MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 9, 2020, 9:30 a.m.
Zoom Teleconference/Video Conference
Originating at Lewis & Clark Law School, 10101 S. Terwilliger Blvd., Portland, Oregon

ATTENDANCE

Members Attending by Teleconference or Video Conference:

Kelly L. Andersen
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer Gates
Barry J. Goehler
Meredith Holley
Drake A. Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Lynn R. Nakamoto
Hon. Susie L. Norby
Scott O'Donnell
Shenoa L. Payne
Hon. Leslie Roberts
Tina Stupasky
Hon. Douglas L. Tookey
Margurite Weeks
Hon. John A. Wolf
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Hon. Norman R. Hill

Guests (by Teleconference or Videoconference)

Matt Shields

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 15 ORCP 21 ORCP 23 ORCP 23/34 / ORS 12.190 ORCP 31 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 7 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 called the meeting to order at 9:45 a.m.

II. Administrative Matters

A. Approval of April 11, 2020, Minutes

Ms. Gates asked if any Council members had suggestions for corrections or changes to the draft April 11, 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. Judge Roberts seconded the motion, which was approved with no objections.

B. Court of Appeals Opinion: *Lacey v. Saunders*

Ms. Gates asked for more information on the recent Court of Appeals opinion, *Lacey v. Saunders*, 304 Or App 23 (2020). Judge Peterson explained that the case touches on a different area than the issue that the Rule 23/34 committee considered and addressed with a proposed amendment to ORS 12.190. In the *Lacey* case, the plaintiff sued the defendant prior to the defendant's death, and was notified of the death by the defendant's personal representative. Plaintiff failed to move to substitute the personal representative for the defendant within the 30 day period provided by ORCP 34 B(2), which *Lacey* held is similar to a statute of limitations. Judge Peterson stated that the case proves that this is an area where problems can arise and mistakes can happen, and shows that some deadlines stated in the ORCP cannot be enlarged. Mr. Andersen agreed that the *Lacey* case involves an entirely different principle and that it does not negate the Council's work this biennium at all.

III. Old Business

A. Committee Reports

1. ORCP 7

Mr. Young stated that the committee had met and discussed a new draft amendment that Judge Peterson was gracious enough to put together (Appendix B) that addressed various concerns that were raised in last month's Council meeting. One change includes providing notice to the insurance carrier, if known, with respect to the waiver of service provision. Mr. Young reminded the Council that this was a concern raised by Mr. Goehler. Public bodies and vessel owners are excluded from the waiver of service, which is consistent with the federal rule. There is also a notice to the defendant to contact an attorney in the form waiver

of service. With this latest iteration of the amendment, the timelines were much shorter, with 14 days to return the waiver, and 45 days to respond, which was the source of a lot of discussion in the committee's meeting. Mr. Young explained that the committee reached a consensus on 28 days to return the waiver, which will give a defendant enough time to seek and retain counsel if needed, and decide whether or not to waive service and return the waiver. He stated that the committee could not reach agreement on the amount of time for a defendant to respond, so the committee would like the Council's feedback on whether 45 or 60 days would be appropriate. The committee would also like the Council's feedback on whether or not to adopt the amendment.

Ms. Gates asked whether the committee's discussions had raised any new information that might have an impact on the Council's discussion today, or whether anyone on the committee had changed their position. Mr. Young explained that committee members' positions had not changed. The defense side feels that 45 days is an inadequate incentive to want to use the waiver provision. Defense counsel would rather just work cooperatively with plaintiff's counsel and accept service without a deadline. He stated that he believes that the plaintiffs' perspective is that 60 days is far too long and encumbers their ability to prosecute the case to a timely resolution. The sticking point seems to be 45 or 60 days, if the Council chooses to adopt the amendment at all.

