DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 26, 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. D. Charles Bailey, Jr.
Troy S. Bundy
Hon. R. Curtis Conover
Kenneth C. Crowley
Travis Eiva
Jennifer Gates
Barry J. Goehler
Hon. Norman R. Hill
Meredith Holley
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

Members Absent:

Drake A. Hood
Jeffrey S. Young

Guests

Matt Shields (Oregon State Bar)

Council Staff (In Person):

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

ORCP/Topics Discussed this Meeting	Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 15	Discovery	Discovery	ORCP 41		ORCP 7
ORCP 21	ORCP 7	ORCP 1	ORCP 43		ORCP 55
ORCP 27	ORCP 15	ORCP 4	ORCP 44		ORCP 68
ORCP 31	ORCP 21/23	ORCP 7	ORCP 45		
ORCP 55	ORCP 23/34C	ORCP 9	ORCP 46		
ORCP 57	ORCP 27/GAL	ORCP 10	ORCP 47		
ORCP 68	ORCP 31	ORCP 17	ORCP 54		
	ORCP 55	ORCP 22	ORCP 62		
	ORCP 57	ORCP 32	ORCP 69		
		ORCP 36	ORCP 79		
		ORCP 39			

I. Call to Order

Ms. Gates called the meeting to order at 9:44 a.m.

II. Administrative Matters

A. Approval of June 13, 2020, Minutes

Ms. Gates asked if any Council members had suggestions for corrections or changes to the draft June 13, 2020, minutes (Appendix A). Ms. Nilsson stated that Justice Nakamoto had previously informed her that Judge Rick Haselton's name was misspelled in the draft minutes. Judge Wolf made a motion to approve the minutes with that correction. Ms. Gates seconded the motion, which was approved with no objections.

III. Old Business

A. Review of Recommendation to Legislature

1. ORCP 23/34

Ms. Gates reminded the Council of its recommendation to the Legislature for a change to ORS 12.090 to correct the problem of plaintiffs filing lawsuits against defendants who the plaintiff was not aware had passed away. The Council's recommendation, with minor changes from Legislative Counsel (Appendix B), was briefly discussed.

B. Committee Reports

1. ORCP 57

Ms. Holley reminded the Council that the committee planned reach out to stakeholder groups and provide them with the current Oregon and Washington rules regarding jurors and the amendment proposed by the committee and give them 30 days to provide a written response. The committee would then consider the written responses and potentially follow up with the interested stakeholders. Ms. Holley asked anyone on the Council who has feedback about this process to please e-mail her by early next week.

C. Discussion of Draft Amendments

1. ORCP 15

Ms. Payne reminded the Council that the primary amendment to Rule 15 (Appendix C) is in section D and is to clarify that the rule applies to all pleadings, not just to answers and replies, and that the rule also applies to responses and replies to motions, not just motions themselves. The intent was to also provide guidance to practitioners, judges, and the public that there is case law that limits the court's ability to grant extensions in certain contexts under Rule 15 D, so new language is added in the opening phrase. Ms. Gates asked if any Council members had comments regarding the proposed changes to Rule 15.

Judge Peterson noted that the language regarding "doing other acts," was also removed. He mentioned that he had never been entirely certain what those other acts were, and that no one on the Council had been able to define them either, but that he suspected that he had witnessed some of them in court last week. He noted that motions and pleadings should be encouraged, not other acts.

Judge Leith asked whether line 26 of page one should read "by an order to enlarge" rather than "by an order enlarge." Ms. Payne explained that the paragraph is awkwardly worded, but that the language is grammatically correct as written. With the other clauses, the sentence reads, "the court may, by an order, enlarge the time." Judge Leith stated that he understood the wording.

Ms. Gates asked whether a roll call vote was required or whether a voice vote was adequate to publish a draft amendment. Judge Peterson explained that the Council typically does a roll call vote for both publication and promulgation. He noted that it is helpful to know the number of votes to determine the strength of support on each proposed amendment.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 15

Ms. Gates made a motion to publish the draft amendment of ORCP 15. Mr. Andersen seconded the motion, which passed unanimously with 21 votes in favor and no abstentions.

2. ORCP 21

Ms. Gates reminded the Council that the proposed draft amendment to ORCP 21 (Appendix C) would make explicit a party's right to move to strike issues in a defendant's amended pleading. She noted that there were additional changes suggested by Legislative Council after the committee's last draft, but those changes relate to generic parts of the rule, not the proposed new language, and they are relatively modest. Judge Peterson explained that the Council has a good relationship with a very amazing proofreader at Legislative Counsel who reads our work product carefully to help look for any unintended

errors. She made a suggestion to change section G on page 5 of the draft, and Council staff modified that suggested change slightly. Council staff believes that the change is helpful and that section G reads better than it did. The main change was to eliminate the oddly enumerated, faux paragraphs and make any subdivisions in the rule conform with standard Council format so that the rule is easy to cite. This odd enumeration was also corrected in section A and section E.

Ms. Gates asked for any discussion on the draft amendment. Justice Nakamoto pointed out a punctuation issue in paragraph A(2)(b). She suggested that the language, "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," be changed so that the words "including affidavits, declarations, and other evidence" are set off by either commas or parentheses. Ms. Gates agreed. Judge Leith stated that he preferred the language in a parenthetical. The Council agreed that the language, "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," would be preferable.

Justice Nakamoto noted that the word "shall" had been changed to "must" in several places and asked whether that was a change made by Legislative Counsel. Judge Peterson explained that Council staff has been trying to clean up the rules and eliminate the use of the word "shall" as much as possible. He observed that Professor Bryan Gardner talks about the evils and imprecision of the word "shall."

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 21

Ms. Gates made a motion to approve publication of the draft amendment labeled "LEGISLATIVE COUNSEL SUGGESTIONS - DRAFT FOR PUBLICATION VOTE, 9/2/2020," with the additional change proposed by Justice Nakamoto. Mr. Crowley seconded the motion, which passed with 19 votes in favor, two opposed, and no abstentions.

3. ORCP 27 (Judge Norby)

Judge Norby explained that the changes to Rule 27 (Appendix C) were primarily to clarify section A with regard what having a guardian ad litem appointed means. The change is meant to be helpful for court staff and unrepresented parties who are being asked to be guardians ad litem. In section B, it was also made clear that unemancipated minors are the only minors who must have a mandatory appointment of a guardian ad litem.

Judge Peterson pointed out that the title of the rule has also been changed. He explained that, unlike statutes, the lead lines in the ORCP are actually a part of the language of the rule, and the Council strives to make them clear and accurate. He stated that the lead line in section B was also modified to add the word "mandatory," which parallels the "discretionary" language in the lead line in section C and clarifies that the appointment of a guardian ad litem under section B is, in fact, mandatory.

Ms. Gates asked whether the Council wished to discuss the proposed amendments. Hearing no comments, she asked for a motion to publish the proposed amendments to Rule 27.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 27

Judge Norby made a motion to publish the draft amendment of ORCP 27. Ms. Holley seconded the motion, which passed with 20 votes in favor, one opposed, and no abstentions.

4. ORCP 31 (Mr. Goehler)

Mr. Goehler reminded the Council that the current rule allows for a *mandatory* award of attorney fees for the party that *files* an interpleader suit or action, along with dismissal for that party. He stated that the committee's goal was to make it clear that whoever was *interpleading the funds* would be allowed to be dismissed, and also to make the attorney fees *permissive* rather than mandatory. The committee worked through the factors to be considered in making an award of attorney fees discretionary. Mr. Goehler noted that Council staff also did some cleanup in terms of breaking up one really long sentence into sub parts and making it read a little more clearly, and the result of that work is the proposed amendment before the Council (Appendix C).

