MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 11, 2021, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Hon. Benjamin Bloom
Hon. Adrian Brown
Kenneth C. Crowley
Nadia Dahab
Hon. Roger DeHoog
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Derek Larwick
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Tina Stupasky
Margurite Weeks
Jeffrey S. Young

Members Absent:

Troy S. Bundy
Scott O'Donnell
(1 vacant position)

Guests:

Jennifer Gates, Outgoing Council Chair
Matt Shields, Oregon State Bar
Aaron Crowe, Nationwide Process Service

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted Upon this Biennium	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 1 ORCP 4 ORCP 7 ORCP 9 ORCP 10 ORCP 14 ORCP 16 ORCP 44 ORCP 55 ORCP 57 ORCP 68 ORCP 69 ORCP 71	ORCP 1 ORCP 4 ORCP 14 ORCP 16 ORCP 69		

I. Call to Order

Vice Chair Ken Crowley called the meeting to order at 9:30 a.m.

II. Introductions

Outgoing Chair Jennifer Gates asked new Council members to introduce themselves. A roster (Appendix A) was distributed that includes all current Council members. Judge Peterson asked for members to provide any corrections to Ms. Nilsson.

III. Approval of December 12, 2021, Minutes

Ms. Gates asked whether any Council member had amendments to the draft December 12, 2021, minutes (Appendix B). Hearing none, she called for a motion to approve the minutes. Ms. Holley made a motion to approve the December 12, 2021, minutes. Judge Norby seconded the motion, which was approved unanimously by voice vote.

IV. Annual election of officers per ORS 1.730(2)(b)

Ms. Gates asked Council members to nominate members as chair, vice chair, and treasurer. Mr. Young made a motion to nominate Mr. Crowley as chair. Judge Leith seconded the motion, which was approved unanimously by voice vote. Ms. Holley made a motion to nominate Mr. Andersen as vice chair. Ms. Stupasky seconded the motion, which was approved unanimously by voice vote. Judge Norby made a motion to nominate Ms. Weeks as treasurer. Judge Leith seconded the motion, which was approved unanimously by voice vote.

Judge Peterson thanked Ms. Gates for her two terms on the Council, plus filling a partial term for a Council member who was unable to complete a term. He thanked her particularly for leading the Council through a biennium of uncertainty, including transitioning from in-person to virtual meetings. He presented (virtually) a commemorative, engraved brick intended to match the brick walls of Ms. Gates' office, and promised to deliver it in person soon. Ms. Gates stated that she had enjoyed her time on the Council and wished the new Council and Executive Committee well in their work.

V. Council Rules of Procedure per ORS 1.730(2)(b) (Judge Peterson)

A. Review

Judge Peterson briefly reviewed the Council's Rules of Procedure (Appendix C) and explained that they were revised in 2018 to reflect current practices.

B. Council Timeline

Judge Peterson briefly reviewed the Council's timeline (Appendix D). He explained that it is a good overview of the biennial process and timelines that need to be met by statute, including publishing proposed rules for public comment and transmitting promulgated rules to the Legislature.

VI. Reports Regarding Last Biennium

A. Promulgated Rules

Judge Peterson briefly reviewed the amendments that the Council promulgated last biennium (Appendix E), and stated that none of those promulgations was modified or rejected by the Legislature, so they will become effective on January 1, 2022:

- Clarified the times for responding to pleadings in ORCP 15 D, and also made it clear that not all of those times can be extended by a judge by including some language that serves as a red flag to practitioners
- Rewrote ORCP 21 to make it easier to cite, and added an amendment that makes it clear that judges may exercise their discretion to allow or to strike an expansive responsive pleading that raises entirely new issues too close to the trial date.
- Modified ORCP 27 to clear up any confusion on the part of litigants and court personnel about the difference between guardians ad litem and guardians.
- Rewrote ORCP 31–the interpleader rule–to clarify when and how interpleader may be used, as well as making the award of attorney fees discretionary rather than mandatory.
- Made some changes to Rule 55. One change allows a party to bring in an adverse party that is already subject to the jurisdiction of the court by serving them under Rule 9 rather than Rule 7 and without having to pay witness and mileage fees. The other change will require a change to all subpoena forms effective January 1, 2022, to include a disclaimer that witnesses who are not offered the witness fee and mileage fee do not have to appear.

The Council also made a recommendation to the Legislature to help solve the problem that arises when a plaintiff unknowingly files a lawsuit against a defendant who is deceased, does not learn of the death until after the expiration of the statute of limitations, and is then barred from refiling the suit under the name of the representative of the estate because there is no relation back. The Council's recommended change to the language in Oregon Revised Statute (ORS) 12.190 made it into Senate Bill 728, the Oregon Law Commission's probate improvement bill, which was passed by the Legislature and signed by the Governor. He praised the Council's Oregon State Bar lobbyists for their assistance in shepherding the Council's suggestion into the OLC's bill and through the

Legislature, which had many more pressing issues to consider other than amending ORS 12.190.

1. Staff Comments

Judge Peterson stated that he is a bit behind in drafting the staff comments for last biennium's promulgated rules. The staff comments are not legislative history but, rather, a short description of the rule change and why the Council made it. They might be compared to Cliff's Notes for a novel. He stated that he would draft the staff comments and get them circulated to the Council for feedback before the next meeting.

2. 81st and 82nd Legislative Assembly's ORCP Amendments Outside of Council Amendments

Judge Peterson explained that, when the Council was created by the Legislature, the Legislature reserved for itself the right to modify or reject any of the Council's promulgations, as well as to make changes to the Oregon Rules of Civil Procedure (ORCP) on its own initiative. He stated that the Legislature had proposed six bills that would have made changes to the ORCP, but that just two of them had passed. House Bill 3401 is a revisor's bill that changed an incorrect reference to Rule 7 that existed in Rule 71. Senate Bill 817 made a change in Rule 78 C(2) to eliminate a reference to a statute that the Legislature had also eliminated regarding fees in certain juvenile cases.

VII. Administrative Matters

A. Set Meeting Dates for Biennium

Mr. Crowley stated that, for the last few biennia, the Council has been meeting on the second Saturday of each month. He asked whether the current Council would like to continue with that tradition. Judge Peterson noted that he and Ms. Nilsson had looked through the calendar to see if the second Saturday scheme would include any secular or religious holidays and did not find any such conflicts. Hearing no request for discussion by Council members, Mr. Crowley asked for a motion to make the second Saturday of each month at 9:30 the Council's meeting day and time. Judge Leith made a motion to set the second Saturday of the month at 9:30 a.m. as the starting time for Council meetings. Mr. Hood seconded the motion, which was approved unanimously by voice vote.

B. Funding

Judge Peterson explained that the Council receives a small amount of funding through a Judicial Department appropriation from the Legislature. This year's appropriation is in the amount of $53,934. That amount will be sent to Lewis and Clark Law School to be held in an account to pay for Judge Peterson's stipend of $1000 per month and Ms. Nilsson's well-deserved hourly salary as the highest paid non-exempt employee at the law school. The Law School partners with the State to provide office space, computer equipment, and a number of other services, so it truly is a public-private partnership. Judge Peterson expressed some concern that, when he eventually retires, it will be difficult for the Council to find an Executive Director willing to take on the task for just $1000 per month, so he will be talking to Mr. Shields and possibly others at the Oregon State Bar (OSB) regarding the possibility of increasing the amount that the Legislature appropriates to support the Council's work.

Another funding source for the Council is the OSB, which provides a travel budget of $4000 per year for Council members. This is typically enough to reimburse the judge members and our public member for their travel to and from meetings. The travel budget might actually get used if the Council ever meets in person again. The statute that created the Council states that the Council should endeavor to meet in each congressional district. The Council has held some meetings outside of the Portland metropolitan area in the past, but never in all of the congressional districts in one biennium since Judge Peterson has been involved. He stated that he would welcome ideas from members on fun and interesting ideas for ways to pair a meeting with an activity in another congressional district.

C. Council Website

Ms. Nilsson gave a brief overview of the Council's website and its features, including the current biennium page, which contains the meeting calendar, agendas, and meeting minutes. She stated that the most important page is the biennial history page, which contains legislative history for all but two biennia, including agendas, minutes, promulgated rules, and staff comments. It is an important resource, especially for those living outside of the I-5 corridor who do not have access to the law libraries that have hard copies of Council history materials. Judge Leith wondered whether a link to the Council's website might be added to the Legislature's page on the ORCP. Ms. Nilsson stated that she would talk to the Council's contact at Legislative Counsel to see whether this was a possibility.

D. Results of Survey of Bench and Bar: Generally

Judge Peterson briefly reviewed the general results of the Council's survey (Appendix F). He stated that ORCP 1 B specifies that the ORCP should secure the just, speedy, and inexpensive determination of every action. He noted that the percentage of lawyers and judges who feel that the ORCP facilitates resolution of civil disputes in a just manner was over 50%; however, the percentages go down on the speedy and inexpensive criteria. Judge Peterson pointed out that this survey is not the only place where such complaints are heard, and we should keep in mind that we seem to be doing better on "just" than on "speedy" and "inexpensive." He stated that it is also apparent from the survey that the majority of the respondents do not know much, if anything, about the Council. Perhaps the Council needs to do a better job of publicity.

Judge Norby suggested that it might be worthwhile to put an article about the Council in the Oregon State Bar Bulletin. Mr. Shields stated that he thought that was a good idea and that he would check with the publication staff. Judge Norby stated that she would be happy to help with an article. Ms. Weeks stated that she would also be willing to help, especially to craft an article in plain English that would be more accessible to legal staff, not just lawyers.

VIII. Old Business

Note: For ease of discussion, the Council opted to include discussion of all suggestions related to a rule the first time the rule arose on the agenda. For example, all suggestions relating to ORCP 7, including those from the Council Survey (agenda item IX.B.) were included when discussing the suggestions made in agenda item IX.A.1.a. through IX.A.1.c.

A. ORCP/Topics to be Reexamined Next Biennium (Appendix G)

1. ORCP 7

a. Service on Registered Agent in Different County

Judge Peterson explained that Zach Holstun, a process server, had raised an issue late last biennium that the previous Council decided to hold over until this biennium.

The issue is that, when a registered agent is located in a county that is not the same as the county in which the action was commenced, the process server must also do follow-up service by mail. Judge Peterson stated that he believes that the language has existed in subparagraph D(3)(b)(ii) since ORCP 7's inception. He noted that he did not understand the important

distinction between subparagraph D(3)(b)(i) and subparagraph D(3)(b)(ii) and that he is uncertain as to why a registered agent located in a different county must be treated differently than if that agent was located in the county where the action is commenced. He stated that he did not understand how someone is prejudiced by just having the registered agent served.

Mr. Andersen posited that it may be an artifact that may go back to horse and buggy days and that it does not reflect the reality of today. He stated that he would volunteer to be on a committee to look into the issue.

b. USPS and Actual Signatures During COVID

Judge Peterson noted that, If a Rule 7 committee is formed, there is another carry-over issue to be included. Holly Rudolph of the Oregon Judicial Department contacted the Council last biennium concerning the change in the manner that the U.S. Postal service handles certified mail return receipt requests with signatures. The question is whether Rule 7 needs to be amended to reflect the current practice.

Ms. Holley stated that she has received certified mail sent back as rejected, or the return receipt postcards sent back with a signature from a postal service worker and a note indicating that signature service is not being offered because of COVID-19. Ms. Dahab stated that she has experienced the same thing, and also has had the postcards sent back simply stamped "COVID-19."

Judge Bloom expressed concern about changing a rule just because there may currently be hiccups in in the availability of a process. He noted that the service rules have a catch-all provision (section G) that validates service that is reasonably calculated to apprise a person of the lawsuit against them, and that he believes that the courts can deal with those situations and determine whether service has been achieved to so apprise the defendant. He wondered whether it would be worth following up with the Postal Service to determine the current status of certified mail, but discouraged the Council from making a rule change that might will become moot by the time the rule actually gets promulgated.

Judge Peterson stated that he is also concerned because some of the suggestions from the survey seem to indicate that there is a thought that the three-day rule in Rule 10 B is no longer applicable, so he thinks that there are some issues with the postal portion of service that probably need

to be looked at. He did agree with Judge Bloom that the Council should not make a rule change to handle a temporary change in post office procedures. Ms. Holley stated that she had intended to send a test piece of certified mail last biennium but had not done so. She stated that she would send a certified letter to Ms. Dahab to see the results.

Judge Peterson alerted the Council to at least two other suggestions regarding Rule 7 that came in after the last meeting of the last biennium (Item IX.A.3, Appendix H). One of the suggestions is in regard to service on governmental defendants. A corporation can be served by leaving the summons and complaint with someone in the office of the corporation. However, for government units other than the Office of the Attorney General, that is not the case. Zach Holstun suggested allowing service on an individual in the office of government entities like we do for corporations. Judge Peterson recalled a conversation during a Council meeting about the fact that government entities range from large, such as the City of Portland, to small, like the vector control district in Klamath County. Some may not have a responsible person in the office to receive service of summons. Judge Peterson stated that there may be a reason not to make this change to Rule 7, and the Council's collective experience would prove helpful in making that decision.

Judge Peterson pointed out that there were also suggestions for improvement of Rule 7 that came from the survey (Appendix I). One is a proposal to eliminate Rule 7 D(4)'s requirement that service in motor vehicle cases be to "any" address at which the defendant might be found. For example, if someone wanted to sue Mark Peterson but they did not know where he was, they could find a lot of Mark Petersons in the Portland area who could arguably be him, so those are potential addresses to which the service would have to be attempted. The proposal is that service on an insurance company be included in Rule 7 D(4) so that, if there is an insurance company for the defendant that has already been identified, service on that insurance company would be sufficient. The proposer notes that a default cannot be taken under Rule 69 without letting the insurance company know about it, so why not make insurance companies step up for service under Rule 7? Mr. Goehler stated that, as the "insurance guy" in the group, he would be happy to serve on the Rule 7 committee if one is formed and be a part of the discussion on this issue. Judge Peterson noted that the Council's strength is that it has a lot of different people with different experiences who can examine the rules and proposals and determine whether changes need to be made and how proposals can be made better.

Mr. Crowley pointed out that the survey contains a number of suggestions regarding Rule 7 and, if the Council planned to form a Rule 7 committee, the committee could go through all of those suggestions as its first order of business. Judge Brown suggested that the committee focus on the issue of service, rather than just on Rule 7, since some of the comments are in regard to Rule 9 and Rule 10, which interrelate to Rule 7 and also implicate service times. Judge Peterson stated that he thinks that is a point well taken and that, if the committee decides that all of the issues are more than they want to bite off, at least the committee can take that view from 10,000 feet and then hone in on the most important issues.

Judge Peterson noted that there are a few suggestions regarding Rule 9 and Rule 10. One of the issues regarding Rule 9 relates to whether file stamped copies of pleadings need to be served. He pointed out that sometimes files are rejected before they are saved to the Odyssey filing system, which could create confusion about whether the parties have served the correct version. There are several file and serve concerns, including concerns stated in the survey about file clerks who refuse to file documents for allegedly unreasonable reasons. Judge Peterson noted that there is also a suggestion that indicates that Rule 9 C on electronic service is not workable and needs to be improved. While some of the survey respondents seemed to think that the Council has the power to change statutes or Uniform Trial Court Rules (UTCR), that is above the Council's pay grade. However, looking at electronic service in its entirety, and either forming a workgroup with the UTCR Committee or simply making suggestions for improvement to that committee, is a good idea.
Ms. Holley pointed out that filing and service procedures in the Oregon trial courts are different from the federal courts. She stated that she believes that it is a good thing that all parties can be served through Odyssey if those parties have included their contact information, but that it is odd to her that it does not happen automatically if "file and serve" is selected but, rather, only if "serve" is selected. She stated that a potential solution would be requiring all parties to be able to be served through Odyssey, not necessarily by email but through a more formal service procedure. Judge Peterson agreed that the committee could look at that issue as well.

Judge Norby stated that significant changes to Odyssey are expected in October, and any committee should probably bring in an Odyssey expert or experts from the individual courts, because not all procedures are necessarily statewide.

Mr. Goehler agreed that creating a Service Committee would be more

comprehensive than simply a Rule 7 Committee. He noted that getting some kind of uniformity in Oregon court practices would be helpful. Ms. Weeks opined that any committee involved in Rule 9 and service through Odyssey may need to be a workgroup with the UTCR Committee because, at the end of the day, she believes that requiring service through Odyssey is going to be a UTCR issue and not part of the ORCP. Judge Peterson again noted that any committee could make friendly suggestions to the UTCR Committee. Ms. Weeks wondered whether it would be possible for her to serve on the Council and the UTCR committee simultaneously, because she is interested in doing so. Judge Peterson stated that the UTCR Committee is a Judicial Department committee and that appointments are made by the Supreme Court. He stated that he did not know the process for seeking appointment to that committee, but that he did not see any conflict with serving there simultaneously with Council service.

Mr. Andersen, Judge Bailey, Judge Bloom, Mr. Goehler, Ms. Holley, Judge Leith, Judge Peterson, Ms. Stupasky, and Ms. Weeks agreed to serve on the Service Committee. Mr. Goehler agreed to chair the committee. Ms. Nilsson agreed to put together a list of the issues that the committee will be reviewing and send that list to committee members as soon as possible.

c. ORCP 55 - Council Review of Objections/Motions to Quash

Judge Peterson explained to the Council that Judge Marilyn Litzenberger of Multnomah County had raised an issue regarding a simple process for non-party witnesses to object to subpoenas. Some of these witnesses are confused as to why they were served, while others might have a serious conflict like a pre-planned vacation out of the country, and some simply choose to ignore the subpoena because they are confused as to what they need to do to address such a conflict. Judge Litzenberger's thought is that it would be handy to have a simple and clear procedure that would not necessarily require these potential witnesses to hire an attorney. Part of the problem with such a potential amendment is due to the fact that there are three categories of subpoenas: trial, for depositions, and for documents. Former Council member Don Corson also pointed out that a subpoena is an order from the court, not an invitation with an RSVP. Judge Peterson observed that last biennium's Rule 55 committee did work on the issue and that it might be worthwhile to revisit it to try to create a relatively straightforward procedure that would allow someone to object to the subpoena, but that would not create those other problems.

Judge Peterson suggested looking at the next item on the agenda, which

also involves Rule 55, to see whether it would make sense to create a Rule 55 committee.

2. ORCP 55 - Require Lawyers to Share Subpoenaed Materials

Judge Peterson stated that this suggestion came from former Council member Brooks Cooper. Mr. Cooper apparently had an occasion when an opposing party refused to share subpoenaed documents with him, and he was required to use a Rule 43 request to obtain them. Mr. Cooper did not feel that this was speedy or inexpensive, and suggested that the Council might tweak the rule to require parties to share subpoenaed documents.

Ms. Holley stated that she could understand Mr. Cooper's issue from both sides, but that she would be opposed to such a change. She explained that she has had numerous responses from big hospitals lately which say that, because of COVID, they cannot provide her clients' medical records. As a result, she has actually had to start subpoenaing her own clients' medical records just to get a response from these hospitals. She stated that she does not want to have to avoid subpoenaing her clients' medical records because she would be automatically required to provide them to the other side as a matter of course. Ms. Stupasky stated that she was thinking the same thing, but it seems like there could be an exception if a rule change was made. Judge Norby pointed out that medical records are covered under ORCP 55 D, the confidential health information section, but the section being discussed is ORCP 55 B, which is the duces tecum section. Ms. Holley wondered whether Mr. Cooper was talking about section B or section D. Judge Norby stated that she did not believe Mr. Cooper was referring to section D, but that, for all of the reasons Ms. Holley mentioned, any change would have to be cognizant of protections for medical records.

Mr. Crowley asked the Council whether it wished to create a Rule 55 Committee based on the foregoing two issues as well as those raised on the survey that had not been discussed. Ms. Nilsson asked Judge Norby whether there were any specific issues that she was concerned about after the previous reorganization of the rule. Judge Norby stated that her interest all along was that the reorganization would reveal any problematic issues to practitioners, who would then bring them to the attention of the Council. She stated that she would be happy to serve on a Rule 55 Committee if the Council decided to form one.

Mr. Larwick, Judge Norm Hill, Judge Norby, and Judge Peterson agreed to serve on the Rule 55 Committee. Judge Norby agreed to chair the committee.

3. ORCP 57 - Continue Council Committee/Workgroup Re: Bias/Discrimination

in Challenges to Jurors in Jury Selection

Ms. Holley updated the Council on the status of last biennium's Rule 57 Committee's work regarding whether to change Oregon's jury bias rule. Last biennium, the committee began putting together a work group of stakeholders to make a recommendation to the Legislature, as there was pretty broad consensus that, whether or not this change is characterized as procedural, it has substantive impacts on all of our communities and how justice is served to those communities. The stakeholder group includes attorneys on both the criminal and civil side, because a change to Rule 57 does impact the criminal jury bias procedures. There are three or four rules nationwide that have changed to reflect a new understanding of unconscious bias basically, and they have done it in different ways, so the workgroup has done a comparison of those rules. It has also looked at a Willamette Law review article that made recommendations for Oregon to make a change. Ms. Holley stated that she has reached back out to stakeholders now that the new biennium has begun and received responses from about seven people.

Judge Peterson noted that Rule 57, like Rule 55, has an impact on more than civil practice by statute. It is also borrowed by the criminal law side of the bar. He also noted that Court of Appeals, in an opinion, asked the Council to fix the rule, and he opined that the Council should accept that invitation. He stated that a small amendment to make the rule a bit better would be procedural, but making some of the changes that have been made by other states would almost certainly be substantive. Since our charter from the Legislature is procedural, it would require a suggestion to the Legislature, much like the Council's recommendation regarding ORS 12.190 last biennium. He stated that he believes that the workgroup that would be formed would be a careful, deliberative group with a good deal of expertise. Not only would the Legislature appreciate that, but practitioners would likely prefer that the Council make the recommendation for improvement to the Legislature.

Judge Bailey stated that he has maintained all along, and wanted to reiterate now, that this is a political hotbed. While he appreciates the fact that the Court of Appeals would like to see the Council take on the matter, he really thinks that this is a legislative issue where the Legislature needs to bring in all of the different interested parties and hold open hearings and have public discussion. Judge Norm Hill stated that he feels that, because the issue is a political hotbed, the Council can be part of starting that conversation in a way that is not necessarily driven by some of those larger political issues by being focused on the mechanics and dealing with fairness on an individual level based on the rule. Since the rule is effectively within the Council's purview, this is a perfect place to at least start that

conversation through a workgroup. Judge Norby suggested that the Council might want to consider involving either the state representative of the Diversity, Equity, and Inclusion Commission, or representatives of local court committees.