Ms. Gates asked whether the plaintiffs on the committee have a preference between just adopting the amendment at all and adopting it at 45 days or at 60 days. Ms. Stupasky stated that the committee's preference was to put both time periods up for a vote before the Council to see what preference emerged. She agreed that the plaintiffs' lawyers think that 60 days is far too long. The incentive for the defendant is that they do not have to pay the service costs if they accept service. She stated that she felt that it is important for the Council to pass something, especially given what is going on with the current COVID-19 pandemic, but 60 days would make it ripe for a malpractice trap.

Mr. Eiva stated that he believes that he federal rule got passed at a time that was different from Oregon's current situation of most courts trying to get trials scheduled within a year. He opined that basically to shave a month off of litigation time is problematic, particularly because newer attorneys who are trying to save money might be the ones who would try to take advantage of this amendment, and they would be shooting themselves in the foot by shaving 30 days off of their litigation time. This would cause concern about how the rule would be used and the possibility of creating more delay when the goal is to make trials more timely.

Judge Peterson explained that his latest draft was an attempt to craft a product that the Council could fairly examine and think about. He noted that he does not have a vote, but that he would like to express a few thoughts. He stated that he does not think that the Council should add a provision to the rule if no one will use it, and he is concerned that the plaintiffs will not use it if it is 60 days. He pointed out that 45 days is consistent with the discovery rules, Rule 43 and Rule 45, for responding to requests for documents or for admissions. He explained that he had left out government entities because, thinking about the reason for adding a waiver provision, it should not be directed at good attorneys who are trying to do it right. It would be directed at defendants who run like hell from the process servers, delay things, and ultimately make things expensive. If the Council decides to add the waiver provision, it seems to him that it should serve a purpose, and the purpose it would serve would be a way to have a consequence for those people who delay litigation and drive up the cost of litigation by playing games. Most government entities would not do that.

Ms. Gates asked how many votes were needed to add the amendment to the publication docket. Ms. Nilsson explained that there are no rules governing this and that a simple majority vote has always been the custom. Judge Peterson agreed that, since a quorum was present, a majority vote was appropriate.

Ms. Gates asked members to first vote on whether they preferred 60 days or no change to the rule at all. Ms. Nilsson polled the members. The vote was 18-1 for no change. Ms. Gates then asked members to vote on whether they preferred 45 days or no change to the rule. The vote was 10-9 for no change. Therefore, any amendment to add a section ORCP 7 H and create a waiver of service provision failed.

Ms. Gates thanked committee members for their time and effort, and stated that both the committee and the Council had done good work to address the concern that was brought to it by the suggestion in the bar poll.

2. ORCP 23

Ms. Gates explained that the committee was presenting three options (Appendix C) to solve the problem that the ORCP 23 committee was tackling. These options were not the same options presented at the last Council meeting, although they are still trying to solve the issue of the perceived unfairness of a defendant raising new defenses that could have been raised earlier after a plaintiff amends a complaint to make minor changes. The committee came up with three potential ways to address the issue, none of which are actually in ORCP 23. Ms. Gates stated that the idea was to signal to a party that is experiencing this unfairness that there

is a potential remedy, or at least a process to obtain court review. She stated that the most simple solution would be adding a sentence to the end of ORCP 15 C. The second option is adding a third basis for a motion to strike to ORCP 21 E, and the language used there was intended to mirror ORCP 23, using similar language, "as justice requires." The third option was also a motion to strike, but using different and slightly more detailed language that talks about what the answer or response to the amended pleading should contain and that the amended response should not go beyond new matters raised in the amended pleading. Ms. Gates explained that this language came from cases that the committee looked at that address this particular issue. She asked other committee members to weigh in and whether the Council in general had questions or comments.

Judge Roberts stated that she was not certain that the problem was necessarily as terrible as some on the Council were making it out to be. She also asked which cases the committee was looking at when they chose the language for the third option. She stated that she did not believe that there were any published cases. Ms. Gates explained that the committee had looked at federal cases because there were no Oregon cases that they could find. She stated that no one was saying that Oregon should adopt a federal standard. She just wanted to alert the Council as to the source of the language, and she stated that she was happy to circulate the list of federal cases. Judge Roberts asked whether they were just federal trial court cases. Ms. Gates stated that some were appellate cases. Judge Roberts noted that they all would have been decided under the federal rules. Mr. O'Donnell also expressed concern that notice pleading in federal court is entirely different from Oregon.

