MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 12, 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 15	ORCP 7
ORCP 21	ORCP 7	ORCP 1	ORCP 43	ORCP 21	ORCP 55
ORCP 27	ORCP 15	ORCP 4	ORCP 44	ORCP 27	ORCP 57
ORCP 31	ORCP 21/23	ORCP 7	ORCP 45	ORCP 31	ORCP 68
ORCP 55	ORCP 23/34C	ORCP 9	ORCP 46	ORCP 55	
ORCP 57	ORCP 27/GAL	ORCP 10	ORCP 47		
	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 9:30 a.m.

II. Administrative Matters

A. Approval of September 26, 2020, Minutes

Judge Peterson pointed out two errors in the draft September 26, 2020, minutes (Appendix A). The first error was on page two in the first full line of the ORCP 57 committee report: the word "to" was left out. The sentence should read, ". . .the committee planned reach out to stakeholder groups. . . ." The second error was another missing word, "not," on page nine in the next to last line. The sentence should read: ". . . but not less than one judicial day prior to the date specified. . . ."

Justice Nakamoto made a motion to approve the September 26, 2020, minutes as amended. Mr. Crowley seconded the motion, which passed unanimously by voice vote.

B. Election of Legislative Advisory Committee

Judge Peterson reminded the Council that its authorizing statutes require the election of a Legislative Advisory Committee (LAC) each biennium. He explained that the LAC had only been called upon once during his tenure with the Council to advise the Legislature. However, the LAC provides a way for a chair of a legislative committee to ask the Council for its input on either a Council promulgation or on statutory matters before the Legislature that might impact the Oregon Rules of Civil Procedure. The LAC is typically comprised of two judges, two attorneys and the public member. He noted that, if there is a judge in Salem who wants to be on the committee, that judge's location would make it easy for the Council to make an appearance before the Legislature.

1. ACTION ITEM: Nominate and Vote on LAC

Judge Peterson asked for volunteers to be on the LAC. Judge Leith, Judge Wolf, Mr. Crowley, Ms. Holley, and Ms. Weeks agreed to serve on the LAC. The Council approved the LAC by acclamation.

C. Set First Council Meeting for September of 2021

Ms. Gates stated that the next item is to set the first meeting for the 2021-2023 biennium. She noted that the Council has been meeting on the second Saturday and wondered whether that schedule would work for those remaining on the Council. After checking to

ensure that the date did not fall on Yom Kippur, the Council agreed to set the first meeting of the next biennium on September 11, 2021.

III. Old Business

A. ORCP 23/34 Update

Mr. Andersen asked Judge Peterson for a progress report on the suggestion that the Council had sent to the Legislature to fix the problem that occurs when a plaintiff unknowingly files a lawsuit against a defendant who has died. Judge Peterson reported that the proposal submitted to Legislative Counsel had been slightly reworked by that office and became a part of the law reform package that the Oregon State Bar submitted. The proposal has now been moved into a probate reform bill as a friendly addition, and hopefully will have a better chance of being heard by the Legislature as it works under pandemic conditions.

B. Committee Reports

1. ORCP 57

Ms. Holley reported that the committee had made a list of stakeholders and interested groups. She emailed them and asked them to respond in writing within 30 days. She provided them with the Washington rule, Oregon's current rule, and the committee's draft amendment to Rule 57. The responses were provided to the Council via email (Appendix B).

Ms. Holley stated that, among those who had responded, most felt that ORCP 57 D should track with Oregon's discrimination law and not be limited to race and sex. She explained that the ACLU had proposed that ORCP 57 just reference the Oregon public accommodation discrimination law as to protected classes. Ms. Holley noted that the groups have differing opinions on the "objective observer" language. There is also disagreement about whether or not there should be presumptive categories of discrimination included, with some groups feeling strongly that these categories should be included, and others that they should not. She stated that her main takeaway was that the groups feel pretty strongly about the rule. She noted that she heard from the Uniform Criminal Jury Instructions Committee, and that they and the Uniform Civil Jury Instructions Committee have now incorporated unconscious bias language into their recommended amendments to Oregon's jury instructions. Ms. Holley explained that, since there are so many groups working on the issue, she had given an extension for responding until December 10. She told the Council that there is also a group of

Willamette University graduates that is doing a full research project on unconscious bias and jury selection, and this group had asked to be included and to submit its research to the Council.

Ms. Holley stated that she believes that the next step would be for the committee to review all of the responses and information. She expressed concern that the responses the committee has received so far indicate that the groups are recommending changes to ORCP 57 that would be substantive in nature. She stated that it may ultimately be an issue for the Legislature to take up.

Ms. Gates thanked Ms. Holley and the committee for the progress they have made. Judge Peterson observed that it is not necessarily an all or nothing; if the Council crafts a rule change through its careful, deliberative process, but ultimately believes that the changes would be substantive, the Council can send that good idea to the Legislature. He noted that the Council's work might help suggest a better product than what the Legislature might do on its own.

Ms. Holley reiterated that some groups felt strongly that guidance on the presumptive areas of discrimination should be included in Rule 57 and others felt strongly that such guidance should not be there. Judge Peterson noted that such a change would not be included in any draft amendments by the Council; however, if the Council decided to make a suggestion to the Legislature, it could be included. Ms. Holley agreed, and stated that the committee can help identify where there are true points of dispute versus where groups generally agree and eliminate some of that work ahead of time.

Ms. Gates stated that she assumed that the committee would continue its work during the period in which the Council was not meeting. She asked Ms. Holley to send an update to the Council in a couple of months. Ms. Holley agreed.

Mr. Crowley stated that, as this topic has circulated in the bar a bit, there has been a lot of discussion within the Department of Justice and its different divisions. He stated that there is interest in being part of the stakeholder discussion, and asked Ms. Holley to keep him in the loop so that he can provide her with contacts at the Department who are interested. Ms. Holley agreed to add Mr. Crowley to the list of email contacts to keep him updated. Mr. Crowley stated that he would follow up with Ms. Holley after the meeting.

C. Discussion/Voting on Amendments Published September 26, 2020

1. ORCP 15

Ms. Payne stated that there were no comments regarding the published amendment to Rule 15 (Appendix C). She noted that it is a pretty simple amendment and that the goal is to clarify that the court has discretion to enlarge time for filing all types of pleadings and responses and replies to motions. She stated that the amendment gives a nod to practitioners that there may be circumstances where the court does not have discretion to grant an extension if an extension is not permitted as a matter of substantive law.

Ms. Gates asked for a motion to promulgate the Council's published amendment to Rule 15.

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

Mr. Andersen made a motion to promulgate the published amendment to ORCP 15. Justice Nakamoto seconded the motion, which passed unanimously by roll call vote.

2. ORCP 21

Ms. Gates noted that there had been several public comments (Appendix D) regarding the Council's published amendment to Rule 21 (Appendix C), all of which were in support of the change. The amendment authorizes a motion to strike in response to an amended pleading that prejudicially enlarges the issues before the court. She asked if anyone on the Council had any more thoughts on the changes to Rule 21 that they would like to share. Hearing none, she asked for a motion to promulgate the published amendment to Rule 21.