Judge Leith also suggested forming a committee and having the committee engage with a workgroup. He stated that the deficiencies in the current rule are partly procedural, and partly substantive. The Council can create procedures that address the procedural deficiencies, and as part of that same process propose to the Legislature solutions to the substance of the deficiencies.

Mr. Andersen asked for a more precise definition of the parameters of a Rule 57 committee. Ms. Holley explained that, in anticipation of this meeting, she had reached out again the previous week to interest groups, including all the affinity bars, the American Civil Liberties Union (ACLU), the Oregon Association of Defense Counsel, a number of public defenders, the District Attorneys' Association, and the Oregon Public Defense Services office. She stated that a number of these stakeholder groups have let her know that they wish to be involved. Her understanding of the parameters of the committee would be to consider the rules that have already been adopted in other states, consider the Willamette Law Review recommendations for Oregon, and determine whether a recommendation should be made to the Legislature based on what the stakeholder groups think Oregon's rule should reflect.

Judge Peterson observed that the Council could follow Arizona and eliminate peremptory challenges altogether, which is actually the recommendation from Willamette Law Review article, but he thinks that a lot of practitioners might have a problem with that. The Council could also choose to do nothing. However, it might be wisest to form a committee, which may morph into a workgroup that includes stakeholders who have different viewpoints from Council members, such as prosecutors and the criminal defense bar. These different viewpoints are necessary, as well as input from trial judges who have to deal with peremptory challenges. Judge Peterson stated that Mr. Shields could confirm the veracity of this statement, but he believes that, of the 90 members of the Oregon Legislature, there may be about eight or nine who have legal training, and he not sure that any of them would know where the courthouse is. He opined that this matter is better being handled "in house." If it is decided that a change would be substantive, and he suspects that it will be, the Council can hand off its best work product to the Legislature for their action.

Judge Norm Hill suggested that, if a committee is formed, the first order of business should be to see if committee members can come to a consensus as to what the scope of its work should be. That will dictate which outside groups

should be invited to join a workgroup. If no consensus can be reached among committee or Council members, any workgroup will be a waste of time. His recommendation would be to form a committee that takes the big issue and starts to frame it into bite-sized pieces to bring back to the Council, and proceed from there.

Judge Bailey stated that he understood where Judge Norm Hill was coming from in the sense that the Council is a non-political group; however, his understanding was that the Council should keep these outside entities away from the decision-making process to maintain that neutrality. He stated that he is confused by the assertion that the issue is so big that the Council cannot take any action without reaching out to these entities because, to him, that indicates that it is a political hotbed that the Legislature really needs to deal with. Judge Norm Hill stated that he appreciated that nuance. His thought is that the Council is a perfect place to start as an incubator, and once the Council has an idea of what it would like to do, it can reach out to get buy-in from these other interest groups. He stated that the value of having the work begin at the Council level is that it frames the discussion in a way that is practice oriented at the outset.

Mr. Andersen stated that, in his mind, the case law develops when an issue comes before the court and has to be decided. He stated that he has not encountered any problems with Rule 57 in the 125 jury trials that he has been involved with, and he wondered whether this is an attempt to craft a solution and then go out to try to find the problem. Ms. Holley pointed out that the Oregon Court of Appeals had, in one of its rulings, essentially asked the Council to take up this issue. Mr. Andersen stated that he was aware of the Court's decision, but wondered whether it is a problem if that decision is the only source driving the a change when there are 11,000 practitioners who are not encountering the problem. Judge Norm Hill stated that this is why he prefers the Council taking on the issue, because that is the threshold question that should be looked at. If the Council comes to the consensus that it is a problem, it does not have the political stakes that the other groups may have. He stated that it seems to him that it is a more appropriate approach than just punting on the issue and throwing it to the Legislature, which may just listen to the loudest voices without having the benefit of the careful, academic discussion that the Council brings to the table.

Mr. Andersen, Judge Bailey, Judge Brown, Mr. Crowley, Ms. Dahab, Judge Jon Hill, Judge Norm Hill, Ms. Holley, Mr. Hood, Judge Leith, and Judge Peterson agreed to join the Rule 57 Committee. Ms. Holley agreed to chair the committee.

4. ORCP 68 - Workgroup Request from OSB Practice & Procedure Committee

Judge Peterson explained that the Council had received a request at the end of last biennium from attorney Joshua Lay-Perez, a member of the Oregon State Bar's Practice and Procedure Committee, expressing interest in making a change to Rule 68 to require, essentially, UTCR 5.010 conferral before filing a statement for attorney fees. The idea is to avoid so much litigation over the reasonableness of fees. Judge Peterson stated that he suggested to Mr. Lay-Perez that changes to the ORCP are the purview of the Council, but that it might be possible to form a workgroup and invite members of the Practice and Procedure Committee if this biennium's Council thought that the idea was worthwhile.

Judge Peterson also noted that there is another issue on the agenda relating to ORCP 68, which is a matter of cleaning up a citation to the Servicemembers Civil Relief Act in the United States Code, as well as three additional suggestions from regarding Rule 68 from the survey.

Mr. Crowley observed that it appears that there is at least one change that needs to be made with regard to the citation that needs to be updated. He asked the Council whether there was any interest in forming a committee to address any of the other issues on the agenda regarding Rule 68. The Council decided not to form a committee regarding Rule 68. Judge Peterson stated that Council staff would draft a proposed amendment to Rule 68 with the updated citation and present it to the Council at an upcoming meeting.

IX. New Business

A. Potential amendments received by Council Members or Staff since Last Biennium (Appendix H)

1. ORCP 1 E - Plain Language

Judge Peterson stated that senior Judge Maureen McKnight had made a suggestion to make the declaration language in ORCP 1 E more user friendly to self-represented litigants by rewriting it in plain language. He noted that Rule 1 is another one of the ORCP that is used in a number of different statutes. His recollection is that the declaration language was not created by the Council but, rather, borrowed from somewhere else. He stated that he could appreciate Judge McKnight's suggestion, and that it would be nice if all of the ORCP were more readable.

Judge Bloom recalled that he was on the Council when Rule 1 was changed to

allow the convenience of using declarations instead of just affidavits. That was a huge change to save people hardship when they are filing or responding to motions and dealing with remote parties. He stated, although he appreciates Judge McKnight's concerns, he believes that the language and the requirements in the rule are appropriate and that the language should remain unchanged because declarations are supposed to be formal proceedings. Mr. Andersen agreed.

Judge Peterson asked if any other Council members had thoughts on the matter. He observed that, if people are going to sign something under penalty of perjury, they ought to know that they are signing under penalty of perjury. His concern before making any change would be to find out where the current language in the rule originated to avoid any unintended consequences. Judge Bloom recalled that the Council had probably adopted the language from the federal court, which was using declarations before Oregon. He opined that the onus is on the proponent of the declaration to make sure that the witness knows the importance of the document, just like any other document. Judge Leith stated that he believes that "subject to penalty of perjury" are words that most people would understand, even if some of the other words are big or unusual.

Mr. Goehler pointed out that Oregon's language is no more complex than the federal declaration language or Washington's declaration language. He stated that attempting to rewrite all of the ORCP in plain English would be a big undertaking, especially since there is so much interplay between the rules themselves and statutes.

The Council decided not to form a committee on Rule 1. Judge Peterson stated that he would inform Judge McKnight of this decision and the reasoning behind it.

2. ORCP 4 - Service on Corporations

Judge Peterson stated that attorney Dallas DeLuca had made a recommendation to change ORCP 4 to make service of summons on members or managers of LLCs confer personal jurisdiction under Rule 4 G. Judge Leith pointed out that the entities under Rule 4 G are those for which service is believed will be supportable, and then there is the catchall (section L) which extends the long arm of personal jurisdiction even further. However, to extend it in the way that is being suggested would be to extend it beyond what is known to be supportable. He stated that, in fact, the Supreme Court has been working on personal jurisdiction recently, and he does not believe that the Council should make such a change at this time.

Judge Peterson noted that, at one point, the Council went out on a limb following an appellate decision and apparently went too far out on that limb and its

amendment was found to exceed the constitutional reach of personal jurisdiction. He noted that not making the suggested change will not cause undue consternation for practitioners, and that it sounds like the Council might be treading into an area that would be fraught with some legal challenges if it did make the suggested change.

The Council decided not to form a committee on Rule 4. Judge Peterson stated that he would inform Mr. DeLuca of this decision and the reasoning behind it.

3. ORCP 7

   a. Service on Public Bodies
   b. E-Service by Parties

   See Item VIII.A.1.

4. ORCP 14 A - Motions to Strike

Judge Peterson stated that attorney Joshua Lay had contacted the Council regarding a potential amendment to ORCP 14. The attorney had received a recent adverse ruling from the Court of Appeals [*Much v. Doe*, 311 Or App 652 (2021)]. Judge Peterson explained that there was a majority opinion with a concurrence, and a dissent, and the issue had to do with making a an objection in a Rule 71 challenge. There were unsworn, written statements submitted and, during oral argument on the motion, the defendant objected to those unsigned statements. The judge did not rule on the oral motion, but did set aside the default. Rule 14 requires motions, except those made during trial, to be in writing. Mr. Lay says that he has done a nationwide survey and Oregon is unique in having a rule that is so strict in requiring motions to be in writing.

Judge Peterson asked whether there is any interest in forming a committee on Rule 14. He also pointed out that there was another suggestion from the survey that mentioned Rule 14, and that comment related to inserting time frames for motion practice into the rule. He noted that there is a very clearly written rule for the time frame for motion practice (UTCR 5.030), and that the Council did amend ORCP 15 D in the last biennium regarding asking for forgiveness or for permission for late filings, depending on whether the time for filing a response to a motion or pleading would be missed or had already been missed.

Ms. Holley asked for clarification regarding Mr. Lay's issue. She stated that it sounded like a motion had been made and, during the hearing on the Rule 71 motion, a new motion was raised orally. Judge Peterson stated that this was

correct, and that the oral motion suggested that the documents on which the Rule 71 movant was relying were unsworn, but the oral motion did not make a specific request to the judge to strike the written statements or if, arguably, he did, he did not insist on a ruling. Judge Armstrong at the Court of Appeals then decided that an error was not identified.

Judge Leith stated that this seems like a unique situation with a unique opinion and that he was not sure how the Council could apply it. One judge found that there was no assignment of error, another judge found that the asserted error was not preserved, and another judge found that it should be reviewed. He did not believe that the Council should try to make a rule that tries to address that circumstance. Mr. Crowley agreed. Judge Peterson stated that it sounds like the case will be taken to the Oregon Supreme Court in any case.

The Council decided not to form a committee on Rule 14. Judge Peterson stated that he would inform Mr. Lay of this decision and the reasoning behind it.

5. ORCP 16 - Ex Parte Request for Pseudonym Use

As Judge Norby needed to leave the meeting early, Judge Peterson explained the issue that she had encountered with regard to ORCP 16 and pseudonyms. He reminded the Council that it had amended Rule 16 to allow the use of pseudonyms in certain cases. Judge Norby presided over a case where a lawyer represented a client who had been informed by the website Reddit that Reddit had been served with a subpoena for some highly personal information about the client. The lawyer intended to file for an injunction that used the pseudonym of initials, suggesting that this client was attempting to avoid the trauma of this information getting out and that requiring the client to use their name in a pleading would defeat the purpose of the proposed litigation. Judge Norby ultimately did not grant permission to sue using the pseudonym.

Mr. Andersen pointed out that there is a long history of the use of pseudonyms going back as far as the Federalist Papers that were all published under pseudonyms. There is also a beautiful statement by Justice John Paul Stevens of the United States Supreme Court, pointing out that if courts did not allow the use of pseudonyms, some litigation that needs to occur would never occur. He stated that he feels very strongly that pseudonyms should be allowed, and he does not see any abuse of that practice, nor an existing problem, one judge's experience notwithstanding,

Ms. Holley recalled that, when the Council promulgated the amendment to Rule 16, it contemplated giving authority to the circuit courts to develop supplemental

local rules (SLR) containing procedures for applying pseudonyms. She wondered whether the problem with Judge Norby's case was the SLR or Rule 16 itself. Judge Peterson stated that Clackamas County has an SLR which is nearly identical to Multnomah County's SLR that does permit the use of pseudonyms, but he stated that he may have mischaracterized how the matter came before the court. Ms. Nilsson stated that it appears that it was a criminal case, but the lawyer filed a civil petition to use the pseudonym to quash the subpoena. Ms. Holley stated that she did not see anything in Rule 16 that would authorize the use of the subpoena in that situation.

Judge Peterson noted that there was another suggestion regarding Rule 16 from the survey (Appendix I) that suggested that pseudonyms be allowed for all family law matters because it is nobody's business what happens in a family. Ms. Holley stated that she is opposed to that because she has used family law cases as background in other cases. Judge Peterson pointed out that there are pitfalls with pseudonyms, such as judgments for money damages and how to collect those awards from someone identified only by pseudonym. There is also the open courts provision in the Oregon Constitution. And, as attorney and former Council member Bob Keating pointed out, it is helpful when defending medical malpractice cases to know if the plaintiff has filed other such cases in the past. Sometimes litigation history is important. Judge Bloom stated that he felt that such a change could have unintended consequences and he did not feel it was appropriate.

The Council decided not to form a committee on Rule 16.

6. ORCP 44 C - Making Applicable to All Parties

Judge Peterson explained the former Council member Shenoa Payne had suggested a revision to ORCP 44 to attempt to make the rule apply more equally. Her concern is that a plaintiff must turn over all medical records regarding their medical condition that is the subject of the lawsuit; however, a defendant can claim their medical condition prevents any liability and conceal that medical condition from plaintiff until midway through trial. Mr. Goehler stated that this is really a privilege issue, because ORCP 44 C gets around the privilege, and we are saying that privilege applies until waived by the defendant.

Judge Peterson noted that there was another suggestion regarding Rule 44 on the survey regarding the "same body part" rule in Multnomah County and the inconsistency in discovery across the state. Ms. Nilsson pointed out that there are many suggestions on the survey that fall into the category of discovery, from Rule 36 through 46, to expert discovery and interrogatories. She suggested that the Council could form a Discovery Committee to examine these issues more closely.

Mr. Crowley agreed.

Judge Bloom stated that the Council had looked at discovery rules when he was on the Council 20 years ago and had done so many times since. Judge Norm Hill stated that, given the entrenched interest that the Council has had on this issue, he would just caution against trying to promulgate a rule if it becomes clear that, at the end of the day, it will not pass. Otherwise, it is just a bunch of headache and work and a rehash of what the Council has been doing for 20 years.

Judge Peterson stated that his experience with the Council is that, if the Council is considering an amendment that one side of the bar feels will especially benefit the other side, that amendment probably will not obtain a supermajority for promulgation. He suggested that it may be wise to use a sort of a legislative bargaining response to determine if another change that would benefit the other side could be part of the negotiation. He stated that the Council should be cautious about taking on a heavy lift, unless it is fairly confident it can figure a way to make it to approval of a promulgation.

Judge Bloom, Mr. Crowley, Ms. Dahab, Mr. Goehler, Ms. Holley, Judge Norm Hill, and Mr. Hood agreed to serve on the Discovery Committee.

7. ORCP 68 - New Cite to Servicemembers Civil Relief Act

See Item VIII.A.4.

8. ORCP 69 - Non-Human Defendants and Opposing Parties

Judge Peterson explained that attorney Katherine Heekin had a motion for default rejected because she did not provide anything with regard to the non-military status of the defendant she is proposing to default because the defendant was a corporation. Ms. Heekin suggested changing Rule 69 to make it clear that incapacity, being a minor, etc., do not need to be covered in the affidavit or declaration in support of a motion for default against a non-human party.

Judge Bloom stated that he agreed that Ms. Heekin's issue is frustrating; however, the court clerks who are receiving the paperwork are just trained to check whether there is affidavit of non-military service. He stated that he believes that leaving the burden with the person seeking the default rather than the court staff is a fine resolution. In fact, clerks are told repeatedly to just do the job and not to give legal advice and practice law illegally. He also stated that he was not sure how big of a problem it is and he could not recall having that issue come before him. Judge Peterson agreed that we want the courts to be able to process those Rule 69

motions without making non-ministerial judgments, but it is an easy workaround to file a declaration that states that a corporation is not a human entity and is therefore not incapacitated, not a minor, and not in the military.

Judge Peterson pointed out that there were several other suggestions from the survey relating to Rule 69 (Appendix I). One stated that the default procedure in Oregon prejudices plaintiffs after the 28-day notice is issued, in that UTCR 7.020 puts the 28-day onus on the plaintiff to move the case forward. The suggestion was that the 28-day notice should serve as the notice of intent to take default. However, the 28-day notice only goes to the plaintiff, not the defendant, since the defendant is not a party to the case because personal jurisdiction has not yet attached to them. The suggestion also posits that it is more trouble to do the motion for an order of default than it is to do the motion for a judgment. While that may be true, because one must show some things to set up the default, it does not take weeks of research to determine whether the defendant is in the Department of Defense active military database. Under the Servicemembers Civil Relief Act, one must only show that they have done due diligence.

Judge Peterson noted that another suggestion states that it could be more clear what the standard is for a prima facie case for a default judgment and what the procedure is to challenge a default judgment. He observed that Judge Shelly Russell wrote a "Tip From the Bench" article in the last issue of the *Multnomah Lawyer* publication about how she handles the prima facie case. While it is not in the rule, it is not rocket science. The procedure to challenge the defaults can be found in Rule 69 F and Rule 71 B. Judge Peterson stated that he did not find the suggestion particularly helpful in improving the ORCP. He did state that clarification of the notice of intent to take default would be helpful.

Mr. Crowley asked whether there was interest in forming a Rule 69 Committee. The Council declined to do so.

9. ORCP 71 - Citation Cleanup Issue

See Item VI.A.2.

10. Post-Covid Remote Appearances

The Council opted to hold over this agenda item until the October 9, 2021, Council meeting.

B. Potential amendments received from Council Survey (Appendix I)

The Council opted to hold over the remaining suggestions in this agenda item until the October 9, 2021, Council meeting.

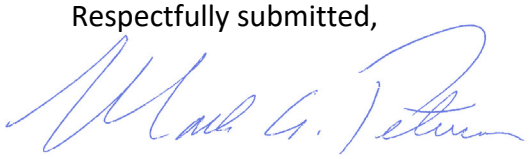
X. Appointment of committees regarding any items listed in VIII-IX

The appointment of committees was handled on an ongoing basis during the discussion of each agenda item. The appointment of committees for the remaining agenda items will be discussed at the October 9, 2021, Council meeting.

XI. Adjournment

Mr. Crowley adjourned the meeting at 12:36 p.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

Oregon Council on Court Procedures - Partial Roster

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DRAFT 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 ORCP 21 ORCP 27 ORCP 31 ORCP 55 ORCP 57	Discovery ORCP 7 ORCP 15 ORCP 21/23 ORCP 23/34C ORCP 27/GAL ORCP 31 ORCP 55 ORCP 57	Discovery ORCP 1 ORCP 4 ORCP 7 ORCP 9 ORCP 10 ORCP 17 ORCP 22 ORCP 32 ORCP 36 ORCP 39	ORCP 41 ORCP 43 ORCP 44 ORCP 45 ORCP 46 ORCP 47 ORCP 54 ORCP 62 ORCP 69 ORCP 79	ORCP 15 ORCP 21 ORCP 27 ORCP 31 ORCP 55	ORCP 7 ORCP 55 ORCP 57 ORCP 68

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 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, 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 D). 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

COUNCIL ON COURT PROCEDURES
RULES OF PROCEDURE

The following are Rules of Procedure adopted pursuant to ORS 1.730(2)(b). These rules do not cover Council membership, terms, notices, public meeting requirements, voting, or expense reimbursement to the extent that these subjects are directly covered in ORS 1.725-1.760.

I. MEETINGS. Meetings of the Council shall be held regularly at the time and place fixed by the Chair after any appropriate consultation with the Council. At least two weeks prior to the date of a regular Council meeting, the Executive Director shall distribute a notice of meeting and agenda. Special meetings of the Council may be called at any time by the Chair after any appropriate consultation with the Executive Committee. Notice of special meetings of the Council stating the time, place, and purpose of any such meeting shall be given personally, by telephone, by e-mail, or by mail to each Council member not less than twenty-four hours prior to the holding of the meeting. Notice of special meetings may be waived in writing by any Council member at any time. Attendance of any Council member at any meeting shall constitute a waiver of notice of that meeting except when a Council member attends the meeting for the express purpose of objecting to the transaction of any business because the meeting is not lawfully called. All meetings shall be conducted in accordance with parliamentary procedure, or such reasonable rules of procedure as are adopted by the Chair from time to time.

II. OFFICERS, EXECUTIVE COMMITTEE, COMMITTEES

A. Officers. The Council shall choose the following officers from among its membership: a Chair, Vice Chair, and Treasurer. These officers shall be elected for a term of one year. Officers for the succeeding year shall be elected at the September meeting of the Council each year and shall serve until a successor is elected. The powers and duties of the officers shall be as follows:

1. Chair. The Chair shall preside at meetings of the Council, shall set the time and place for meetings of the Council, shall direct the activities of the Executive Director, may issue public statements relating to the Council, and shall have such other powers and perform such other duties as may be assigned to the Chair by the Council.

2. Vice Chair. The Vice Chair shall preside at meetings of the Council in the absence of the Chair and shall have such other powers and perform such other duties as may be assigned to the Vice Chair by the Council.

3. Treasurer. The Treasurer shall preside at all meetings of the Council in the absence of the Chair and Vice Chair and shall have general responsibility for reporting to the Council on disbursement of funds and preparation of a budget for the Council and shall have such other powers and perform such other duties as may be assigned to the Treasurer by the Council.

B. Executive Committee. The above officers shall constitute an Executive Committee of the Council. The Executive Committee shall have the authority to employ or contract with staff and may authorize disbursement of funds of the Council or may delegate authority to disburse funds to the Executive Director and shall perform such other duties as may be assigned to it by the Council. The Executive Committee or its delegate shall set the agenda for each Council meeting prior to the meeting and provide reasonable notice to Council members of the agenda.

C. Committees. The Chair may appoint any committees from Council membership as the Chair shall deem necessary to carry out the business and purposes of the Council. All committees shall report to and recommend action to the Council.

D. Legislative Advisory Committee ("LAC").

1. Definitions. When used in this section, the phrase "LAC" means the committee elected pursuant to ORS 1.760. The phrase "super majority" means the vote necessary to promulgate rules under ORS 1.730(2)(a).