Ms. Gates stated that her understanding is that it actually only applies to the responsive pleadings. She reiterated that the committee is not saying that Oregon should adopt a federal standard by any means. This is just language that was found in some federal cases. The committee just wanted to provide different options that address the issue in different ways. Overall, the committee probably supports a less robust description than what appears in the third option.

Ms. Payne stated that she did not want to get too sidetracked by federal versus state. She opined that Ms. Gates provided helpful information as to what federal courts were doing with these sorts of cases, and it seems like the majority of federal courts were granting motions to strike when defendants came in without seeking leave and added defenses that did not respond to the specific new allegations that were included in the amended complaint. She stated that Oregon courts are not doing that, but the language in the federal rule [Federal Rule of Civil Procedure 15(a)(3)] that the federal courts were relying on is not different than Oregon's Rule 15 C. The committee's concern was whether Oregon's rule allows

the motion to strike procedure, and there seemed to be some consensus that the answer is not clear. Ms. Payne stated that the committee wanted to look at Oregon's rules and not try to create any substantive rights in either direction, but perhaps to make sure that there is a procedure to take the issue to the court.

Mr. O'Donnell asked for clarification whether federal courts are allowing motions to strike without any language that is different from what is in Oregon's rule. Ms. Gates agreed that this is correct. Ms. Payne stated that federal courts are relying on FRCP 15(a)(3) and relating it to responsive pleadings, and it did not seem any different from Oregon's rule. Mr. O'Donnell asked how certain the Council is that courts are not doing this in Oregon. He asked how many anecdotes there really are. He stated that the Council is aware of Judge Leith having granted a motion to strike a defense because it was untimely, but he asked how many others there have been. He reiterated Judge Roberts' question of whether this is a problem or some sort of aspirational issue.

Ms. Stupasky stated that she has seen this problem in the past. Ms. Gates noted that the Council had initially received a suggestion in the survey and that Ms. Stupasky had noted that she had encountered the problem. She explained that when she and Mr. Bundy had reached out to their respective peer groups, they both had received comments saying that it had affected people. In particular, lawyers were upset because these expanded responses to amended complaints had pushed the trial date out much further, because of new issues being raised at a late date.

Judge Roberts stated that it appeared that the drafts before the Council were not limited to amendments that happen just before trial but, rather, they could apply in the first week of the case being in existence. They would potentially cut off the ability to raise defenses without regard to whether it is a surprise, whether any discovery has taken place, or whether trial is approaching. She expressed concern that the solution is much broader than the problem of timeliness that was originally raised. She noted that there are some provisions [ORCP 21 F and G] that indicate that, if defenses like the statute of limitations are not raised in the first responsive pleading, regardless of how quickly thereafter the attempt to raise them is made, they are barred. Ms. Gates explained that the use of the phrase, "as justice requires" is imperative to allow the court to say that there is no timing problem or that the defense can be raised regardless of the timing. It basically leaves it in the judge's hands to make that evaluation. She stated that the intent is definitely not to set the standard about what is the right or wrong timing.

Judge Roberts expressed concern that this means that there are no standards and that the court has unfettered ability to stop a defendant from raising a defense.

Ms. Gates stated that the trial court would still be evaluated on whether it acted within its discretion, but that the Council is not trying to proscribe that with any of these three changes. Mr. Eiva pointed out that, with regard to the "as justice requires," language, there are plenty of standards and a good deal of case law about the phrase "when justice so requires" with regard to Rule 23. When a trial court denies amendments, it is often legal error, not pure, unfettered discretion, because there really has to be a showing of prejudice as to when that defense has been raised. With a showing of prejudice, or that the new pleading is purely without merit, trial courts do get reversed for denying motions to amend. Basically, it is the same exact standard: is the defendant prejudicing the plaintiff by raising the issue now? Mr. Eiva noted pointed out *Franke v. Oregon Dep't of Fish & Wildlife*, 166 Or App 660, 2 P3d 921 (2000), where the Court of Appeals found that the trial court committed legal error by denying a motion to amend two months ahead of trial when a new issue was brought in, because two months is plenty of time to acknowledge the motion to amend from the defense. He stated that he believes that there is a standard, and it is an equal standard about whether this pleading creates undue prejudice.

