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

ATTENDANCE

Members Present:

Kelly L. Andersen
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
Drake Hood
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Margurite Weeks

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Meredith Holley
Derek Larwick
Hon. David E. Leith
Tina Stupasky
Jeffrey S. Young
(1 vacant position)

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting		ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
Discovery	ORCP 54	ORCP 1	ORCP 55		
Service	ORCP 55	ORCP 4	ORCP 57		
ORCP 7	ORCP 57	ORCP 14	ORCP 58		
ORCP 15	ORCP 58	ORCP 15	ORCP 60		
ORCP 17	ORCP 60	ORCP 16	ORCP 68		
ORCP 18	ORCP 68	ORCP 17	ORCP 69		
ORCP 21	ORCP 69	ORCP 18	ORCP 71		
ORCP 22	ORCP 71	ORCP 21			
ORCP 23		ORCP 22			
ORCP 27		ORCP 23			
ORCP 32		ORCP 27			
ORCP 47		ORCP 32			
ORCP 52		ORCP 52			

I. Call to Order

Mr. Crowley called the meeting to order at 9:30 a.m.

II. Approval of September 11, 2021, Minutes

Mr. Crowley asked whether any Council member had amendments to the draft September 11, 2021, minutes (Appendix A). Hearing none, he called for a motion to approve the minutes. Mr. Andersen made a motion to approve the September 11, 2020, minutes. Ms. Dahab seconded the motion, which was approved unanimously by voice vote.

III. Reports Regarding Last Biennium

A. Staff Comments

Judge Peterson explained that he was still working on staff comments for the previous biennium's promulgated rules. He explained to the new Council members that staff comments are not legislative history but, rather, a bystander's report to explain why the Council made the changes it did and, in some cases, to make clear that changes to a rule were for improvement of its organization, grammar, etc., not to make a substantive change to its operation. The staff comments also include a disclaimer that legislative history can be found in the Council's minutes.

IV. Administrative Matters

A. Adding Link to Council's Website from Legislature's Website

Mr. Crowley asked whether there had been progress in having a link to the Council's website added to the Legislature's ORCP web page. Ms. Nilsson explained that she and Ms. Weeks had a discussion about the subject after the last Council meeting, and that Ms. Weeks planned to reach out to a colleague in the Legislative Counsel office to see if that process could get started.

B. Article on the Council in Oregon State Bar Bulletin

Mr. Crowley asked for an update regarding the possibility of having an article about the Council appear in the Oregon State Bar Bulletin in order to increase awareness about the Council among the bench and bar. Mr. Shields stated that he had spoken with Susan Grabe about the idea, and she agreed that it was a good one. He stated that, if someone is interested in writing the article, there is a good chance it would be published. Judge Norby volunteered to write an article and run it by Council staff for accuracy. The Council agreed that it did not need to review the article prior to publication.

V. Old Business

A. Committee Reports

1. Discovery Committee

Mr. Crowley stated that the committee had met, but that it was primarily members of the defense bar and judges who were able to attend the meeting. Those present at the meeting reviewed all of the comments regarding discovery that were submitted by bar members and focused on a few main areas and whether to pursue changes this biennium. One such area is the question of expert discovery, which is an issue that has come up regularly over the past several years; there was not a lot of appetite for pursuing that issue. Mr. Crowley reminded the Council that the issue has not gotten much traction when it has come up in the past and that there is a sense that, when it comes to expert discovery, the ORCP are working in state court. Of course, federal court is different and, while there were some comments advocating for the federal process, there seems to be a firm base that has a strong interest in maintaining the status quo when it comes to expert discovery.

Mr. Crowley noted that another suggestion regarded situations where a party's medical condition is put at issue in litigation, and suggested requiring that there be reciprocity between plaintiffs and defendants. As it stands right now, under Rule 44, when the plaintiff's medical condition is at issue, discovery proceeds without delay on the medical condition. However, if a defendant raises their medical condition in an affirmative defense, that will not be discoverable and tested out until trial. Mr. Crowley stated that the committee was open to considering that further.