2. Activities of LAC and LAC Members. When the LAC is called upon to provide technical analysis and advice to a legislative committee, it must not represent that such technical analysis and advice is representative of the Council unless the one of the following has occurred:

a. the Council, during its current biennium, had previously approved such technical analysis and advice through a super majority; or

b. the LAC, after a request by a legislative committee, has presented any proposal to the Council and the Council has voted, by its super majority, to support the specific analysis and advice to be rendered to the committee.

Unless the Council has approved the matter through one of the methods above, the LAC shall offer any technical analysis and advice with the express disclaimer that such technical analysis and advice does not represent the opinion of the

Council on Court Procedures. The LAC shall not exercise its statutory discretion to take a position on behalf of the Council on Court Procedures on proposed legislation unless that position has been submitted to the Council and approved by a super majority. Any member of the LAC who chooses to appear and offer testimony before a legislative committee, and who has not obtained the approval of the Council concerning the content of his or her testimony, shall not represent to the legislative committee that the member speaks for the Council, but shall only identify himself or herself as a member of the LAC, and expressly indicate that he or she is not authorized to speak on behalf of the Council.

III. EXECUTIVE DIRECTOR, STAFF, ADMINISTRATIVE OFFICE, CONTROL OF FUNDS

A. Executive Director. Under direction of the Chair, the Executive Director shall be responsible for the employment and supervision of other Council staff; maintenance of records of the Council; presentation and submission of minutes of the meetings of the Council; provision of all required notices of meetings of the Council; preparation and distribution of Council meeting agendas; and receipt and preparation of suggestions for modification of rules of pleading, practice, and procedure, and shall have such other powers and perform such other duties as may be assigned to the Executive Director by the Council, the Chair, or the Executive Committee.

B. Staff. The Council shall employ or contract with, under terms and conditions specified by the Council or the Executive Committee, such other staff members as may be required to carry out the purposes of the Council.

C. Control and Disbursement of Funds. Funds of the Council appropriated by the Legislature shall be retained by the Lewis and Clark Law School and funds authorized for the Council by the Oregon State Bar shall be retained by the Bar. All such funds shall be paid out only as directed by the Council, the Executive Committee, or the Executive Director as authorized by the Executive Committee.

D. Administrative Office. The Council shall designate a location for an administrative office for the Council. All Council records shall be kept in that office under the supervision of the Executive Director.

IV. PREPARATION AND SUBMISSION OF RULES OF PLEADING, PRACTICE, AND PROCEDURE.

The Council shall consider and propose such rules of pleading, practice, and procedure as it deems appropriate at its meetings.

A. Notice of Proposed Amendments. As required by ORS 1.735(2), at least thirty days before the meeting at which final action is to be taken on the promulgation, amendment, or repeal of any rule included or to be included within the Oregon Rules of Civil Procedure, the Executive Director shall prepare and cause to be published to all members of the Bar the exact language of the proposed promulgations, amendments, or repeals.

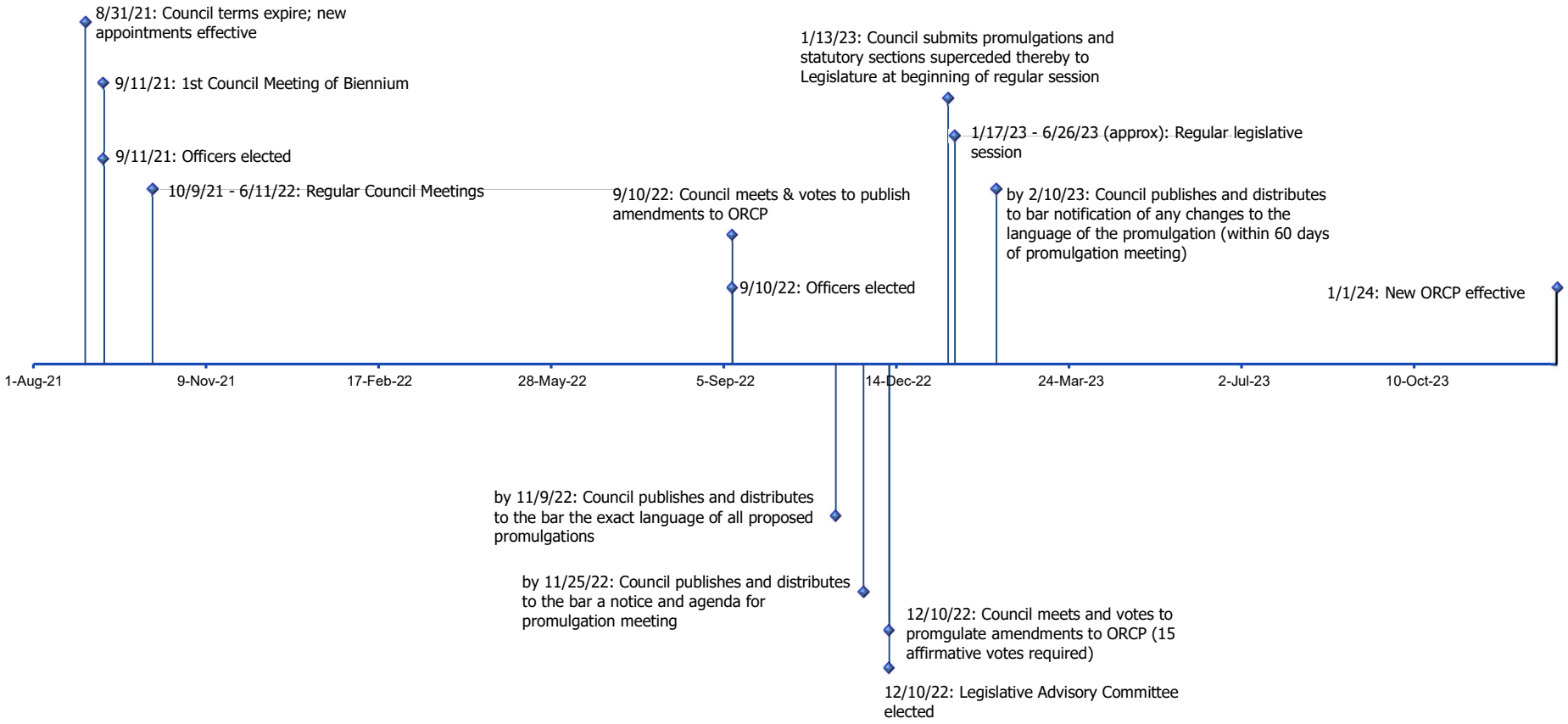
B. Notice of Promulgation Meeting. As required by ORS 1.730(3)(b), at least two weeks prior to the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published to all members of the Bar and to the public a notice of such meeting, which shall include the time and place of such meeting and a description of the substance of the agenda. At such meeting, the Council shall receive any comments from the members of the Bar and the public relating to the proposed promulgations, amendments, or repeals.

C. Promulgation of Rules by the Council. Before the meeting at which final action is to be taken on the promulgations, amendments, or repeals, the Executive Director shall distribute to the members of the Council a draft of the proposed promulgations, amendments, or repeals, together with a list of statutory sections superseded thereby in such form as the Council shall direct. The Council shall meet and take final action to amend, repeal, or adopt rules of pleading, practice, and procedure and shall direct submission of such promulgations, amendments, or repeals and any list of statutory sections affected thereby, to the Legislature before the beginning of the regular session of the Legislature.

D. Notice of Changes after Promulgation Meeting. Pursuant to ORS 1.735(2), if the language of a proposed promulgation, amendment, or repeal is changed by the Council after consideration at the meeting at which final action is to be taken on promulgations, amendments, or repeals, the Executive Director shall prepare and cause to be published notification of the change to all members of the Bar within 60 days after the date of that meeting.

Adopted by vote of the Council on Court Procedures this 3rd day of December, 2016.

Council on Court Procedures: 2021-2023 Biennium Timeline (some dates approximate)



AMENDMENTS

TO THE

OREGON RULES OF CIVIL PROCEDURE

promulgated by the

COUNCIL ON COURT PROCEDURES

December 12, 2020

COUNCIL ON COURT PROCEDURES

Judge Members

Hon. Lynn Nakamoto, Justice, Oregon Supreme Court, Salem (8/31/21)
Hon. Doug Tookey, Judge, Oregon Court of Appeals, Salem (8/31/21)
Hon. D. Charles Bailey, Circuit Court Judge, Washington Co. (8/31/21)
Hon. R. Curtis Conover, Circuit Court Judge, Lane Co. (8/31/21)
Hon. Norman R. Hill, Circuit Court Judge, Polk Co. (8/31/21)
Hon. David Euan Leith, Circuit Court Judge, Marion Co (8/31/23)
Hon. Thomas McHill, Circuit Court Judge, Linn County (8/31/23)
Hon. Susie L. Norby, Circuit Court Judge, Clackamas Co (8/31/21)
Hon. Leslie Roberts, Circuit Court Judge, Multnomah Co (8/31/23)
Hon. John A. Wolf, Circuit Court Judge, Wasco Co. (8/31/21)

Attorney Members

Kelly L. Andersen, Medford (8/31/21)
Troy S. Bundy, Portland (8/31/23)
Kenneth C. Crowley, Salem (8/31/23) (Vice Chair)
Travis Eiva, Eugene (8/31/21)
Jennifer Gates, Portland (8/31/21) (Chair)
Barry Goehler, Lake Oswego (8/31/23)
Meredith Holley, Eugene (8/31/21)
Drake A. Hood, Hillsboro (8/31/23)
Scott O'Donnell, Portland (8/31/21)
Shenoa L. Payne, Portland (8/31/21)
Tina Stupasky, Eugene (8/31/23)
Jeffrey Young, Portland (8/31/23)

Public Member

Margurite Weeks, Portland (8/31/21) (Treasurer)

Staff

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INTRODUCTION

The following amendments to the Oregon Rules of Civil Procedure have been promulgated by the Council on Court Procedures for submission to the 2021 Legislative Assembly. Pursuant to ORS 1.735, they will become effective January 1, 2022, unless the Legislative Assembly by statute modifies the action of the Council.

The amended rules are set out with both the current and amended language. New language is shown in boldface with underlining, and language to be deleted is italicized and bracketed.

Please note that, during its December 12, 2020, meeting, the Council made changes to the previously published version of ORCP 55 for the following reason:

ORCP 55: The Council deleted the final clause of the proposed published language in subparagraph A(1)(a)(5), as well as changes to subsection A(7) in the published rule. The Council received one comment regarding the proposed changes to Rule 55, and discussion during both the publication meeting and the promulgation meeting brought concerns to light regarding the fact that the rule, in its existing form, provides uneven treatment in the manner in which the recipient may respond to subpoenas for documents and subpoenas for depositions or trials, and little guidance as to whether and how any objection may be raised in regard to subpoenas requiring an appearance. The Council decided that the rule should be examined further next biennium to determine whether such a distinction should be made before including language regarding non-party witnesses and their right to file motions to quash. The Council did, however, feel that it was important to promulgate the other changes to Rule 55 this biennium.

The Council held the following public meetings during the 2019-2021 biennium:

September 14, 2019, Oregon State Bar, Tigard, Oregon
October 12, 2019, Oregon State Bar, Tigard, Oregon
November 9, 2019, Oregon State Bar, Tigard, Oregon
December 14, 2019, Oregon State Bar, Tigard, Oregon
January 11, 2020, Oregon State Bar, Tigard, Oregon
February 8, 2020, Oregon State Bar, Tigard, Oregon
March 14, 2020 - Lewis and Clark Law School, Portland, Oregon/Webex Virtual Meeting
April 11, 2020 - Lewis and Clark Law School, Portland, Oregon/Webex Virtual Meeting
May 9, 2020 - Webex Virtual Meeting
June 13, 2020 - Webex Virtual Meeting
September 26, 2020 - Webex Virtual Meeting
December 12, 2020 - Webex Virtual Meeting

The Council expresses its appreciation to the bench and the bar for the comments and suggestions it has received.

2020 PROMULGATED AMENDMENTS TO
THE OREGON RULES OF CIVIL PROCEDURE

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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 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 court.*]

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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 paragraph A(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a), or B(3)(b) 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.

A(3) Who may issue.

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

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

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

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

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

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

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

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

A(6) Recipient obligations.

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

testimony, unless the witness is sooner discharged.

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

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

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

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

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

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

A(7)(a) Written objection; timing. A written objection may be served on the party who

issued the subpoena before the deadline set for production, but not later than 14 days after service on the objecting person.

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

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

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

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

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

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 [*the*] **than** 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt

more than 3 days before the date to appear and testify.

B(2)(d) 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.

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General Suggestions

Suggestion
I think with the COVID stuff, the CCP should have a little more say in things. For example, I know most of the family law attorneys I work with would like to continue status conferences by phone because it saves a lot of time and money for our clients. The only response in favor of personal appearance is that certain judges believe they need to have these in person for the attorneys to actually talk - which is certainly not my experience. The courts have had a lot of trouble getting on the same page with this - even within the same county. Having each judge be able to decide how each status conference will occur is starting to make it real complicated. It should be by phone and all judges should use the same phone system - with exceptions for smaller counties.
It is critical that the CCP apply rules changes evenly and fairly for both sides of civil cases and not try to make things easier for 1 side over the other.
Please encourage and/or recruit participation from judges and attorneys *outside* Multnomah/Washington/Clackamas/Marion counties. While those do represent a large percentage of both the general population of the state, as well as the legal community, having those counties dominate a rulemaking body like the CCP reinforces a perception that the rest of the state is subject to the whims of the "City" (alternatively, "Portland" or "Salem").
keep up the good work. if it aint broke don't fix it.
I don't know much about it. Maybe send out educational information?
If people do not know what you do, they will not respect what you do. Tell people what you do and how they can contribute to modernizing ORCPs for the modern practice of law.
I don't have time right now to send you an entire list of all the proposed changes to the Oregon rules of civil procedure, but I do wish your organization did much better work networking with lawyers. I've been a trial lawyer for 25 years and I've never even heard of you.
I believe that the CCP is extremely valuable and I don't think that the legislature can be sufficiently responsive to the needs of all practitioners in all jurisdictions. Representatives represent their district while the CCP is designed to serve all practitioners.
The court system is designed well to handle disputes between sizable business entitles that can afford to pay a lawyer to spend 20 hours writing a motion, or taking hours of depositions. Litigation for even medium sized businesses (let alone individuals or small businesses) is far too expensive. I believe the cost of litigation (specifically the way motions and discovery are handled) is one of the single biggest threats to equity in the legal system. The mandated mediation is on the right path, but we need more system improvments.
The CCP crawls at a glacial pace. It needs to be more nimble and quick.
I am grateful for the efforts over the years to simplify and clarify the Rules, but would love for it to be made still more understandable/accessible to unrepresented or self-represented litigants, if not already done in some other way. I think greater access to rules, laws, and caselaw by non-lawyers is an important tool in reducing economic barriers to justice.
I'm glad for an expedited way to make changes through the CCP; I didn't know the CCP existed (new attorney).
The Council has several times considered proposals to include a proportionality rule, but has deliberately chosen not to adopt on. This indicates to me that the CCP is not an impartial, professional body acting to promote a modern, functional litigation system in the State of Oregon, but instead an ill informed or amateur body that is inappropriately vulnerable to partisan lobbying. As a result, I have declining confidence in the professionalism and ability of the CCP to implement changes based on sound practice.
It is important to keep a balance of members in terms of plaintiff/defense and big firm/small-solo firms on the CCP/
Good work on ORCP 55, the current version is a big improvement.
CCP should approve rule changes subject to Supreme Court Approval. However, existing Oregon systems have worked well—we're fortunate to practice here.

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Two other things: First, I've always been surprised that the CCP website does not have a copy of the original proposed rules and comments from 1978-79. I have a copy so I am not at a loss, but I assume very few other lawyers do. Second, I've always found it a little cumbersome to locate the CCP commentary that goes with the rule changes. As I recall (I haven't used it for a year), you have to dive a bit before you find what you're looking for. I've always been able to find it, but I thought it should be a little more obvious where material is located.
The focus of the civil rules should be to promote justice not trial practice. I don't think the CCP is the sole problem in the system, but the Oregon system is too focused on pushing every case towards a costly trial.
I would like to see a Contact form on the contact page where people could submit comments and suggestions for improvement in the Oregon Rules of Civil Procedure when they think of an idea for improvement in the rules. Right now there is an email address, which makes submitting a proposed change take longer than necessary. Also, I think that the committee should public all proposed requests for changes to the rules, and respond to each request in some public manner.
The CCP should advertise itself to make practitioners more aware of who is on the council and what it does. Requests for suggestions should be made throughout the year and not just in August when new rules come out. (If this is already being done, I apologize.) I just haven't seen it, but that may just be me.
I visited the CCP website several years ago, hence why I have no opinion on the questions related to it. I really don't remember my experience that well but I did not form a negative opinion, so that's probably a positive.
I thoroughly enjoyed the work on CCP. It is a very effective group and I hope that continues into the future.

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 D). 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.

Shari Nilsson <nilsson@lclark.edu>

RE: New submission from Contact Form - Holly Rudolph

Holly Rudolph <Holly.Rudolph@ojd.state.or.us> Wed, Oct 14, 2020 at 10:13 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

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!

the proposed amendment to ORS 12.090 was part of the work that the Council did, but note that the proposal is being put forward by the Oregon State Bar.

IV. New Business

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

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

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

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

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

5. ORCP 55

Ms. Gates stated that there had been one comment, 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.

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>

New submission from Contact Form - Brooks Cooper

1 message

COCP Website Form <info@counciloncourtprocedures.org> Tue, Jul 28, 2020 at 1:25 AM
Reply-To: Brooks@draneaslaw.com
To: nilsson@lclark.edu

Name

Brooks Cooper

Email

Brooks@draneaslaw.com

Phone

(503) 496-5511

Subject

ORCP 55

Message

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

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.

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.

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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

Re: Council on Court Procedures

1 message

Mark Peterson <mpeterso@lclark.edu> Mon, Jul 20, 2020 at 8:11 PM
To: Shari Nilsson <nilsson@lclark.edu>
Cc: Shenoa Payne <spayne@paynelawpdx.com>, Joshua Lay-Perez <joshua@hlplawpc.com>, Jennifer Gates <jgates@pearllegalgroup.com>

Joshua and all,

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

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

Mark
Executive Director
Council on Court Procedures
Clinical Professor of Law
Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219
mpeterso@lclark.edu
(503) 768-6505

On Tue, Jul 14, 2020 at 9:47 PM Shari Nilsson <nilsson@lclark.edu> wrote:

> Hi Joshua,
>
> I apologize for the delay in getting back to you. You'd think that with so many of us working from home, we would have more time, but I'm finding that the opposite is true. And I don't even have small children to worry about any more!
>
> I'm copying Mark Peterson, our Executive Director, who has been with the Council a bit longer than I have and I believe has been involved in an instance where the Council and the Practice and Procedure Committee worked cooperatively. He is unfortunately not available this week, but I'm sure he'll get in touch next week with some insights.
>
> Best regards,
> Shari
>
> ---
> Shari C. Nilsson
> Executive Assistant
> Council on Court Procedures
> nilsson@lclark.edu
> councilоncourtprocedures.org
>
> On Fri, Jun 26, 2020, 11:15 Shenoa Payne <spayne@paynelawpdx.com> wrote:
>
> > This does seem like something the COCP should be involved in, as it proposes an amendment to the ORCPs. Unfortunately we just finished proposing amendments for this Biennium and won't consider potential amendments

again until September 2021.

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

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

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

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

SP SHENOA PAYNE
ATTORNEY AT LAW PC

My office has moved. Please note new contact information:

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

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

> Shenoa,
>
> I hope you are well. Thank you for speaking with me before about oral arguments. I think mine went really well, and I appreciate your willingness to help.
>
> I saw your name on the Council on Court Procedures website as a current member, and thought I'd approach you first. I am currently on the Practices and Procedures Committee, and proposed a modification to the way attorney fees are considered in Oregon. My goals involve reducing fee disputes that require conventional judicial intervention, and fairness in fee disputes. I am looking to potentially work with someone from your committee on this issue, or at least to make sure that we aren't overlapping on projects. I'm not sure if you think it's a good idea for two plaintiff's lawyers to team up, or if you recommend working with someone else on the committee.
>
> As part of my research, I came across Local Rule 54.3 from the Northern District of Illinois, which I think would serve as a good model for a change to our process. The rule mandates a good faith attempt to confer, pre- fee petition, and, if the respondent objects after receiving records from the petitioner, the respondent is required to furnish their time and billing records. It also requires the respondent to specifically identify particular items in dispute. If the parties still have a dispute, then they are required to submit a joint statement. The final fee petition is limited to only the items that still remain in dispute.
>
> Thanks for your time again!
>
> --

Thank you,

Joshua B. Lay-Perez
Attorney at Law
HLP Law PC
495 State Street, #400
Salem, OR 97301
Phone: (971) 239-5660
Fax: (971) 239-5659
www.HLPLawPC.com

MAUREEN McKNIGHT
SENIOR JUDGE

CIRCUIT COURT OF THE STATE OF OREGON

maureen.mcknight@ojd.state.or.us

June 28, 2021

Hon. Mark Peterson, Executive Director
Council on Court Procedures
c/o Lewis & Clark Law School
10101 S.W. Terwilliger Blvd.
Portland, Oregon 97219

Re: Plain Language Change(s) to ORCP 1E(2)

Dear Judge Peterson,

I write to request that the Council on Court Procedures (CCP) consider Plain Language changes to ORCP 1E(2) on Declarations under penalty of perjury.

I make this request on my own behalf and not at the request of the Oregon Judicial Department (OJD). I believe my request is consistent, however, with OJD priorities.

The mandated language in ORCP 1.E's U.S.-made Declaration **tests at a reading grade level of 15.4-16** using the Flesch-Kincaid reading algorithm. This is the most commonly used readability formula. Yet the average American who signs such Declaration reads, at best, at the level of a 7th or 8th grader (12-14 years old). *The Literacy Project; see also National Assessment of Adult Literacy.* Efforts to assist self-represented litigants by communicating in Plain Language have long been a priority for the court.[1] While ORS 183.750 exempts judicial agencies from Plain Language directives, I can see no reason why the CCP would not want language that must appear on the majority of OJD forms produced for the public to be understandable by a majority of users.

