearings. The defenses specifically [*denominated (1) through (9) in section A of this rule,*] **enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule,** whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

D Motion to make more definite and certain. Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 10 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent. If the motion is granted and the order of the court is not obeyed within 10 days after service of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

E Motion to strike. [*Upon*] **On** motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, [*upon*] **on** motion made by a party within 10 days after the service of the pleading [*upon*] **on** such party or [*upon*] **on** 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.*]

E(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated;

E(2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; or

E(3) any claim or defense inserted in a pleading filed, as required by Rule 15 B(2) or Rule 15 C, in response to an amended pleading that is filed as the trial date approaches, expands the issues to be determined, or alters the evidence necessary to determine the merits of the action.

F Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party [*which*] **that** this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G(3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

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G Waiver or preservation of certain defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived under either of the following circumstances: [*(a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.*]

G(1)(a) if the defense is omitted from a motion in the circumstances described in section F of this rule; or

G(1)(b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in

Rule 23 B in light of any evidence that may have been received.

G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction over the subject matter, the court shall dismiss the action.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

[*A How presented.* *Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry*

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of judgment.]

A How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, with the exception of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule.

A(1) The following defenses may, at the option of the pleader, be made by motion to dismiss:

A(1)(a) lack of jurisdiction over the subject matter;

A(1)(b) lack of jurisdiction over the person;

A(1)(c) that there is another action pending between the same parties for the same cause;

A(1)(d) that plaintiff has not the legal capacity to sue;

A(1)(e) insufficiency of summons or process or insufficiency of service of summons or process;

A(1)(f) that the party asserting the claim is not the real party in interest;

A(1)(g) failure to join a party under Rule 29;

A(1)(h) failure to state ultimate facts sufficient to constitute a claim; and

A(1)(i) that the pleading shows that the action has not been commenced within the time limited by statute.

A(2) A motion to dismiss making any of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(g) of this rule, the facts constituting such

defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense described in paragraph A(1)(c) of this rule, the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment.

B Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C Preliminary hearings. The defenses specifically [*denominated (1) through (9) in section A of this rule,*] **enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule,** whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

D Motion to make more definite and certain. Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 10 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent. If the motion is granted and the order of the court is not obeyed within 10 days after service of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

E Motion to strike. [*Upon*] **On** motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, [*upon*] **on** motion made by a party within 10 days after the service of the pleading [*upon*] **on** such party or [*upon*] **on** 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.*]

E(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated;

E(2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; or

E(3) any claim or defense inserted in a pleading filed, as required by Rule 15 B(2) or Rule 15 C, in response to an amended pleading that introduces issues that could have been previously raised and will have an adverse impact on the court's docketing schedule.

F Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party [*which*] **that** this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G(3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

G Waiver or preservation of certain defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending

between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived under either of the following circumstances: [*(a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.*]

G(1)(a) if the defense is omitted from a motion in the circumstances described in section F of this rule; or

G(1)(b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B in light of any evidence that may have been received.

G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction

over the subject matter, the court shall dismiss the action.

DEFENSES AND OBJECTIONS; HOW PRESENTED; BY PLEADING OR MOTION; MOTION FOR JUDGMENT ON THE PLEADINGS

RULE 21

[*A How presented.* *Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by motion to dismiss: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) that there is another action pending between the same parties for the same cause, (4) that plaintiff has not the legal capacity to sue, (5) insufficiency of summons or process or insufficiency of service of summons or process, (6) that the party asserting the claim is not the real party in interest, (7) failure to join a party under Rule 29, (8) failure to state ultimate facts sufficient to constitute a claim, and (9) that the pleading shows that the action has not been commenced within the time limited by statute. A motion to dismiss making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting defenses (1) through (7), the facts constituting such defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense (3), the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry*

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April 11, 2020, Meeting
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of judgment.]

A How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, with the exception of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule.