Ms. Gates noted that the proposed rule was the subject of much discussion, but asked whether anyone on the Council had further comments or questions.

Judge Peterson pointed out that Justice Nakamoto had found an article that was instrumental in guiding the committee's, and Council's, analysis of whether attorney fees should be awarded. [Best, Franklin L. Jr. "Reforming Interpleader: The Need for Consistency in Awarding Attorneys' Fees." Baylor Law Review, vol. 34, no. 4, Fall 1982, p. 541-580.] There was also a good deal of case law research, especially some federal court cases where attorney fees are permissive.

Judge Bailey noted that the proposed language states that the court "must" consider any factors that ORS 20.075 permits the court to consider, and wondered whether the word should be "may." Mr. Goehler explained that the committee had gone back and forth a bit on that question, but decided that it is a two-step approach. Since ORS 20.075 is the go-to statute for deciding attorney fees, first a judge would go there and then move on to the interpleader-specific factors. The word "must" is there, really, to direct the court to look to the statute as the first step in making the attorney fee decision. He pointed out that, if the word were "may," a judge could just skip that step, and he did not think that this would be appropriate. Judge Leith noted that the substantive statute, ORS 20.075, makes the factors permissive, and that the word "must" makes it mandatory. Mr. Goehler explained that the word "must" makes considering the statute mandatory, but applying the factors within the statute is still permissive. Mr. Goehler stated that the "must" language also helps make the record for having gone through the factors, and helps the judge make the right record to

support a decision regarding an award of attorney fees.

Mr. Eiva pointed out that ORS 20.075 states that the court "shall" consider the factors, so it seems kind of odd that Rule 31 would say that the court "must." He suggested perhaps saying that the court "must consider ORS 20.075" instead. Judge Norby explained that the court must consider the factors, but does not have to apply them, so it is mandatory that the court review the statute and make decisions about whether any of the factors are applicable. The court could still read every factor in ORS 20.075 and decide that none of them applies, as long as the court has read them and considered them before making that decision. Mr. Eiva agreed.

Judge Peterson agreed that it helps make a record that some factors listed in ORS 20.075 will not or even could not possibly apply. He noted that appellate cases on attorney fees frequently find fault with a trial court decision that does not explain how the judge came up with the decision on fees.

Judge Leith wondered whether the language, "the court must consider any factors in ORS 20.075 and the following additional factors," would work better, because the existing proposed language is cumbersome. Mr. Eiva agreed. Judge Norby agreed that this language would be better and wondered how much trouble it would it cause to make this change at this juncture. Ms. Gates explained that the Council can make small changes now, especially ones that are not controversial. She allowed that the Council could even have small controversies now, as long as they are resolved in this meeting. Judge Norby stated that the change does not seem substantive and that the language is more concise.

Mr. Goehler clarified that the request was to change the existing proposed language:

> 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:

to read

> In determining whether to deny or to award in whole or in part a requested amount of attorney fees, the court must consider ORS 20.075 and the following additional factors:

Judge Norby agreed that this was the proposal. Judge Leith asked whether ORS 20.075 contains any language besides the factors that would be inadvertently incorporated by making this change. Mr. Eiva stated that ORS 20.075 has a standard of review in subsection three, but that it would not apply here because the ORCP are rules for the trial courts. He observed that the fact that the proposed language states "additional factors" at the end refers back to indicate that we were really pointing out the ORS 20.075 factors. He also noted that he does not believe that the Council can create a standard for review because *State v. Vanornum* [354 Or. 614, 630, 317 P.3d 889 (2013)] rejected the notion that preservation cannot happen unless it done a certain way under the ORCP. He stated that he believes that the proposed change would not cause too much confusion, but that the citation could be changed to just refer to the sections of the statute that contain factors, rather than the entire statute. Ms. Gates stated that she did not believe that citing the entire statute was confusing, as it is pretty clear to what the Council is referring and why. Judge Leith agreed.

Judge Bailey asked whether the intention was to ensure that the court has to consider the entire statute, ORS 20.075, or just the factors within ORS 20.075, because those are different things. If the intent is to require the court to apply all of ORS 20.075, the wording that the court must consider ORS 20.075 and the following additional factors is correct. If the intent is for the court to consider the factors within ORS 20.075 and the additional following factors, then that change would be different. He stated that he is trying to determine whether the idea is wanting the court to apply all of ORS 20.075 and those additional factors, or just to consider the factors within ORS 20.075 and those additional Rule 31 factors specified in the amendment. Mr. Bundy stated that the amendment talks about factors and so, regardless of whether the rule refers to all of ORS 20.075 or just the factors recited therein, it does not matter, because the statute says what it says. From his standpoint, since the rule is just talking about factors, it makes sense to just say factors.

Mr. Eiva stated that it is important to be careful with ORS 20.075. The statute is applied regularly in attorney fee cases, but the actual text is very clear that it actually only applies to attorney fees authorized by statute, not by other means. So what the Council is doing by including ORS 20.075 in the amendment is making it so that ORS 20.075's factors are applied whether or not the attorney fees in an interpleader case are authorized by statute or not.

Judge Norby stated that ORS 20.075 contains only two sections that are not related to factors. Section three relates to appeals and section four talks about not authorizing fees in excess of reasonable fees. So, in effect, the entire statute is made up of factors. Judge Bailey stated that the new wording before the Council means that the court has to apply the entirety of ORS 20.075, including those one or two lines that are not just the factors. He suggested that, if it is just the factors that the Council wants the court to consider, the rule should read that the court must consider any factors in ORS 20.075 and the following additional factors. Judge Norby pointed out that, by just saying "the factors in ORS 20.075," section four would be missed, and she believes that judges absolutely must consider the reasonableness of attorney fees when awarding them under ORCP 31. She also noted that she was not sure that incorporating section three has any deleterious effect since it only

applies when there is an appeal. Judge Bailey noted that he was not taking a position either way; he was merely pointing out that the language change does substantively change what is in the current draft amendment.

Ms. Gates stated that she prefers the new proposed language to just cite the entire statute. She agreed that section four is somewhat of a factor to make sure that the court does not approve a fee that is in excess of a reasonable attorney fee, and that section three is not relevant to the trial courts and is not confusing.

Judge Leith made a motion to approve the change to the existing proposed language. Judge Norby seconded the motion, which passed unanimously by voice vote.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 31

Mr. Andersen made a motion to publish the draft amendment of ORCP 31 with the changes noted above. Ms. Gates seconded the motion, which passed unanimously with 21 votes in favor and no abstentions.

5. ORCP 55 (Mr. O'Donnell)

Mr. O'Donnell explained that the proposed draft amendment before the Council (Appendix C) contains two primary changes. The first change is the addition of new language in section A to give direction about a process for objecting to a subpoena to appear in person. This was a suggestion made by Judge Marilyn Litzenberger, who had concerns about witnesses, particularly unrepresented witnesses, not understanding what their rights are. The draft amendment specifies a process to contest a subpoena to appear in person seven days after service of the subpoena or no less than one judicial day prior to the scheduled testimony. The change provides some clarity and gives people some idea what their options are if they receive a subpoena, especially very close to trial or during trial. The other addition was suggested by Judge Peterson and can be found in subsection B(5). He noted that Washington has a court rule under which parties can be called to appear, but Oregon does not. This change is a way to avoid the necessity of subpoenaing a party and, rather, having a party appear through a more streamlined approach. Judge Norby noted another change, new subparagraph A(1)(a)(v), which requires the addition of language to every subpoena that alerts the person to whom the subpoena is directed about their entitlement to fees and mileage and their option to object and move to quash or modify.