Ms. Payne reiterated that the committee used that specific language because it is in Rule 23 and the intent was to incorporate the standard described in that case law. She stated that she believes that there already are guidelines for judges based on exactly what Mr. Eiva was saying, and that was the committee's hope in using that language that is already used in Rule 23. Mr. Eiva stated that the upshot is that just about every new issue that the defense raises is going to be allowed as long as it is not raised on the eve of trial.

Ms. Stupasky stated that her understanding is that Judge Roberts thinks that she would not have the ability to refuse a defendant from bringing up a denial of liability for the first time when a plaintiff simply amends the complaint during trial to conform to the evidence, for instance of medical bills. She stated that it would be a huge problem if the judges do not have the authority to prevent the defense, at a very late and prejudicial time, from bringing in a completely new defense that no one foresaw being raised at that point in the case. She stated that she believes that the committee's first two options do a good job of addressing that concern and give judges the ability to use their learned discretion and use the same standard that plaintiffs have to meet for filing an amended complaint. So, those two options would really level the playing field.

Judge Roberts stated that she was not saying that judges would lack discretion to do anything but, rather, that there are no bounds. She expressed concern that the language stating that amendments should be freely allowed does not appear in the draft amendments. She stated that she does not think that the possibility that,

after an appeal and three or four years down the line and $100,000 later, a party can get a reversal and a new trial is an adequate remedy for having a poor rule. She stated that, if the amendment is meant to deal with untimely amendments raising new issues, it should say that an amendment can be struck as untimely, not that it can be struck at any time, for any reason.

Mr. Goehler stated that he believes that the Council should amend the rule and that it should have some standards, as Judge Roberts expressed. The amendment could specify, for example, untimely or unduly prejudicial, which is also a reasonably well defined term. He stated that, to him, it makes sense to include it as part of a motion to strike, rather than in an amendment to Rule 15, but he does not believe that either of the two versions of Rule 21 has enough specificity. Ms. Gates explained that, at the last Council meeting, the committee had actually proposed what Mr. Goehler just described. She noted that the Council provided a lot of feedback that the draft was either not specific enough because it did not include standards, or too specific because it included untimeliness and prejudice.

Mr. Andersen stated that he thought that amending ORCP 15 was the cleanest way to make the change and uses the clearest language. Mr. Eiva asked whether anyone recalled the name of the court case that provides the standard for the four factors for what justice requires. Ms. Gates stated that she would e-mail it to Mr. Eiva. Judge Peterson questioned whether it was appropriate for the amendment to appear in Rule 15, which is only about timing. Having the amendment, which adds content, appear there, seems wrong. Judge Peterson stated that he agreed with Mr. Goehler that, if the judge ought to have the authority to strike what appears in a response to an amendment, putting it in Rule 21 make sense. Ms. Gates agreed with Judge Peterson, and stated that she preferred the change to appear in a location that a practitioner might actually look at to see if there is anything that can be done about it.

Ms. Gates asked Council members to take an informal poll on whether the Council should continue discussions on this issue, or whether it should stop work because it is just attempting to create a solution to a problem that does not really exist. Ms. Nilsson polled the members, and a simple majority agreed that the Council should continue its efforts.