A(1) The following defenses may, at the option of the pleader, be made by motion to dismiss:

A(1)(a) lack of jurisdiction over the subject matter;

A(1)(b) lack of jurisdiction over the person;

A(1)(c) that there is another action pending between the same parties for the same cause;

A(1)(d) that plaintiff has not the legal capacity to sue;

A(1)(e) insufficiency of summons or process or insufficiency of service of summons or process;

A(1)(f) that the party asserting the claim is not the real party in interest;

A(1)(g) failure to join a party under Rule 29;

A(1)(h) failure to state ultimate facts sufficient to constitute a claim; and

A(1)(i) that the pleading shows that the action has not been commenced within the time limited by statute.

A(2) A motion to dismiss making any of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule shall be made before pleading if a further pleading is permitted. The grounds upon which any of the enumerated defenses are based shall be stated specifically and with particularity in the responsive pleading or motion. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If, on a motion to dismiss asserting the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(g) of this rule, the facts constituting such

defenses do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits. If the court grants a motion to dismiss, the court may enter judgment in favor of the moving party or grant leave to file an amended complaint. If the court grants the motion to dismiss on the basis of defense described in paragraph A(1)(c) of this rule, the court may enter judgment in favor of the moving party, stay the proceeding, or defer entry of judgment.

B Motion for judgment on the pleadings. After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings.

C Preliminary hearings. The defenses specifically [*denominated (1) through (9) in section A of this rule,*] **enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule,** whether made in a pleading or by motion, and the motion for judgment on the pleadings mentioned in section B of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

D Motion to make more definite and certain. Upon motion made by a party before responding to a pleading, or if no responsive pleading is permitted by these rules upon motion by a party within 10 days after service of the pleading, or upon the court's own initiative at any time, the court may require the pleading to be made definite and certain by amendment when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge, defense, or reply is not apparent. If the motion is granted and the order of the court is not obeyed within 10 days after service of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

E Motion to strike. [*Upon*] **On** motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, [*upon*] **on** motion made by a party within 10 days after the service of the pleading [*upon*] **on** such party or [*upon*] **on** 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.*]

E(1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated;

E(2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; or

E(3) any claim or defense inserted in a pleading filed, as required by Rule 15 B(2) or Rule 15 C, in response to an amended pleading that expands the issues to be determined and will prejudice the other party as prejudice is construed in Rule 23 A.

F Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule, except a motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process, but omits therefrom any defense or objection then available to the party [*which*] **that** this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection G(3) of this rule on any of the grounds there stated. A party may make one motion to dismiss for lack of jurisdiction over the person or insufficiency of summons or process or insufficiency of service of summons or process without consolidation of defenses required by this section.

G Waiver or preservation of certain defenses.

G(1) A defense of lack of jurisdiction over the person, that there is another action pending

between the same parties for the same cause, insufficiency of summons or process, or insufficiency of service of summons or process, is waived under either of the following circumstances: [*(a) if the defense is omitted from a motion in the circumstances described in section F of this rule, or (b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.*]

G(1)(a) if the defense is omitted from a motion in the circumstances described in section F of this rule; or

G(1)(b) if the defense is neither made by motion under this rule nor included in a responsive pleading. The defenses referred to in this subsection shall not be raised by amendment.

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted upon a showing by the party seeking to amend that such party did not know and reasonably could not have known of the existence of the defense or that other circumstances make denial of leave to amend unjust.

G(3) A defense of failure to state ultimate facts constituting a claim, a defense of failure to join a party indispensable under Rule 29, and an objection of failure to state a legal defense to a claim or insufficiency of new matter in a reply to avoid a defense, may be made in any pleading permitted or ordered under Rule 13 B or by motion for judgment on the pleadings, or at the trial on the merits. The objection or defense, if made at trial, shall be disposed of as provided in Rule 23 B in light of any evidence that may have been received.

G(4) If it appears by motion of the parties or otherwise that the court lacks jurisdiction

over the subject matter, the court shall dismiss the action.