The other big topic that the committee discussed was e-discovery, and considerations of proportionality. Mr. Crowley noted that the issue has been raised in the past and has been polarizing, so the committee felt that it would not be wise to pursue the issue unless there is a chance to come to some collaborative arrangement across the bar. He noted that members of the defense bar are certainly interested in the idea, and they have reached out a little bit to the plaintiffs' bar and want to have some follow-up discussion on that point. He stated that he would like for the committee to meet again next month for further discussion after Mr. Andersen has had a chance to reach out further to members of the plaintiffs' bar for more discussion.

Judge Brown asked Council members for some background on why the consensus is to stick with the status quo on expert discovery. She stated that she thinks that

there is an equity lens that this should be looked through, and noted that many of the comments referred to concerns about trial by ambush. She did not want to miss an opportunity to look at the issue through an equity lens.

Mr. Crowley stated that one of the points in favor of staying with the status quo is that adding expert discovery is going to make the state court process more expensive, as well as slow things down. He stated that, from his perspective, the Department of Justice files cases in both state and federal court, with policy reasons for each forum. Sometimes there are weightier cases with a real need to get into expert discovery; those cases are filed in federal court. On the other hand, sometimes there is a preference for moving a case to trial more quickly, in which case those cases remain in state court.

Mr. Andersen stated that he is a plaintiff's attorney who practices in both state and federal court. He agreed with Mr. Crowley that expenses in federal court are higher - sometimes triple the cost of state court. He suggested that, if anything, other states are looking with envy at Oregon. As for the term "trial by ambush," it really is not. If an attorney has prepared a case well, they will have a pretty good idea of what the other side is going to say, as well as their own experts to help fill them in on the gaps in their own case. Mr. Andersen noted that, since the early 1980s, there has been a continuous whimper, at least by a few, to model the federal rules and have expert discovery, and that idea has been beaten down like a bad ember in a forest every time it has come up.

Judge Norby asked Council staff to confirm whether the Council's mission statement includes that it should not only create rules that are fair, but to also keep litigation as inexpensive as reasonably possible. Ms. Nilsson confirmed that this language is in Rule 1. Judge Peterson reminded the Council that the biennial survey had indicated that those surveyed think that the rules resolve cases fairly, but in terms of speedily or inexpensively, they could do better. He stated that the feeling among many lawyers is that expert discovery would slow things down and make litigation more expensive. However, proportionality of discovery, while a very scary thought for some, could make things go more quickly and less expensively. However, he stated that in order to think about adopting any of these suggestions, there likely needs to be some good interplay between the plaintiffs' bar and defense bar, so that they both feel that this will move the ball forward, and not harm one side over the other.

Mr. Goehler agreed with Mr. Andersen's comments. He pointed out that, with regard to expert discovery, he believes that it is one of the issues where the plaintiffs' bar and defense bar are pretty well aligned. He noted that Oregon's system works, and that he thinks that the equity lens actually favors Oregon's

system because of the lower cost. He stated that the bulk of his cases at the moment are in Washington, and the cost of trial is basically double that of Oregon because of expert discovery. He stated that, in his experience, it is usually defense lawyers in big commercial or product liability cases who want more expert discovery. They may represent parties with deep pockets who can use that advantage to leverage unfair settlements, so he believes that not having expert discovery makes for a level playing field for both sides.

Judge Norm Hill agreed with the comments that were made, but asked Judge Brown for more information on the equity lens issues that she perceives. Judge Brown stated that she agrees that there certainly is the risk of increased costs for discovery. However, to the extent that more information is provided early on, it can possibly reduce costs in cases going to trial, if things are exposed and discussed among the parties. She noted that it is all about levels of communication, because there is certainly a range of different types of cases. For example, commercial litigation is going to be very different than personal injury litigation. She stated that her question is more about whether those questions are being asked and considered, and that it is not just "we are doing this because we have always done it." She stated that she could see the point that having additional steps in litigation can increase costs but, if those steps could reduce costs in the long run by cases getting resolved because more information has been shared, that is going to be much less expensive than going to trial.