Ms. Payne observed that the change to the timing of objecting to the subpoena to from 14 to seven days after service of the subpoena appears to apply to any subpoena to appear and testify, not just to trial subpoenas. She expressed concern that the language may be broader than the Council had intended. Mr. O'Donnell agreed that the discussion that the committee and Council had primarily focused on trial subpoenas. He pointed out that the challenge is that there is no real delineation in the current form of the rule. Ms. Payne agreed that it does not appear that there is a delineation. She stated that her concern is that Oregon is a state that has, along with other states, adopted certain procedures for subpoenas to testify in depositions. She wondered whether, by changing the timing for all

subpoenas, Oregon would no longer be complying with the adopted state-by-state procedure. She stated that she could not recall having this conversation during prior Council meetings, and wanted to be sure that this change did not have unintended consequences.

Mr. Crowley agreed with Ms. Payne. He stated that he had attempted to raise this point previously, but perhaps he did not articulate it clearly. He stated that he does defend a lot of deposition subpoenas in his role with the State, and sometimes they are not even received seven days beforehand. He believes that the new language is unworkable. He stated that he would have no problem to amending the language to read, "not later than 14 days after service."

Judge Norby pointed out that, so far, there has not been any delineation within Rule 55 that makes deposition subpoenas different in any other way from all other subpoenas. She stated that it would be unique to try to carve something out that makes a provision only inapplicable to deposition subpoenas. She agreed that, as written, it is meant to apply to all subpoenas, but that is because there is no carve-out so far for deposition subpoenas anywhere in the ORCP 55 world.

Ms. Payne opined that changing the seven days back to 14 days would solve the problem of making sure that any objection received for a trial subpoena would be received at least one day prior to the date specified in the subpoena for trial. Mr. O'Donnell agreed, and stated that it was not the intent to change things for deposition subpoenas, just trial subpoenas.

Judge Leith asked whether the intent is to give the court no discretion to enlarge these timelines after they have been missed in a particular circumstance. Mr. O'Donnell stated there may be a mechanism by which the 14 days could be extended, but that he does not believe that the rule currently has that mechanism. So he does not believe that using 14 days here would change anything that does not already exist.

Mr. Andersen stated that his recollection is that the reason for seven days in the current draft amendment is that, if it is getting close to trial and an attorney issues a subpoena, there may not be 14 days from the date of service until trial. Ms. Payne stated that this is where the language about "no less than one judicial day" comes in, because it would be 14 days, or no less than one judicial day prior. She stated that she believes that the last part of the sentence would also need to be changed to clarify that it applies to trial subpoenas only, because as written it would also apply to deposition subpoenas. Mr. O'Donnell asked what the problem would be if that language were to stay as it is. Ms. Payne stated that, if someone were served with a deposition subpoena less than 14 days prior to the date to appear, it would not be reasonable. Mr. Andersen stated that the "one judicial day prior" specified in the subpoena to appear and testify would trump any other calculation of dates. Mr. Eiva suggested language such as, "if the date to appear is less than 14 days, as soon as possible, but less than one judicial day prior to the date specified." Judge Norby pointed out that the language says "in any case." She asked whether that is not clear enough.

Ms. Payne stated that trial subpoenas are just different, and she does not want the rules to

give parties the idea that they should be sending deposition subpoenas out three days before a deposition. She stated that she believes that, by not clarifying that "by one judicial day prior" applies to trial subpoenas, it would seem that the Council is saying that it is acceptable to send out deposition subpoenas just three days prior to the scheduled deposition because the recipient may object one day before the date specified in the subpoena.

Mr. Eiva noted that the point of the amendment was to make sure that witnesses who did not have counsel had some understanding of their rights to object, not to create any barrier to a timeline that was forced upon the person serving the subpoena. He stated that subpoenas get sometimes served in open court during trial for testimony that day or the next day. He explained that the nervousness that he and Ms. Payne are feeling is that the rule might inadvertently become a source of power with regard to getting people hauled into places on a rapid schedule.

Mr. Andersen stated that the wording as it is now, whether it's seven or 14 days, would appear to eliminate any possibility of a subpoena being issued during a trial itself, which is rare, but it does happen. He agreed that perhaps a different rule for trial subpoenas and deposition subpoenas is needed. Judge Norby explained that the new language is not about when subpoenas are issued but, rather, just explains how to object to them. She stated that the assumption that people would be extrapolating that the rules about objection somehow condone or refute their notion about when they want to issue subpoenas seems a bit tenuous to her. People are not likely to extrapolate backward to decide how and when they will issue subpoenas. The rule means what it says in its plain language.

Mr. O'Donnell noted that there is no substantive change to the current language in paragraph A(7)(a) except that an objection must be served not less than one judicial day prior to the date specified for the appearance. If you are in open court and you want to subpoena someone that day, you could get a judge to order it that day and waive the one judicial day or say that the subpoena is inappropriate or unnecessary.

Judge Norby reminded the Council that she was on the committee last biennium that did the reorganization of Rule 55. To bring this all back to that point, that rewrite did not change anything but, rather, was just to help the bench and bar understand what was already there, because it was so confusing. The Council's plan was, in subsequent biennia, to try to make incremental moves toward a better rule as issues are brought to its attention. The Council had learned during the rewrite that there was a gap in paragraph A(7)(a) that should be filled – the gap that does tend to come up at trial. The current discussion is potentially a bigger change. She stated that she is not sure that the Council should wait until big changes are suggested; if a rule is incomplete, the Council may want to do make an improvement now. Since yet a new problem has arisen from this new clarity, the Council can reconstitute a Rule 55 committee next biennium to address whether there needs to be a carve out for deposition subpoenas on this point and also maybe on some other points as well. Judge Norby stated that the Council has two options: 1) not publish the changes before it now at all and just keep going and try to refine those changes next time; or 2) publish the changes before it now, and keep going and try to get the rule better

next time.

Judge Peterson stated that the Council had a long discussion regarding this issue at a prior meeting. He reiterated that the intent of the rule amendment was to let people who are innocent bystanders and who get served with subpoenas have some direction to go. He also recollected asking Council members at the last meeting to let the whole Council know of any thoughts or concerns about the draft rules prior to the publication meeting so that changes are not being made on the fly in September or really good changes to a rule are not put off for another two years.

Ms. Payne stated that she did recall some discussion about the issue, but simply because it was discussed before does not mean that she wants to put out a poorly written rule or one with unintended impacts. She stated that her understanding is that the intent is to fix an issue with trial subpoenas only; however, the way the change is written, it would impact all subpoenas. She stated that, unless that can be fixed today, she does not want to move forward with publishing the draft amendments. She stated that she would rather send the rule back to have trial and deposition subpoenas delineated in the rule, unless there is an easy fix today.

Mr. Eiva made a suggestion to amend the language in paragraph A(7)(a). After further wordsmithing by Judge Norby, Ms. Payne, and other Council members to address Ms. Payne's concerns regarding inviting practitioners to serve deposition subpoenas less than 14 days before the deposition, the Council arrived at the following language:

A written objection to a subpoena to appear and testify must be served on the party who issued the subpoena and on the clerk of the court in which the subpoena originated not later than 14 days after service of the subpoena, or prior to the time specified in the subpoena to appear and testify, whichever comes first.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 55

Mr. Andersen moved to amend the draft version of Rule 55 before the Council with the language the Council agreed on above, and to publish that amended rule. Judge Roberts seconded the motion. The motion passed with 15 votes in favor, five opposed, and no abstentions.

IV. New Business

A. New Suggestions for Amendment of Rule 55

Ms. Gates explained that attorney Brooks Cooper, who was a previous Council chair, had suggested an amendment to Rule 55 (Appendix D) to explicitly require lawyers to share subpoenaed materials, instead of requiring the other parties to formally request them. This suggestion will be forwarded to the agenda of the first Council meeting of the next biennium.