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 filing 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,

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 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 a person described in section B of this rule 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

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answer after service of a summons; or

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

B(3) when the plaintiff or petitioner is a person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person; or

B(4) when the defendant or respondent is a person who is incapacitated or is financially incapable, as those terms are defined in ORS 125.005, upon application of a relative or friend of the person, or other interested person, filed within the period of time specified by these rules or any other rule or statute for appearance and answer after service of a summons or, if the application is not so filed, upon application of any party other than the person.

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

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

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

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

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

E(2)(a) to the person;

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

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

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

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

E(2)(f) if the person is receiving moneys paid or payable by the United States through the

Department of Veterans Affairs, to a representative of the United States Department of Veterans Affairs regional office that has responsibility for the payments to the person;

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

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

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

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

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

F Contents of notice. The notice shall contain:

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

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

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

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

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

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

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

INTERPLEADER

RULE 31

A Parties. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but adverse to and independent of one another, or that the plaintiff alleges that plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties otherwise permitted by rule or statute.

B Procedure. Any property or amount involved as to which the plaintiff admits liability may, upon order of the court, be deposited with the court or otherwise preserved, or secured by bond in an amount sufficient to assure payment of the liability admitted. The court may thereafter enjoin all parties before it from commencing or prosecuting any other action regarding the subject matter of the interpleader action. Upon hearing, the court may order the plaintiff discharged from liability as to property deposited or secured before determining the rights of the claimants thereto.

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 shall 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 be discharged from liability as to the funds or property.*]

C(1) Generally. In any action or for any cross-claim or counterclaim in interpleader filed

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pursuant to this rule, the party interpleading funds 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. Further, the party interpleading funds shall 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. **In determining whether to deny or to award in whole or in part a requested amount of attorney fees, the court shall consider the factors provided by ORS 20.075; however, attorney fees may not be awarded if:**

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

C(1)(b) the party interpleading funds was not subject to multiple litigation; or

C(1)(c) the interpleader was not in the interests of justice and did not further resolution of the dispute.

C(2) Sureties. Section C of this rule does not apply to a party who has been compensated for acting as a surety with respect to the funds or property interpled.

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.*] **rule; and**

A(1)(a)(v) alert the person to whom the subpoena is directed of the entitlement to fees and mileage under paragraphs A(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a) or B(3)(b) of this rule, and the option to object or move to quash or modify under subsection A(7) of this rule.

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.

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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,*] **to whom a subpoena is directed** may object, [*or*] move to quash **the subpoena,** 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) Written objection to subpoena to appear; timing. A written objection to a subpoena to appear and testify must be served on the party who issued the subpoena and on the clerk of the court in which the subpoena originated, not later than 7 days after service of the subpoena and, in any case, no less than 1 judicial day prior to the date specified in the subpoena to appear and testify.

A(7)(b) Written objection to subpoena for production; timing. A written objection to a subpoena that commands a person 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, must 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)*] A(7)(b)(i) Scope. The written objection may be to all or to only part of the command to produce.

[*A(7)(a)(ii)*] A(7)(b)(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)*] A(7)(c) Motion to quash or to modify. A motion to quash or to modify [*the command for production*] **a subpoena** must be served and filed with the court no later than **1 judicial day prior to the date specified to appear and testify, or** 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

appearance or 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.*] prisoners, and parties.

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 nonparty 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.*] **specified in the subpoena.**

B(2)(a) 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) 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) 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) 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) 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) Signed mail receipt. The subpoena was mailed more **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) 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*] **delivered, along with fees for one day's attendance and mileage** 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 **fees for** 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 **fees for** 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*] **specified** 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.

B(5) Service of subpoenas requiring the appearance or testimony of individuals who are parties to the case or party organizations. A subpoena directed to a party who has appeared in the case, including an officer, director, or member of a party organization, may be served as provided in Rule 9 B, without any payment of fees and mileage otherwise required by this Rule.

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*] **comply with** 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.