ORCP 1.E lacks an "in substantial conformity with" qualification. The rule-prescribed words for the Declaration, therefore, must be stated in forms verbatim. While I have been successful in advocating for the bulleted language below in some OJD forms, changing the *rule* to simpler words would significantly improve reader understanding overall. As currently drafted, the subsection's primary sins against Plain

[1] The 2006 OJD/OSB Task Force on Access to State Courts for Persons with Disabilities called for public notices and correspondence to meet an 5th grade reading level. The State Court Administrator issued directives in 2008 that its documents designed for the public should meet an 8th grade or lower reading level. Significantly, OJD's 2020-2021 Strategic Campaign incorporates an emphasis on improving understanding of court processes in its access to justice initiative.

Language principles are its very long sentence structure (37 words/sentence as opposed to the recommended cap of 10) and needlessly complex word choice. Consider these comparisons:

Required language only	
Current Rule Language	**Suggestion**
I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.	▪ I believe the statements I made above are true. ▪ I understand these statements may be evidence in court. ▪ I am aware the crime of perjury could apply if I make these statements knowing they are false.
Grade level: 15.4	Grade level: 6.8

If one were to re-write the rule's prefatory language as well -- changing passive voice to active and shortening the sentences -- the result would be similar to the following. Changing at least the required statements as set out above, however, would be my priority:

Entire rule	
Current Rule	**Suggestion**
A declaration made within the United States must be signed by the declarant and must include the following sentence in prominent letters immediately above the signature of the declarant: "I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.	A person making a declaration within the United States must sign the statement. The declaration must include the sentences below. These sentences must appear directly above the person's signature. ▪ I believe the statements I made above are true. ▪ I understand these statements may be evidence in court. ▪ I am aware the crime of perjury could apply if I make these statements knowing they are false.
Grade level: 29 (college graduate)	Grade level: 8.7

I appreciate the Council's consideration of my request. My language is only a suggestion and can surely be improved. (You may know that it took 5 years and the review of numerous committees to complete the Plain Language conversion of the FRCP in 2008). But I know we are both aware from procedural justice studies that courts who make their rules and rulings clearly understandable increase the public's trust in us and their view of our legitimacy as an institution.

Very truly yours,

Maureen McKnight

Maureen McKnight
Senior Judge
Maureen.McKnight@ojd.state.or.us

cc: Shari C. Nilsson, Executive Assistant

Shari Nilsson <nilsson@lclark.edu>

New submission from Contact Form - Dallas DeLuca

COCP Website Form <info@counciloncourtprocedures.org> Wed, Sep 4, 2019 at 9:47 PM
Reply-To: dallasdeluca@mhgm.com
To: nilsson@lclark.edu

Name

Dallas DeLuca

Email

dallasdeluca@mhgm.com

Phone

(503) 295-3085

Subject

ORCP 4 G

Message

Hello - Why limit ORCP 4 G to just "domestic corporations"? To be consistent with the original goal of ORCP 4, does ORCP 4 G need to be expanded to members and managers of LLCs, and further expanded to include the officers & directors & partners of all entities that can be served under ORCP 7 D(3)(b), (c), (d), (e) and (f)? I understand that with the "catch-all" in ORCP 4 L that this might not be necessary, but the original Council stated that adding as many examples as possible was needed. See comment pasted below.
Thank you for your review of this question.
Sincerely,
Dallas
ORCP 4 G currently provides, "G Director or officer of a domestic corporation. In any action against a defendant who is or was an officer or director of a domestic corporation where the action arises out of the defendant's conduct as such officer or director or out of the activities of such corporation while the defendant held office as a director or officer."

The original comment to ORCP 4, referred to above, is as follows: "The intent of the Council was to extend personal jurisdiction to the extent permitted by the federal or state constitutions and not foreclose an attempt to exercise personal jurisdiction merely because no rule or procedure of the state authorized such jurisdiction."

From: Mark A. Peterson
Sent: Friday, March 26, 2021 5:24 PM
To: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: RE: Alt Service

Holly,

Long time, no see or hear.

The Council's discussions (and minutes) were pretty clear that certain e service is unlikely to be effective if it is sent by a stranger but will be looked at if it comes from a known source, even a known source that the defendant does not like. I think that the process of getting an order from a judge spelling out the reasons for utilizing alternative service and the reasons for utilizing the particular method of alternative service proposed should solve the issue. The learned judge should specify in his or her order exactly how service is to be accomplished and by whom. Since an email or a post to Facebook from a stranger may not be looked at by the recipient, it is not unreasonable for the motion and order to specify that the plaintiff may perform the service contact on the defendant. If that is the judge's order, the plaintiff would be the most qualified person to execute a proof of service. That said, section E could be amended to make it clear that judges have the authority to provide by an order that the plaintiff may serve the defendant.

I believe that you have championed a change in the rule allowing plaintiffs and petitioners to effect service on defendants and respondents. The Council has pretty firmly held to a concern that personal jurisdiction is too important to leave to amateurs and interested parties. (Even attorneys are precluded from performing most forms of service of the summons, but not lesser document such as subpoenas.) The issue you raise relates to alternative service which can be accomplished by publication in a newspaper that no one reads, so an attempt to craft a means of obtaining service that is very likely to be more effective and less expensive seems like a worthy effort.

Hope that this helps. If you wish, I can put this issue on the Council's September agenda.

Mark

From: Holly Rudolph <Holly.Rudolph@ojd.state.or.us>
Sent: Friday, March 26, 2021 3:10 PM
To: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>
Subject: Alt Service

Happy Friday!

I wanted to pass on that a concern we discussed about eService has become a problem. The notes I have say the committee didn't intend the "who can serve" to be restrictive in alternative service situations, but I've had half a dozen issues come to me so far (and unknown numbers that haven't come to me) where judges aren't sure they can accept a cert of service by email or social media if the party does it themselves.

I would like to ask again that the committee clarify that the party can serve and add language to that effect in the rule.

Hope you're doing well!

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.

Shari Nilsson <nilsson@lclark.edu>

Suggested Amendment to ORCP 7D(3)(h)

Zack Holstun <zack@mercurypdx.com> Tue, Sep 17, 2019 at 10:55 PM
Reply-To: zack@mercurypdx.com
To: ccp@lclark.edu
Cc: Desiree White <desiree@mercurypdx.com>

Hi there,

I am writing to recommend amending ORCP 7D(3)(h), which is for service upon Public Bodies other than the State or Federal Government (which does not have a 7D subsection to my knowledge).

ORCP 7D(3)(h) does not mention the phrase "personal service upon any clerk on duty" as you have in 7D(3)(b) for Corporations, nor does it have the wording "by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk", as you have in 7D(3)(g) for service upon the state.

ORCP 7D(3)(h) only mentions "personal service or office service upon an officer, director, managing agent, or attorney thereof."

This phrasing as Office Service triggers the need for a mailing (since personal service of a clerk on duty or leaving true copy with clerk is not mentioned as an option), unless you are lucky enough to get the County/City attorney or other busy officer/higher up to come out and accept personally, which is unlikely due to their schedules.

We do a lot of mailings, and I am no whiner, nor am I just lazy!! It just seems like this may be an oversight/omission of verbiage, as it does not make a ton of sense to me to allow personal service on the receptionist of "Acme Widgets", but not call that manner of service the same thing for service of a Paralegal or Support Staff in the office of a County Official.

If you agree, we would save some time and paper by adding some verbiage allowing personal service to staff at the office for a Public Body!

Thank you for your time and consideration of this.

Regards,

Zack Holstun

President

MercuryPDX

Office (day)-503-247-8484

Re: ORCP 14

1 message

Joshua Lay <joshua@hlplawpc.com> Thu, Jun 17, 2021 at 10:39 PM
To: Mark Peterson <mpeterso@lclark.edu>
Cc: Shari Nilsson <nilsson@lclark.edu>

I neglected the attachment.

On Thu, Jun 17, 2021 at 1:38 PM Joshua Lay <joshua@hlplawpc.com> wrote:

> My office compiled a list of jurisdictions and it confirmed my belief that Oregon's rule is unique. In the petition for review, I think we'll be asking the Oregon Supreme Court to clarify this apparent "trial like" hearing exception that is not in the rule, but suspect the correct place for that is really the CCP.
>
> On Wed, Jun 16, 2021 at 1:33 PM Mark Peterson <mpeterso@lclark.edu> wrote:
>
> > Looking at the opinion refreshes my recollection.
> >
> > Thanks,
> >
> > Mark
> > --
> > Mark A. Peterson
> > Executive Director
> > Council on Court Procedures
> > Clinical Professor of Law
> > Lewis & Clark Law School
> > 10015 SW Terwilliger Blvd
> > Portland OR 97219
> > mpeterso@lclark.edu
> > (503) 768-6505
> >
> > On Wed, Jun 16, 2021 at 1:14 PM Joshua Lay <joshua@hlplawpc.com> wrote:
> >
> > > On Wed, Jun 16, 2021 at 1:10 PM Mark Peterson <mpeterso@lclark.edu> wrote:
> > >
> > > > Mr. Lay,
> > > >
> > > > Thank you for raising a concern with ORCP 14 A. A brief review of the drafting history indicates that the drafters arrived at the current language at least as early as February 27, 1978. There were only two changes thereafter. The word "Form" was deleted from the leadline and the phrase "including Rule 17 A" was added in section B. There was also a correction of a typographical error, "or" to "of." The early drafting notes reference ORS 16.710, 16.720, 16.730, and 16.740. I might add that the source notes indicate that the Legislative Assembly made a change in c. 284, section12, in the 1979 session laws. I did not dig that session law up but the Council's promulgated Rule 14 A did not appear to be changed; the typographical error, "or" to "of" in section B, appears to be the only change.
> > > >
> > > > The Council works on a biennial schedule and the first meeting of the coming biennium will be on September 11, 2021, At the first, and sometime the second, meeting the Council determines which rules and what issues it wishes to tackle during the biennium. I will include the concern that you have raised in the agenda for the first meeting to determine whether there is a consensus to examine, and possibly amend, Rule 14. In the meantime, I missed the ruling from the Court ofAppeals. Could you please forward the citation?
> > > >
> > > > Mark
> > > > --
> > > > Mark A. Peterson
> > > > Executive Director
> > > > Council on Court Procedures
> > > > Clinical Professor of Law

Lewis & Clark Law School
10015 SW Terwilliger Blvd
Portland OR 97219
mpeterso@lclark.edu
(503) 768-6505

On Wed, Jun 16, 2021 at 12:17 PM Joshua Lay <joshua@hlplawpc.com> wrote:

> Mr. Peterson,
>
> I recently received an adverse ruling from the Court of Appeals on an issue related to ORCP 14 concerning motions to strike evidence at hearings, given the rule's requirement that all motions, other than those made a trial, must be in writing. The Court seems to acknowledge there is some kind of exception for "trial like" hearings, although there is essentially no law on point and virtually no legislative history.
>
> As I begin to wade through the issues raised by the rule and pertinent law, I figure I'd reach out to you and perhaps open a dialogue about this to see if the rule is having the intended effect, and if, perhaps there is something here that needs to be addressed.
>
> From my preliminary research, it appears that Oregon is the only jurisdiction that has such a strict rule. Federal court, and all other jurisdictions that I've reviewed thus far say that motions must be in writing unless made during trial *or a hearing*. Notably, the adoption of ORCP 14(A) in the 1977-1979 biennium references ORS 16.710 as the basis of the rule and the comment says that it is "an expansion of the last sentence of ORS 16.710 by adding a requirement of a writing [...]." ORS 16.710 only ever required *orders* to be in writing, and the last sentence said, "An application for an order is a motion." That is the extent of what I can find on the history. While I think it's far fetched to say it was a mistake, the strictness of the rule is certainly unique, and I thought it was worth a look, and perhaps a conversation.
>
> --
> Thank you,
>
> **Joshua B. Lay (he/him)**
> Attorney at Law
> HLP Law PC
> 495 State Street, #400
> Salem, OR 97301
> Phone: (971) 239-5660
> Fax: (971) 239-5659
> www.HLPLawPC.com
>
>

--
Thank you,

Joshua B. Lay (he/him)
Attorney at Law

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Linda MUCH,
Plaintiff-Appellant,
v.
Jane DOE,
an unknown party,
Defendant,
and
FRED MEYER STORES, INC.,
a foreign corporation,
Defendant-Respondent.

Yamhill County Circuit Court
18CV03056; A168009

Ronald W. Stone, Judge.

Argued and submitted June 15, 2020.

Joshua B. Lay-Perez argued the cause and filed the briefs for appellant.

Megan J. Crowhurst argued the cause for respondent. Also on the brief were Francis T. Barnwell and Kalia J. Walker.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Aoyagi, Judge.

ARMSTRONG, P. J.

Affirmed.

Aoyagi, J., concurring.

Tookey, J., dissenting.

ARMSTRONG, P. J.

Plaintiff brought a wage claim against defendant Fred Meyer and obtained a default judgment after defendant failed to appear. Plaintiff appeals an order of the trial court granting defendant's motion for relief from the default judgment on the ground of mistake, inadvertence, or excusable neglect. ORCP 71 B(1)(a).[1] For the reasons explained below, we reject plaintiff's assignments of error and affirm the trial court.

In support of defendant's contention that its failure to appear was the result of mistake, inadvertence, or excusable neglect, defendant offered the declarations of members of its legal staff explaining that, in the lengthy process of routing notice of plaintiff's action to the correct legal department, defendant's staff neglected to forward a copy of the summons and complaint. The trial court held a hearing on the motion and granted it, concluding:

> "Now, let's get to the heart of the thing and that is whether there is evidence sufficient to meet the premise of the law to set aside the default based on mistake, inadvertence or excusable neglect. Clearly that's exactly what happened here."

Plaintiff's first assignment on appeal asserts:

> "The trial court erred as a matter of law in considering declarations and attached exhibits that was [*sic*] not under penalty of perjury as required by ORCP 1 E,[2] OEC 603, and ORS 153.080, in setting aside the order of default.

---

[1] ORCP 71 B(1) provides:

"On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect ***. A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21 A which contains an assertion of a claim or defense."

[2] ORCP 1 E provides:

"A declaration made within the United States must be signed by the declarant and must include the following sentence in prominent letters immediately above the signature of the declarant: 'I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.'"

Defendant responds that the asserted claim of error is not preserved or properly before the court, and we agree.

Preliminarily, we note that plaintiff's assignment of error is not directed to any ruling of the court and therefore is not a proper assignment. ORAP 5.45(3) ("Each assignment of error shall identify precisely the legal, procedural, factual, or other ruling that is being challenged."). As we said in *Village at North Pointe Condo. Assn. v. Bloedel Const.*, 278 Or App 354, 359, 374 P3d 978, *adh'd to on recons*, 281 Or App 322, 383 P3d 409 (2016), "[c]ompliance with ORAP 5.45 is not a matter of mere form; it is crucial to our ability to review trial court rulings for error and to determine whether the appellant's claims of error were preserved." A court's consideration of declarations submitted with a motion brought under ORCP 71 B(1) is not a "ruling." An appropriate assignment might have been that the court erred in denying at the ORCP 71 hearing an oral motion that plaintiff made to strike the declarations, which would have highlighted the fact that the court did not rule on plaintiff's oral motion, explaining, perhaps, why plaintiff chose to assign error in the manner that she did.

Contrary to the dissent's assumption, plaintiff's *argument* in support of her assignment of error—*viz.*, that the court erred in admitting the declarations—is not an assignment of error. Assuming, however, that plaintiff's briefing is sufficient to apprise us of the ruling being challenged on appeal, we reject plaintiff's assignment, either because it is not preserved or because it does not constitute error.

In the trial court, plaintiff first mentioned the omission from the declarations of the "penalty for perjury" clause in a footnote on the thirteenth page of her sur-reply memorandum, without argument.[3] Then, at the hearing on defen-

---

Defendant's declarations did include a statement immediately above the declarant's signature line, but it is missing the concluding clause, "and is subject to penalty for perjury":

> "I hereby declare that the above statement is true to the best of my knowledge and belief and that I understand it is for use as evidence in court."

[3] Plaintiff's objection, in its entirety, stated: "Plaintiff also objects to Defendant's declarations for non-compliance with ORCP 1 E by failing to obtain declarations under penalty of perjury."

dant's motion to set aside the judgment, plaintiff made an oral motion to strike the declarations as "inadmissible and void for failing to be under penalty of perjury as required under ORCP 1 E," again without argument.

The trial court did not rule on plaintiff's oral motion, nor was it required to do so. That is because the court did not have a proper motion before it. ORCP 14 provides:

> "An application for an order is a motion. Every motion, unless made during trial, shall be in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."

A motion, other than one made at trial, must be in writing. The footnote in plaintiff's sur-reply memorandum was not a motion; and plaintiff's motion made at the hearing, which was not a trial or a trial-like proceeding, was not in writing. The written declarations submitted by defendant with its motion under ORCP 71 B(1)(a) were a part of the trial court's record. Had plaintiff wished the court not to consider the written declarations, she should have filed a written motion to strike them on which the court would then have ruled. Had the court been presented with a proper motion, it could have directed defendant to correct the declarations to include the missing "penalty of perjury" clause or could at least have given defendant the opportunity to do that. We agree with defendant that plaintiff's footnote in her hearing memorandum or her oral motion to the court did not constitute a written motion or preserve the objection for appeal.

The dissent proposes that plaintiff's oral motion was like an objection made at trial to the admission of evidence which, apparently, we should treat as having been implicitly overruled. But a hearing under ORCP 71 B to set aside a judgment is not a trial. Like a motion for summary judgment or the many other pre- and post-trial motions, a motion under ORCP 71 is typically addressed to the court through written submissions, including affidavits and declarations. Those declarations and affidavits become a part of the record when submitted. A court may allow a hearing to permit the parties to make legal arguments on whether the court should grant the pending motion in light of the facts contained in the submitted declarations. But a party

seeking to take issue with submitted declarations should file a motion to strike or exclude them, which, under ORCP 14, must be in writing,[4] unless excused by the trial court.

It is true, as the dissent points out, that when courts allow a hearing under ORCP 71 B(1), they sometimes do exercise their discretion to allow parties to submit evidence at the hearing, including testimony. When a court holds an evidentiary hearing, we would agree that, in that respect, the hearing would be sufficiently similar to a trial to permit the court, within its discretion, to allow the parties to object to evidence without filing a written motion. But that is not what happened here. The parties did not seek to submit evidence at the hearing; the only "evidence" before the court were the declarations submitted in support of and in opposition to defendant's motion. Those declarations were in the trial court's record. If plaintiff wished the court not to consider them, she should have filed a written motion to strike them. Plaintiff having failed to submit a written motion, there could be no error in failing to strike the declarations. Because the declarations were not stricken, they were a part of the record that the court could consider in ruling on defendant's motion under ORCP 71 B. We therefore reject plaintiff's first assignment of error.

Plaintiff contends in her third assignment that the court erred in failing to reject defendant's motion outright because defendant did not simultaneously tender a responsive pleading with its motion, as required by ORCP 71 B ("A motion for reasons (a), (b), and (c) shall be accompanied by a pleading or motion under Rule 21A which contains an assertion of a claim or defense."); *Duvall v. McLeod*, 331 Or 675, 677, 21 P3d 88 (2001) (holding that ORCP 71 B(1) requires that a party tender a motion for relief from default judgment and a responsive pleading simultaneously).

In *Dickey v. Rehder*, 239 Or App 253, 244 P3d 819 (2010), *rev den*, 349 Or 664 (2011), we explained that the simultaneous responsive pleading is required under ORCP

[4] We recognize that defendant did not invoke ORCP 14 in support of its preservation argument. Defendant's failure to invoke an applicable rule in opposition to plaintiff's assignment of error does not prevent us from recognizing and applying it. *Miller v. Water Wonderland*, 326 Or 306, 309 n 3, 951 P2d 722 (1998).

71 B to assure the court that the party seeking to set aside a default judgment has a meritorious defense. *Id.* at 259. But we reasoned in *Dickey* that ORCP 71 B(1) does not limit a party to only one attempt to file a correct motion and that allowing a party to withdraw a motion and refile it along with a responsive pleading does not undermine the requirements of *Duvall* "that the party tell the court why it failed to properly respond to the original pleadings and why that matters." *Id.* at 259. Thus, we held in *Dickey* that the trial court did not err in granting the defendant's motion to withdraw an incomplete motion to set aside the judgment and to refile a complete one. *Id.* at 260.

We have reviewed the record here. It shows that, although defendant's initial motion did not attach an answer, the court, within its discretion (and before ruling on the motion), allowed defendant to withdraw its motion and refile. It shows also that, at the time that the court ruled on defendant's refiled motion, the court had before it defendant's answer. We conclude that the court did not err in addressing defendant's motion to set aside the judgment.

Finally, in her fourth assignment, plaintiff contends that the record does not support the trial court's grant of defendant's motion to set aside the judgment. Courts liberally construe ORCP 71 B, particularly when the judgment is the result of a default. *In re Long*, 366 Or 194, 200, 458 P3d 688 (2020). The record here supports the court's finding that defendant's default was the result of mistake, inadvertence, or excusable neglect, and we conclude that the court did not abuse its discretion in granting defendant's motion to set aside the judgment.

We reject plaintiff's second assignment of error without discussion.

Affirmed.

AOYAGI, J., concurring.

I join in the majority's opinion but write separately to briefly provide some additional perspective on the first assignment of error. In short, I agree with the majority that the trial court did not err in granting relief from the default

judgment under ORCP 71 B based on mistake, inadvertence, or excusable neglect. I write separately only to emphasize that the purposes of preservation were not served in this case.

The majority opinion focuses on the lack of a written motion, but I do not understand it to announce a bright-line rule under which, outside trial, an oral motion is insufficient to preserve an issue for appeal under ORCP 14. Rather, I understand the majority opinion to say that, in this case, the trial court did not rule on plaintiff's oral motion to strike; that the trial court committed no error in not ruling, because the motion was not properly presented to the court; and that plaintiff has tried to get around her failure to secure a ruling from the trial court by assigning error to a nonruling (the trial court's "consideration" of defendant's declarations), which is procedurally improper. I agree with each of those points. Akin to summary judgment, a declaration submitted in support of an ORCP 71 B motion is in the record until and unless it is stricken therefrom—there is no point at which the court rules to "admit" it—and, as long as it is in the record, it is not error to consider it. If plaintiff wanted to have declarations stricken, she needed to move to strike them, and, if she wanted to obtain appellate review on that issue, she needed to obtain a ruling denying her motion. That is not what happened here.

As I said, however, I write separately to emphasize something that may not be obvious from the majority opinion: The *purposes* of preservation were not served in this case. *See Peeples v. Lampert*, 345 Or 209, 219-20, 191 P3d 637 (2008) (preservation requirements promote judicial efficiency, ensure fairness to opposing parties, and foster full record development). That is, the problem with what plaintiff did is not her failure to comply with ORCP 14 in and of itself. Noncompliance with a rule does not necessarily translate to lack of preservation for appeal. Rather, the fundamental problem is that she did not adequately apprise the trial court and defendant of her position and, consequently, failed to secure a ruling.