Judge Norm Hill stated that expert discovery does occur in Oregon now, but it is not compulsory. For example, it is very common in construction defect cases for there to be an early mediation among the experts to try to develop a scope of repair to avoid spending money and doing depositions trying to get there. He stated that he thinks that the Council receives pushback when it considers adding expert discovery in a compulsory fashion because compulsory expert discovery almost compels lawyers, either on the plaintiff's side or the defense side, to start spending money and deciding whether a trial expert or a consulting expert is needed. That changes the standard of care for lawyers, which is a concern. Judge Hill also stated that what convinced him is that the federal approach to discovery was designed to deal with a backlog of cases waiting to get to trial and to address exactly Judge Brown's question of whether there are cases going to trial because people have imperfect information, and whether cases can be peeled out of the system to avoid that. However, he stated that he does not believe that there is a problem in Oregon with civil cases going to trial, as the vast majority of those cases resolve before trial. If anything, there is a problem of too few cases going to trial, with no case law being generated because everything is resolving. Judge Hill further stated that adding expert discovery to the ORCP seems like a solution in search of a problem, because most of these cases are resolving anyway. However,

he wanted to be sure that the Council was not missing that avoiding expert discovery may be having an impact on a particular class of cases in a way that perhaps is not being seen by current Council members.

Judge Jon Hill asked whether the Council has examined the issue in the past in terms of whether certain types of cases are impacted by not having expert discovery. Judge Norm Hill replied that, while expert discovery has often been raised during his tenure on the Council, he does not believe that anyone has really brought the equity lens argument that Judge Brown has asserted. He stated that his only hesitation in examining the issue further is that he is not aware of whether there is a class of cases that are different than typical plaintiff-defendant cases and that are impacted negatively by the lack of expert discovery. Judge Brown stated that she was not aware of that either but, seeing the same comments over and over on the survey makes her pause and wonder why the rule was created the way it was and what is the impact of the rule now versus the intent of the rule when it was created. She stated that there may well be a middle ground, since it sounds like parties are possibly doing some expert discovery informally. She wondered whether there might be a statement or introductory provision to the rule the Council acknowledges that it is important for the parties to talk and share information to the extent feasible so that there is not a trial by ambush.

Mr. Andersen stated that he and Mr. O'Donnell are currently involved in a case and that, just this week, they had a robust discussion about a case where Mr. O'Donnell disclosed what his experts would say and asked him to consider that. Mr. Andersen stated that this robust informal exchange of information happens all of the time in Oregon trial practice. He worried that putting a rule into effect requiring it means that lawyers will have to spend a lot of time with reports and preparing experts for depositions, which seriously drives up the cost of litigation. He stated that he does not see a need to revisit an issue that has been knocked down probably almost every biennium since the early 1980s.

Mr. O'Donnell noted that, when the ORCP were originally created, lawyers from large firms with a lot of experience were trying a lot of cases, many of which involved experts. There was a genuine understanding, especially among insurance claims people, that plaintiffs' attorneys knew what they were doing and would be able to get a case to the jury. It really did not matter who the experts were, because the assumption was that they would be quality experts. However, Mr. O'Donnell explained that this is a different era, an era in which there are a lot of cases filed that are hard to understand, in some instances because of lack of experience and lack of training. He stated that he did not know how any rule could really obviate challenges such as lawyers who file plaintiffs' cases where they have

never heard of the plaintiff. Lawyers are reluctant to settle cases without having information about what is actually going to be presented. Oftentimes, there will be cases that have been non-suited, suffered directed verdicts, or even been abandoned at trial, because some lawyers really do not understand what it takes to get that kind of case to a verdict with expert reliance. Mr. O'Donnell opined that there is not anything that the rules can do about that.