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

Judge Leith made a motion to promulgate the published amendment to Rule 21. Ms. Gates seconded the motion, which passed by roll call vote with 15 votes in favor and 4 votes against.

3. ORCP 27

Judge Norby reminded the Council that the published amendment (Appendix C) was a cleanup of some parts of Rule 27, the guardian ad litem rule. The committee and Council had some pretty robust discussion and came through with an amendment that should help court staff who have requested some assistance in working with self-represented litigants in probate, guardianship, and conservatorship matters, most of whom do not understand what a guardian ad litem is. She noted that court staff in Clackamas County is really excited about the potential amendment. Judge Norby pointed out that the amendment also contained minor clarifications, including when the appointment of a guardian ad litem is mandatory for unemancipated minors. No public comments were received by the Council regarding the published amendment to Rule 27.

Ms. Gates asked for a motion to promulgate the published amendment to Rule 27.

a. ACTION ITEM: Vote on Whether to Promulgate Published Amendment of ORCP 27

Ms. Holley made a motion to promulgate the Council's published amendment to Rule 27. Judge Norby seconded the motion, which passed unanimously by roll call vote.

4. ORCP 31

Mr. Goehler reminded the Council that the purpose of the amendment to Rule 31 (Appendix C), the interpleader rule, was to make attorney fees permissive rather than mandatory and, also, to broaden or to clarify the rule to allow attorney fees for not just the plaintiff in interpleader. He noted that, at the last Council meeting before publication, a minor change was made to clarify the incorporation of ORS 20.075 as far as the factors to consider for awarding attorney fees. No public comments were received by the Council regarding the published amendment.

Ms. Gates asked for a motion to promulgate the published amendment to Rule 31.

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

Mr. Crowley made a motion to promulgate the published amendment to Rule 31. Justice Nakamoto seconded the motion, which passed unanimously by roll call vote.

5. ORCP 55

Ms. Gates stated that there had been one comment (Appendix E), which was not in favor of the published amendment to Rule 55 (Appendix C). She noted that the person who had made the comment had also called her, and that she had taken a closer look at the amendment as a result. She suspected that the amendment may be more controversial than the others.

Judge Peterson pointed out that the sole comment was a thoughtful one, from a former chair of the Council, Don Corson, who is a thoughtful lawyer. He stated that it was clear to him at the last Council meeting that there was a problem to solve and that the Council may have come up with a solution, but it was clear that there was still some concern. One Council member had stated at the publication meeting that they would rather not promulgate a rule than promulgate a bad one. There were five "no" votes to publish, which seems to put the rule in jeopardy of not being promulgated today.

Judge Peterson recalled that one of the reasons the Council decided to do a little tinkering with Rule 55 this biennium was because there are some hapless, non-involved, non-party occurrence witnesses who get subpoenaed, and the current rule does not make it very clear what recourse that they might have. He stated that Judge Marilyn Litzenberger from Multnomah County thought it would be helpful to give such witnesses some direction. The Council's idea was to make it possible for a person who is not involved in litigation to somehow avoid either an onerous subpoena or a subpoena that simply does not work for them because they happen to be on out of town on vacation. This process should be easy and should not require these witnesses to hire an attorney in order to be heard. However, Mr. Corson pointed out that, instead of being an order from the court, the published amendment would make a subpoena more like a invitation with an RSVP. Judge Peterson noted that document subpoenas, deposition subpoenas, and trial subpoenas all have slightly different concerns, and that the Council was trying to fix that on the fly at the September meeting. He agreed that the last-minute fix may not have been effective at doing that.

Judge Peterson stated that Mr. Corson would be relieved if the Council would

remove the part of the amendment that requires language in the face of the subpoena that implies that, if a witness does not want to appear, they just need to write a note, especially because they could apparently make that objection on the last day prior to the scheduled appearance. He noted that Mr. Corson would be even happier if the Council did not make the published changes to subsection A(7), which is where the Council really tried to make some kind of a uniform and understandable process for how to properly object to a subpoena.

Judge Peterson noted that Mr. Corson, as well as the Council, did not seem to have a problem with other parts of the amendment. One such non-controversial part is the idea that, if someone subpoenas a witness, they need to offer the witness fee and the mileage. Judge Peterson noted that there are instances where, in particular, unrepresented litigants and prisoners send out subpoenas to people without the mileage and fee, and that it is onerous for persons to try to figure out whether they have to respond to such subpoenas. The other small change that seems non-controversial is similar to what is in both the Washington and Illinois rules: a party may subpoena a party who has already appeared without having to chase them down and serve them personally and pay them mileage and witness fees. Judge Peterson stated that he would rather not lose the entire amendment over the fact that the Council had not really gotten comfortable with the idea of how to object to a subpoena.

Judge Bailey stated that he had read the comment and that he was not sure that people do not currently have a right to do that. He stated that he was not sure that the changes necessarily invites witnesses to think that they do not have to appear on the day of the hearing itself. If someone files a motion to quash, they do not have to show up and the court cannot find them in contempt. He stated that he does not see an issue with the way the amendment was written, although including the word “prior” may have made it better. The amendment merely points out an existing practice and lets witnesses know that they can do it legally.

Judge Norby stated that what is concerning is the part of the amendment that states that the filing of an objection suspends a witness’s obligation to comply. Basically, merely filing an objection and not showing up to argue the objection or to find out what the ruling is on the objection is not acceptable. She stated that, if appropriate, she would move to vote on the published amendment without the part that was objectionable to Mr. Corson. She stated that she would like to see the non-controversial parts get promulgated but to have the other issue get more work in the Council’s next biennium.

Ms. Gates agreed with Judge Peterson and Judge Norby that the Council should try to save the non-controversial portions of the amendment. She agreed with Mr.

Corson that subsection A(7) is problematic and that it changes what is allowed for a response to a subpoena to attend something in that it applies the rules for a subpoena to produce documents, which does allow for an objection, to other types of subpoenas. She stated that this was unintentional and that the subject deserves a lot more discussion.

Mr. Eiva stated that one of the problems with the current rule, which has been exposed by this discussion, is that Rule 55 never really had a procedure for dealing with subpoenas that also include an appearance. He pointed out that this was always a common law rule. Subpoenas are like court orders so, under the common law and under ORCP 55 A(6)(d), if a person fails to abide by any of the types of subpoena, it is punishable by contempt. The only way to avoid contempt, traditionally, is through a motion to quash, because you have to nullify a court order, which is what a subpoena is. ORCP 55 A(7) made an exception to that subpoena dynamic for the limited circumstances of subpoenas involving production only, with no command to appear. The published amendment has actually erased that distinction to say that subsection A(7) applies to all types of subpoenas. He stated that the problem with that is, if a person is being commanded to appear at trial and they can do a simple objection to avoid their appearance, it removes the ability of parties to bring people into court, which is a fundamental dynamic of trial practice.