Ms. Gates then asked the Council whether it was prepared to vote to move any of the draft amendments from the committee to the September publication agenda. Judge Roberts stated that she was concerned about voting when the drafts seem to be based on research or cases that have not been shared with the entire Council. She also expressed concern that the draft amendments appear to go far beyond the original issue, which was the timeliness of amendments or raising new

issues just before trial. Justice Nakamoto agreed that the draft amendments were not ready for a vote. She suggested that, between an amendment to Rule 15 versus Rule 21, the suggestion put to the Council should be a reworking of an amendment to Rule 21. Mr. O'Donnell agreed that the amendments were not ready to be voted on and stated that he would like to do some independent research on the issue.

Judge Norby stated that it seems like the proposed amendments are very soft in that they just say that judges can strike the response if justice requires. She stated that she does not understand how it enhances anything that does not already exist or change what judges already are doing. She stated that, if there is a real problem, it would seem that the solution would have to be a bit more than simply restating a judge's generic authority to do things that justice requires. She explained that she is not really sure what direction the amendment is intended to take, and wondered whether the Council ever needs to make an amendment that is so soft that it just sort of mirrors a lot of things that are already stated in the law about judges having authority to do things that justice requires.

Ms. Gates stated that Judge Norby's point is definitely well taken. She stated that the committee spent a fair amount of time trying to find a spot between too many standards or too many factors to be considered versus the other end of the spectrum of just sort of alerting practitioners that there could be a remedy without providing any commentary or standards. She stated that part of the reason the committee engaged in that discussion was because of comments received from the Council. She stated that there is probably even more room for discussion about at what level the rule should describe the circumstances that are intended to be addressed or how they should be addressed by a judge. Judge Norby asked whether the Council is simply trying notify people that this is an issue of concern, rather than shape any response to it. Ms. Gates replied that there seems to be a lack of consensus at this moment about the direction in which the Council should go.

Mr. Eiva reiterated that "when justice so requires" is not a discretionary standard but, rather, a legal standard. He stated that he would circulate a memo before the next Council meeting with regard to the case law on that term and what it means. He explained that he believes that none of the factors that are laid out in the case law describing the term are offensive, and that the more difficult issue would be for someone to argue why a pleading that violates one of those factors should be allowed to proceed. He opined that it is a very elegant way to say it, based on what the case law has done with that phrase so far.

Ms. Gates recalled that Judge Leith was a very passionate proponent of that

specific phrase for those reasons, because it is well defined in case law and it is already used in the rules. However, she agreed that it results in a more soft and undefined phrasing in the rule. Judge Leith stated that it made sense to him that, if the Council is trying to establish the court's authority to disallow a pleading in the specific circumstances, because there is apparently ambiguity on that point, then simply incorporating the Rule 23 language as the standard for when the court should allow or disallow part of a responsive pleading would just incorporate that same standard. He stated that it was deliberately a light touch in terms of not trying to dig in and create new standards but to just base it off of what Rule 23 had already established. Ms. Gates clarified that judges were not the only ones who liked that language; the whole committee did. The same standard was used in the option for amending Rule 15 and is one of the choices for Rule 21. However, the committee has heard today, obviously, that some people would like it to be more robust. Judge Leith stated that Rule 23 has already established a body of law, and he wondered why the Council would want to reinvent that wheel.

Judge Roberts asked whether the scope of the work of the committee has ever been defined. She stated that her understanding was that the committee's charge was originally untimely amendments, and it seems to have expanded. Ms. Gates stated that her understanding of the committee's charge was to address circumstances where a party files a response to an amended complaint that raises new issues that have some unfair impact on the case, that are late in the game, or that are prejudicial for some reason. She stated that most of the circumstances that have been discussed are timing issues that will either affect the trial or require reopening discovery after discovery has been closed for some period of time, but everyone on the committee surely has their own take on the scope of the committee's work.

Judge Peterson stated that his recollection was that the concern that came in from the survey of bench and bar members was a concern over a new issue having an impact on trial scheduling very late in the game. He noted that this does not mean that the Council cannot go further than that. He stated that some Council members have mentioned that it can have an adverse impact on litigation because it can reopen discovery, so that does expand the scope, but he thinks there may be more support if it is linked to the impact on trial scheduling instead of the more expensive view. Judge Peterson noted that Mr. Young had made a good point in the April Council meeting about the word "untimely" being problematic because it would make a responsive pleading susceptible to a motion to strike if the response to the amended pleading was untimely under Rule 15, which was not the intention. So he thinks that the word "untimely" by itself is not sufficient.