On this record, it is not at all clear that the trial court or defendant even caught plaintiff's objection to

defendant's declarations, let alone understood its basis. The omission in the attestations appears, on its face, likely to be a scrivener's error. It is the type of defect that, unless clearly identified, may be easily missed by lawyers and judges who read declarations regularly and are looking at them for their substance. Meanwhile, in plaintiff's view, the defect is fatal to defendant's ORCP 71 B motion, regardless of the merits of that motion, and thus determinative of the final outcome of this litigation. In that context, plaintiff's one-sentence objection in a footnote in a sur-reply, followed by a one-sentence motion at hearing, was not enough to bring attention to the issue and, more importantly, secure a ruling. For context, plaintiff mentioned the penalty-of-perjury issue near the beginning of a lengthy argument to the court, in the midst of a series of summary procedural arguments. She first renewed a prior motion to strike hearsay from the declarations; then objected to "hearsay statements made by counsel in testifying during the previous hearing back in April which contained evidence that was not submitted in the declarations"; then objected and moved to strike "*all of the Defendant's declarations as attached to all of its motions including the motion for sanctions* as being inadmissible and void for failing to be under penalty of perjury as required under ORCP 1 E" (emphasis added); then argued for six transcript pages about the answer-filing issue that is the subject of her third assignment of error on appeal; and then addressed the merits of the ORCP 71 B motion.

Finally, default judgments are disfavored—a principle that weighs against leniency on preservation in this case. *See In re Long*, 366 Or 194, 199-200, 458 P3d 688 (2020) (referencing long-standing rule that ORCP 71 B should be "liberally construed" in favor of relief, "particularly when the judgment is the result of a default," because "the policy of the law is to afford a trial upon the merits when it can be done without doing violence to the statute and established rules of practice that have grown up promotive of the regular disposition of litigation" (internal quotation marks omitted)). Had plaintiff properly and clearly raised the issue in the trial court, defendant would have had a meaningful opportunity to respond, including, for example, offering to file corrected declarations, and the trial court would have

ruled. On this record, by contrast, the most plausible inference is that the trial court never ruled at all, leaving us nothing to review.

It would be inconsistent with the purposes of preservation to reverse the grant of an ORCP 71 B motion—thus reinstating a default judgment and avoiding a trial on the merits—where a procedural issue was not clearly and properly raised, where the trial court never ruled on it, and where the issue pertains to a likely scrivener's error that could have been easily corrected had the issue been properly raised.[1]

For all of those reasons, in addition to those discussed in the majority opinion, I concur.

TOOKEY, J., dissenting.

I write separately to dissent, because I disagree with the majority's contention that plaintiff's objection was not properly made, and because I disagree with the concurrence's contention that plaintiff's objection was not preserved. As explained below, I would reach the merits of plaintiff's first assignment of error and, in so doing, I would conclude that the trial court erred in granting defendant's motion to set aside the default order and judgment; accordingly, I think the default judgment should be reinstated in this case, thereby entitling plaintiff to the award for damages that she sought as compensation for nearly two decades' worth of unauthorized payroll deductions made by defendant.

This case relates, in part, to an unsettled question within the context of hearings on motions to set aside under ORCP 71 B—specifically, whether a party attending such

[1] I would also note that, in the circumstances of this case, even if the trial court erred in not ruling on the oral motion to strike, the appropriate remedy would be to remand, not rule on the motion ourselves. The trial court might well exercise its discretion to allow filing of corrected declarations, rather than simply striking the declarations and denying the ORCP 71 B motion on that basis. *Cf. Chevalier Advertising v. Ballista Tactical Systems*, 278 Or App 148, 160, 373 P3d 1211 (2016) ("[I]n adopting plaintiff's belated and extraneous procedural argument pertaining to the first Johnson declaration without providing defendant an opportunity to address the claimed defect [(the lack of an original signature)], the trial court abused its discretion.").

hearings may make an oral objection concerning the admission of testimonial evidence, such as declarations.[1] That is precisely what I understand plaintiff to have done in this case when her attorney stated, at the hearing on defendant's motion to set aside, "I also have to object to and move to strike all of the Defendant's declarations *** as being inadmissible and void for failing to be under penalty of perjury as required under ORCP 1 E."

The majority answers that unsettled question in the negative; they conclude that, in the context of hearings on motions to set aside under ORCP 71 B, a party is required to object by way of a written motion to strike and that plaintiff's oral objection in this case was improper. 311 Or App at 651. In explaining that conclusion, the majority analogizes motions to set aside under ORCP 71 B to motions for summary judgment under ORCP 47:

> "Like a motion for summary judgment or the many other pre- and post-trial motions, a motion under ORCP 71 is typically addressed to the court through written submissions, including affidavits and declarations. *** But a party seeking to take issue with submitted declarations should file a motion to strike or exclude them, which, under ORCP 14, must be in writing[.]"

311 Or App at 651-52.

The difficulty with the majority's analogy is that trial courts do not confine themselves to considering only the affidavits or declarations that may be attached to an ORCP 71 B motion to set aside; rather, trial courts routinely hold evidentiary hearings on those motions at which they receive and admit evidence, including testimonial evidence offered by parties and witnesses. *See, e.g.*, *Duvall v. McLeod*, 331 Or 675, 678, 21 P3d 88 (2001) (noting trial court received evidence at hearing on ORCP 71 motion); *Wagar v. Prudential Ins. Co.*, 276 Or 827, 831, 556 P2d 658 (1976) (noting trial court took oral testimony at hearing on motion to set aside); *Benson v. Harrell*, 241 Or App 362, 366, 251 P3d 203 (2011) (noting trial court heard testimony from multiple witnesses at hearing on ORCP 71 B motion to set aside); *Knox v. Genx*

[1] Under ORS 45.010, "The testimony of a witness is taken by six modes[,]" including by "[d]eclaration under penalty of perjury, as described in ORCP 1 E[.]"

Clothing, Inc., 215 Or App 317, 321, 168 P3d 1251 (2007) (noting trial court heard witness testimony at hearing on ORCP 71 B motion to set aside); *Matchey v. Staffing Network Holdings, Inc.*, 195 Or App 576, 579, 98 P3d 1174 (2004) (noting trial court received evidence and testimony from parties at hearing on ORCP 71 B motion to set aside); *McKenna and McKenna*, 57 Or App 185, 188, 643 P2d 1369 (1982) (noting trial court heard oral testimony and admitted written evidence at hearing on motion to set aside).

If a party is allowed to present testimony and other evidence at hearings on ORCP 71 B motions to set aside, it is difficult to understand why a party would not also be allowed to make oral objections to evidence at those very same hearings. Indeed, the majority acknowledges that perhaps a party could be allowed to object at such hearings without filing a written motion. But, the majority argues, such an objection would only be allowed in limited circumstances. 311 Or App at 652. Notably, the majority cites no rule, authority, or principle of law in support of that argument. Likewise, the majority cites no authority for the contention that an objection to a declaration—like the objection made by plaintiff in this case—is required to be made in writing.

To be sure, the majority does cite the writing requirement in ORCP 14 to support their contention that a *motion to strike*—other than one made during trial—must be made in writing. Yet the majority's reliance on ORCP 14 is only well founded if, as they propose, plaintiff's oral objection is accurately characterized as merely an oral motion to strike. But that characterization, while perhaps accurate, is nevertheless incomplete; it ignores the part of plaintiff's objection where she said "*I also have to object to* and move to strike *all of the Defendant's declarations *** as being inadmissible*[.]" Thus, in light of the entirety of plaintiff's objection, I think what plaintiff did can just as accurately be characterized as an objection to the admission of testimonial evidence.[2] And, significantly, the majority cites no rule or other authority disallowing oral objections to testimonial evidence at hearings on Rule 71 B motions to set aside.

[2] To the extent that the majority contends that plaintiff's objection also included a motion to strike, I do not disagree.

Given that absence of authority, I see no reason to say that plaintiff could not orally object to defendant's declarations at the hearing on defendant's motion to set aside. Instead, I think the fairer approach would be to recognize the propriety of plaintiff's objection and to address plaintiff's first assignment of error on its merits.

Before addressing the merits, however, I note my disagreement with the majority's contention that plaintiff's first assignment of error "is not an assignment of error," and that it "is not preserved." 311 Or App at 650.

Plaintiff's first assignment of error is proper. Though plaintiff's briefing may not be a model of clarity, its language does make clear that plaintiff assigns error to the trial court's decision to admit evidence—*i.e.*, "The trial court erred as a matter of law in *admitting* and considering the evidence contained in [defendant's] defective declarations." (Emphasis added.) The majority discounts that language as an "argument" rather than an "assignment of error." But that language—along with the rest of plaintiff's briefing—does not require a search of the record to be understood, and I believe it is sufficient to satisfy the purpose of an assignment of error. *See State v. Brown*, 310 Or 347, 356, 800 P2d 259 (1990) ("[T]he purpose of an assignment of error was satisfied," because "one of the parties fully briefed the matter and set out verbatim the pertinent parts of the record," such that "this court on appeal need not search the record." (Citing ORAP 5.45(3).)). Moreover, this court routinely reviews assignments of error regarding the admission of evidence over a party's objection. *See, e.g.*, *State v. Hixson*, 307 Or App 333, 335, 476 P3d 977 (reviewing trial court's admission of a statement over party's hearsay objections); *State v. Reineke*, 297 Or App 84, 91-92, 441 P3d 637 (2019) (reviewing whether trial court erred when witness testimony was "admitted, over defendant's OEC 401 and OEC 403 objections"); *State v. Navaie*, 274 Or App 739, 745, 362 P3d 710 (2015) (reviewing whether "the trial court erred when it admitted evidence, over [defendant's] hearsay objections"); *State v. Serrano*, 355 Or 172, 188, 324 P3d 1274 (2014) (reviewing whether "the trial court erred by permitting a police criminalist to testify, over defendant's objection"); *Stuart v. Kelsay*, 261 Or 326, 329, 494 P2d 249 (1972)

(reviewing whether the trial court erred by "receiving in evidence, over plaintiff's objection, certain evidence pertaining to the decedent"). Thus, contrary to the majority, I think that plaintiff's first assignment of error is proper.

Additionally, plaintiff's first assignment of error is preserved. As noted above, plaintiff stated at the hearing, "I also have to *object to* and move to strike all of the Defendant's declarations as attached to all of its motions *** as being inadmissible and void for failing to be under penalty of perjury as required under ORCP 1 E." In my view, that objection is sufficient to satisfy the preservation requirement: Plaintiff raised the evidentiary issue before the trial court in a sound, clear, and articulate oral objection, thereby giving the court an opportunity to consider the objection, permitting the opposing party to respond, and allowing the record to develop. *See Peeples v. Lampert*, 345 Or 209, 219-21, 191 P3d 637 (2008) (discussing policy considerations underlying preservation requirement, namely "giv[ing] a trial court the chance to consider and rule on a contention," "permitting the opposing party to respond to a contention and by otherwise not taking the opposing party by surprise," and "foster[ing] full development of the record"); *see also id.* at 219 ("'A party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge a chance to consider the legal contention or to correct an error already made.'" (Quoting *Shields v. Campbell*, 277 Or 71, 77, 559 P2d 1275 (1977).)). Here, plaintiff's oral objection provided both defendant and the trial court an opportunity to address that objection—even if they chose not to do so. And certainly, plaintiff's oral objection was sufficient to dispel any chance that raising the issue again on appeal would come as a genuine surprise to the opposing party.

The concurrence posits that plaintiff's objection is not preserved because "she did not adequately apprise the trial court and defendant of her position." 311 Or App at 654 (Aoyagi, J., concurring). But here, I think there can be no doubt that plaintiff's objection provided enough information for both her opponent and the trial court to understand and respond to that objection. *See State v. Blasingame*, 267 Or App 686, 691, 341 P3d 182 (2014) ("[W]hen determining

if an issue has been adequately preserved for review, the appropriate focus 'is whether a party has given opponents and the trial court enough information to be able to understand the contention and to fairly respond to it.'" (Quoting *State v. Walker*, 350 Or 540, 552, 258 P3d 1228 (2011).)); *see also Clinical Research Institute v. Kemper Ins. Co.*, 191 Or App 595, 607, 84 P3d 147 (2004) ("Traditionally, in order to preserve a ground for appeal, it has been deemed essential for a party to raise an *issue* at trial but less important to make a specific *argument* or identify a particular *source*." (Emphases added; citation and internal quotation marks omitted.)). Plaintiff not only raised the issue—*i.e.*, the admissibility of defendant's testimonial evidence—but also made a specific argument and identified a particular source—*i.e.*, that defendant's declarations were inadmissible testimony because they failed to comply with the perjury requirements set forth in ORCP 1 E. As such, I am not sure what more plaintiff was required to say or do in order to sufficiently apprise the trial court and defendant of her position.

Thus, I would conclude that plaintiff's first assignment of error is both proper and preserved. For those reasons—and the reasons that follow—I respectfully dissent, and I would review this case as set forth below and reverse and remand for the trial court to reenter the general judgment.

* * *

The relevant facts are undisputed and largely procedural. Plaintiff sued defendant for unauthorized payroll deductions. After defendant did not timely appear or respond, plaintiff obtained an order of default and, later, a general judgment. Shortly thereafter, defendant submitted a motion under ORCP 69 F and ORCP 71 B to set aside the default order and judgement.[3] In that motion, defendant asserted that its "failure to appear or respond to plaintiff's

[3] ORCP 69 F provides, "For good cause shown, the court may set aside an order of default. If a judgment by default has been entered, the court may set it aside in accordance with Rule 71 B and C."

ORCP 71 B(1) provides, in part, "On motion and upon such terms as are just, the court may relieve a party or such party's legal representative from a judgment for the following reasons: (a) mistake, inadvertence, surprise, or excusable neglect[.]"

complaint was the result of mistake, inadvertence, or excusable neglect." In support of its motion, defendant submitted declarations from members of its legal team. Those declarations explained that defendant's failure to appear resulted from an error in its complaint routing process. Notably, those declarations did not contain a clause stating that they were under penalty of perjury, as required under ORCP 1 E(2).

Plaintiff opposed defendant's motion to set aside, noting in her briefing to the trial court that she "objects to Defendant's declarations for non-compliance with ORCP 1 E" because defendant did not "obtain [those] declarations under the penalty of perjury." Additionally, at a hearing on defendant's motion to set aside, plaintiff repeated her objection to defendant's declarations: "I also have to object to and move to strike all of the Defendant's declarations *** as being inadmissible and void for failing to be under penalty of perjury as required under ORCP 1 E."

The trial court did not explicitly rule on plaintiff's objection to defendant's declarations and ultimately granted defendant's motion to set aside, stating:

> "Now let's get to the heart of the thing and that is whether there is evidence sufficient to meet the premise of the law to set aside the default based on mistake, inadvertence, or excusable neglect. Clearly that's exactly what happened here. ***
>
> "*****
>
> "*** I do find there was mistake, inadvertence, and excusable neglect which allows you to set aside the default."

On appeal, plaintiff contends that the "trial court erred as a matter of law in considering declarations *** that w[ere] not under penalty of perjury as required by ORCP 1 E," and that "if the trial court erred in admitting the declarations, there [i]s no remaining properly presented evidence to establish excusable neglect." In response, defendant contends that its "declarations substantially complied with the language in ORCP 1 E(2), and so the lower court had the discretion to consider them."

"A decision under ORCP 71 B can implicate multiple standards of review." *Union Lumber Co. v. Miller*, 360 Or 767, 777, 388 P3d 327 (2017). "Conclusions that a trial court reaches under ORCP 71 B as to whether a moving party's neglect, inadvertence, surprise, or mistake constitute cognizable grounds for relief, are legal rulings that an appellate court reviews for errors of law." *Id.* at 778. "If, in the course of reaching such a conclusion, a trial court makes express or implied findings on issues of disputed fact, an appellate court will accept those findings if they are supported by evidence in the record." *Id.* Where the trial court admits or excludes declarations based on its understanding of the meaning of a rule of civil procedure, we review that decision for legal error. *Cf. Yoshida's Inc. v. Dunn Carney Allen Higgins & Tongue*, 272 Or App 436, 443, 356 P3d 121 (2015) ("Where the trial court admits or excludes evidence based on the court's interpretation of a statute, we review the court's ruling for legal error."); *Union Lumber Co.*, 360 Or at 785 (noting that, when court's decision depends on its understanding of the meaning of ORCP rule, we review for errors of law).

The parties' dispute as to whether declarations are required to include a perjury clause calls into question the proper construction of ORCP 1 E(2). "We construe the rules of civil procedure using the same analytical method that applies to statutory construction." *Rains v. Stayton Builders Mart, Inc.*, 258 Or App 652, 657-58, 310 P3d 1195 (2013). That is, "we examine the text, context, and history of the rule to discern the intent of the Council on Court Procedures." *Union Lumber Co.*, 360 Or at 785.

For the reasons explained below, I would conclude that the text, context, and rule history indicate that the intent of the Council on Court Procedures (CCP) was that declarations under ORCP 1 E(2) are required to include the perjury clause specified in that rule in order to be admissible testimony.

I begin with the text of ORCP 1 E(2), because there is no more persuasive evidence of the intent of the CCP than the words by which it undertook to give expression to its wishes. *Cf. State v. Gaines*, 346 Or 160, 171, 206 P3d 1042

(2009) (so noting with respect to legislative intent). The text of ORCP 1 E(2) indicates the CCP's intent to require that declarations include the perjury clause specified in that rule. ORCP 1 E(2) provides:

> "A declaration made within the United States must be signed by the declarant and *must include the following sentence in prominent letters immediately above the signature of the declarant*: 'I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court *and is subject to penalty for perjury.*'"

(Emphases added.) That text unambiguously indicates not only that declarations "must" include the prescribed sentence—which includes the perjury clause—but also specifies the precise location for that perjury clause, *i.e.*, "immediately above the signature."

Of particular significance here is use of the word "must" in ORCP 1 E(2). Although the CCP did not define "must," relevant dictionary definitions of "must" include "is required by law." *See Webster's Third New Int'l Dictionary* 1492 (unabridged ed 2002) (defining "must" to mean, among others, "is required by law, custom, or moral conscience <we ~ obey the rules>").

Understanding "must"—as it is used in ORCP 1 E(2)—to mean "required by law" is consistent with the meaning this court has ascribed to that term in interpreting statutes. *See, e.g.*, *Oregon Cable Telecommunications v. Dept. of Rev.*, 237 Or App 628, 635, 240 P3d 1122 (noting that "the verb 'must,' *** generally connotes a required action when used in law," and citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 577-78 (2d ed 1995) (explaining that, in legal drafting, "must" is generally used in the sense of "an absolute requirement" or "is required to")); *Bishop v. Waters*, 280 Or App 537, 545, 380 P3d 1114 (2016) ("Similar to the word 'shall,' the word 'must' ordinarily expresses 'a duty, obligation, [or] requirement ***.").

In sum, the text of ORCP 1 E(2) indicates the CCP's intent that declarations are required by law to include the

specified perjury clause immediately above the declarant's signature.

The context and history of ORCP 1 E(2) further indicate the CCP's intent to require inclusion of the perjury clause, as the CCP considered it important to ensuring that declarants would be liable for perjury. "Context includes *** related rules and statutes," and "the legislative history that we consider is generally the history of the proceedings before the council [on court procedures]" but also "any legislative history that we find useful." *Rains*, 258 Or App at 658. Because the context and history of ORCP 1 E are intertwined, I discuss them together.

In early 2002, the CCP began the process of amending ORCP 1 E to allow the use of declarations. *See* Agenda, Council on Court Procedures, Feb 9, 2002, 3. A "major concern" for the CCP was that "declaration[s] should be subject to perjury prosecution." Agenda, Council on Court Procedures, May 11, 2002, Attachment B at 1-2. Indeed, when the CCP considered amending ORCP 1 E,

> "all members appeared to be agreed that if use of declarations is to be introduced into practice under the ORCP there must be absolute assurance that knowingly false statements of material fact contained in the declarations would be subject to prosecution for perjury to the same extent as is true of affidavits."

Minutes, Council on Court Procedures, Apr 13, 2002, 2. With those concerns about perjury in mind, the CCP drafted amendments to ORCP 1 E to allow declarations under penalty of perjury. *See* Agenda, Council on Court Procedures, June 8, 2002, Attachment 4d at 1-3.

At that same time, the CCP also began drafting proposed amendments to the ORS. The CCP had determined that, in order for "a declaration to be subject to perjury prosecution on the same basis as such statements contained in an affidavit, certain statutory amendments would be needed." Minutes, Council on Court Procedures, Apr 13, 2002, 2-3. Consequently, the CCP proposed amendments to ORS 162.055(4), which defines a "sworn statement," as that term is used in Oregon's perjury statute,

ORS 162.065.[4] *See* Agenda, Council on Court Procedures, June 8, 2002, Attachment 4d at 1-3. Ultimately, as a result of that proposal, the very same act that amended ORCP 1 E to allow the use of declarations also amended ORS 162.055(4) so that, for purposes of perjury, a "sworn statement" would include a "declaration under penalty of perjury *as described in ORCP 1 E*." *See* Or Laws 2003, ch 194, §§ 1, 4 (amending ORCP 1 E and ORS 162.055(4) (emphasis added)).[5]

Prior to the enactment of Or Laws 2003, ch 194, the CCP sent its proposed amendments for ORCP 1 E and ORS 162.055(4) to the Oregon State Bar Board of Governors "for its approval as a legislative package for pre-session filing and sponsorship by the Oregon State Bar (OSB) in the 2003 Legislative Assembly." Minutes, Council on Court Procedures, May 11, 2002, 2.

In early 2003, a representative from OSB explained to the House Committee on Judiciary the intended purpose and effect of the proposed amendments to ORCP 1 E:

> "This would simply allow lawyers and people representing themselves pro se to sign a declaration, right in front of their name, that specifically says 'I am giving this testimony under the penalty of perjury.'
>
> "*****
>
> "If we were to pass this, *anyone who signs that is going to see right in front of their name, 'I swear under penalty of perjury* that the statement I am signing right now is true.'"

---

[4] Oregon's perjury statute provides that a "person commits the crime of perjury if the person makes a false sworn statement or a false unsworn declaration in regard to a material issue, knowing it to be false." ORS 162.065. I note that the provisions of ORS 162.065(1) relating to "unsworn declarations" are not relevant to my analysis. Pursuant to ORS 162.055(5), an "unsworn declaration," as that phrase is used in 162.065(1), "has the meaning given that term in ORS 194.805." ORS 194.805 concerns declarations made by a declarant who, at the time of making the declaration, "is physically located outside the boundaries of the United States ***."