B. Request for Workgroup Regarding Rule 68 (Judge Peterson)

Judge Peterson stated that Ms. Payne had forwarded him an e-mail from attorney Joshua Lay-Perez (Appendix D), who is a member of the OSB's Practice and Procedure Committee. He suggested a modification to the way attorney fees are considered in Oregon. Judge Peterson corresponded with Mr. Lay-Perez and noted that the ORCP are the province of the Council and, if there is interest, the Practice and Procedure Committee could be invited to join a workgroup next biennium to work on the issue. The issue will be placed on the agenda of the first Council meeting of the next biennium.

Judge Peterson noted that each Council is a new body, because members leave and new members join, but the new Council may consider whether it would like to form committees regarding both of these issues.

V. Adjournment

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, June 13, 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:

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Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Travis Eiva
Meredith Holley
Margurite Weeks

Council Staff (In Person):

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

ORCP/Topics Discussed this Meeting	Committees Formed this Biennium	ORCP/Topics Discussed & Not Acted on this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7 ORCP 21 ORCP 23 ORCP 23/34	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		ORCP 7

I. Call to Order

Ms. Gates called the meeting to order at 9:33 a.m.

II. Administrative Matters

A. Approval of May 9, 2020, Minutes

Ms. Gates asked if any Council members had suggestions for corrections or changes to the draft May 9, 2020, minutes (Appendix A). Hearing none, she asked for a motion to approve the minutes. Judge Norby made a motion to approve the draft minutes. Mr. Crowley seconded the motion, which was approved with no objections.

III. Old Business

A. Committee Reports

1. ORCP 21/23

Ms. Gates stated that the ORCP 21/23 committee had circulated a memorandum (Appendix B) to the Council. The memorandum was drafted by the committee after the reconstituted or refreshed membership met again last month to talk about the comments the committee received from the full Council at the May meeting and how the previously suggested amendment language might be changed to address those comments. The memorandum contained new language recommended as an amendment to ORCP 21 E. Ms. Gates stated that the change uses the same formulation as is used for a motion to strike. She asked for Council members' reactions.

Judge Roberts stated that the Council talked at great length at the last meeting, and it does not seem to her that the committee's change makes any difference. It simply includes a kind of hedge word that basically says that there is no right to respond to a new pleading unless the court somehow wants you to respond or finds that you are responding appropriately, which does not meet any issue. Judge Roberts pointed out that the only issue that was raised about the existing rule was a concern when overly expansive responses to amendments are made just prior to trial. She noted that there is nothing in the proposed amendment that is confined to last-minute changes, and that the amendment is far more expansive than any problem that was raised with the Council. She pointed out that the draft amendment suggests that, at any point in the litigation, even if there is a year until trial, the defendant can be denied the opportunity to raise any defense that they have, in the completely unfettered, as far as the rule goes, discretion of the

court. Judge Roberts emphasized that this is not a problem that has ever been raised with the Council before, and that nothing suggests that the current rule is inadequate. She stated that the only issue that the person who made the suggestion was concerned about were those changes that are made just before trial. She opposed the draft amendment proposed by the committee.

Mr. Andersen respectfully disagreed with Judge Roberts. He stated that he believes that the "when justice so requires" language in the proposed subsection E(3) addresses the last-minute changes, even though the words "last minute" are not used. He opined that, if there is an amended pleading filed at the beginning of litigation, there is no reason that justice would require not allowing that amendment. However, if the amendment is sought just before trial and introduces a new matter, justice requires that not it be allowed. Mr. Andersen stated that he believes that the amendment is needed and that the language is as perfect as the Council can get it.

Judge Norby stated that she was more inclined to be in favor of this amendment after reviewing the case law on the "justice so requires" language. Her only remaining hesitation is that she is not certain that the phrase itself suggests that one should go looking for case law to interpret it. Rather, it feels like a phrase that invites action. She observed that trial judges are the ones who will be using it, and trial judges are usually making decisions on the fly. She expressed concern that, if there is not something that hints at the fact that there is an explanation that is found in the case law, judges may not go looking for it. She stated that this would be a shame, because that would leave it closer to what Judge Roberts is talking about. However, having looked at the case law, and thinking about parity, she is now in favor of the proposed amendment.

Judge Roberts noted that the proposed amendment is not parallel to the provisions for amending a pleading, which specifically state that amendments will be freely granted. She stated that the proposed amendment treats defendants as more confined than plaintiffs, as plaintiffs can presumptively make late changes but, apparently, defendants are more confined.

Mr. Andersen stated that there were both plaintiff and defense attorneys on the committee, and both agreed that the proposed amendment was evenhanded. Ms. Gates asked Judge Roberts whether her concern would be alleviated if the proposed amendment could somehow incorporate the case law that all Council members think is invoked by using the phrase "as justice so requires"? She wondered whether providing specific parameters would be helpful, because she shares the concern that it is not totally obvious that this is what is being invoked. Judge Roberts stated that would certainly help. She noted that it is her hope that

this proposed amendment would be rarely used and only in circumstances where there is a clear abuse. She opined that amendments should be granted freely up until very shortly before trial for both plaintiffs and defendants.

Ms. Payne stated that the committee's, and the Council's, intent is clearly to incorporate the standards in Rule 23 and not to make them more narrow. The goal is to make things evenhanded, not to make it harder for defendants to amend than it is for plaintiffs. She stated that anything the Council can do to show this intent, whether it is a staff comment, or to say "as provided in Rule 23 A," at the end of the sentence, the Council should do it. It must be made clear to practitioners and to judges that the Council is trying to incorporate the "when justice so requires" standard from Rule 23.

Judge Leith agreed and pointed out that the reason that the "leave shall be freely given" language was not also borrowed from Rule 23 A is that the committee did not want to require the defendant to have to seek leave to respond to an amended pleading. In other words, there was not going to be a reason to have any leave of the court be granted or denied. Instead, it is a plaintiff's motion that would seek to challenge an amendment as being not permitted under the "as justice so requires" standard. He stated that he understands Judge Roberts' concern and, if there is a way to use the "leave shall be freely given" type of language without suggesting that a defendant needs to seek leave, he would support that. He observed that the idea is to borrow the entire standard from Rule 23 A, not just part of it.

Mr. O'Donnell agreed with Judge Roberts that there has not been a showing that this change is needed, and stated that amending a rule based on aspirational information or anecdotal information seems unnecessary. He observed that there could be unintended consequences if someone like Judge Roberts has concerns about how it will be interpreted. He stated that he believes that the defense bar has a concern generally that other judges may not understand or agree with what the committee thinks is a proper interpretation. He stated that he does not support the draft amendment.

Ms. Stupasky stated that she feels that the draft amendment would even the playing field a little bit. Plaintiffs actually have to move to amend and, in this case, all defendants have to do is file a responsive pleading. They can file whatever answer they want to file and add new allegations that have nothing to do with the new issues brought up in the plaintiff's amended pleading. Further, defendants can add these new issues right before trial if they want to, and then it becomes the plaintiff's burden to move to strike. So the onus is still on the plaintiff to do something. While this may not seem to be a problem, in practice, it is a problem.

Ms. Stupasky noted that this is something that is unfair that the Council can make fair, and she stated that she does not understand why it is so difficult to interpret what "when justice so requires" means. She observed that trial judges make those kinds of rulings all of the time. To her, that seems like a really fair standard. She stated that she supports the draft amendment.

Judge Roberts pointed out that defendants must move to amend unless there has been an amended or a new pleading first put in by the plaintiff. She stated that she has yet to hear an explanation of why this is an issue at any time except in the circumstance when trial is pending. She asked whether there is any other circumstance where a defendant should be prohibited from filing a new pleading to raise any issue that they have. Ms. Stupasky stated that, if the issue would be prejudicial to the plaintiff, it should be prohibited. Judge Roberts asked for an example. Ms. Stupasky gave the example of a plaintiff, during trial, changing the amount of the medical bills, which happens all of the time. Judge Roberts noted that she had stated that this does not seem to be an issue other than immediately before trial. She again asked for an example of circumstances under which a defendant should be prohibited from raising a new issue, for example, six months before trial.