Ms. Payne stated that the discussion at the last committee meeting was that the original comment received by the Council was not so limited as to just be addressing the issue of untimeliness but, rather, prejudicial impact in general, using the example of an amendment right before trial. So she did not believe that the comment itself was limiting the concern to responsive pleadings right before trial. She agreed that there are other situations, although that may be an example of the most egregious, where prejudice can exist. She opined that the Council should be looking at all of these situations.

Mr. O'Donnell asked whether a defendant who first admitted liability but then denied it was adding a new defense or just changing the wording of a pleading from "admit" to "deny." Mr Eiva stated that it certainly is a change of the issues at trial, but that it does not have to be a change to a defense. Mr. O'Donnell stated that this is the problem we get into with unforseen consequences, because it is not a defense, just changing the pleading. Mr. Eiva stated that, in most cases, admitting liability will probably be allowed, because all parties have done full discovery and are aware of the issues. However, there could be cases where that is unique. Mr. Eiva emphasized that trial judges have very limited authority. There is a high risk of reversal for error when a trial judge denies a motion to amend without some real showing of prejudice or a another deep problem, and that would apply with a Council amendment as well. He stated that almost all of the factors point to a timing issue where it really is just kind of a surprise for which no one can be prepared. He opined that it is almost like a loophole that, for some reason, this one aspect of pleading did not have that standard applied to it. The amendment would just seal that up. When a judge looks at the factors that are in the case law, they will not be looking at random stuff; it will mostly be timeliness around the motion, timeliness around certain discovery availability, and timeliness. around trial. These are the same arguments defendants use all of the time to try to deny plaintiffs' motions to amend. When defendants win those motions, it is because something significant has been shown. This is going to be a very narrow read for courts, but it makes it clear that, within the rules, the courts do have this authority.

Mr. Eiva agreed that it is appropriate to delay a vote until all Council members have had a chance to ponder the issue more. He suggested that members who were interested could circulate memoranda on the issue. He stated that it is important for Council members to think about why it might be problematic to give the court authority in allowing amendments, and to think about why they might be troubled by a trial court having this authority in striking responses to those amendments. Mr. O'Donnell stated that he did not disagree with that generally. He stated that the first issue for him Is whether the courts do it now, and the second issue is unforeseen consequences with whatever language the Council

might adopt. He agreed that Council members drafting cross memos would be helpful.

Ms. Gates asked any Council members who are interested in the issue to join the next committee meeting. She stated that added diversity would be helpful. Mr. Andersen, Mr. Crowley, Judge Norby, Mr. O'Donnell, and Ms. Stupasky, asked to be included in the next committee meeting.

3. ORCP 31

Mr. Goehler explained that the committee was presenting what is hopefully a final draft (Appendix D) to the Council. He reminded the Council that the committee was considering amending the interpleader rule to provide authority for awarding attorney fees in cases where it is not the plaintiff filing an interpleader, because there are interpleader claims filed by defendants as well. The amendment basically expands the attorney fee provision. It also changes the current mandatory award of attorney fees to discretionary and provides factors for making the award of attorney fees. The committee's prior draft articulated factors in addition to referring to ORS 20.075, and justice Nakamoto suggested a rewrite of those factors. The current draft includes that rewrite, along with some cleanup by Judge Peterson to make the language of the rule consistent with other rules. Mr. Goehler stated that the committee was ready to submit the draft amendment for a vote, but was also open to more discussion if the Council felt that it was warranted.

Mr. Eiva emphasized that there is an article that the committee has circulated to the Council [Franklin L. Best, Jr., *Reforming Interpleader: The Need for Consistency in Awarding Attorneys' Fees*, 34 Baylor L. Rev. 541 (1982)] that discusses the different reasons why it is necessary for judges to have discretion on this issue. He stated that he wanted to have this information included in the Council's history so that, in the future, people can look to that article to provide some guidance on how to address this issue.