Judge Brown stated that she would leave it to the discretion of the committee to consider everything that was discussed by the Council. She stated that she believes that it is worthy of the Council's time to consider whether expert discovery is being looked at in the most equitable way. Mr. Crowley stated that the Council's discussion was robust and that the committee should circle back and touch on it again at the next meeting to see if the entire Council agrees. He stated that he appreciates that the Council is made up of a lot of experienced practitioners, and the discourse in reaching a conclusion like this valuable and useful for the bar.

2. Service Committee (Appendix B)

Mr. Goehler reported that the committee had met and looked at the comments received by the bench and bar regarding service. (Appendix C). For the most part, the comments fell into three main groups. One of the specific issues was looking at ORCP 7(D) and the different treatment of corporations and LLCs versus partnerships. There was also an issue about follow-up mailing being required if a registered agent is not located in the county where a suit is filed, even if there is personal service on the registered agent. Mr. Goehler stated that he volunteered to do research on those issues before the committee's next meeting. The idea was that those provisions may have had purposes when the rules were originally written, but that the Council needs to know what those purposes were, and whether it is still a concern that warrants distinguishing treatment between the different entities and whether it matters that the registered agent is in the county of filing or not.

Mr. Goehler stated that many of the other comments involved concerns about e-service, and the committee feels that this is a Uniform Trial Court Rules (UTCR) issue. He stated that the ORCP provide that, if the service is done in accordance with court rules, then it is valid. He stated that he feels that this is really the best approach and, if the Council starts making changes to the ORCP, they may not jibe with what the court is doing with respect to the Odyssey filing and service system. He stated that the committee felt that there is a pretty elegant solution in place right now. He observed that a solution to some of the concerns raised may be to put a procedure in place similar to the federal file and serve system and enforcing

it so that, whenever anything is filed, it is automatically then served. However, that would be a change to the UTCR and not the ORCP.

Mr. Goehler stated that the committee had also discussed postal service concerns, such as signatures on return receipts for certified mail. The consensus of the committee was that the rules are in place based on Postal Service practice and, while that practice may have changed somewhat during COVID, it seems like it is getting back to normal. The committee felt that no changes to the ORCP were needed as a reaction to what seems like a temporary situation.

The final, and biggest, issue the committee discussed was the topic of incentivizing the acceptance of process. As background, the federal rules have a provision [FRCP 4(d)] where a party that accepts service is allowed more time to appear and, if a party does not accept service, the opposing party can recover the reasonable costs for having to effect service. Mr. Goehler noted that this topic came up last biennium, but members of the Council from the plaintiffs' bar objected to the idea of expanding the time for the defendant to appear since there is already a pretty compressed timeline for getting service effected, getting parties to appear, and moving the case forward. Throwing another 60 days in there was not something that seemed viable The idea was to come back to the whole Council this biennium and revisit the issue and really take a temperature to see if such an amendment should be attempted again. Mr. Goehler stated that he thinks that perhaps removing the time to appear piece of it and really focusing on the costs and the penalty might work - if a party is offered the ability to accept service and they do not, and then the filing party has to go get a process server, then making those costs recoverable is something to consider. A tangential issue is what to do when a party unreasonably dodges service, and whether that should be something that the Council looks at again as a cost recovery piece, to give parties an incentive not to dodge service. Mr. Goehler asked the Council for comments to see whether these ideas are worth pursuing by the committee.