Mr. Eiva stated that subsection A(7) transforms subpoenas that are purely for documents into requests for production to non-parties. So, if someone objected to a subpoena for documents, they could just file an objection and the burden is on the subpoenaing party to file a motion to compel. Mr. Eiva explained that the Council never meant for that rule to be used for someone being commanded to appear for testimony. If the timeline is the day before trial, that puts the onus on the litigating party to not only file a motion to compel, but also to file a motion for contempt or a motion for expedited hearing to get the witness to appear, which may not be possible before the time the person's appearance is needed. He pointed out that this is not a just a plaintiffs' issue, since defendants subpoena people to trial all of the time. His preference is to see the rule changed to actually outline a motion to quash subpoenas that command appearance. He agreed with judge Norby's suggestion to remove the controversial portions of the rule and vote on the non-controversial ones.

Mr. O'Donnell stated that, although he was the chair of the Rule 55 committee this biennium, he has no vested interest in the issue. However, he agrees with Mr. Eiva that this is not just a plaintiffs' attorneys issue. He stated that he personally believes that judges do have the authority to hold someone in contempt under the language in the published amendment, but that he is not strongly advocating

moving forward with that change. He stated that he would be fine agreeing with the amendment that Judge Norby and Mr. Eiva propose and re-examining the rule next biennium, because he does not want to create a problem with getting witnesses to testify at trial.

Judge Norby agreed with Mr. Eiva's suggestions about a potential way to restructure the rule and stated that she would like to see that through next biennium. She stated that she was not quite sure how to phrase a motion to remove the controversial parts of the amendment. Judge Peterson summarized the suggestions for changing the published amendment as follows:

1) on page 1, remove the comma at the end of line 22 and replace it with a period, and remove line 23; and
2) delete all changes to subsection A(7) and leave that section in its current form.

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

Judge Norby made a motion to promulgate the published Rule 55 with the amendments suggested by Judge Peterson. Judge Wolf seconded the motion, which passed by roll call vote with 17 votes in favor and two opposed.

IV. New Business

A. Problems with Mail Service

Judge Peterson explained that Holly Rudolph, the forms manager for the Oregon Judicial Department, had brought up an item of new business (Appendix F). It turns out that the post office is not always timely delivering mail and, with the COVID pandemic, there has been a change in the way that they are handling certified mail return receipt requests with signatures. He stated that he did not believe that this impacts Rule 7, Rule 9, or Rule 55, and that the Council cannot do much about the postal service's issues. He noted that Rule 7 is commonly a topic for discussion when each new biennium begins, and that the Council can look at the state of the postal service at that time and see if any tweaks need to be made with any of the rules that allow service by mail.

Ms. Holley stated that she suspects that this might be a longer-term problem. She was at the post office recently to send a letter by certified mail with return receipt, and the certified mail sticker was different than it used to be. She was also asked whether she wanted electronic return on it, which she did not even know existed. She stated that she

would be willing to send a test letter to Ms. Payne and see what happens. Ms. Gates stated that this might be a good idea, and asked Ms. Holley to report back on the result.

Judge Norby pointed out that there may be some broader issues going on with the post office with the multi-layered challenges that it is facing in the moment. She observed that these postal challenges mean that getting proof that something was mailed does not necessarily constitute proof that it was received.

Ms. Payne stated that it could be worthwhile to look at all of the service rules next biennium, as they might be impacted by a pandemic or other emergency in the future. She stated that this would be a good opportunity to plan ahead. She has had a lot of problems with service during this pandemic because businesses have been closed, and it is difficult to personally serve a company when it is not physically open. Judge Norby wondered whether the rules only refer to the post office because, in the past, there have not been other options for delivery. This could also be an issue for a future committee to examine.

V. Adjournment

Ms. Gates thanked all Council members with expiring terms for their service to the Council. She particularly thanked Ms. Weeks for being the Council's public member. Judge Peterson stated that he would be in touch with all Council members with expiring terms who are eligible for reappointment to ask whether they would, indeed, like to be reappointed. Judge Norby thanked Ms. Gates for leading the Council through this difficult year.

Ms. Gates adjourned the meeting at 10:42 a.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
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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

Shari Nilsson <nilsson@lclark.edu>

CCP ORCP 57D Committee Update

Meredith Holley <meredith@erisresolution.com> Fri, Nov 27, 2020 at 6:51 PM
To: "Lynn R. Nakamoto" <lynn.r.nakamoto@ojd.state.or.us>, "Douglas L. Tookey" <douglas.l.tookey@ojd.state.or.us>, "D. Charles Bailey" <d.charles.bailey@ojd.state.or.us>, John Wolf <John.Wolf@ojd.state.or.us>, "Thomas A. McHill" <Thomas.a.mchill@ojd.state.or.us>, Drake Hood <dah@brisbeeandstockton.com>, "David E. Leith" <david.e.leith@ojd.state.or.us>, al@brisbeeandstockton.com, Mark Peterson <mpeterso@lclark.edu>, Shari Nilsson <nilsson@lclark.edu>

Hello everyone,

I wanted to give an update on the workgroup responses we've gotten so far regarding the ORCP 57D Committee. Some have responded in writing and others I have spoken with over the phone.

On November 13, 2020, I met with Dean Brian Gallini of Willamette Law and Justice Nelson about work they have been doing on this issue. Justice Nelson is Oregon Supreme Court Council on Inclusion and Fairness and co-chair on the Committee on Bias in the Oregon Justice System. Dean Gallini has a group of recent graduates who are doing an extensive research project on jury bias.

Dean Gallini asked to provide the student research to us mid-December, and I said that would work. So that is still to come.

On November 17, I spoke with Stanton Gallegos, who is the chair of the Oregon Hispanic Bar Association.

This is my summary of the general comments and suggestions, but I am open to other takes on these issues if you see something I've missed.

Expand protected classes. OHBA, OSB Diversity Section, and the ACLU recommended that the rule track with Oregon law to cover all protected classes. ACLU recommended a reference to ORS 659A.403, rather than a list of classes. This was the most consistent feedback I saw.

Objective observer. Justice Nelson said that in her groups there was some concern over the "objective observer" language and that it might be confusing. My interpretation of this comment was that it was targeted at the way the paragraph is written, not the sentiment that bias may unintentional. Justice Nelson referenced the work her committees have been doing on raising awareness of unconscious and implicit bias, but I believe the comment was that the paragraph does not provide clear instruction to judges, as others have pointed out.

When I spoke with Mr. Gallos, he felt that being clear that the rule is not limited to intentional situations is important, but that the way the paragraph is written could be changed.

PDS and ODAA responses. PDS was the only group so far that has asked that the presumptive categories be included. In the meeting with Dean Gallini and Justice Nelson, Dean Gallini felt strongly that categories were a roadmap to discrimination and should not be included. I do not know of evidence of that, but it may be included in the Willamette research. I am attaching my conversation with PDS about that and other issues.

ODAA had a list of other changes they are asking for that the committee has not considered. I did not follow up with them regarding presumptive categories because their requests were so different than what I was seeing with other groups. I wanted to get the committee's thoughts first.