Judge Norby explained that the draft amendment is not written as a prohibition but, rather, is written in a way that allows and instructs a judge, under the case law, to consider whether an amendment would be prejudicial and under what circumstances it would qualify as prejudicial. She stated that she understands that Judge Roberts feels strongly about it, but emphasized that the word "prohibition" is inappropriate for the context.

Ms. Gates addressed Judge Roberts' question about whether this would ever apply in any situation other than right before trial. She stated that she believes that the draft amendment is intended to address that specific situation; however, she could imagine availing herself of such a rule in a discovery-intensive case where discovery had concluded, the parties were on the cusp of motions for summary judgment, the plaintiff had made an amendment to make a very modest change, and the defense at that point introduced brand new defenses that would require more or different discovery than had already been taken. She stated that, if the parties raise the standards that are used in Rule 23, she believes it would give the court enough discretion to decide whether to reopen discovery and just push the litigation calendar back or to agree with the plaintiff and move the case forward because the defense could have raised the defenses earlier.

Judge Leith agreed and stated that he believes that the cases show that it is usually later in the process that a proposed pleading gets limited under the "as

justice so requires" language. If it is early in the case, it is unlikely that anyone is going to be prejudiced by changing the pleadings. He stated that it is generally going to be late, but it does not necessarily have to be on the exact eve of trial. For example, if trial is two or three weeks out and everybody thinks that discovery is done, and then all of a sudden there is a new pleading, that is still clearly within the scope of the proposed rule. He stated that the committee tried to consider ways to limit the proposal in terms of timing and lateness and it just turned out to be a Pandora's box that they were opening. In the final analysis, just adopting the "as justice so requires" standard seemed to properly apply the concerns about timeliness that the committee had been trying reinvent the wheel about, so that is how the committee ended up coming back around to simply adopting the existing standard that is covered so well in the case law. He pointed out that this standard is also covered well in law school, and every every first year civil procedure student knows that leave to amend the pleadings shall be freely granted as justice requires.

Mr. Andersen explained that he believes that the draft amendment is appropriate. A rule change is needed because, as it stands right now, a plaintiff could amend to move the amount of medical bills slightly upward based on the latest medical treatment, and the defense could respond with a new and amended answer that raises an entirely new issue. Under the current rule, a judge would only be able to say that it is a defendant's right to do so and that there is no rule that allows the judge to prevent it; the plaintiff took their chances when filing the amended pleading. The proposed rule change would allow the defendant's response to an amended pleading to be stricken when justice so requires, which is a standard that is as close as the Council can get to allowing the judge the freedom to do what is just under the circumstances. He stated that he agrees that, most of the time, the issue will come up right before trial, but there needs to be a fix for that circumstance. This proposed rule amendment would clarify what a judge can do, and he thinks it is needed.

Ms. Gates emphasized that she did not hear anyone on the committee state that this proposed amendment would create a new right or a new ability that was not already there.

Mr. Crowley believed that the right to raise a challenge like this already exists. However, he thinks that the language of the proposed amendment lacks clarity, and that is a problem that could cause unintended consequences. He stated that plaintiffs can already challenge late pleadings and they do not need this amendment to do so. He noted that he does not think there is anything wrong with challenging late pleadings, but that he worries about unintended consequences that could occur if this amendment were to be implemented.

Mr. Andersen asked Mr. Crowley what rule a party would cite to challenge a late amendment. Mr. Crowley stated that they could cite the inherent discretion of the court to control trial proceedings, as well as case law, like the Council has been discussing. Mr. Andersen wondered, instead of having to go to case law or fumble around through all of the ORCP, what is the harm in having language in Rule 21 that identifies that the judge has this authority when justice so requires. Mr. Crowley stated that, because parties already have the ability to make that challenge, he does not believe that a rule change needs to be created, especially one that parties may interpret to mean something broader than what already exists. Mr. Andersen asked for an example of a broader interpretation. Mr. Crowley stated that he could see parties challenging amended pleadings earlier in the litigation. He stated that the draft amendment seems like it just invites more dispute.

Mr. O'Donnell noted that, if practitioners think that this practice already is available and exists, some could infer that such a rule change is adding something more and that, even the language "as justice so requires," may have a different meaning in this context. He pointed out that some people may not be reading the Council's minutes or staff commentary and might assume that the change gives them more authority to deal with a problem that never really existed in the first place. He stated that this is the potential unintended consequence of the draft amendment.

Judge Norby opined that, when we think like that, we are thinking like members of the Council. She pointed out that, before she was a Council member, she did not know the ORCP as well as she does now. She did not read them regularly and analyze them to try to figure out what was new and what was old; she only referred to them when she wanted to find law. She looked for a rule that related to the law and did not question whether it was a new provision that was just adopted. She would find the language and use it. She stated that the only person she knows who would think about what the rule used to look like is Judge Peterson, or perhaps some longstanding members of the Council. In her opinion, a majority of practitioners and lawyers, although they use the rules every day, would not necessarily notice a new provision but, rather, would just use it.

Ms. Gates stated that she feels that the draft amendment would actually narrow whatever previously unwritten understandings existed, because it puts constraints on the discretion of the court per the case law that exists under interpretations of "when justice so requires." She stated that those standards actually provide guardrails that were not in place before. Judge Roberts disagreed. She stated that the law is that, any time a court has discretion, the judge can only use that discretion as justice requires. They cannot use it whimsically, in a way that is

unjust; that is to say, "as justice so requires," actually adds nothing to the exercise of discretion. She stated that it seems to her that, if this standard is adequate, those who agree should be advocating for replacing all of the Oregon Rules of Civil Procedure with a simple rule that says that the court should act as the court feels is just. That one rule would then serve for all purposes.

Ms. Payne disagreed strongly with the idea that adding "when justice so requires" adds nothing. She noted that the case law states that "when justice so requires" under Rule 23 is a legal standard with four specific factors tied to it. It is not "as justice so requires" in a very vague, undefined way where a court just exercises its subjective discretion. As Judge Rick Hazleton stated in *Ramsey v. Thompson*, 162 Or App 139, 147, 986 P3d 139 (1999), *rev den*, 329 Or 589 (2000), the phrase very much limits the court's discretion, and courts are reversed regularly for denying amendments under Rule 23. Ms. Payne stated that she disagrees with the idea that this proposed amendment would permit courts to deny amendments six months before trial, because she believes that amendments must be granted freely and, unless there is a timeliness issue or the plaintiffs can show undue prejudice, an amendment should not be denied. She noted that the draft amendment would provide very limited discretion.

Judge Roberts pointed out that the language in Rule 23 A is different than the language proposed in the draft amendment, because the language in Rule 23 A states affirmatively that amendments shall be granted freely as justice requires She noted that the language "shall be granted freely" puts a thumb on the scales and indicates that proposed amendments should be granted, which is not present in the language of the draft amendment. Judge Leith pointed out again that there is no requirement for the responding party to seek leave, and this is why the committee did not include the language about leave being freely given. He stated that, to him, the question is not whether the court *should* have the authority to disallow an amendment that raises new issues at an inappropriate time. He noted that the committee was unanimous that the court should have that authority. There was some disagreement about whether the court already does. But everyone agreed that the rules should provide a tool for the court to address this problem. He noted that Judge Roberts seems to have taken the position that the court does not yet have this authority. He asked whether Judge Roberts disagrees that the court *should* have this authority, or whether there is language she would propose to accomplish it.