Judge Norm Hill asked for more details about the plaintiffs' bar's concern about giving a party who accepts service an extra 30 days. He stated that he did not see how that creates a problem. Mr. Goehler stated that his recollection is that adding additional time to the summons' 30 days to appear compresses the timeline for doing discovery and other things that need to happen to get the case to trial within a year as required by the UTCR. Mr. Andersen stated that the concern expressed was that the extra 30 days infringes on meeting the other deadlines. However, he stated that he was not sure that this would make a change dead on arrival. He noted that a concern is that Oregon, unlike many states, has a 60-day window [ORS 12.020(2)] to get service completed on a case. In many instances, plaintiffs' lawyers do not even know who defense counsel is, but missing that 60

day window to obtain service of summons can be fatal. It was felt that, if some of that time is burned up trying to get the insurance company to agree to accept service of summons, it would be a waste of time when one is already in the red zone on the 60 days. Judge Norm Hill stated that he now understood that it is not an issue of a filing of the answer but, rather, the UTCR requirements and 60-day service issue.

Judge Peterson stated that he recalled the discussion because he ended up doing some drafting last biennium. He noted that there was a distinct difference of opinion between plaintiffs' and defense counsel, and timelines were a big part of it, everything from UTCR 7.020, the 60 days for effecting service, and having time to conduct discovery. He stated that one of the things that he believed was not fully appreciated is that there is a huge amount of civil litigation that goes on, and most of the cases are handled rather civilly and the players are known to each other. However, there is also a number of cases where the players do not know one another and they do not play by the rules. There are people that are dodging service, and although one of the Council's judge members said they believe they can sanction someone for that, he does not believe there is a rule that allows it. There is also a number of cases where people run up costs and take time simply because they cannot find the person to serve.

Judge Norm Hill asked whether it might be useful to have the committee look not so much at incentivizing someone to accept service but, rather, to disincentivize not accepting service or avoiding service in order to deal with that narrow range of cases that seem to be problematic. Judge Peterson stated that he actually believes that it is a rather large range of cases; it is many cases that lawyers do not handle or see. He agreed that disincentivizing could be the right approach, and it could be as simple as establishing authority for a judge to assess service costs when the process of obtaining service is unduly drawn out. Mr. Goehler agreed that this is a worthwhile idea, and suggested that the committee work on a draft amendment to create the authority and the standard.

Judge Bloom expressed concern about trying to create a remedy to a problem that does not exist. If someone is avoiding service, the rules already have a way of dealing with that: an attempt to serve them at their residence or place of business by process server, then by moving for alternative service which a court can, and often does, grant. Judge Bloom pointed out that, In automobile cases, there already is a way to deal with such situations: DMV service. There are also extensions of the deadlines for cases involving people who are out of state or otherwise avoiding service. He stated that he believes that the court has inherent power to award costs or fees to sanction someone for inappropriate conduct. He stated that he is uncertain that creating an amendment would incentivize

anything.

Judge Peterson stated that he would like to have the committee talk about the idea a bit. However, he stated that he does not disagree with Judge Bloom in that the Council made a significant change in terms of making alternative service much more readily available, and that is a good workaround for someone who is dodging service.

3. Rule 55 Committee (Appendix D)

Judge Norby reported that the committee had met and examined the comments from the survey. The comments were narrowed down to seven subject areas, two of which the committee decided to address and had drafted proposed language for the Council to review. Judge Norby reviewed the subject areas that the committee had addressed and the committee's reasoning behind whether to take action or not take action on them.

One suggestion that carried over from the last biennium was to create a process for motions to quash subpoenas to appear and testify. Judge Norby explained some background about Rule 55 for new members of the Council. She stated that, two biennia ago, Rule 55 was pretty random and confusing, which made it difficult for parties and practitioners to find things or to interpret some of the language. The Council rewrote the entire rule in order to reorganize it and to try to ensure that every section could be understood, but made a specific decision not to add or change anything at that time. Last biennium, the Council re-examined the reorganized rule to see whether any improvements could be made, and they were guided in this effort by suggestions from the biennial survey and other comments received by Council staff. The Council published an amendment to create a process for motions to quash subpoenas to appear and testify but, at the final meeting of the biennium, realized that there were some problems with that published amendment. it. So that part of the amendment was removed and the decision was made to carry over the item to this biennium to see whether the language and process could be improved.