I have given others until December 10 to provide comments.

Justice Nelson also let me know that the committees on the Criminal and Civil Jury Instructions are considering amendments there, and all of our work could impact each other. I will reach out to Sheri Browning and Per C Olson, who are the contacts in charge of those amendments to find out more about that.

Let me know if you feel there are other important steps you feel we should take in the meantime. I thought I would wait

until I got the research from Willamette, and then give the Committee some time to review it. Then we should meet to discuss how to move forward.

Thanks!
Meredith

_____
Meredith Holley | Lawyer
pronouns: she, her, hers

Author of *Career Defense 101: How to Stop Sexual Harassment Without Quitting Your Job*
(Also available from Amazon and Barnes & Noble)

Author of *The Inclusive Leader's Guide to Healthy Workplace Culture*
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4 attachments

ACLU of Oregon Response 201117.pdf
299K

Initial Email Outreach November Deadline.pdf
365K

ODAA feedback re ORCP 57D4 proposed modification 201117.pdf
612K

PDS Appeals Comment 201127.pdf
106K

Gmail **Meredith Holley <meredith@erisresolution.com>**

Bias in Jury Selection Workgroup

Meredith Holley <meredith@erisresolution.com> Thu, Nov 19, 2020 at 2:51 PM
To: Lorelei Craig <lcraig@uoregon.edu>

No worries! Other folks brought that up as well, and I'm happy to pass it along. Thanks!

Meredith Holley | Lawyer
pronouns: she, her, hers

Author of *Career Defense 101: How to Stop Sexual Harassment Without Quitting Your Job*
(Also available from Amazon and Barnes & Noble)

Author of *The Inclusive Leader's Guide to Healthy Workplace Culture*
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On Thu, Nov 19, 2020 at 9:08 AM Lorelei Craig <lcraig@uoregon.edu> wrote:

> Meredith,
>
> I see that I missed the November 17th deadline for comments. My sincerest apologies. We discussed this at our last DSEC meeting, and wanted to know if the definition of "sex" included sexual orientation and gender identity. If it does not, then the group recommends that be added to the definition of sex so that it would be improper to exercise a peremptory challenge on the basis of sexual orientation or gender identity as well. Similarly, we wanted to know if the definition of "ethnicity" also included national origin. If not, it would be our recommendation that the definition include national origin.
>
> Is it possible to still pass along our feedback?
>
> Many thanks for your work on this important initiative.
>
> Best,
>
> Lorelei

Lorelei Craig, J.D. (she/her)

Associate Director

Center for Career Planning & Professional Development

Phone: (541) 346-3608

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1221 University of Oregon, Eugene, Oregon 97403-1221

From: Meredith Holley <meredith@erisresolution.com>
Date: Saturday, October 17, 2020 at 2:02 PM
To: "Lynn R. Nakamoto" <lynn.r.nakamoto@ojd.state.or.us>, "Douglas L. Tookey" <douglas.l.tookey@ojd.state.or.us>, "D. Charles Bailey" <d.charles.bailey@ojd.state.or.us>, John Wolf <John.Wolf@ojd.state.or.us>, "Thomas A. McHill" <Thomas.a.mchill@ojd.state.or.us>, Drake Hood <dah@brisbeeandstockton.com>, "David E. Leith" <david.e.leith@ojd.state.or.us>, "al@brisbeeandstockton.com" <al@brisbeeandstockton.com>, Mark Peterson <mpeterso@lclark.edu>, Shari Nilsson <nilsson@lclark.edu>
Cc: "kevin_barton@co.washington.or.us" <kevin_barton@co.washington.or.us>, "elisa.dozono@clearesult.com" <elisa.dozono@clearesult.com>, "bsingh@ojrc.info" <bsingh@ojrc.info>, "slawson@schwabe.com" <slawson@schwabe.com>, "kristin.asai@hklaw.com" <kristin.asai@hklaw.com>, "aruna@bennetthartman.com" <aruna@bennetthartman.com>, "jennifer@robinslawsite.com" <jennifer@robinslawsite.com>, Emery Wang <emery@vameswang.com>, "ocnbapresident@gmail.com" <ocnbapresident@gmail.com>, "psabido@chernofflaw.com" <psabido@chernofflaw.com>, "hegonza41@gmail.com" <hegonza41@gmail.com>, "jminn808@gmail.com" <jminn808@gmail.com>, "stantongallegos@markowitzherbold.com" <stantongallegos@markowitzherbold.com>, "chase@lawyerspdx.com" <chase@lawyerspdx.com>, "maya@cej-oregon.org" <maya@cej-oregon.org>, "sabaoregon@gmail.com" <sabaoregon@gmail.com>, "tpage@harrislawsite.com" <tpage@harrislawsite.com>, Rebecca Ivanoff <rivanoff@uoregon.edu>, "martha.kleinizenson@lasoregon.org" <martha.kleinizenson@lasoregon.org>
Subject: Bias in Jury Selection Workgroup

Shari Nilsson <nilsson@lclark.edu>

Fwd: RESPONSE DUE NOV. 17: Bias in Jury Selection Workgroup (Change to ORCP)

1 message

Meredith Holley <meredith@erisresolution.com> Sun, Dec 6, 2020 at 8:58 PM
To: Shari Nilsson <nilsson@lclark.edu>

---------- Forwarded message ---------
From: **Elisa Dozono** <elisa.dozono@clearesult.com>
Date: Sun, Dec 6, 2020 at 8:56 PM
Subject: RE: RESPONSE DUE NOV. 17: Bias in Jury Selection Workgroup (Change to ORCP)
To: Meredith Holley <meredith@erisresolution.com>

Ms. Holley,

The ACLU of Oregon offers the following additional edits. In regards to the question regarding inclusion of implicit bias in the definition of an "objective observer" perspective, the ACLU believes that the implicit bias language is necessary to clarify the intent requirements of the rule because:

1. These rule amendments are proposed against the backdrop of *Batson*. Because *Batson* challenges are grounded in the 14th Amendment equal protection clause, they require proving intentional discrimination.

2. Section D(4)(d) of the proposed amendments doesn't say what constitutes using race, ethnicity, or sex as a factor in a preemptory challenge. It just says that the discrimination doesn't need to be purposeful. This begs the question: What conduct, other than purposeful discrimination, is prohibited? Answering this question is critical, in light of *Batson*'s intent requirement.

3. Section D(4)(e) of the proposed amendment helps answer this question by placing implicit, institutional and unconscious bias in contradistinction to purposeful discrimination. This is, the implicit, institutional and unconscious bias language clarifies the intent requirement of the rule by showing what discrimination is prohibited, beyond the purposeful variety.

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

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

unfair exclusion of potential jurors in Oregon State.

Thank you for inviting the ACLU to comment.