Judge Roberts observed that the committee always talks about untimely amendments in relation to a trial, but that language is not part of the proposed rule. If the amendment were limited to the only problem that anyone ever raised, which is to say, an unexpected response to an amendment that is untimely in

relation to the progress of the case, that would be a completely different situation. She stated that she agrees that this is something that the Council should do. However, to say broadly that, at any time in the case, for any reason that tickles the fancy of the judge, a defendant can be blocked from raising a defense to an amended pleading strikes her as being entirely inappropriate. Judge Leith stated that he trusts judges not to rule based on whimsy and fancy. He stated that he believes that the "as justice so requires" standard is a standard that has been fleshed out extensively in case law and has parameters and is real. Judge Roberts wondered how there could be case law for a rule that does not exist. Judge Norby pointed out that *Ramsey v. Thompson* arose under Rule 23 A, but it applies to that phrase that is being taken from Rule 23 A. Judge Roberts suggested that the whole phrase be used.

Ms. Gates asked whether any Council member believes that the draft amendment presented by the Council is not ready to be voted on. Judge Roberts stated that she would prefer to amend subsection E(3) of the proposed draft before the vote takes place. Ms. Payne explained that the committee carefully considered the "untimely" language and rejected it in favor of the "as justice so requires" language because the latter incorporates the timeliness factor under the *Ramsay* standard and a prejudice factor as well as the nature and merits of the proposed amendment. She opined that the proposed draft already incorporates the timeliness standard that Judge Roberts wants. Judge Roberts stated that, if her motion to amend were not to be seconded, there would be no need for further discussion.

Judge Peterson stated that the use of the word "untimely" is unfortunate, and that "adversely affecting the docketing of the case" might be a better choice, since "untimely" could also have an impact under Rule 15 as to whether that the response was filed within Rule 15's time requirements, not just on the eve of trial. He explained that this was one of the reasons that the committee rejected the word "untimely." He agreed that anyone should certainly have the right to make an amendment, but he offered a friendly suggestion that, if Judge Roberts were to offer an amendment to the proposed language, the word "untimely" should not be chosen. Judge Roberts did not object to this suggestion.

Ms. Gates asked for input from defense counsel, because one consideration when the committee rejected a focus on the timeliness language was that defendants could file an amended pleading and a court could do exactly what Judge Peterson suggested and strike it or strike some component of it, taking the stance that the response was late and calling out the timeliness factor alone without consideration of whether there is prejudice to the docket.

Judge Leith asked for clarification about what the suggested amendment is. He wondered whether the language about adversely affecting the docket would be used instead of "as justice so requires," or be added before or after that language. Judge Roberts stated that it could be added just before or just after, but that it would not replace it. Ms. Payne expressed confusion because she stated that "when justice so requires" already includes the timing of the proposed amendment and related docketing concerns. Judge Roberts opined that this is packing a lot into those words, particularly when the rule does not put a thumb on the scale in favor of allowing responsive amendments as it does for the complaint. She noted that the rule makes it clear that, for complaints, denying the ability to amend is unusual, whereas the proposed amendment for responsive pleadings does not. It just says, "Well, whatever." Ms. Payne explained that this is because the defendant does not have to move to amend the complaint. Judge Roberts stated that this does not make any difference at all because, once the issue is raised, the issue has been raised and it should be determined in the same way, one way or the other. She stated that she is just trying to write a rule that alleviates the problem that was proposed to the Council.

Ms. Payne stated that she understood, but that she was frustrated because the committee came together and agreed on language. She stated that she would appreciate just voting on the language that the committee suggested instead of spending time on wordsmithery.

Ms. Gates asked whether there was a second to the motion to amend that was suggested by Judge Roberts and modified by Judge Peterson:

> E(3) any response or part thereof that raises new issues that affect the docketing of the case when justice so requires.

Mr. Andersen asked for clarification as to whether the Council would be voting on whether to accept Judge Roberts' amendment to the committee's proposed rule change. Ms. Gates explained that the Council would first determine whether all members have the same understanding of what that amendment is; once there is a mutual understanding of that language, she will ask if any member will second Judge Roberts' motion to amend.

Judge Peterson stated that the language could be changed to use the word "scheduling" instead of "docketing," but otherwise the language seems to address Judge Roberts' concerns. He stated that what he understood her main concern to be is that judges do not have a tool for these unseemly responses to amendments, so having a tool would be good, but the question is what that tool should look like. He stated that, if there are four factors like the committee

pointed out, judges should not have a problem striking a response to an amendment that does not have any colorable merit. He noted that he thinks it is unfortunate that lawyers must go to the Council minutes and to the staff comments, but the minutes are replete with comments that it is very rare that this is going to be a motion that would be granted other than just before trial, where it would have an adverse impact on the trial scheduling. He noted that there is certainly something to be said about the fact that it could disrupt discovery that has been closed, but it seems that is pushing a larger rock up a steeper hill.

Mr. Young stated that he is opposed to a change in the rule. However, if there are four *Ramsay* factors, why not just incorporate all four factors into a subpart within the rule so that we are not dancing around whether or not people need to look to the case law, the Council minutes, or the staff comments. This would make it plainly evident to anyone who looks at the rule because they want to file such a motion. Ms. Gates stated that she does not have an objection to that, but asked what other Council members think. She stated that it is not something that the Council normally does, but that it is not necessarily a bad idea.

Judge Norby stated that she thinks that perhaps what might be happening is that there were so many people on the reconstituted committee who have already had this discussion that they do not really feel the need to continue discussing it. She noted that the people who have been dominating the discussion are the people who were not at the committee meetings. While those members may be waiting for committee members to speak, the committee members have already talked about all of these issues at some length and are ready to vote

Mr. Andersen agreed. He stated that the committee was composed of members from the plaintiffs' bar, the defense bar, and judges, and the issue has been discussed from many angles. He suggested voting on the committee's draft.

Ms. Gates asked for a second to Judge Roberts' motion to amend the committee's proposed language as suggested by Judge Roberts and as modified by Judge Peterson. No Council member seconded the motion. The motion was tabled.

Ms. Gates moved to approve the original language proposed by the committee for ORCP 21. Mr. Andersen seconded the motion. The motion passed with 12 in favor and 5 opposed, so the language will be placed on the publication agenda for the September meeting.

2. ORCP 57

Justice Nakamoto stated that she was not aware of any progress with the committee. Judge Wolf agreed. Judge Peterson stated that his recollection was that the committee was waiting for the pandemic to settle down before contacting potential members for a work group.

B. Review of Draft Amendments for September Publication Agenda

Ms. Nilsson stated that she had included in the meeting packet the drafts of Rule 15, Rule 27, Rule 31, and Rule 55 (Appendix C) that the Council had previously voted to place on the September agenda to be voted on for publication. She asked that members review them carefully and let her know of any errors or problems. Judge Peterson agreed that any questions or concerns should be shared with both him and Ms. Nilsson before the September meeting, because last-minute wordsmithery in September can lead to unintended consequences.

Ms. Gates re-emphasized the importance of informing Ms. Nilsson and Judge Peterson of any issues with the draft amendments, but also asked that the Council listserv be copied so that the entire Council will be aware of potential issues and be prepared to discuss them at the September meeting.

C. Review of Recommendation to Legislature

1. ORCP 23/34

Judge Peterson discussed the status of the Council's suggestion to the Legislature regarding the problem that now exists with the situation of a defendant who dies without the knowledge of the plaintiff, and when the death is not discovered until after the complaint has been filed. He explained that the Oregon State Bar's Board of Governors has approved including the Council's suggestion to amend ORS 12.190 as a part of its legislative law improvement package. He noted that the most recent issue of the Bar's Public Affairs Committee electronic pamphlet incorrectly stated what the law was and what the suggested amendment was, and stated that he would contact Susan Grabe and attempt to correct it. He stated that he suspects that having the suggestion as a part of the Bar's legislative package will enhance the likelihood that it will be will be enacted.