[5] ORCP 1 E was amended in 2003 to allow the use of declarations. Or Laws 2003, ch 194, § 1. Later, in 2014, "[s]ection E [wa]s reorganized in light of the Legislature's enactment of ORS 194.800-194.835 to incorporate the Uniform Foreign Declarations Act into the Oregon Revised Statutes." Council on Court Procedures, Staff Comment to ORCP 1 Amendment, 2 (Dec 6, 2014). As a result of that reorganization, current "subsection E(2) retains the approved language for domestic declarations under penalty of perjury and subsection E(3) now contains the approved language for foreign declarations." *Id.* That reorganization does not affect our analysis.

Tape Recording, House Committee on Judiciary, House Bill 2064, Jan 22, 2003, Tape 1, Side A (statement of Kevin Chames (emphasis added)).

Thus, the above context and history further indicate that declarations under ORCP 1 E(2) were intended to require inclusion of the perjury clause.

In light of the foregoing, I would conclude that the text, context, and relevant history indicate the CCP's intention that declarations under ORCP 1 E(2) are required by law to include the specified perjury clause immediately above the declarant's signature in order to be admissible.

Because defendant's declarations did not conform with the requirements of ORCP 1 E(2), I would conclude that it was error for the trial court to admit them. I would further conclude that, because the evidence supporting defendant's motion to set aside was contained in those erroneously admitted declarations, there is not any evidence sufficient to support a finding of mistake, inadvertence, or excusable neglect, as required to set aside a judgment under ORCP 71 B; therefore, the trial court erred when it concluded otherwise.

In seeking a contrary result, defendant contends that "the Court was required to disregard any errors or defects pursuant to ORCP 12 B[ ] and had discretion to accept some or all of" the statements in defendant's declarations, because they "substantially conform[ed] to the language set forth in ORCP 1 E(2)." ORCP 12 B provides that "[t]he court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party." However, failure to comply with ORCP 1 E(2)'s perjury clause requirement is not an excusable error or defect, *cf. Bridgestar Capital Corp. v. Nguyen*, 290 Or App 204, 210-11, 415 P3d 1095 (2018) (A "party's complete failure to comply with the textual requirements of ORCP 68 C(2) *** cannot be excused by ORCP 12 B."), and admitting defendant's declarations ultimately affected a substantial right, *see Mary Ebel Johnson, P.C. v. Elmore*, 221 Or App 166, 170, 189 P3d 35 (2008) (order setting aside default judgment based on evidence of defendant's neglect, mistake, or inadvertence affected substantial right of the plaintiff).

Defendant also contends that two of its declarations were made by "lawyers and officers of the court, and so their declarations could have been appropriately considered even without the 'under penalty of perjury' language." That contention is unavailing; nothing in ORCP 1 E suggests that lawyers are exempt from the declaration requirements, and defendant does not cite any authority supporting that contention. Defendant's argument is, therefore, insufficiently developed for us to address it. *See Beall Transport Equipment Co. v. Southern Pacific*, 186 Or App 696, 700 n 2, 64 P3d 1193, *adh'd to on recons*, 187 Or App 472, 68 P3d 259 (2003) (it is not "our proper function to make or develop a party's argument when that party has not endeavored to do so itself").

For the foregoing reasons, I would conclude that defendant's declarations were required by ORCP 1 E(2) to include the specified perjury clause; therefore, the trial court erred by admitting them without that clause. I would further conclude that, without those declarations, the evidence in the record is insufficient to support a factual finding of mistake, inadvertence, or excusable neglect; therefore, the trial court erred when it determined otherwise and set aside the judgment. Consequently, I would reverse and remand for the trial court to reenter the general judgment.

"Motion must be made in writing, unless made during a **trial**."	Motions must be made in writing, unless made during a **hearing** or **trial**."
Oregon	Alabama Alaska Arizona Arkansas California Colorado Connecticut Delaware Florida Georgia Hawaii Idaho Illinois Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Massachusetts Michigan Minnesota Mississippi Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York North Carolina North Dakota Ohio Oklahoma Pennsylvania Rhode Island South Carolina South Dakota Tennessee Texas Utah Vermont Virginia Washington West Virginia Wisconsin Wyoming FRCP 7

RE: Interesting Ex Parte Request for Pseudonym Use

1 message

Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us> Sat, May 29, 2021 at 2:46 AM
To: Susie Norby <Susie.L.Norby@ojd.state.or.us>, Shari Nilsson <nilsson@lclark.edu>

Susie,

Yes, Shari is still enjoying the sunny nights in Sweden.

You are right that we cannot apply the civil rules in a criminal case without authority, just because they are useful. It does seem to me that the Petitioner's attorney could have filed a civil action to gain an injunction to protect the information from discovery. (The privacy right is found in the penumbra of the Constitution.) I rather like your thought of having the attorney file the action in aid of his right and duty to protect the interests of his client.

No matter how carefully we craft our rules, those wily attorneys will see if they can construe them to accomplish goals that we never considered. Interesting case and issue.

Mark

From: Susie Norby <Susie.L.Norby@ojd.state.or.us>
Sent: Friday, May 28, 2021 5:33 PM
To: Mark A. Peterson <Mark.A.Peterson@ojd.state.or.us>; Shari Nilsson <nilsson@lclark.edu>
Subject: Interesting Ex Parte Request for Pseudonym Use

Hi Mark & Shari,

I had an interesting issue come up at ex parte. I want to tell you about it before I forget, because it may be of interest to the Council.

An attorney who typically practices in criminal defense, with an occasional foray into family law, presented a document at ex parte captioned "Petition to Use Pseudonym." The case caption on the Petition actually used the pseudonym as the name of the initiating party, and named the elected District Attorney as the Respondent. It cited our local SLR as the only authority. The situation was this: Reddit received a Grand Jury Subpoena that required Reddit to turn over information about the holder of a particular account, including the person's name and identity information. Reddit contacted the person, telling him or her that if they didn't get an Order Quashing or Suspending the Subpoena by tonight, then they would comply with it and turn over the information.

The person hired the attorney, who filed the Petition asserting that his client had a right to privacy (without citing authority, other than a general mention of "the constitution") in the identity information s/he has on file with Reddit, and the only way to assert that right is to attempt to quash the subpoena, but if required to reveal his or her identity in order to request to

quash the subpoena, the person must compromise his or her right to privacy by identifying him/herself as a party. The attorney argued that this is exactly the sort of situation that the pseudonym rule was built to serve.

I noted that both the SLR and the pending ORCP revision apply only in civil cases, and asked whether he could convert a criminal case / criminal investigation into a civil case by filing a document called a "Petition" within the context of the criminal matter, using a civil sort of caption at the top. He dodged the question, rather deftly.

I asked if he had any other legal authority that might outweigh the open courts provisions of the constitution, and he did not. I even floated the idea that he could use his own name (the attorney's) as representative of an "anonymous client" if he wanted to get really creative trying to find a way to proceed without a pseudonym. (He was disinclined.)

In the end I denied it, telling him that I am more concerned about the constitution's mandate about open courts than in a general interest in the privacy of an internet company's records that contain user identities. But I thought it a very interesting fact pattern and question. I don't think we envisioned this scenario when we discussed the pseudonym rule, but I'm curious to know the other Council members' thoughts, if we get the time to discuss it.

Thanks, and have a lovely long weekend… hope Shari is still in Sweden!

Susie

Re: COCP -- Request to amend ORCP 44 C

1 message

Mark Peterson <mpeterso@lclark.edu> Sat, Jun 19, 2021 at 12:37 AM
To: Shenoa Payne <spayne@paynelawpdx.com>
Cc: Shari Nilsson <nilsson@lclark.edu>

Shenoa,

Thank you for providing a clear and succinct explanation of how the ORCP can be perceived to favor some parties over other parties. As you can anticipate, Rule 44 can be a battleground. I will be sure to include this request for an amendment to Rule 44 on the Council's agenda for its opening meeting on September 11, 2021.

Mark--
Mark A. Peterson
Executive Director
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mpeterso@lclark.edu
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On Fri, Jun 18, 2021 at 2:31 PM Shenoa Payne <spayne@paynelawpdx.com> wrote:

> Shari and Mark:
>
> As I won't be on the council next biennium, I wanted to bring to the council's attention to an issue regarding ORCP 44 C. Currently ORCP 44 C applies only to plaintiffs. I am requesting that the council consider an amendment to change ORCP 44 C to apply to all parties, particularly where a defendant asserts in an affirmative defense that a defendant's medical condition prevents liability to the plaintiff.
>
> Currently, ORCP 44 C provides "In a civil action **where a claim is made for damages for injuries** to the party or to a person in the custody or under the legal control of a party, upon the request of the party **against whom the claim is pending**, **the claimant** shall deliver to the requesting party a copy of all written reports and existing notations of any examinations for which recovery is sought unless **the claimant** shows inability to comply."
>
> I recently got involved as appellate counsel in a personal injury case, *Einarsson v. Indoor Billboard Northwest, Inc. et al.*, involving a motor-vehicle collision where a defendant raised a "sudden medical emergency," affirmative defense alleging that the defendant could not be liable for causing the plaintiff's injuries due to an unforeseeable and sudden medical emergency.
>
> In that case, the plaintiff submitted an RFP to the defendant seeking medical records related to the defendant's sudden medical emergency affirmative defense, and the defendant refused to produce the medical records based on the physician-patient privilege, which is not waived in Oregon simply by putting a medical condition at issue. The physician-patient privilege is unlike the psychotherapist-patient privilege, where the patient waives the privilege if the patient relies on the condition as either an element of the patient's claim **or defense**. OEC 504-(4)(b)(A). Plaintiff moved to compel, and the trial court (Judge Roberts) ruled that ORCP 44 C did not apply, but ordered that redacted portions of the medical records be produced because the privilege was limited. Defendant sought mandamus to the Oregon Supreme Court on the trial court's ruling regarding the scope of the physician-patient privilege, the Oregon Supreme Court granted mandamus and stayed the trial court's ruling. Shortly before oral argument, the parties settled the case. The issues on mandamus are not relevant but the dispute over privilege and the mandamus litigation would not have been necessary had ORCP 44 C simply applied even-handedly.
>
> The plaintiff in *Einarsson* also attempted to obtain information about the defendant's medical condition via an ORCP 44 A examination, but the trial court ruled that due to the issues pending on mandamus, the IME doctor could not inquire into any privileged information -- including prior treatment or diagnoses by the defendant's treatment providers.

ORCP 44 C was enacted as a compromise to require the production and discovery of the patient's medical records. But ORCP 44 C applies only to a **claimant** who has made a claim for damages, it does not apply to a defendant who puts their medical condition at issue as part of an affirmative defense.

This leaves a plaintiff with their hands tied behind their back and completely unable to rebut a defense that is based on a defendant's medical condition. This is particularly problematic because the defendant does not waive the privilege until they voluntarily testify about the medical condition during trial -- but that would not occur until the defendant's case in chief. This means that the plaintiff would be required to put on their entire case in chief without knowing anything about the defendant's medical condition that comprises their defense. The plaintiff would be completely unprepared to rebut the defense in any rebuttal, as they would have been unable to line up rebuttal experts.

ORCP 44 C needs to be amended. As it currently stands, it creates an unfair playing field. Plaintiff must turn over all medical records regarding their medical condition that is the subject of the lawsuit, but the defendant can claim their medical condition prevents any liability and conceal that medical condition from plaintiff until mid-way through trial.

Thanks for your consideration and I hope you all have a successful biennium.

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

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Web: www.paynelawpdx.com

Shari Nilsson <nilsson@lclark.edu>

ORCP 68 Needed Update

Mark Peterson <mpeterso@lclark.edu> Fri, Jun 25, 2021 at 2:12 AM
To: Shari Nilsson <nilsson@lclark.edu>

Shari,
For the September agenda, ORCP 68 C(1)(e) needs an updated cite to the Servicemembers Civil Relief Act section 3901(b)(1) instead of section 201(b)(1)(now 50 U.S.C. Section 3901-4043). The federal statutes were reorganized.

M
--
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Re: Proposed change to ORCP 69

Mark Peterson <mpeterso@lclark.edu> Wed, Apr 28, 2021 at 2:35 AM
To: Katherine Heekin <katherine@heekinlawoffice.com>
Cc: Shari Nilsson <nilsson@lclark.edu>

Ms. Heekin,

Thank you for your interest in and suggestion regarding ORCP 69 and default orders and judgments. As I understand your suggestion, an amendment would modify paragraph C(1)(d) and(e) and paragraph C(2)(a) and (b) to make those requirements inapplicable to non-human defendants and opposing parties. Is that correct?

As you may be aware, the Council meets on a biennial schedule. Promulgated amendments for this biennium have been transmitted to the Legislative Assembly. The next Council meeting will be the inaugural meeting of the next biennium, on September 11, 2021. Your suggestion will be included on the agenda as the Council determines which proposals will be studied for possible amendments.

Best,

Mark
--
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On Tue, Apr 27, 2021 at 1:22 PM Katherine Heekin <katherine@heekinlawoffice.com> wrote:

> Dear Judge Mark Peterson and Ms. Nilsson,
>
> I suggest that we change ORCP 69 C to make clear that if the party in default is an entity, then it is not necessary to state in a declaration in support of a default order and judgment that the entity is not a minor, incapacitated, protected person or in the military.
>
> See attached rejection of a proposed default order against an entity that is the basis of my request for such change.
>
> Thank you for considering this request.
>
> Katherine Heekin
>
> The Heekin Law Firm
>
> 7327 SW Barnes Rd., #824

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

GARY WHITEHILL-BAZIUK and GINA WHITEHILL-BAZIUK, Plaintiffs, v. 1314 SARATOGA, LLC, an Oregon limited liability company, WILDE PROPERTIES, INC., an Oregon corporation, MARK WILDE, an Oregon resident, and BRETT BARTON, an Oregon resident,, Defendants.	Case No. 20CV38708 **ORDER OF DEFAULT**

This case having come before the Court on Plaintiff's Motion for an Order of Default, it appearing from the records and files herein that Defendant 1314 Saratoga, LLC was served with Summons and Complaint as prescribed by law and that they have not answered or appeared herein and are in DEFAULT; and it further appearing that Defendant 1314 Saratoga, LLC is not a minor nor incompetent nor incapacitated persons, nor in the military service of the United States; now, therefore, it is hereby

ORDERED AND ADJUGED that Defendant 1314 Saratoga, LLC is in default and such default is hereby entered of record.

UNSIGNED - ORCP 69 requires that the declaration in support of a motion for default address (1) the required capacity statements, (2) whether written notice of intent to appear has been received by the movant, and (3) the military status for all defendants. ORCP 69 does not differenciate between individual defendants and business defendants.

Submitted By:
THE HEEKIN LAW FIRM

s/Katherine R. Heekin
Katherine R. Heekin, OSB #944802
Attorney for Plaintiffs

UTCR 5.100 CERTIFICATE OF READINESS

This proposed order or judgment is ready for judicial signature because:

1. [ ] Each opposing party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.
2. [ ] Each opposing party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation of approval sent to me.
3. [ ] I have served a copy of this order or judgment on all parties entitled to service and:
   a. [ ] No objection has been served on me.
   b. [ ] I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.
   c. [ ] After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.
4. [ ] The relief sought is against an opposing party who has been found in default.
5. [ ] An order of default is being requested with this proposed judgment.
6. [**x**] Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.
7. [ ] This is a proposed judgment that includes an award of punitive damages and notice has been served on the Director of the Crime Victims' Assistance Section as required by subsection (4) of this rule.

DATED this 8th day of March 8, 2021.

THE HEEKIN LAW FIRM

s/Katherine R. Heekin
Katherine R. Heekin, OSB #944802
Attorney for Plaintiffs

ATTORNEY CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, I have made service of the foregoing ORDER OF DEFAULT on the parties listed below in the manner indicated:

Brian Chenoweth
Sandra Gustitus
Chenoweth Law Group
510 SW 5th Ave 5th FlPortland OR 97204

Attorneys for Defendants
Wilde Properties, Inc., Mark
Wilde, and Brett Barton

___ U.S. Mail
_x_ ECF
___ Hand Delivery
___ Overnight Courier
___ Email

DATED this 8th day of March, 2021.

s/Katherine R. Heekin
Katherine R. Heekin
OSB #944802
Attorney for Plaintiffs

Note for CCP - Cleanup Aisle 7! :-)

1 message

Susie Norby <Susie.L.Norby@ojd.state.or.us> Thu, May 20, 2021 at 1:47 AM
To: "Mark A. Peterson" <Mark.A.Peterson@ojd.state.or.us>, Shari Nilsson <nilsson@lclark.edu>

Hi Mark & Shari,

I needed to consult ORCP 71C yesterday, and saw a cross-reference to ORCP 7D(6)(f).

But I couldn't find an (f) in ORCP 7D(6).

Maybe we need to attend to that when we next publish?

Thanks,

Susie Norby

Shari Nilsson <nilsson@lclark.edu>

Re: Attorney Mark Kramer - Remote Appearance Post-COVID

1 message

Mark Peterson <mpeterso@lclark.edu> Thu, May 27, 2021 at 10:30 PM
To: Mark Kramer <Mark@kramer-associates.com>
Cc: Marc Abrams <marcabramspdx@comcast.net>, Shari Nilsson <nilsson@lclark.edu>

Mark,

Please excuse the delay in responding. As you may know, the Council works on a biennial schedule. The Council's current promulgated rules changes are now before the Legislature. The Council's new biennium will start with the inaugural meeting on September 11, 2021. At that time, the incoming suggestions for rule changes will be presented to the Council and committees will be formed to study and make recommendations regarding those suggestions that gain enough support to warrant further study. Your suggestion will be presented at the September meeting. If you wish to add any detail, such as particular rules that could make remote appearances more available, please feel free to forward them to me. Also, if a committee on remote appearances is formed, the committee will contact you for further information.

Another avenue to explore in the Uniform TrialCourt Rules Committee. I'm thinking, e.g., UTCR 5.050(2).

Thank you for your interest in making the practice of law in Oregon work better for lawyers and their clients.

Mark

--
Mark A. Peterson
Executive Director
Council on Court Procedures
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10015 SW Terwilliger Blvd
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(503) 768-6505

On Sun, May 16, 2021 at 10:45 PM Mark Kramer <Mark@kramer-associates.com> wrote:

> **Greetings,**
>
> **Please advise if the CCP or others are considering to what degree we can maintain some degree of remote appearances after the current COVID restrictions are relaxed.**
>
> **While in person appearances are preferable in many cases, there are many advantages to clients to have the option of appearing with counsel remotely, by Web EX, MS Teams or another platform.**

While appearing remotely has been challenging and my experiences have been uneven, it has been a great financial benefit to my clients. Among other advantages, I am not obliged to charge them for travel and waiting time, services that are legitimately billable but provide no value to clients.

I would be happy to participate in any committees or work groups that may be charged with working on this.

Thank you for considering my comments.

MARK KRAMER, ATTORNEY
503.243.2733

www.kramer-associates.com

mark@kramer-associates.com

Here's how to best stay in touch with me:

Please copy your replies to my legal assistant Erika-Leigh at 503.243.2733 or Erika-Leigh@kramer-associates.com. Please feel free to contact her directly. for other case related matters that don't require my direct input or involvement, Thank you.

For scheduling matters, contact my assistant Vishek at 503.243.2733 or Reception@kramer-associates.com;

For billing matters, contact my office manager Jamie Nelson at 503.243.2733 or jamie@kramer-associates.com

Council on Court Procedures
2021-2023 Biennial Survey Results
Suggestions for Improvements to ORCP

Rule #	Topic	Suggestion
		ORCP 7(D)(4) should be amended to allow for service on an insurance company in auto cases where the defendant is known to be insured and where the insurance company has accepted coverage and is acting as the agent of the defendant for purposes of settlement and claims handling. The ORCP rules already essentially recognize that the insurance company is the agent of the defendant in auto cases by requiring service on the insurance company to obtain a default in such cases under ORCP 69(E)(3). If insurance coverage is acknowledged and if the insurance company is acting as the agent of the defendant for other purposes (i.e. collection of records, processing the claim, settling the claim. etc.) then there is no reason why the insurance carrier could not also be agent for purposes of service. Allowing service on the insurance agent would not be unprecedented as we essentially allow this in Tort Claim notices. Especially in cases where the plaintiff is not seeking an amount above the policy limits there is absolutely no reason to require the plaintiff to waste time and resources to chase down the defendant. Of course the insurance carrier can and will let the insured know what is going on. Serving a fully insured defendant in an auto case is an absolute waste of time, money and resources and lets the defendants and insurance company lawyers play games by questioning or challenging service even though the insurance company may have already been defending the case for years. Although ORS 7(D)(4) helps in serving defendants in most auto cases, there are times under the current rules that a careful plaintiff's attorney is required to waste significant time, money, energy and "worry" over service issues of fully insured plaintiffs. One example of this is when the defendant is a permissive driver allowed to drive the car by the named insured but who has lost contact with the insured's family. In such cases a plaintiff's lawyer may not have a driver's license or address (before discovery) in order to serve the defendant. This makes "one attempt" at service as required by ORCP 7(D)(4(a)(i) problematic even if the insurance company has already accepted coverage for the case and has been negotiating in good faith for two years to settle the case with plaintiff's counsel.