Best,

Elisa

Elisa Dozono

Pronouns: she/her

Sr. Corporate Counsel

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Meredith Holley <meredith@erisresolution.com>

RESPONSE DUE NOV. 17: Bias in Jury Selection Workgroup (Change to ORCP)

Elisa Dozono <elisa.dozono@clearesult.com> Tue, Nov 17, 2020 at 6:24 PM
To: Meredith Holley <meredith@erisresolution.com>

Hello, apologies for forgetting to email this earlier. The ACLU of Oregon was primarily concerned about the limited list of categories of discrimination prohibited by preemptory challenges. In particular, we had concerns regarding whether "sex" would include gender identity, and also the exclusion of disability and other classes protected under Oregon law. To remedy that, we suggest the following change:

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

D(4)(a) A party may not exercise a peremptory challenge on any basis enumerated in ORS 659A.403(1). Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge. The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.

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

D(4)(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.

We have another meeting of our Lawyer's Committee next Wednesday, and I can raise your further particular questions then. I will make sure to get you that feedback by December 10, but I wanted to make sure I provided this much for now.

Elisa Dozono

Pronouns: she/her

Sr. Corporate Counsel

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

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

D(4)(b) **Objection.** If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge**. The court may also raise this objection on its own. The objection should be made by simple citation to this rule.** [*The objection must be made before the court excuses the juror. The objection*] **Further discussion of the objection** must be made outside of the presence of the jurors. **The objection must be made before the potential juror is excused, unless new information is discovered that could not have been reasonably discovered prior to the excusal.** [*The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*]

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

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

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

Additional Comments

- The rule should more broadly prohibit the use of race, ethnicity and sex as a basis to challenge or keep any prospective juror (current proposal is limited to challenges only). Race, ethnicity and sex should not be considered in jury selection for any reason whatsoever.
- The rule should include a statutory framework for the "totality of circumstances" consideration. Under *Curry*, the Court of Appeals applied a "comparative juror analysis" for the first time in Oregon. The rule should specify the analysis to be used so that the court and parties may make an appropriate record.
- The rule should specify how the challenge of alternate jurors is to be reviewed. The selection of alternate jurors in a criminal case is subject to a separate statutory framework per ORS 136.260. A judicial review of a peremptory challenge of an alternate juror must take into account that separate statutory framework as compared to a peremptory challenge of a regular juror.
- The rule should include provisions requiring the court to maintain relevant records if a challenge of a peremptory is made. (e.g. requiring all jury selection to be on the record; requiring all juror questionnaires to be maintained by the court as part of the official record; requiring the attorneys to maintain all jury selection notes if a challenge to a peremptory is made; etc.) No such requirements currently exist.
- The rule should ensure that attorneys are provided adequate time to engage in adequate review of jurors and to make an appropriate record in the event of a challenge to a peremptory. Suggestions include ensuring each party has at least the same amount of time for *voir dire* as the other; ensuring a baseline amount of time for *voir dire* on a per juror basis (e.g. at least 5 minutes per juror).

Gmail **Meredith Holley <meredith@erisresolution.com>**

Bias in Jury Selection Workgroup

Joshua B. Crowther <Joshua.B.Crowther@opds.state.or.us> Tue, Nov 17, 2020 at 2:43 PM
To: "meredith@erisresolution.com" <meredith@erisresolution.com>
Cc: Zack Mazer <Zack.Mazer@opds.state.or.us>, "Ernest G. Lannet" <Ernest.G.Lannet@opds.state.or.us>

Dear Ms. Holley,

Thank you for the opportunity to provide input and recommendations to the Council on Court Procedures proposed changes to Oregon's Jury Selection rule, ORCP 57D(4).

The Appellate Division of the Office of Public Defense Services supports the proposed amendments to the peremptory challenge process. Those amendments will make the process easier to implement and will more likely ensure that Oregon criminal trials are tried before fair and impartial juries.

In addition, the Appellate Division encourages the Council to also adopt the remainder of the Washington rule, including a non-inclusive list of circumstances for the trial court to consider (Wash GR 37(g)), a list of presumptively invalid reasons to utilize preemptory challenges (Wash GR 37(h)), and a requirement that, if a party is justifying a peremptory challenge based on conduct, that the party provide reasonable notice to the court and the other parties so the behavior can be verified and addressed in a timely manner (Wash GR 37(i)).

Although the proposed Oregon amendments do not prohibit the court from considering the factors listed in (g) of the Washington rule, the factors listed there are identified by case law as appropriate considerations. Many or most of the reasons that are “presumptively invalid” under (h) of the Washington rule are also all well supported in case law as historical examples of implicit racially discriminatory peremptory strikes. Case law also requires there to be a record of any non-verbal indicators that are cited as justification for a strike.

If the Council has any questions or seeks additional information, please let me know.

/s/ Josh Crowther

Chief Deputy Defender

Office of Public Defense Services, Appellate Division

Zack Mazer (appellate attorney in *State v. Curry*)

Deputy Defender

Office of Public Defense Services, Appellate Division

2020 PROPOSED AMENDMENTS TO
OREGON RULES OF CIVIL PROCEDURE

The Council on Court Procedures is considering whether or not to promulgate the following proposed amendments to the Oregon Rules of Civil Procedure. Boldface with underlining denotes new language; italicized language within brackets indicates language to be deleted.

To receive full consideration by the Council, written comments regarding the proposed amendments to the Oregon Rules of Civil Procedure should be received by the Council no later than the close of business on December 7, 2020. Written comments may be sent by mail or by e-mail to:

Mark A. Peterson
Executive Director

Shari C. Nilsson
Executive Assistant

Council on Court Procedures
c/o Lewis and Clark Law School
10101 S. Terwilliger Blvd
Portland, OR 97219
ccp@lclark.edu
www.counciloncourtprocedures.org

The Council meeting at which the Council will receive oral comments from the public relating to the proposed amendments will be held commencing at 9:30 a.m. on the following date and in the following place:

December 12, 2020

WEBEX MEETING:

https://counciloncourtprocedures.my.webex.com/counciloncourtprocedures.my/j.php?MTID=m0e84afabf8f3002095c6f0515a794557
Meeting number: 126 613 8973
Password: dQ92pS2dePP

Join by phone
+1-408-418-9388 United States Toll
Access code: 126 613 8973
Password: 37927723

The Council will take final action on the proposed amendments at its December 12, 2020, meeting.

2020 PROPOSED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

Table of Contents

TIME FOR FILING PLEADINGS OR MOTIONS

RULE 15

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

B Pleading after motion.

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

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

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

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

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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

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.

[*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 ORS 20.075 and the following additional factors:

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

C(1)(b) whether the party interpleading funds was 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

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

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

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

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

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

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

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

provided] as follows.

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

A(7)(a) Written objection to subpoena to appear; timing. A written objection to a subpoena to appear and testify must be served on the party who issued the subpoena and on the clerk of the court in which the subpoena originated not later than 14 days after service of the subpoena, or prior to the time specified in the subpoena to appear and testify, whichever comes first.