Ms. Gates asked whether the Council would still send a separate letter to the Legislature, even though the Bar is taking action. Judge Peterson stated that he thought it would be appropriate to mention in the Council's transmittal letter that the proposed amendment to ORS 12.090 was part of the work that the Council

did, but note that the proposal is being put forward by the Oregon State Bar.

IV. New Business

Judge Peterson stated that the Council had received a comment from Zach Holston, a process server, asking about Rule 7 (Appendix D). He stated that the Clackamas County sheriff's office had interpreted that, under Rule 7, serving a Salem-based registered agent for a corporation or equivalent organization located in Clackamas County is alternative service. Mr. Holston objected to the need for a follow-up mailing in such a case and wondered why the Rule is crafted in the way that it is.

Judge Peterson agreed with Clackamas County's interpretation of the rule. He stated that Ms. Nilsson had pulled together a lot of the history of Rule 7 and, the way the rule has been written, service on a clerk in the office of the registered agent is primary service. It is only in the next subparagraph, if the registered agent is not in the county where the case is filed, that you get to the point that service on the registered agent's clerk is an alternative method of service. Judge Peterson stated that he is not sure that there is any real justification, but it seems to be that finding the person in the county in which the action is commenced is part of the issue.
Judge Peterson stated that he had let Mr. Holston know that the Council was at the point in its biennial work schedule where it was not considering any new amendments; however, Rule 7 is almost always a matter that gets looked at by each new Council. He stated that he is not sure whether the rule can be written a little more clearly so that it is clear from the beginning that service on a registered agent in a different county is an alternative method of service as opposed to primary.

Ms. Gates stated that she thought that the complaint was legitimate and that the language seems somewhat outdated or unnecessary. She stated that, if Judge Peterson did not find history that made it clear why the language was included, the issue should probably be added to the agenda for next biennium.

Judge Norby asked whether there was anyone who disagreed that this is a problem that should be fixed. She stated that it appears that it could be a simple fix. However, if there is any disagreement, it should be discussed further. Judge Roberts stated that she feels that the issue should be sent to a committee for further investigation. She noted that, at first look, she did not understand why it is a problem, because one can serve by mailing to the registered agent, which makes it easier to serve.

The Council agreed that the issue should be sent to the agenda for next biennium's Council.

V. Adjournment

Ms. Gates reminded the Council that its next meeting will be on September 12, 2020. She also reiterated the importance of reviewing the rules that will be voted on for publication during that meeting, and alerting Ms. Nilsson, Judge Peterson, and the entire Council to any problems.

Ms. Gates adjourned the meeting at 10:36 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

LC 308
2021 Regular Session
OSB00-006
8/17/20 (MNJ/ps)

D R A F T

SUMMARY

Allows party to amend complaint to substitute personal representative of defendant's estate for deceased defendant in certain circumstances.

A BILL FOR AN ACT

Relating to deceased defendants in civil actions; creating new provisions; and amending ORS 12.190.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 12.190 is amended to read:

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

(2)**(a)** If a person against whom an action may be brought dies before the expiration of the time limited for its commencement, an action may be commenced against the personal representative of the person after the expiration of that time, and within one year after the death of the person.

(b) Notwithstanding paragraph (a) of this subsection, if an action is commenced against a defendant who dies before the expiration of the time limited for commencement of the action or within 60 days after the action is commenced, a party may amend the complaint within 90 days after the action is commenced to substitute the personal representative of the defendant's estate for the deceased defendant. An amendment under this paragraph relates back to the date

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

the complaint was filed.

SECTION 2. The amendments to ORS 12.190 by section 1 of this 2021 Act apply to actions commenced before, on or after the effective date of this 2021 Act.

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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

B Pleading after motion.

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

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

C Responding to amended pleading. A party must respond to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise directs.

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

Council on Court Procedures
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Appendix C-1

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

RULE 21

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

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of judgment.]

A Defenses. 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) How presented.

A(2)(a) Generally. 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. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

A(2)(b) Factual basis. The grounds on which any of the enumerated defenses are based shall be stated specifically and with particularity in the 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.

A(2)(c) Remedies available. 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 a 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*] **claim**, defense, or reply is not apparent. If the motion is granted and the

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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 response to an amended pleading, or part thereof, that raises new issues, when justice so requires.

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.

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G Waiver or preservation of certain defenses.

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

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

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

G(2) A defense that a plaintiff has not the legal capacity to sue, that the party asserting the claim is not the real party in interest, or that the action has not been commenced within the time limited by statute, is waived if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof. Leave of court to amend a pleading to assert the defenses referred to in this subsection shall only be granted [*upon*] **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

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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.

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

RULE 21

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

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of judgment.]

A Defenses. Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim, or third party claim must 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) How presented.

A(2)(a) Generally. 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. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion.

A(2)(b) Factual basis. The grounds on which any of the enumerated defenses are based must be stated specifically and with particularity in the 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 will 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.

A(2)(c) Remedies available. 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 a 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*] **must** 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*] **claim**, defense, or reply is not apparent. If the motion is granted and the

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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 response to an amended pleading, or part thereof, that raises new issues, when justice so requires.

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.*] **circumstances, and cannot 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.

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*] **will** 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*] **will** 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.

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[*MINOR*] UNEMANCIPATED MINORS OR INCAPACITATED PARTIES

RULE 27

A Appearance of parties by guardian or conservator or guardian ad litem. [*When a person who has a conservator of that person's estate or a guardian is a party to any action, the person shall appear by the conservator or guardian as may be appropriate or, if the court so orders, by a guardian ad litem appointed by the court in which the action is brought*.] **In any action, a party who has a guardian or a conservator or who is a person described in section B of this rule shall appear in that action either through their guardian, through their conservator, or through a guardian ad litem (that is, a competent adult who acts in the party's interests in and for the purposes of the action) appointed by the court in which that action is brought.** The appointment of a guardian ad litem shall be pursuant to this rule unless the appointment is made on the court's motion or a statute provides for a procedure that varies from the procedure specified in this rule.

B [*Appointment*] Mandatory appointment of guardian ad litem for unemancipated minors; incapacitated or financially incapable parties. When [*a*] **an unemancipated** minor or a person who is incapacitated or financially incapable, as those terms are defined in ORS 125.005, is a party to an action and does not have a guardian or conservator, the person shall appear by a guardian ad litem appointed by the court in which the action is brought and pursuant to this rule, as follows:

B(1) when the plaintiff or petitioner is a minor:

B(1)(a) if the minor is 14 years of age or older, upon application of the minor; or

B(1)(b) if the minor is under 14 years of age, upon application of a relative or friend of the minor, or other interested person;

B(2) when the defendant or respondent is a minor:

B(2)(a) if the minor is 14 years of age or older, upon application of the minor filed within the period of time specified by these rules or any other rule or statute for appearance and

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answer after service of a summons; or

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

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

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

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

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

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

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

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

E(2)(a) to the person;

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

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

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

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

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

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

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

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

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

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

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

F Contents of notice. The notice shall contain:

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

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

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

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

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

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

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

INTERPLEADER

RULE 31

A Parties. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not **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. The attorney fees awarded shall be assessed against and paid from the funds or property ordered interpled by the*

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court.]

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

SUBPOENA

RULE 55

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

A(1) Form and contents.

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

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

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

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

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

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

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

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

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

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

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A(3) Who may issue.

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

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

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

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

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

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

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

A(5) Proof of service. Proving service of a subpoena is done in the same way as provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify

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requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

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

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

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

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

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

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

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provided] as follows.