Judge Norby explained that the consensus of the current Rule 55 committee members is that creating a motion to quash process for subpoenas to appear and testify is potentially unnecessary, because that is what people already do to deal with subpoenas to appear and testify that they find objectionable. However, there was no strong adverse reaction to the possibility of incorporating this process into the rule. It was noted that attorneys are generally aware that a motion to quash can be filed to challenge any subpoena. What the Council had worked on last biennium and made extra clear is that there had already been language (now

refined) that mentions a method to challenge subpoenas to produce. There is also a definite process in the rule, whether it was understandable or not, for motions to produce. The implication of not having a process for a motion to quash a subpoena to appear and testify is that it could be interpreted as the Council not believing that one can file such a motion. The committee perceives it as a benefit to add language to make it clear that one may move to quash a subpoena to appear and testify, just as one may try to challenge a subpoena to produce. The committee drafted language for the Council to consider regarding this suggestion.

Another suggestion was to allow others to seek copies of non-confidential health information documents at their own expense, just as it is currently allowed for confidential health documents in paragraph D(6)(b). Judge Norby explained that the committee consensus was that this addition is unnecessary, because the practice is already so common that there is no need to reiterate it in different sections of the rule. If the Council disagrees, it would be very easy to add language to section C to extend it to all motions to produce and not just motions to produce the confidential health information.

Another survey taker suggested, "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." Judge Norby stated that committee members were confused by that suggestion, as well as by the nature of the delays that were being referred to and the precondition that some confidential health information documents may be put at issue by pleadings and others may not. The committee therefore did not recommend acting on that suggestion.

Another suggestion was to clarify that a registered agent may be served a subpoena to produce. Judge Norby explained that the committee's consensus was that this pertains to Rule 7 and does not need to be repeated in Rule 55, especially when so many of the people surveyed requested a simplification of Rule 55 and not an expansion of it. If the suggestion was requiring notice to non parties whose documents are subpoenaed, the committee agreed that this would be unwise. Those who issue subpoenas for documents are unlikely to know what references to non parties might appear in those documents, as that is part of why those documents are sought, so it would be unfair to require the issuer of the subpoena to anticipate all of the non parties that may be mentioned in the documents that ultimately are produced and generate notice to those non parties whose identities are not easily identifiable. In cases where entities are subpoenaed for documents about specified non parties, especially with confidential health information, those entities typically already notify people before their documents are released in response to subpoenas. The committee

thought it would be an unfair burden to require attorneys to predict what names might appear in documents that were to be produced subject to a subpoena and to later criticize those attorneys for not having anticipated the correct persons and not having notified them in advance that subpoenaed documents might contain their names. The committee did not create new suggested language to address this concern.

Judge Norby stated that a suggestion had been made to create an option for a simplified notice to compel the testimony of an entity's officer, director, or managing agent instead of a subpoena, similar to Washington's CR 43(f). She stated that Rule 55 already has a section on subpoenas to adverse parties in section B(2)(d), and the committee agreed that, if an informal notice is to be created as an alternative to a subpoena, that may merit a separate rule and not an expansion of Rule 55. The Washington code is not organized in the same way as the ORCP, and does not have a subpoena rule with a separate exception for an informal notice. Rather, it is a rule that has much content that is not related to subpoenas. She stated that the Rule 55 committee was not taking a position on the merits of the idea because the committee's opinion is that it does not belong in Rule 55.