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

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

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

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

appearance or production.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D(4) Conditions on service of subpoena.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Shari Nilsson <nilsson@lclark.edu>

Re: Comment on Court Procedure Changes

1 message

Rebecca Cambreleng <rebecca@employmentlaw-nw.com> Mon, Dec 7, 2020 at 10:53 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Hon. Mark A. Peterson, Executive Director

Shari C. Nilsson, Executive Assistant

Council on Court Procedures

10101 S. Terwilliger Blvd

Portland, OR 97219

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Thank you,

Rebecca

Rebecca Cambreleng

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She/Hers

Council on Court Procedures
December 12, 2020, Meeting
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December 4, 2020

Via email and mail

Hon. Mark A. Peterson, Executive Director
Shari C. Nilsson, Executive Assistant
Council on Court Procedures
10101 S. Terwilliger Blvd
Portland, OR 97219

Re: Council on Court Procedures; proposed amendment to ORCP 21 E(3)

Dear Judge Peterson and Ms. Nilsson:

I was pleased to read the Council's proposed amendment to ORCP 21 E(3) (providing for a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires"), and write to encourage the Council to formally promulgate this proposed amendment to the Oregon Rules of Civil Procedure.

As you know, plaintiffs commonly must amend their complaints before trial, often shortly before trial, and to do so must either have the written consent of the adverse party or must move for leave of the court to make the amendments. In my experience, at least, most complaints need to be amended before trial, if for no other reason than to update the amount of damages based on the evidence that has developed since the case was filed. When a plaintiff seeks leave of the court to amend, the court may consider whether the amendment would cause undue prejudice to the defendant. When the amended complaint is filed, the defendant may then answer. There is no comparable rule for the court to consider whether new matters raised by the defendant would cause undue prejudice to the plaintiff. The proposed amendment to ORCP 21 E(3) would help to remedy this procedural imbalance.

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I have had the experience many times of a defendant raising entirely new matters on the eve of trial because the current rules allow them to do so. For one example of many, I vividly recall a defendant raising for the first time shortly before trial a defense of comparative fault in a product liability case involving serious burn injuries. The defense could have been raised at the start of the case, but was not. Allowing last-minute new defenses of this sort works unfair prejudice to a plaintiff, who has gone through discovery, developed the evidence, and scheduled witnesses based on the case as previously plead.

One might imagine a rule that would not allow substantive late amendments to an answer if the plaintiff merely deletes claims or allegations or modifies the allegations of the amount of damages. Short of that, the proposed amendment to ORCP 21 E(3) would provide a mechanism for the court to consider whether raising new issues late in the process is unfair such that justice should require that the new matters not be part of the case. The mere existence of that mechanism should discourage "sandbagging," and encourage parties to get issues on the table earlier, so that everyone has a fair opportunity to prepare for trial or settlement.

Thank you for your consideration of these comments.

Sincerely,

Don Corson

DC:sw

Shari Nilsson <nilsson@lclark.edu>

proposed amendment to ORCP 21 E(3)

Ben Falk <ben@benfalklaw.com> Fri, Dec 4, 2020 at 2:22 PM
To: ccp@lclark.edu

Hon. Mark A. Peterson, Executive Director

Shari C. Nilsson, Executive Assistant

Council on Court Procedures

10101 S. Terwilliger Blvd

Portland, OR 97219

ccp@lclark.edu

12/4/20

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

Benjamin Falk

Falk Law Office

Council on Court Procedures
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Benjamin O. Falk

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Shari Nilsson <nilsson@lclark.edu>

Comment on Proposed Amendments to ORCP

1 message

Julia Fraser <julia@juliafraserlaw.com> Sun, Nov 29, 2020 at 9:11 AM
To: ccp@lclark.edu

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

Julia Fraser

Law Office of Julia M. Fraser

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(Pronouns - She, Her, Hers)

Shari Nilsson <nilsson@lclark.edu>

Proposed Amendments to ORCP 21 E(3)

1 message

Rhett Fraser <rhett@hueglifraserlaw.com> Sat, Dec 5, 2020 at 10:26 AM
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

I have personally experienced numerous “late hour” attempts by defendants to amend their answers. For instance, in one case that I tried in late 2019, defense counsel actually filed an amended answer on the Friday before trial (at call in Multnomah County) with trial to start on Monday. That answer was filed in response to an amended complaint that merely modified the amount of damages. The amended answer asserted new affirmative defenses that could have been raised during the entire year we were litigating the case.

This is not an isolated example. By way of background, I primarily practice medical malpractice. Before every trial, we will usually file an amended answer amending the damages alleged (typically the economic damages, like the final medical bills since these are usually incurred right up until (and after) the day of trial). What then happens is the defense will file an answer, but will habitually assert new affirmative defenses that have nothing to do with the amendments, and leave us with only days to respond. This happens over and over again. As discussed, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. On two different occasions the only remedy available to the trial judge was to offer us either a reset, or to proceed to trial. In personal injury cases, when months of preparation and tens of thousands of dollars have been spent already and experts’ flights and hotel rooms are booked, this is no choice at all. We simply have to proceed forward despite being last minute sandbagged.

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party. There is a need for this amendment and it is important.

Thank you.

Rhett G. Fraser

Huegli Fraser PC

Attorney | Huegli Fraser P.C.

101 SW Main Street, Suite 1900 | Portland, Oregon 97204

P: 971-266-8877 | F: 971-277-6970

rhett@hueglifraserlaw.com | www.hueglifraserlaw.com

Council on Court Procedures
December 12, 2020, Meeting
Appendix D-9

Shari Nilsson <nilsson@lclark.edu>

ORCP 12 E(3)

1 message

Talia Guerriero <talia@oregonworkplacelaw.com> Tue, Nov 24, 2020 at 2:25 PM
To: ccp@lclark.edu

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. The amendment simply gives the court an opportunity to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice. In this way, the amendment would provide balance in the justice system.

Thank you,

Sincerely,

Talia

Talia Y. Guerriero
Meyer Stephenson – Employment Law
1 SW Columbia St., Suite 1850
Portland, OR 97204
Office: (503) 459-4010

Direct: (971) 339-7552
talia@oregonworkplacelaw.com
www.oregonworkplacelaw.com
Pronouns: She/Hers/Her

Like many others, I am working from home for the foreseeable future. Please email me a courtesy copy of any documents you are serving by mail. Thank you.

James D. Huegli*
Rhett G. Fraser*†
Jason V. Cohen*

*admitted in Oregon and Washington
†also admitted in Idaho

HUEGLI FRASER PC

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101 SW Main Street
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www.hueglifraserlaw.com

November 29, 2020

Shari C. Nilsson, Executive Assistant

Council on Court Procedures

10101 S. Terwilliger Blvd

Portland, OR 97219

ccp@lclark.edu

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue

raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

James D. Huegli

Very truly yours,

James D. Huegli

Enclosures

Shari Nilsson <nilsson@lclark.edu>

RE: ORCP Amendments

James Huegli <jim@hueglifraserlaw.com> Sun, Nov 29, 2020 at 7:57 PM
To: Shari Nilsson <nilsson@lclark.edu>
Cc: "ccp@lclark.edu" <ccp@lclark.edu>, Rhett Fraser <rhett@hueglifraserlaw.com>

Thank you Shari. I have pretty strong feelings on this one. The judge is given a lot of discretion, but before he can exercise that discretion he first needs authority to look at the issue. Justice requires flexibility when technical issues allow for justice to be thwarted. I honestly see no downside to this amendment and great upside for both parties.