Ms. Gates asked whether Council members were prepared to vote on whether to move the draft amendment to the September publication docket. Council members agreed, and Ms. Nilsson polled the membership. The Council voted unanimously to move the draft amendment to the September publication docket.

Ms. Gates thanked the Rule 31 committee and everyone involved in preparing the draft amendment.

4. ORCP 57

Ms. Gates asked whether Ms. Holley had an update on the committee's work. Ms. Holley explained that the committee was continuing to wait for the quarantine to ease up before reaching out to form a workgroup, and that they would hopefully be able to do so soon.

IV. New Business

No new business was raised.

V. Adjournment

Ms. Gates reminded the Council that the June 13, 2020, meeting is the last one before the September publication meeting, unless an issue arises that requires the Council to meet in July or August.

Judge Peterson encouraged all Council members to look carefully at the draft amendments that will be put on the September publication docket to make sure that there are no glitches in terms of structure, form, or substance. He explained that it is better not to have to make edits on the fly during the publication meeting. Ms. Nilsson stated that she would include all draft amendments in the June meeting packet so that members can look over them again in a timely manner.

Ms. Gates adjourned the meeting at 11:15 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

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:

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Members Absent:

Hon. D. Charles Bailey, Jr.
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Margurite Weeks

Council Staff (In Person):

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

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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		

Council on Court Procedures
May 9, 2020, Meeting
Appendix A-1

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 H). 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

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

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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.

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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

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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;

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

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

H(1)(a)(iii) in either case noted in part H(1)(a)(i) or part H(1)(a)(ii) of this rule, also be addressed to any insurance carrier for the defendant known to the plaintiff;

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 28 days after the request is 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 signed waiver need not file and serve an answer or motion responsive to the complaint until 45 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

A LAWSUIT HAS BEEN FILED AGAINST YOU. 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.

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 AND, IF APPLICABLE, DEFENDANT'S INSURANCE CARRIER, IF KNOWN TO THE PLAINTIFF]

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 _____, 20___ which is at least 28 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 45 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 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 within 45 days from _____,20___, the date when the Plaintiff's request was sent.

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

[PRINTED NAME]

[ADDRESS]

[EMAIL ADDRESS]

[TELEPHONE NUMBER]

TO: **Council on Court Procedures**

FROM: **Rule 23 Committee – Scope of Response to Amended Pleading**

DATE: **April 22, 2020**

The Council tasked the Rule 23 Committee with evaluating a comment expressing concern about unfairness in the circumstance where a plaintiff amends a complaint close to trial to make minor changes and the answer in response to the amendment raises entirely new defenses or counterclaims that could have been raised earlier and were not triggered by the amendment.

At the March CoCP meeting, we discussed the following addition to ORCP 21E (underlined):

> **E Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; **or (3) any pleading or defense that the court determines is untimely or prejudicial to the moving party under the standards for permitting amendments to pleadings under Rule 23.**

The discussion seemed to indicate that most if not all Council members recognize the potential for unfairness when answers to amended pleadings go beyond the amendment by raising new defenses or counterclaims. There were differing views on how this should be addressed, including whether the better path is to articulate detailed standards or merely identify a process for challenging it.

The committee met again and discussed alternative language as well as federal court decisions on this issue, given the dearth in Oregon. Attached to this memorandum are excerpts from some of those cases. The committee identified three options for adding language to the civil rules that would make clear that a court can address the issue.

1. Amend ORCP 15C:

   > **C Responding to amended pleading.** A party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs. **Where a response to an amended pleading raises new issues, a court may strike the response, or any part thereof, as justice requires.**

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This language indicates that a remedy is available as well as mirroring the language of ORCP 23 regarding the circumstances in which a court should allow an amendment ("leave shall be freely given when justice so requires").