Council on Court Procedures
2021-2023 Biennial Survey Results
Suggestions for Improvements to ORCP

Rule #	Topic	Suggestion
7		Another problem arises under the vague and imprecise language of section ORCP 7(D)(4)(a)(i)(C) which states that service also needs to be made at "any other address ... known to the plaintiff at the time of making the mailings that reasonably MIGHT result in actual notice to that defendant." (Emphasis added). Who makes that determination of what address "MIGHT" reasonably result in actual notice? This has become an issued lately as with today's digital internet services and electronic data bases can now often provide us with dozens of addresses for every potential defendant's name. These data bases can provide names of many people with the same name for any locality together with the names of possible parents, aliases, family members, neighbors, former addresses, and former spouses for anyone with the same or similar name as the defendant. Although these data bases are very helpful, they can also generate data overload. Most of the information is useless but the defendant "MIGHT" be at one of the locations listed. I have heard horror stories of judges thinking that service should have been tried in some of these addresses which only became "reasonably foreseeable" using the judges 20/20 hindsight long after the SOL has passed. For these reasons, and because service issues can be an "all or nothing" issue if the SOL has passed, the ambiguity in the rule can cause a cautious lawyer to waste a ton of time serving many different addresses for no real benefit. Where do we draw the line? Where do we draw the line on a case where the SOL has passed and we only have a few days left to properly serve an elusive defendant where we have 20 potential addresses to serve? This is all unnecessary in auto cases where the insurance company is known and is already acting as the agent for the insured in every other way except service. Bottom line, the CCP should work to amend the service rules to allow service upon insurance carriers as the agent for known insured defendants in auto cases. In the alternative, it should at least eliminate the above referenced problematic language in ORS 7(D)(4)(a)(i)(C).
7		Clean up the service rules in ORCP 7. They are a confusing mess, and should be updated to account for service using new technologies.
7		ORCP 7 D(4)(a) service should be made available for more than just car crash cases.
7		Ability to shift the cost of personal service to defendant if defendant refuses to waive personal service like the FRCP.
7		ORS 46.465(3) and ORCP 7(C) are inconsistent. Under ORCP 7(C), a defendant has thirty days to respond. ORS 46.465(3)(c) requires a defendant to appear within ten days after service of a summons, but there is no provision authorizing the summons to say that the defendant has only ten days instead of thirty days. This is confusing. And ORCP 1A does not help, because a removed action under ORS 46.365(3) is no longer a small claims case.
7		I have previously suggested doing away with the "true and correct copy" initial requirements since the proof of service already says a true and correct copy is served.
7		Service rules need to be updated

Council on Court Procedures
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Rule #	Topic	Suggestion
7		In prior times a change of Venue would start the clock anew for purposes of rule 7.Presently it does not, resulting in the necessity to ask the court for a continuance because of the time delay and needs of the transfer . While a continuance is virtually always granted the entire procedure should not be necessary and adds to the work of both staff and litigants. I have discussed the option of an auto reset of the 70 day rule if a claim changes venue. 100% of the clerks i polled were in support of one time auto reset to preclude the necessity of a notice of intent to dismiss, a responding motion to continue and the entry of a continuance necessitated by the fact of the artificial timelines. The rule just adds work to all concerned and adds nothing to a timely resolution .
7		Amend Rule 7 to have penalties for refusal to accept service of the summons.
7		I think ORCP 7 and 9 should specify whether a party must serve a file-stamped copy of a pleading that must be filed with the court. I see this happen both ways, and sometimes a filing is rejected before it is served through Odyssey, which I think could create confusion about whether the parties have served the correct version.
9		I think ORCP 7 and 9 should specify whether a party must serve a file-stamped copy of a pleading that must be filed with the court. I see this happen both ways, and sometimes a filing is rejected before it is served through Odyssey, which I think could create confusion about whether the parties have served the correct version.
9		9C4 Electronic service rarely works for us, and it would be great if that could be improved.
9		If the service contact requirement was enforced more broadly in civil matters and I could rely on a next judicial day acceptance, perhaps the date of service could be on the date of submission (with ORCP 10 B 3 days added to response times) and nothing would be lost to the recipient litigants while ensuring that the serving party can rely on e-file and serve. (Also any requirement to file and serve could be extended in the event of a rejection - I may not be able to rely on e-file and serve if my filing can be related back, but my service cannot.) Another option would be to go ahead with service of rejected documents so that the service requirement is met doing e-file and serve without regard to whether there is a rejection and subsequent related back filing.
9		ORCP 9(C)(3). In this day and age, attorneys should be permitted to serve each other by email without needing to obtain the prior written consent of the other attorney or confirmation of receipt by the other attorney. I suggest that ORCP 9(C)(3) be amended as follows: "An automatically generated e-mail delivery status notification will support a certification that the email and attachment were received by the designated recipient, unless the sender receives an automatically generated message indicating that the recipient is out of the office or is otherwise unavailable shortly after completing service by email."
9		Also, as a new attorney, I would like to see other attorneys comply with ORCP 9 and SERVE their motions prior to filing.

Council on Court Procedures
2021-2023 Biennial Survey Results
Suggestions for Improvements to ORCP

Rule #	Topic	Suggestion
9		Add to ORCP 9G that efiling documents is consent to service by email but only if the attorney or party electronically filing a document does not list him/her/themself as a service contact. (ORCP 9H service should be used if the filer is listed as a service contact, but if the filer does not list him/her/themself as a service contact, ORCP 9G service is allowed when a party or attorney files documents electronically).
9		At this point with the experience of the pandemic, I don't think that there should be a preference for service through fax over email. I do not see a continued purpose in requiring confirmation of receipt of a document via email or stipulation to receiving documents via email, and it allows wiggle room for parties to assert that service was never completed.
9		Enforce or make it mandatory that an attorney add themselves as a service contact when they file into a case electronically (unless they are filing on behalf of a self-represented litigant).
10		US postal mail is no longer a reliable communication method, especially not the expectation that mailed items will be received in 3 days. Any rule based on that expectation should be changed.
10		If the service contact requirement was enforced more broadly in civil matters and I could rely on a next judicial day acceptance, perhaps the date of service could be on the date of submission (with ORCP 10 B 3 days added to response times) and nothing would be lost to the recipient litigants while ensuring that the serving party can rely on e-file and serve. (Also any requirement to file and serve could be extended in the event of a rejection - I may not be able to rely on e-file and serve if my filing can be related back, but my service cannot.) Another option would be to go ahead with service of rejected documents so that the service requirement is met doing e-file and serve without regard to whether there is a rejection and subsequent related back filing.
10		I've encountered some confusion about the application of Rule 10 B to the notice period for subpoenas. In my view the opposing party has a right to "do some act" when served notice of a subpoena--i.e., object or move for a protective order--and, thus, an additional three days is added to all notice periods under Rule 55 unless the notice is hand delivered. However, this has been an issue of dispute. In one case opposing counsel argued that Rule 10 B is not applicable to the seven-day notice period under Rule 55 C(3)(a) because there is no particular right to act within the seven days. In a different case opposing counsel argued the same as to the 14-day notice period under Rule D(6)(a) (though that struck me as much more tenuous given the statement in Rule 55 D(4)(a)(i) that the notice period allows the patient to object). It may be worth clarifying this issue in either Rule 10 or Rule 55.
14		ORCP 14(A) needs to be amended to bring it in line with the rest of the states and FRCPs in that, courts have either had to create a "trial like" hearing exception to ORCP 14, or can use it as a way to claim a lack of preservation when an objection or motion to strike is made orally in another type of hearing.

Council on Court Procedures
2021-2023 Biennial Survey Results
Suggestions for Improvements to ORCP

Rule #	Topic	Suggestion
14		I find it very frustrating that the ORCPs do not directly address the timeframe that must be given in civil matters for objecting to motions filed into cases. I know the UTCRs say something but why not amend ORCP 14 or 15 to make it clear and obvious in a sectioin of the ORCPs that deals directly with motions?
15		It may be helpful to clarify which rules apply to procedural motions vs substantive motions, and what the applicable time limitations are for each.
15		Clarification of the time to file a rule 21 motion against a reply asserting affirmative allegations in avoidance of defenses pleaded in an answer. Does ORCP 15A (30 days) or ORCP 21E (10 days) control?
15		I find it very frustrating that the ORCPs do not directly address the timeframe that must be given in civil matters for objecting to motions filed into cases. I know the UTCRs say something but why not amend ORCP 14 or 15 to make it clear and obvious in a sectioin of the ORCPs that deals directly with motions?
15		Make it clear, particularly with the ORCP and UTCR, that the rules (and any forms) are mandatory if that is what is intended. If there is any variance or allowance to "relax" a rule, then say so instead of assuming that there will be a different ORCP that applies. This typically comes up in discovery and ORCP 68 fee situations - the rule says this is the firm deadline, but ORCP 15 allows for that to be disregarded in some situations. Why not say, "this is the firm deadline, except . . ." or "this is the firm deadline, subject to ORCP 15."
15		Regarding ORCP 15, there seems to be some disagreement as to whether the request to enlarge the time must be made prior to the expiration of the deadline or afterward. I think it makes sense to do it beforehand whenever it is known that there will be a need to enlarge, if that was the purpose. Or just say, "a request to file a pleading after the deadline or to enlarge the filing period may be made at any time."
16		I would like a rule that allows for family law matters to be filed with parties' initials. There is no public policy argument for knowing what happens in a family.
17		Strengthen ORCP 17 and increase the penalties for violation. There are many Oregon lawyers who are engaging in dishonest practices on behalf of their client, including the filing of allegations and presentation of arguments that the lawyer knows to be false or misleading.

Council on Court Procedures
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Suggestions for Improvements to ORCP

Rule #	Topic	Suggestion
18		I have thought that ORCP 18 should be amended to make some reference to the additional pleading requirements found in ORS 31.300 and ORS 31.350: RULE 18 A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain: A A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition. B A demand of the relief which the party claims; if recovery of money or damages is demanded, the amount thereof shall be stated; relief in the alternative or of several different types may be demanded. C In the case of a claim for relief to which ORS 31.300 (action against construction design professionals) applies, a certification that complies with the requirements of ORS 31.300. D In the case of a claim for relief to which ORS 31.350 (action against real estate licensees) applies, a certification that complies with the requirements of ORS 31.350. It seems to me that those statutes are malpractice actions waiting to happen. See e.g., Zupan's Enterprise, Inc. v. Morrison Building Corp., Orders of Dismissal, No.: 0506-06875 (Mult. Co. Cir. Feb. 14, 2006). I have a copy of the order if you would like it. John
18		Having more onus on the plaintiff to know damages before filing suit and providing as much as possible as early as possible keeps cases moving quickly
21		I would like to see an option in ORCP 21 to move to dismiss based on a prior settlement agreement, waiver, etc.
21		Clarification of the time to file a rule 21 motion against a reply asserting affirmative allegations in avoidance of defenses pleaded in an answer. Does ORCP 15A (30 days) or ORCP 21E (10 days) control?
21		I would like to see an option in ORCP 21 to move to dismiss based on a prior settlement agreement, waiver, etc.

Council on Court Procedures
2021-2023 Biennial Survey Results
Suggestions for Improvements to ORCP

Rule #	Topic	Suggestion
22		ORCP 22 C, the third-party practice rules currently seems unworkable. The deadline to join a third party claim as a matter of right is 90 days after service of the complaint. This is an unrealistic timeframe of virtually all cases—usually discovery has barely even started within this timeframe. Also, if a defendant wishes to add a third party after 90 days, agreement of all parties AND leave of the court are BOTH required. I suggest amending the rule to make the deadline 180 day and/or required EITHER agreement by all parties OR leave of the court. Thank you for you're good work!
23		I also think that rule 23 and ORS 12.020 should be consolidated so that a plaintiff can either file a motion to correct an incorrect Plaintiff name or refile the case to relate back against a different defendant who had notice of the original pleading and knew that the original complaint was directed against that defendant. That way errors in naming a corporate defendant will not prejudice Plaintiffs who need to change the name of the defendant due to an error in the original complaint.
23		clarification of the rights of a successor in interest to continue an action under ORCP 23. Many lender's attorneys run into challenges where a loan is sold (as has been a regular and approved economic decision, condoned by no less an authority than the Federalist Papers) and yet courts routinely require a party to restart an action where a loan in default is sold after litigation is commenced. There is no reason for this when Bank A commenced an action while it holds a loan, and Bank B is assigned the action and the loan prior to trial. The result is only wasted costs and judicial resources. ORCP 23 suggest the courts can continue the action, but the court decisions and even local rules/policies (see Multnomah County Foreclosure Panel statement) say otherwise. A clear rule on point would serve the interests of all parties in clarifying the rights to continue actions by successors.
27		I also think that the rules should clarify that Parents are allowed to represent minor children in court without separate appointment as guardians ad litem. I believe the current caselaw mentions in dicta that Parents are the natural guardians of their children and as such, should be able to file lawsuits on their behalf without jumping through additional procedural hoops. However, at present, the right of parents to quickly and directly file lawsuits on behalf of their children to remedy harm done to them is not clear under the present version of the rules.
32		Eliminate 32H, I, and J and M(2).
32		Amend ORCP 32B by adding a factor for the Court to consider whether the policy behind the laws sought to be prosecuted as a class are furthered by the class determination.
32		ORCP 32 needs some help. The procedure for issuing notices and the content of the notices is not clear.
36	Proportionality	ORCP 35-add "proportionality" consideration to production request, similar to Federal Court
36	Proportionality	Need to make discovery expressly proportionate to the needs/size of the case and give judges tools and expectations to enforce limits.

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Rule #	Topic	Suggestion
36	Proportionality	Include "proportionality" in discovery rules.
36	Proportionality	Electronic discovery continues to escalate in terms of burden. I'd like to see the federal concept of proportionality be incorporated into the state system.
36	Proportionality	There should be a proportionality rule for discovery.
36	Proportionality	The CCP needs to implement a proportionality rule for discovery. The notion that we don't need it because judges will simply require it, or that it's somehow already imbedded in the rule is inaccurate, antiquated, and deliberately obtuse. If the CCP is serious about having disputes resolved efficiently and equitably, there is no good excuse to perpetuate the incentive to prolong and complicate litigation with discovery.
36	Proportionality	ORCP 36B(1) should be amended to mirror the federal proportionality requirement found in FRCP 26(b)(1): "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."
36	Proportionality	We should adopt the "proportionality" standard for discovery that the Federal Courts adopted a few years ago.
36	Proportionality	Electronic discovery continues to escalate in terms of burden. I'd like to see the federal concept of proportionality be incorporated into the state system.
39		allow discovery motions to compel or motions regarding deposition testimony to be made without a writing if made at the time the issue arises(i.e. the parties can pick up the phone and call the Court to address the issue)
39		ORCP 39: extinguish the distinction of a perpetuation deposition (39I). All deposition testimony generally admissible at trial.
43		You need sanctions for attorneys who do not comply with their obligations under the ORCP re: identifying which documents are responsive to specific requests. Failure to do this makes it more expensive for litigants and drags out cases. Many lawyers do not comply because there is no penalty.
43		Make it standard practice that documents must be produced absent very substantial reasons to the contrary. This will reduce discovery fights. Judges encourage these fights and encourage recalcitrant behavior when they tolerate objections.
43		The discovery provisions are too onerous, particularly where the person disclosing documents is supposed to organize by request number. It's busy work and it does not serve litigants of small matters. It should be removed.
43		ORCPs fail to account for (1) complexity and quantity of e-discovery

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Rule #	Topic	Suggestion
43		Electronic discovery continues to escalate in terms of burden. I'd like to see the federal concept of proportionality be incorporated into the state system.
43		Rules are great, but the penalties for not following them seem virtually nonexistent. Tired of pro-se and abusive persons/parties taking advantage of lack of penalties for basic documentary discovery violations and failure to meaningfully participate in the discovery process.
44		I would love to see ORCP 44 specify the discovery of records better. Multnomah County follows a same body part position that attorneys are trying to expand to other areas, but it is impractical. The absence of addressing this in the rule leads to inconsistent results. However, I recognize that this is a divided position between plaintiff and defense counsel.
46		Amend ORCP 46 to make discovery sanctions mandatory where the party failed to comply with a discovery order.
	Discovery (generally)	Pre-trial discovery disputes, especially in family law cases, should be handled by someone other than circuit court trial judges. This might speed up these determinations and take at least a little pressure off trial judges.
	Discovery (generally)	Amend civil rules to require disclosure of expert report consistent with FRCP 26 Amend civil rules to require a discovery plan to prevent last minute discovery and to set appropriate deadlines consistent with FRCP 26. Trial by surprise is a recipe for poor decision-making. In what professional capacity does anyone encourage good decision-making by introducing surprise information. It is counter to fairness and justice. It is outdated. Oregon is in the minority when compared with other states. Time to change.
	Discovery (generally)	Mandatory disclosure. My limited experience with Oregon civil litigation has shown a hid-the-ball approach to litigation. Rather than putting their cards on the table and crafting the best legal arguments possible with a given set of fact...Oregon litigators seem to take pride in using surprise, obviation, and chicanery to win the day. Those hurt by this method of litigation are the ones lawyers have the highest duty to, the clients. Oregon needs to take that leap to the 22nd century; make disclosure mandatory. https://www.osbar.org/publications/bulletin/01july/truth.htm
	Discovery (generally)	Consider implementing a modern approach to civil procedure: expert disclosure, interrogatories, pre-trial conferences. Pre-trial orders with discovery cut-off, pre-trial submission deadlines, trial date.

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Rule #	Topic	Suggestion
	Discovery (generally)	end trial by ambush
	Discovery (generally)	consider economic litigation rules for cases subject to mandatory arbitration such as limiting discovery and shortening timelines so discovery can be completed in time to serve the prehearing statement of proof without having to seek extensions of arbitration timelines.
	Discovery (generally)	A large part of my practice area is Landlord-Tenant Law. Evictions (technically called FEDs) proceed on an expedited docket - first appearance must set within one or two weeks of the filing of the complaint, and trial must be set within 15 days of first appearance (and usually trial is set within three days of first appearance), so the turnaround from filing to trial is always less than 30 days in the normal course. This makes conventional discovery impossible under the normal rules of civil procedure, as requests for production and requests for admissions have a default 30-day response time. It is also not always practicable to move the court for expedited discovery (for example, say that the tenant retains counsel only days before first appearance, and the Court sets trial for just a few days later). I believe that having a set of expedited discovery rules for eviction cases, to proceed along a timeline that works with the expedited docket, would be helpful to parties.
	Discovery (generally)	Disclosure of Witnesses prior to trial.
	Discovery (generally)	Discovery obligations and penalties should be more clear. It is too easy for plaintiffs to file a lawsuit and then force the defense to figure out what documents and evidence the plaintiff has, and there are few real penalties for plaintiffs who sit back and intentionally obfuscate discovery. For example, initial disclosures like in federal court, where plaintiffs must put forth what they have earlier would help.
	Discovery (generally)	Discovery should be modernized.
	Expert Discovery	The lack of expert discovery promotes trial by ambush over the pursuit for the most just outcome in cases. Likewise, the ability to defeat summary judgment motions by certifying expert testimony will create an issue of fact, rather than having the expert disclose his or her opinions and the bases therefor to determine whether a dispute of fact exists, deludes the search for truth and a just outcome in cases.
	Expert Discovery	Amend civil rules to require disclosure of expert report consistent with FRCP 26 Amend civil rules to require a discovery plan to prevent last minute discovery and to set appropriate deadlines consistent with FRCP 26. Trial by surprise is a recipe for poor decision-making. In what professional capacity does anyone encourage good decision-making by introducing surprise information. It is counter to fairness and justice. It is outdated. Oregon is in the minority when compared with other states. Time to change.
	Expert Discovery	The lack of expert discovery is insane. The ORCP should more closely track the FRCP on expert discovery. When I first moved to OR an experienced trial judge admitted that OR utilizes "trial by ambush." In more complicated expert cases, this makes no sense.

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Rule #	Topic	Suggestion
	Expert Discovery	I would strongly urge to CCP to amend ORCP 36 to permit expert discovery and delete ORCP 47 E. Trial by ambush has no place in 21st-century civil practice. Forcing attorneys to prepare to cross-examine an expert on complex scientific or technical issues over a lunch break in the middle of trial is not conducive to the search for truth or the administration of justice.
	Expert Discovery	Oregon's trial by ambush regarding experts is ridiculous, unfair and warps the state trial system and the administration of justice in the state courts. Let's follow the FRCP on experts.
	Interrogatories	Interrogatories: the lack of interrogatories (form or special) results in the need to draft overbroad RFP. If one wanted to determine information that could then be the focus of a more specific RFP, it would be necessary to do a deposition. But everyone knows it's best to do depositions with production in hand; and while Oregon does not have an hours cap like other jurisdictions, it would generally be frowned upon to do multiple depositions. To the extent Oregon could conform to most other jurisdictions or the federal rules on this front, it would promote more efficient and targeted discovery and reduce the tedium for practitioners in navigating a procedure system that is very 18th century.
47		ORCP 47 needs to be amended to make Summary Judgment a viable option in Civil Actions. Specifically, ORCP 47 E must be eliminated. The entire Oregon Courts system is directed towards pushing litigants to trial, and ORCP 47 E is the worst example. The ability to hide evidence from the Court in a dispositive motion prevents justice for those who do not have the financial resources for a trial. There is a massive backlog of cases awaiting trial in Deschutes County, and our office is constantly informing clients that there will be no resolution to a matter for 4 years because summary judgment is not a viable option. A judge is capable of considered expert opinion evidence in a dispositive motion.
47		The summary judgment standard isn't working at all. Judges won't grant motions that in all fairness, should be granted. The standard should be more like the federal rule.
47		The timing of the offer of judgment and the motion for summary judgment seems incongruent. Since the summary judgment decisions rarely happen less than 14 days trial and at times change the landscape of the case, requiring that the offer of judgment be made no less than 14 days prior to trial makes it unavailable as a post-MSJ litigation tool.
47		Summary judgment rules need to be updated.
47		I would strongly urge to CCP to amend ORCP 36 to permit expert discovery and delete ORCP 47 E. Trial by ambush has no place in 21st-century civil practice. Forcing attorneys to prepare to cross-examine an expert on complex scientific or technical issues over a lunch break in the middle of trial is not conducive to the search for truth or the administration of justice.

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Rule #	Topic	Suggestion
47		It should be made clear that ORCP 47E is not available to pro se litigants because they are not subject to the same knowledge, practice, and ethic standards as attorneys.
47		The lack of expert discovery promotes trial by ambush over the pursuit for the most just outcome in cases. Likewise, the ability to defeat summary judgment motions by certifying expert testimony will create an issue of fact, rather than having the expert disclose his or her opinions and the bases therefor to determine whether a dispute of fact exists, deludes the search for truth and a just outcome in cases.
47		The time to reply for Summary Judgment is way too short, it doesn't even give people time to get a lawyer.
47		Summary Judgment motions should have a required notice setting out the timelines and what happens if you miss the deadline.
47		There should only be an opportunity to do an MSJ once. If trial is postponed, Defendant's shouldn't get another shot at MSJ if they already did it.
47		I would strongly urge to CCP to amend ORCP 36 to permit expert discovery and delete ORCP 47 E. Trial by ambush has no place in 21st-century civil practice. Forcing attorneys to prepare to cross-examine an expert on complex scientific or technical issues over a lunch break in the middle of trial is not conducive to the search for truth or the administration of justice.
52		There should be less discretion to the court when requesting a postponement of a trial or hearing date when it is the first request for postponement and the parties stipulate to the postponement. There are certain counties which deny postponements even when good cause is shown and the parties agree.
54	54 A	It is extremely wasteful of judicial and party resources that a plaintiff is allowed to litigate a claim up to trial and drop it five days before trial with no consequences (ORCP 54A(1)). Allowing last-minute dismissal of this nature serves only to allow a plaintiff to bring frivolous claims to try to increase the cost of the case and then abandon it at the last minute. Most states do not permit dismissals after a certain point without the consent of the defendant or by court order. If the plaintiff wants to dismiss a claim because it knows it has no reasonable grounds for it, the defendant can then bargain over prevailing party costs. This helps put pressure on the plaintiff to settle. It is tremendously inefficient to litigate a claim for years and then have one side decide unilaterally to abandon it five days before trial, after court and opposing party time has been put into discovery as to the claim, possible motion practice, and trial preparation.
54	54 E	The timing of the offer of judgment and the motion for summary judgment seems incongruent. Since the summary judgment decisions rarely happen less than 14 days trial and at times change the landscape of the case, requiring that the offer of judgment be made no less than 14 days prior to trial makes it unavailable as a post-MSJ litigation tool.