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

A(7)(a) Written objection to subpoena to appear; timing. A written objection to a subpoena to appear and testify must be served on the party who issued the subpoena and on the clerk of the court in which the subpoena originated, not later than 7 days after service of the subpoena and, in any case, no less than 1 judicial day prior to the date specified in the subpoena to appear and testify.

A(7)(b) Written objection to subpoena for production; timing. A written objection to a subpoena that commands a person to produce and permit inspection and copying of documents or things, including records of confidential health information as defined in subsection D(1) of this rule, must be served on the party who issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

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

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

[*A(7)(b)*] A(7)(c) Motion to quash or to modify. A motion to quash or to modify [*the command for production*] **a subpoena** must be served and filed with the court no later than **1 judicial day prior to the date specified to appear and testify, or** the deadline set for production. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of

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appearance or production.

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

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

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

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

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

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

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

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

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

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witness expressly declines payment, whether personal attendance is required or not.

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

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

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

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

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

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

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

B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a peace

officer in a professional capacity may be served by substitute service of a copy, along with **fees for** one day's attendance [*fee*] and mileage as allowed by law, on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge at least 10 days before the date the peace officer is required to attend, provided that the peace officer is currently employed by the law enforcement agency and is present in this state at the time the agency is served.

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

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

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

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

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

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

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

deposition at, or by remote location testimony from, the place of confinement; and

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

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

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

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

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

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

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

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

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

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

D(1) Application of this section; "confidential health information" defined. This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

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

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

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

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

D(4) Conditions on service of subpoena.

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

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

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

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

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

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

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

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

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

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be separately enclosed in a sealed envelope or wrapper on which the name of the court, case

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name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

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

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

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

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

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

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

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

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

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D(7) Inspection of CHI delivered to court or other proceeding. After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the CHI may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise the copy must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The CHI must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. CHI that is not introduced in evidence or required as part of the record must be returned to the custodian who produced it.

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

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

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

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

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

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

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

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

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

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

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

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

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

Shari Nilsson <nilsson@lclark.edu>

New submission from Contact Form - Brooks Cooper

1 message

COCP Website Form <info@councilonCourtProcedures.org> Mon, Jul 27, 2020 at 4:25 PM
Reply-To: Brooks@draneaslaw.com
To: nilsson@lclark.edu

Name

Brooks Cooper

Email

Brooks@draneaslaw.com

Phone

(503) 496-5511

Subject

ORCP 55

Message

I recommend you consider adding language to ORCP 55C that mirrors ORCP 55D(6)(b). I have had multiple lawyers issue subpoenas, (after proper notice to me), receive documents and not share them unless I tell them I want them. I have had at least one refuse to do so unless I prepared and issued an RFP pursuant to ORCP 43. I think that is extra work that counsel should not have to do.

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Shari Nilsson <nilsson@lclark.edu>

Re: Council on Court Procedures

1 message

Mark Peterson <mpeterso@lclark.edu> Mon, Jul 20, 2020 at 11:11 AM
To: Shari Nilsson <nilsson@lclark.edu>
Cc: Shenoa Payne <spayne@paynelawpdx.com>, Joshua Lay-Perez <joshua@hlplawpc.com>, Jennifer Gates <jgates@pearllegalgroup.com>

Joshua and all,

Thank you for your suggestion regarding reducing contested ORCP 68 fee disputes. I have not served on the Practice and Procedure Committee and I hope that I do not come off as too territorial. I think that changes to the ORCP should come from the Council. The makeup of the Council, judges and lawyers selected from the plaintiffs' and defense bars, and the continuity of a staff that endeavors to make the rules consistent from rule to rule are, I think, superior to having amendments coming from several sources.

That said, the Council receives, and seeks, suggestions for improvements to the rules from the bench and bar and is happy to gain insight and involvement from sources outside of theCouncil. The ORCP are amended on a biennial schedule and the changes for this biennium are at the final stage prior to publication. Therefore, new proposed amendments will be on the agenda for the initial meeting of the next biennium's Council, i.e., September of 2020. Your suggestion will be on the agenda and someone from the Council will reach out to you, as the person who suggested the change, at that time. In the past, the Council has worked with teh UTCR Committee and the Oregon Law Commission and, if the Practice and Procedure Committee has interest, a work group could be formed to gain input from the Committee.

Mark
Executive Director
Council on Court Procedures
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On Tue, Jul 14, 2020 at 9:47 PM Shari Nilsson <nilsson@lclark.edu> wrote:

> Hi Joshua,
>
> I apologize for the delay in getting back to you. You'd think that with so many of us working from home, we would have more time, but I'm finding that the opposite is true. And I don't even have small children to worry about any more!
>
> I'm copying Mark Peterson, our Executive Director, who has been with the Council a bit longer than I have and I believe has been involved in an instance where the Council and the Practice and Procedure Committee worked cooperatively. He is unfortunately not available this week, but I'm sure he'll get in touch next week with some insights.
>
> Best regards,
> Shari
>
> _____
> Shari C. Nilsson
> Executive Assistant
> Council on Court Procedures
> nilsson@lclark.edu

councilоncourtprocedures.org

On Fri, Jun 26, 2020, 11:15 Shenoa Payne <spayne@paynelawpdx.com> wrote:

This does seem like something the COCP should be involved in, as it proposes an amendment to the ORCPs. Unfortunately we just finished proposing amendments for this Biennium and won't consider potential amendments again until September 2021.

I'm copying Shari Nilsson, administrative staff for the COCP, who keeps track of potential future amendments. I'm also copying the current chair of the COCP, Jennifer Gates. They might have a better idea of how to move forward with something like this when the Practice and Procedure committee is proposing a change to the ORCPs. I don't know if the COCP usually gets involved in that, gives input, or if we just let the Practice and Procedure committee make the proposed rule change without our input.

As part of my firm's effort to help slow the spread of the Covid-19 virus, my firm is operating remotely. I am requesting that all written materials be sent to my firm electronically, rather than through physical mail or deliveries, and I consent to service of all documents pursuant to ORCP 9(G) via email.

Thank you. May you and yours stay healthy and safe.

Shenoa Payne, Attorney
Pronouns (she/her/hers)
Practicing in appellate law, disability rights, employment discrimination, and housing discrimination.

SP SHENOA PAYNE
ATTORNEY AT LAW PC

My office has moved. Please note new contact information:

Powers Building
65 SW Yamhill, Suite 300
Portland, Oregon 97204
Telephone: (503) 914-2500
Email: spayne@paynelawpdx.com
Web: www.paynelawpdx.com

On Tue, Jun 23, 2020 at 3:12 PM Joshua Lay-Perez <joshua@hlplawpc.com> wrote:

Shenoa,

I hope you are well. Thank you for speaking with me before about oral arguments. I think mine went really well, and I appreciate your willingness to help.

I saw your name on the Council on Court Procedures website as a current member, and thought I'd approach you first. I am currently on the Practices and Procedures Committee, and proposed a modification to the way attorney fees are considered in Oregon. My goals involve reducing fee disputes that require conventional judicial intervention, and fairness in fee disputes. I am looking to potentially work with someone from your committee on this issue, or at least to make sure that we aren't overlapping on projects. I'm not sure if you think it's a good idea for two plaintiff's lawyers to team up, or if you recommend working with someone else on the committee.

As part of my research, I came across Local Rule 54.3 from the Northern District of Illinois, which I think would

serve as a good model for a change to our process. The rule mandates a good faith attempt to confer, pre- fee petition, and, if the respondent objects after receiving records from the petitioner, the respondent is required to furnish their time and billing records. It also requires the respondent to specifically identify particular items in dispute. If the parties still have a dispute, then they are required to submit a joint statement. The final fee petition is limited to only the items that still remain in dispute.

Thanks for your time again!

--
Thank you,

Joshua B. Lay-Perez
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