2. Add the same language to ORCP 21E:

   E Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; **or (3) as justice requires, any response to an amended pleading, or part thereof, that raises new issues.**

This puts the same language into Rule 21E where the process for challenging the response to the amended pleading is specifically identified as a motion to strike.

3. Add more detailed language to ORCP 21E:

   E Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 10 days after the service of the pleading upon such party or upon the court's own initiative at any time, the court may order stricken: (1) any sham, frivolous, or irrelevant pleading or defense or any pleading containing more than one claim or defense not separately stated; (2) any insufficient defense or any sham, frivolous, irrelevant, or redundant matter inserted in a pleading; **or (3) any allegation, defense or counterclaim asserted in response to an amended pleading that goes beyond responding to the new matters raised by the amended pleading without having obtained prior permission of the court.**

This language alerts responding parties that a response to an amended pleading is limited by the contents of the amendments unless the responding party moves to add new, unrelated defenses or counterclaims. It also makes clear that a motion to strike is the means of challenging a response that does otherwise. This language comes from some of the federal analyses.

Recommendation

All committee members support options 1 and 2. At least one committee member does not support option 3.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

A Time for filing motions and pleadings. An answer to a complaint or to a third-party complaint, or a motion responsive to either pleading, must be filed with the clerk within the time required by Rule 7 C(2) to appear and defend. If the summons is served by publication, the defendant must appear and defend within 30 days of the date of first publication. A reply to a counterclaim, a reply to assert affirmative allegations in avoidance of defenses alleged in an answer, or a motion responsive to either of those pleadings must be filed within 30 days from the date of service of the counterclaim or answer. An answer to a cross-claim or a motion responsive to a cross-claim must be filed within 30 days from the date of service of the cross-claim.

B Pleading after motion.

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

B(2) If the court grants a motion and an amended pleading is allowed or required, that pleading must be filed within 10 days after service of the order, unless the order otherwise directs.

C Responding to amended pleading. A party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs. **Where a response to an amended pleading raises new issues, a court may strike the response, or any part thereof, as justice requires.**

D Enlarging time to [*plead or do other act.*] file and serve pleadings and motions. [*The*] **Except as otherwise prohibited by law, the** court may, in its discretion, and upon any terms as may be just, allow [*an answer or reply*] **any pleading** to be made, or allow any [*other pleading or*] motion**, or response or reply to a motion,** after the time limited by the procedural rules, or

by an order enlarge [*such time*] **the time limited by the procedural rules**.

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 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 asserting any of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule must be filed before pleading if a further pleading is permitted. The grounds on 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 the asserted 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 the asserted defenses or may defer any 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*] **the motion** 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*] **On** motion made by a party before responding to a pleading[,] or**,** if no responsive pleading is permitted by these rules**,** [*upon*] **on** motion by a party within 10 days after service of the pleading, or [*upon*] **on** 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*] **any** 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) as justice requires, any response to an amended pleading, or part thereof, that raises new issues.

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*] **cannot** 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*] **on** a showing by the party seeking to amend that [*such*] **the** 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*] **must** 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 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 asserting any of the defenses enumerated in paragraph A(1)(a) through paragraph A(1)(i) of this rule must be filed before pleading if a further pleading is permitted. The grounds on 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 the asserted 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 the asserted defenses or may defer any 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*] **the motion** 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*] **On** motion made by a party before responding to a pleading[,] or**,** if no responsive pleading is permitted by these rules**,** [*upon*] **on** motion by a party within 10 days after service of the pleading, or [*upon*] **on** 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*] **any** 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 allegation, defense, reply, counterclaim, or cross-claim asserted in response to an amended pleading that goes beyond responding to the new matters raised by the amended pleading without having obtained prior permission of the court.

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*] **cannot** 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*] **on** a showing by the party seeking to amend that [*such*] **the** 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*] **must** dismiss the action.

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 **a** 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 **are** 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 will 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 must consider any factors ORS 20.075 permits the court to consider 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 subject to multiple litigation; and

C(1)(c) whether the interpleader was in the interests of justice and furthered 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.