Can you pass this note along as well.

Thanks

James D. Huegli

Attorney at Law

Huegli Fraser PC

101 SW Main St. Suite 1900

Portland, Oregon 97204

P: 971-266-8877

F: 971-277-6970

Consult an attorney prior to making or responding to any legal claim or taking any legal action.

From: Shari Nilsson <nilsson@lclark.edu>
Sent: Sunday, November 29, 2020 7:28 PM
To: James Huegli <jim@hueglifraserlaw.com>
Cc: ccp@lclark.edu; Rhett Fraser <rhett@hueglifraserlaw.com>
Subject: Re: ORCP Amendments

Dear Mr. Huegli,

Thank you for your comments regarding what I assume from context are the proposed amendments to Rule 21 E(3). I will be sure to pass them along to the Council for consideration prior to the promulgation meeting on December 12, 2020. If you are interested in attending that meeting, you can find information here:

http://counciloncourtprocedures.org/Content/2019-2021%20Biennium/2020-12-12_agenda.pdf

Best regards,

Shari

_____
Shari Nilsson
Executive Assistant
Council on Court Procedures

c/o Lewis and Clark Law School
10101 S Terwilliger Blvd
Portland OR 97219

(503) 768-6505
nilsson@lclark.edu

On Wed, Nov 25, 2020 at 3:35 AM James Huegli <jim@hueglifraserlaw.com> wrote:

> Please see attached. Even though this is a form letter, it expresses my thoughts very well. I have run into this issue more than once and this correction is very necessary. It also is not oppressive as it give the court discretion. I believe it is well drafted.
>
> Thanks. Happy Thanksgiving.

Jim Huegli

James D. Huegli

Attorney at Law

Huegli Fraser PC

101 SW Main St. Suite 1900

Portland, Oregon 97204

P: 971-266-8877

F: 971-277-6970

Shari Nilsson <nilsson@lclark.edu>

2020 Proposed ORCP Amendments

1 message

Scott Pratt <scopratt@aim.com> Tue, Nov 24, 2020 at 12:29 PM
Reply-To: Scott Pratt <scopratt@aim.com>
To: "ccp@lclark.edu" <ccp@lclark.edu>

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 12 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Scott O. Pratt
Attorney at Law
503 241-5464

Shari Nilsson <nilsson@lclark.edu>

Proposed Changes to ORCP 21 E(3)

Quinn Kuranz <quinn@kuranzlaw.com> Fri, Dec 4, 2020 at 2:46 PM
To: ccp@lclark.edu

Dear Judge Peterson and Ms. Nilsson:

I am writing in support of the proposed amendment to ORCP 21 E(3) permitting a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment would provide balance in the justice system. Currently, a court must consider whether a proposed amendment to a complaint causes undue prejudice to the defendant. However, defendants can raise new issues in a response to an amended complaint shortly before trial and there is no mechanism in which a court can consider whether such amendments cause similar prejudice to the plaintiff. This is true even when the amendments raise substantively new issues and do not respond to the limited amendments in the plaintiff's complaint.

For example, a plaintiff could delete a claim in order to narrow issues for trial, or simply amend the prayer. In response to those amendments, a defendant could raise a new affirmative defense shortly before trial in which the plaintiff did not have the opportunity to obtain discovery or depose witnesses. That new defense could cause undue prejudice or delay trial. A court should be able to determine whether the new issue raised in response to the amended pleading is untimely, would affect the court's docket management, and would cause the plaintiff undue prejudice.

For those reasons, I support the amendment. It is fair and provides the Court the proper discretion to strike untimely amendments by either party.

Sincerely,

Quinn E. Kuranz
Attorney at Law

The Office of Q.E. Kuranz, AAL, LLC
Employment Discrimination • Wage Accountability • Unemployment Benefits
65 SW Yamhill St. Suite 300
Portland, OR 97204
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Se Habla Español

Council on Court Procedures
December 12, 2020, Meeting
Appendix D-19

Shari Nilsson <nilsson@lclark.edu>

Proposed Change to ORCP 12E(3)

1 message

Aaron Reichenberger <aaron@rosenbaumlawgroup.com> Thu, Dec 3, 2020 at 10:18 AM
To: ccp@lclark.edu

Good morning, Judge Peterson and Ms. Nilsson:

I support the proposed amendment to ORCP 12 E(3), which permits a motion to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires."

This amendment brings some balance to ORCP 12. As you both know, the current rules require the court to consider whether proposed amendments to a complaint unduly prejudice a defendant. But there is no consideration that occurs when a defendant (in response to an amended complaint) raises new defenses. This is currently the case even if the new defense is raised days before trial or go outside the amendments to the complaint.

Defendants can abuse this current lack of consideration in multiple ways. A simple example is when a plaintiff amends their complaint to eliminate claims and narrow the focus for a trial. Ordinarily, this is what we'd want: a focused and efficient trial that is a good use of everyone's resources. Currently, though, in response to this, a defendant can weaponize this step by raising a wholly new substantive defense that the plaintiff would have no opportunity to prepare for absent requesting a reset of a scheduled trial date. This, of course, creates inefficiencies and waste for everyone.

I support this amendment. Thank you for your time and consideration.

Best,

Aaron D. Reichenberger
Rosenbaum Law Group, P.C.
1826 NE Broadway
Portland, OR 97232
Ph: 503.288.8000 x 113
Fax: 503.288.8046
www.rosenbaumlawgroup.com

Shari Nilsson <nilsson@lclark.edu>

ORCP 21

1 message

Sarah-Ray Rundle <sarahrayrundle@gmail.com>
To: ccp@lclark.edu

Sat, Nov 21, 2020 at 5:31 AM

Dear Council on Court Procedures,

I commend you for attempting to make ORCP 21 more clear by reorganizing it and breaking up the formerly unwieldy paragraph A into subsections. While it may take some time to get used to the new numbering, I don't foresee it being an issue because I believe the legal community can easily adapt to a minor change, especially when it makes the rule so much easier to read. Thank you!

May I also recommend that you make it clear in the rule that a party may not submit affidavits, declarations, and other evidence when filing a motion to dismiss based on A(1)(h) failure to state ultimate facts sufficient to constitute a claim (and A(1)(g)). I think it is clear from the language but I can tell you, based on my experience, that it is not. I work as a judicial clerk in Multnomah County and ORCP 21 motions are filed in almost every civil case so this is a rule I work with often. During my year and a half at the court, I have seen far too many motions to dismiss for failure to state a claim with affidavits, declarations, and other evidence attached. If opposing counsel does not point out that the Court may not consider extrinsic evidence under the rule, the Court is forced to explain it to the moving party. Either way, it must be embarrassing for newer attorneys who thought they understood the rule but didn't quite catch the significance of A(2)(b). And if attorneys cannot understand the rule, imagine how difficult it must be for pro se parties to understand it.