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Rule #	Topic	Suggestion
55		Simplified Subpoena process, particularly for pro se litigants, or litigants in Family Law
55		ORCP 55-simplify subpoena process; clarify timelines for service; develop method to avoid lengthy delays in producing medical information in cases where Plaintiff puts medical condition at issue by pleadings
55		ORCP 55: The rule is cumbersome and could use some updates.
55		ORCP 55 should make it clear that it is acceptable (or I suppose unacceptable? but acceptable is much much better) to serve a subpoena duces tecum by mail on the registered agent of a corporation. As it stands, people just do it, but it's not expressly permitted.
55		ORCP 55 is very confusing. It also appears that if documents of a person who is not a party to the case are subpoenaed, there is no requirement to give notice to that person. I think that needs to change. More notice is necessary for subpoenas in general. Also, the rule needs to be simplified to make it easier for everyone to understand.
55		I would like Oregon to adopt a version of Washington's CR 43 (f), a provision for serving notice on a party that compels an officer, director or managing agent of the noticed party to appear for trial testimony, notwithstanding a subpoena or whether that party's testimony has been perpetuated before trial. It is a fantastic time saver.
55		Simplified Subpoena process, particularly for pro se litigants, or litigants in Family Law
55		Clarify ORCP 55 A(7) and 55 B & C so that it is clear that both a person subpoenaed to testify and a person not subpoenaed to testify and an entity under ORCP 39 C (6) can object to or move to quash the subpoena for testimony and/or document production. Presently these rules are very unclear and probably should be broken out into different headings.
55		I've encountered some confusion about the application of Rule 10 B to the notice period for subpoenas. In my view the opposing party has a right to "do some act" when served notice of a subpoena--i.e., object or move for a protective order--and, thus, an additional three days is added to all notice periods under Rule 55 unless the notice is hand delivered. However, this has been an issue of dispute. In one case opposing counsel argued that Rule 10 B is not applicable to the seven-day notice period under Rule 55 C(3)(a) because there is no particular right to act within the seven days. In a different case opposing counsel argued the same as to the 14-day notice period under Rule D(6)(a) (though that struck me as much more tenuous given the statement in Rule 55 D(4)(a)(i) that the notice period allows the patient to object). It may be worth clarifying this issue in either Rule 10 or Rule 55.
55		Should only require objection period for documentary subpoenas for bank accounts in the other parties name or sensitive personal information.
58		ORCP 58 should allow instruction to the jury before opening on the legal claims.
60		ORCP 60-allow Court to consider directed verdict on its own motion, sua sponte

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Rule #	Topic	Suggestion
68		I am concerned about the lack of notice to unrepresented parties of the time and manner to object when a statement of attorney fees and costs is filed under ORCP 68. Many unrepresented parties are not aware that these statements can be contested.
68		Lastly, the CCP should consider an amended to ORCP 68. The current system causes unnecessary subsequent litigation on fees and improperly incentivizes the non-prevailing party to challenge all fee petitions, especially when the non-prevailing party has an attorney who is paid hourly and the prevailing party's attorney is working on a contingency. Effectively, the hourly attorney will get paid their attorney fees for all of their work, but the contingency attorney must rely on the court to award fees. Often times, and despite the legislative intent, the net result of the "fee litigation" is that, despite prevailing, the contingency lawyer will end up being paid less than their normal hourly rate and less than that of the opposing counsel who had no risk of non-payment or delay associated with payment. The hourly attorney working for the non-prevailing party will challenge fee petitions as excessive in time and rate, despite being relatively on-par with the hourly attorney's on bills. I strongly encourage the CCP to consider incorporating a version of Local Rule 54.3 from the US District Court for the Northern District Court of Illinois into ORCP 68 to ensure fairness and judicial efficiency in attorney fee disputes.
68		Make it clear, particularly with the ORCP and UTCR, that the rules (and any forms) are mandatory if that is what is intended. If there is any variance or allowance to "relax" a rule, then say so instead of assuming that there will be a different ORCP that applies. This typically comes up in discovery and ORCP 68 fee situations - the rule says this is the firm deadline, but ORCP 15 allows for that to be disregarded in some situations. Why not say, "this is the firm deadline, except . . ." or "this is the firm deadline, subject to ORCP 15."
68		Depositions should be considered a recoverable cost.
69		The default procedures in Oregon law prejudice plaintiffs after a 28 day notice is issued. I propose that a 28 day notice should also constitute a notice of intent to take default on the defendant by the court, which would allow Plaintiffs to take default on Defendants who do not make their appearances within 28 days of the notice being issued. I also think that a Motion to take default should be sufficient to satisfy the rule 28 day requirement notice. It might take weeks of research to find a defendant's birth date in order to look up the defendant's information on the military database. This means that drafting a motion for a default judgment is considerably longer and more time consuming than drafting a motion to take default. If a plaintiff fails to issue a 10 day notice of intent to take default on a Plaintiff who has provided an ORCP 69 letter more than 15 days before the 28 day notice expires, it becomes excessively complicated and difficult to take default on a defendant who fails to make an appearance.

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Rule #	Topic	Suggestion
69		I think the rules relating to default judgments could be more clear - what the standard is for prima facile case, what the procedure is to challenge a default judgment (I.e., for defective service), the definition of an “appearance.”
69		I think clarification of Notice of Intent to Take Default would be helpful. My understanding (and practice) has been that this notice should be mailed to self-represented parties whether they have sent an ORCP 69 letter or not.
71		Also ORCP 71 contains in its title the statement "Motion for Relief from Judgment or Order". However, in the body, it only allows a motion to correct a clerical error in an order, but not to correct an inadvertent mistake which led to an incorrect order under ORCP 71(b)(1). Technically as written, there appears to be no way to correct a mistake in an order that should be remedied due to inadvertence, fraud, or discovery of new evidence. However, it could be months or years before a judgment is issued in the case through which a party could seek relief under ORCP 71. This could cause injustice and lead to multiple legal proceedings premised on erroneous rulings or fraud, simply because relief from an order was not obtainable under ORCP 71 as written. In practice, I have seen judges grant relief from orders under ORCP 71, even though no judgment had been rendered. Consequently, I think ORCP 71(b) should be amended to include the term Judgment or Order everywhere the term judgment is mentioned
71		ORCP 71 should be amended to expressly impose heightened scrutiny for negligence of attorneys/legal departments and should include an express mechanism to allow the non-moving party to conduct discovery such that an ORCP 71 relief hearing should maintain adversarial characteristics and is no longer a one-sided presentation allowing the movant to present a carefully crafted version of facts that may omit key information about the mistake, inadvertence, or excusable neglect.
71		ORCP 71 C should be amended to remove a cross-reference to a non-existent Rule. Rule 71 C currently contains a reference to "the power of a court to grant relief to a defendant under Rule 7 D(6)(f)," but there is no Rule 7 D(6)(f). Rule 7 D(6) ends at subpart (e)! However, there is no Rule 7D(6)(f)!
	Abatement	Multnomah county LR 7.055(7) allows that court to abate any case upon upon a showing of good cause and motion by counsel or the court. I have had at least two instances in other counties where opposing counsel and I have agreed a case should be abated (e.g., a personal injury plaintiff needs a surgery and will require additional treatment beyond 12 months after the filing date).

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Rule #	Topic	Suggestion
	Abatement	I am a Collaborative attorney and mediator. I would like the ORCP and/or ORPCs to be more supportive of alternative dispute resolution options including Collaborative Divorce. Specifically, allow parties to seek a stay or abatement to pursue a Collaborative process once a case has been filed, to support court enforcement of Collaborative Participation agreements if a Collaborative case goes to litigation, etc. The Uniform Collaborative Law Act has been adopted by 22 states, and Oregon should be the next.
	Affidaviting judges (improvements to)	the procedure for challenging a judge for prejudice is confusing and needs to be revamped in light of how cases are modernly assigned.
	Affidaviting judges (improvements to)	Also, there should be an actual rule for the procedure for affidaviting a judge. The statute is loose enough that right now some counties are making it the right to affidavit impossible to exercise due to overly restrictive constraints.
	Arbitration/mediation	More arbitration and mediation in all possible forms to help litigants find solutions other than 1-3 years of expensive litigation.
	Arbitration (court annexed)	Get rid of the "opt in" for expedited jury trials on small cases and make it mandatory for anything under, say $50K; that will promote speedy resolution of smaller cases and result in greater access to justice for self-represented litigants and those who can't afford to pay attorneys to go through lengthy discovery and motion practice. Lawyers will still try and plead around it, so make that difficult. Get rid of court-annexed, non-binding arbitration. It's a waste of time and money. Either make it binding for relatively small cases, like those subject to ORS 20.080, or eliminate entirely to eliminate or at least reduce the common practice of insurance companies appealing and asking for jury trials on small cases and then driving up fees for plaintiff's lawyers. Small dollar value cases should have a mechanism for decision that is speedy, efficient, and inexpensive.
	Arbitration (court annexed)	Add some teeth to the mandatory arbitration rule. Right now large corporate defendants (i.e. insurers) can abuse the process in simply refusing to arbitrate in good faith because they simply intend to appeal for a trial de novo if they lose at arbitration. This requires Plaintiff (in my practice, individual Oregonians) to put on a case at arbitration knowing that defendant's will not defend the case. As a result, my clients both tip their hand in terms of how the case may be tried and they must incur costs for an effectively empty arbitration. There needs to be a mechanism that leads to more meaningful arbitrations, such as the rules in other jurisdictions that say if you do not participate in the arbitration in good faith, you are barred from raising certain defenses at trial.
	Arbitration (court annexed)	the process for mandatory arbitration needs to be revamped to encourage mediation instead.

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Rule #	Topic	Suggestion
	Clear language	Civil cases are often confusing to navigate for attorneys, and far more confusing for pro se litigants who often have a lot on the line. I'd like to see the rules become more streamlined and easy to understand by lay-people. Additionally, civil procedures should strive to include accessibility and trauma-informed practices. Many pro se litigants, especially those dealing with issues like domestic violence or racism, have been repeatedly retraumatized by court procedures and the lack of trauma-informed policies and procedures in place.
	Clear language	ORCPs fail to account for (5) rules are arcane, poorly worded and make little sense to new lawyers who have to hang out their own shingle due to a lack of legal jobs upon graduation
	Clear language	Do a complete overhaul for plain English as the federal rules did a while back.
	Clear language	For new rules, amendments to rules, and regular review of all existing rules, use plain language instead of legalese and use a trauma-informed lens for making the rules friendly to non-lawyers.
	Clear language	I think that the rules in general are extremely inaccessible to pro se litigants. Law students have to take at least a semester on the topic to understand the rules and their function, but pro se litigants are presumed competent to understand and follow the rules without that same background. This is certainly not an issue that is limited to the rules, but it is frequently apparent in regard to the rules.
	Collaborative practice (rules to support)	I am a Collaborative attorney and mediator. I would like the ORCP and/or ORPCs to be more supportive of alternative dispute resolution options including Collaborative Divorce. Specifically, allow parties to seek a stay or abatement to pursue a Collaborative process once a case has been filed, to support court enforcement of Collaborative Participation agreements if a Collaborative case goes to litigation, etc. The Uniform Collaborative Law Act has been adopted by 22 states, and Oregon should be the next.
	Expedited Trial	Get rid of the "opt in" for expedited jury trials on small cases and make it mandatory for anything under, say $50K; that will promote speedy resolution of smaller cases and result in greater access to justice for self-represented litigants and those who can't afford to pay attorneys to go through lengthy discovery and motion practice. Lawyers will still try and plead around it, so make that difficult. Get rid of court-annexed, non-binding arbitration. It's a waste of time and money. Either make it binding for relatively small cases, like those subject to ORS 20.080, or eliminate entirely to eliminate or at least reduce the common practice of insurance companies appealing and asking for jury trials on small cases and then driving up fees for plaintiff's lawyers. Small dollar value cases should have a mechanism for decision that is speedy, efficient, and inexpensive.
	Family law (different rules for)	As a family law practitioner, I sometimes think there should be some different rules of civil procedure for family law. Some of the deadlines and specifics of the rules that make sense for civil litigation matters (personal injury, business/contract disputes) make less sense in the family law context.

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Rule #	Topic	Suggestion
	Federalize Oregon	The ORCPs should be amended to mirror the Federal Rules of Civil Procedure. Access to justice is an important value in Oregon and having two different procedural regimes hinders the goal of having affordable and efficient access to Oregon's courts. Adopting the FRCPs makes it easier and cheaper for litigants to proceed in state courts.
	File clerks (regulate dictatorial ones)	I would like a rule that creates a conflict resolution process when a court clerk unilaterally determines a court document must XYZ. Most times, these clerks cannot cite a rule requiring their determination. We need a process to address these gross power over-reaches.
	File clerks (regulate dictatorial ones)	Require Circuit Court clerks to be trained on accepting documents filed online. My experience is that clerks are very inconsistent in accepting or rejecting documents. When a document is rejected, it should still be served electronically on opposing counsel by the Tylerhost system.
	File clerks (regulate dictatorial ones)	If possible, require action by clerks on filings within next judicial day and require service contacts from all who first appear to allow for more extensive use of e-service. I do not use e-file & service regularly because I cannot guarantee when the service will occur (on acceptance of the filing). I can e-serve and then separately e-file, but that is almost as many steps as fax and if someone does not have a service contact, I have to then amend my service proof.
	Interpreters (challenging court-appointed ones)	Finally, there needs to be a rule on how an attorney or a party can request that a court appointed interpreter be replaced. I am one of the few Russian speaking lawyers in Oregon and several times, in disparate proceedings, I've had to correct the interpreter on the record. Unfortunately there are interpreters who are not as proficient with legal terminology, or lack the necessary familiarity with regional dialects. Incomplete or incorrect interpretation can result in extreme prejudice to a litigant, and there must be a consistent procedure for replacing an interpreter
	Lawyer Civility	https://www.utcourts.gov/courts/sup/civility.htm Utah has these and I find they help a lot. I'm stunned at some of the things Oregon lawyers say but forget we don't have these here. https://www.utcourts.gov/resources/rules/urcp/urcp026.html
	Lis pendens (summary procedure to expunge)	We also need rules to permit summary adjudication to expunge a lis pendens prior to judgment when one is recorded when not authorized.

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Rule #	Topic	Suggestion
	Medical records/bills (improve admission of)	Streamline the process for admitting medical records and bills. Allow preliminary direct and cross examination of experts pre-trial in front of a judge with a video recording to later show the jury. It would be nice to get the judicial rulings in advance of trial on admissibility. We can video in advance but if there are evidentiary disputes the videotape can be rendered inadmissible which requires us to hire high priced experts for extended periods of time and risk paying expert fees multiple times due to last minute set overs.
	One Set of Rules	Interaction of ORCP, UTCR, and SLR: These sets of rules should be streamlined to make practice less cumbersome and expensive. In particular, and while it's understood that local rules are unlikely to be abolished, the types of procedures included in the rules should correspond to the applicability and level of abstraction of a ruleset. This is to say that local rules and UTCR should truly cover localized, granular, or practical matters and should not contain matters more appropriately set forth in the ORCP. To this end, the ORCP could generally be beefed up to provide greater clarity to practitioners (see the California Code of Civil Procedure, for example; it's specific, thorough, codified by subject matter, detailed, and easy to use and important items of information are generally not buried in the Rules of Court, the Rules of Court appropriately complement the Code).
	One Set of Rules	I am tired of having to consult the statutes, then the orcp's, then the uniform trial court rules, then the local rules, only to find also under Covid there are no Presiding court rules for the court house that are different or unwritten in the local rules. I should be able to go to any courthouse anywhere in this state and practice without feeling there is so much potential for a rule I did not realize existed, or that is dealt with differently from courthouse to courthouse. Or where the Oregon Rules are different than the Uniform trial court rules.
	One Set of Rules	I think we should stick with the Oregon Rules and combine these with the Uniform Trial court Rules, and have no local rules. Just make everything standard. why is it I have to file a show cause order for a hearing in one courthouse, but in another I have to serve the motion and declaration and wait 30 days first, to then get a hearing date? And that hellacious certificate of readiness form is all messed up and calls for orders to be filed when there is no ruling yet -like a rule 21 motion. We need a lot of clean up. And by the way that whole notion of conferring is used by many attorneys to evade calls and then claim one has not tried to confer in good faith. We need loopholes gotten rid of, and to combine rules, it's crazy that we can't go one place to find out time limitations, or how much notice to provide, or if documents are to be provided with notice, like in an immediate danger order...

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Rule #	Topic	Suggestion
	Probate/trust litigation (define when ORCP governs)	Probate Litigation: The CCP should develop or collaborate with other working groups to develop clearer basic principles of procedure for trust litigation because trust litigation often more closely resembles civil litigation, but practitioners are left to borrow from vague standards (no form of pleading required) or from Ch. 115 and the procedures for administering wills and estates (quite different from trust litigation). There could be greater clarity in the ORCP or the Trust and Probate Codes with regards to the ORCP that apply. In particular, practitioners often struggle with whether to proceed by petition or complaint in certain trust cases, and what the deadline for answering a petition is as well as whether ORCP 69 can apply with respect to the time for answering a petition. It is anticipated that trust litigation will continue to increase in frequency, and the code/ORCP should be adapted in this regard.
	Quick Hearings (procedure for)	Create a route for a quick hearing. I've found that sometimes I can get one by working with presiding, but I shouldn't have to hound presiding to get something heard in a reasonable amount of time.
	Quick Hearings (procedure for)	Should allow expedited resets and postponements for hearings set by court.
	Remote Hearings/Trials	allow for in court testimony via live video conferencing without the need to obtain prior permission. Given today's technology and COVID19 accelerating the use of technology this should be allowed without need to obtain advance permission. This also helps keep costs down by allowing more diverse experts witnesses to testify and other lay witnesses that would otherwise not be able to testify in court do so.
	Remote Hearings/Trials	Amend ORCP to permit depositions by videoconference (Zoom) post-COVID, as well testimony via Zoom (remote testimony) without the need for a showing of good cause or motion practice.
	Remote Hearings/Trials	Streamline the process for admitting medical records and bills. Allow preliminary direct and cross examination of experts pre-trial in front of a judge with a video recording to later show the jury. It would be nice to get the judicial rulings in advance of trial on admissibility. We can video in advance but if there are evidentiary disputes the videotape can be rendered inadmissible which requires us to hire high priced experts for extended periods of time and risk paying expert fees multiple times due to last minute set overs.
	Remote Hearings/Trials	I would like to continue the availability of remote hearings. It is very practical for lawyers and parties and witnesses.
	Remote Hearings/Trials	Specific proposal: To make all non-evidentiary hearings telephonic or otherwise remotely held by default without a requirement for a motion and order as there are many firms that operate statewide.
	Remote Hearings/Trials	Generally to make remote appearances by counsel and remote testimony by witnesses easier.

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Rule #	Topic	Suggestion
	Rules, Generally	ORCPs fail to account for (2) lack of professionalism from lawyers willing to abuse rules or exploit ambiguity
	Rules, Generally	ORCPs fail to account for (3) access to justice to rural Oregonians
	Rules, Generally	ORCPs fail to account for (4) lawyer wellness, such as flexible work schedules, part-time or reduced work schedules
	Rules, Generally	ORCPs fail to account for (6) no concept or appreciation of equity
	Rules, Generally	should remove the 9 month limitation on the conclusion of civil matters when children are involved
	Rules, Generally	Yes, they are designed to promote expediency/economy but what I see too often is complete disregard for ORCP and UTCR rules by court staff and judges when it comes to self represented litigants, who could file a banana peel and get that accepted for filing. Yet, the smallest picayune deficiency gets rejected when a lawyer files something. And our increasingly young bench, seemingly is terrified of granting a summary judgment motion.
	Self-Represented Litigants	Oregon courts are often hostile and unjust to pro se litigants. Self represented people don't know the ORCPs and can't follow them when they do. Washington allows the use of affidavits way more than we do and I think that helps a lot, especially in family court
	Standardized forms (increase)	Expand use of standard forms as much as possible state-wide.
	Statutory Fees	The statute that rewquires parties to pay a fee to file certain motions is financially burdensome on parties
	Statutory Fees	Reduce the filing fees.
	Trial judges (authority of)	trial judges should have more clear latitude to protect pro se litigants from abuses by lawyers.
	Trial judges (authority of)	Trial judges should have more clear authority to dismiss facially invalid claims.
	UTCR 2.010	I would like the rules for court documents to be updated. They are antiquated and require formatting that is both no longer in style and difficult (at times) to enact.
	UTCR 5.010	Make exceptions to rules requiring conferral in situations where there is good cause
	UTCR 5.100	Should allow submission of exhibits electronically
	UTCR 5.100	Need some more work on UTCR 5.100. Certain language was removed that made that provision apply only to orders/judgments in response to a judge's rulings. With that removed, I have run into attorneys that are submitting judgments and order prior to the time allowed to respond to the petition/motion.
	UTCR 5.100	should allow more time for review of proposed judgments, not orders

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Rule #	Topic	Suggestion
	UTCR 7.020	In prior times a change of Venue would start the clock anew for purposes of rule 7.Presently it does not, resulting in the necessity to ask the court for a continuance because of the time delay and needs of the transfer . While a continuance is virtually always granted the entire procedure should not be necessary and adds to the work of both staff and litigants. I have discussed the option of an auto reset of the 70 day rule if a claim changes venue. 100% of the clerks i polled were in support of one time auto reset to preclude the necessity of a notice of intent to dismiss, a responding motion to continue and the entry of a continuance necessitated by the fact of the artificial timelines. The rule just adds work to all concerned and adds nothing to a timely resolution .
	Vexatious litigants (procedures for)	We need a vexatious litigant statute and requirements for a bond to continue with a case when a judge finds the litigant to be a serial litigator who has been unsuccessful.