If you are editing the rule for clarity, I implore you to go further and provide complete clarity in A(2)(b) on the issue of when a party may not submit extrinsic evidence in support of their motion to dismiss. I believe this change would limit the number of frivolous motions to dismiss, which in turn would reduce litigation costs for clients on all sides and reduce the burden on the courts.

Thank you for taking my concern seriously.

Sincerely,

Sarah-Ray Rundle OSB#184388

Council on Court Procedures
December 12, 2020, Meeting
Appendix D-21

THE
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December 7, 2020

Via email and mail

Hon. Mark A. Peterson, Executive Director
Shari C. Nilsson, Executive Assistant
Council on Court Procedures
10101 S. Terwilliger Blvd
Portland, OR 97219

Re: Council on Court Procedures; proposed amendments to ORCP 55 on subpoenas

Dear Judge Peterson and Ms. Nilsson:

I am writing to respectfully request that the Council *not* promulgate the proposed amendments to ORCP 55 on subpoenas.

I have great respect for the Council and the hard work of Council members who draft and consider amendments to the rules, so have some hesitation in sending this letter. On the other hand, the purpose of the public comment period is at least in part to point out matters that are worthy of further consideration. I believe this is one such matter.

My primary concerns are with what I assume are likely unintended consequences of the proposed amendments. Consider for example the hypothetical situation where defense counsel suspects that there may be more to the employment records than have

been disclosed, the case does not settle at a pretrial mediation, and shortly before trial defense counsel needs to subpoena the employer's records custodian to trial. Under the proposed amendments, Defense counsel might serve a subpoena ten days in advance for the records custodian to appear and testify and to produce documents. The records custodian, on the morning of trial when the custodian was subpoenaed to testify, serves objections on defense counsel and the clerk. Objections under the amendments would be allowed any time "prior to the time specified in the subpoena to appear and testify." Under the proposed rule as amended, "[s]erving a written objection suspends the time to produce the documents or things," proposed ORCP 55 A(7)(b)(ii), so the witness complies with the rules by showing up to trial without the subpoenaed documents. Perhaps nice for the records custodian, but not so nice for defense counsel, defendant, and the administration of justice.

What if the witness not only does not produce the documents, but simply does not show up for trial after objecting? Does the written objection to the subpoena excuse the witness from appearing? The witness may point to proposed ORCP 55A(7), which allows them to "object, move to quash the subpoena, or move to modify the subpoena," which is written in the disjunctive, and proposed ORCP 55A(1)(a)(v) informs the witness that they have the "option to object or move to quash or modify." Defense counsel may point to ORCP 55A(6)(d), which says that a witness must obey a subpoena, but what would it mean under the proposed rules to "obey" a subpoena?

Consider as a second hypothetical example a deposition in which plaintiff's counsel wishes to have the defendant's former employer testify and bring defendant's employment records to the deposition. It's a full three months before trial, and plaintiff's counsel serves on the former employer a subpoena thirty days in advance for the former employer to appear and testify and to produce documents. Thirteen days later, the witness serves objections on plaintiff's counsel and the clerk of the court. Under the proposed rule as amended, "[s]erving a written objection suspends the time to produce the documents or things," so in the absence of a motion to compel and a court order compelling production, the witness need not produce the documents. It may be unclear to the witness and to counsel if the witness still needs to appear for the deposition (see discussion above). If the witness does appear, the deposition would likely be a waste of time without the documents. Would all this get resolved in time for the deposition to be taken with the documents, the transcript prepared, and for that to be useful before trial? And under the proposed rules, what would be the expense to the parties and the additional time demands on the court?

Any judge or practicing attorney could come up with many other hypotheticals (just think, for example, of when the need for a new subpoena arises during trial). The predictable consequence of the proposed rule change would be to encourage objections, which can be made quickly and cheaply, and force parties seeking legitimate discovery from non-parties to file motions to compel. That would likely increase the burden on our state trial court judges, with no corresponding improvement in the "just, speedy, and inexpensive determination of every action," which should be the touchstone of the rules. See ORCP 1B.

Historically, subpoenas were orders of the court. Under the newly proposed ORCP 55 amendments, a subpoena would effectively no longer serve that historical function, but be something more along the lines of a notice that a party may later bring a motion to compel. The implications of that could be serious, particularly as cases get closer to trial, and in trial itself.

I sincerely hope that the Council does not go forward with the Rule 55 proposed amendments at this time, and respectfully suggest that subpoena issues can be considered further in the next biennium.

Sincerely,

Don Corson

DC:sw
cc: Jennifer Gates

Shari Nilsson <nilsson@lclark.edu>

RE: New submission from Contact Form - Holly Rudolph

1 message

Holly Rudolph <Holly.Rudolph@ojd.state.or.us> Wed, Oct 14, 2020 at 1:13 PM
To: Shari Nilsson <nilsson@lclark.edu>
Cc: Mark Peterson <mpeterso@lclark.edu>

Thank you! I'll pass that on to the groups. Please let me know if there is anything I can do to provide or gather information.

Holly C. Rudolph, J.D. (she/her)

OJD Forms Manager

Office of General Counsel

holly.rudolph@ojd.state.or.us

503-986-5400

I am working from home for the time being. Please email me if you need to reach me.

"[If there be] no check on the public passions, [individual liberty] is in the greatest danger." ~ SCJ J. Iredell

From: Shari Nilsson <nilsson@lclark.edu>
Sent: Tuesday, October 13, 2020 10:34 PM
To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Cc: Mark Peterson <mpeterso@lclark.edu>
Subject: Re: New submission from Contact Form - Holly Rudolph

Hi Holly,

The Council will meet again on December 12 for its promulgation meeting. I can add this issue to the agenda. I'm copying Mark here to see if he has any insights or other thoughts on how to proceed.

Best regards,

Shari

Council on Court Procedures
December 12, 2020, Meeting
Appendix F-1

Shari Nilsson
Executive Assistant
Council on Court Procedures

c/o Lewis and Clark Law School
10101 S Terwilliger Blvd
Portland OR 97219

(503) 768-6505
nilsson@lclark.edu

On Wed, Oct 7, 2020 at 2:01 PM COCP Website Form <info@councilоncourtprocedures.org> wrote:

Name

Holly Rudolph

Email

holly.rudolph@ojd.state.or.us

Phone

(856) 906-2805

Subject

Service by mail - USPS conflict

Message

Hello,
I am the OJD forms manager and we have encountered a serious problem with complying with the ORCP rules around mail service in rules 7 and 9. Part of the USPS response to COVID has been discontinuing wet signatures on return receipts. Instead, the postal worker is marking the receipts with a code or note regarding COVID. I've discussed this with the OJD forms review groups and we're reaching out to you for guidance. Is the committee aware of this issue and are there any suggestions or recommendations for changing the rules/educating judges or filers/etc.?
It doesn't seem to be something we can resolve with forms but it is problematic for us to instruct filers to follow the UTCR requirements when USPS will not give them what they need to do that. Any help would be appreciated!

Thank you!