Judge Norby stated that the final suggestion reviewed by the committee was connected to the first one. The committee did draft some proposed language to clarify that anyone can object or move to quash a subpoena, not merely the person who receives the subpoena. She noted that this arose because the published draft from last biennium referred to the recipient being allowed to move to quash when, in fact, other people can also move to quash or object to a subpoena. The committee uniformly agreed that it is overly limiting to use the word "recipient," and agreed that it was an inadvertent issue that should be fixed. The concept of the proposed language is to extend a process for allowing motions to quash subpoenas to appear and testify, which already exists for subpoenas to produce, as well as language that does not limit the potential to move to quash only to people who received a subpoena.

Mr. Crowley stated that he would like to have the timeline for objections be the same whether it is a subpoena for appearance, to testify, or to produce documents. Judge Norby did not think this was possible because motions to appear and testify can happen at any time, right up to the night before someone shows up to testify in the middle of a proceeding, whereas motions to produce documents are, by their very nature, things that take a lot of time.

Mr. Crowley pointed out that, in the committee's proposed language, paragraph A(6)(e) has a longer response time for filing a motion to quash than paragraph

A(7)(b) which is a response to a document subpoena. Judge Norby stated that it depends on whether paragraph A(7)(b) is read as one judicial day prior to the date specified for production. She did acknowledge Mr. Crowley's point about whether that one judicial day is extended prior to the date set to appear and testify. She stated that she did not recall the process that made those either or, because they seem pretty different. In that same paragraph A(7)(b), it can be wildly disparate to be one day prior to the date set to appear and testify with documents in hand or one day prior to the deadline specified for production.

Judge Peterson reminded the Council that this issue arose because of a suggestion last biennium from now-senior Judge Marilyn Litzenberger about how occurrence witnesses might more easily object to subpoenas. The objective is for people to respond to subpoenas and not to ignore them. Last biennium's committee reviewed subpoena forms from Utah and perhaps one other jurisdiction that included a form motion to quash on the reverse side. This might be a potential solution for an occurrence witness who receives a subpoena but has a pre-planned vacation out of the country on the date of trial, for example, to easily respond without the need to hire an attorney.

Mr. O'Donnell agreed that Utah was the jurisdiction with this form motion to quash. He stated that he had not done research on whether there were any problems with the form in Utah or how it was working, but stated that it does seem to be a fairly streamlined and simple process. He agreed that it would be good to allow for a simpler process for occurrence witnesses to raise their concerns to the court, even though they may or may not be successful with their motion to quash. He stated that a solution like Utah's would at least give subpoena recipients a solution without tempting them to, as attorney Don Corson stated last biennium, view a subpoena as an invitation that does not require an RSVP. Judge Norby recalled that one of Mr. Corson's concerns, shared by many on the Council, was that, if a process was made easy to access, there is a risk that everyone will use it, and it will appear that subpoenas are not nearly as coercive and powerful as we intend for them to be. She stated that she would like the current Rule 55 committee to continue to look into Judge Litzenberger's suggestion to see if it is something that it and the Council finds appropriate, and then perhaps have a separate conversation about whether the Council should be dictating an alteration to the entire subpoena form. She stated that she would rather first decide how the rule should look and what it should say and then maybe figure out if the Council wants to make challenges to subpoenas more accessible by changing the form a bit.

Judge DeHoog stated that he did not have any substantive concerns about the committee's proposed interlineation, but he wondered whether there was a slight

disconnect between the intent behind the modification to subsection A(7) and the language that remains in place under paragraph A(7)(a). His understanding of the intent behind those modifications is that they are to make the option of objecting available to those who are not served with the subpoena, and are not necessarily a recipient of it, but are somehow affected by it. However, paragraph A(7)(a) sets a timeline that is tied to the service on the objecting person. The disconnect seems to be that this can be viewed as suggesting that the person who can object is the one who is served. Judge Norby asked whether deleting the words "on the objecting person" would solve the problem. Judge DeHoog stated that the fix may be that simple; however, that could raise a procedural issue as to whether that is a good time frame to bind other people who are not served, or to hold them to, because, certainly, if they are not aware that the subpoena has been served until sometime thereafter, they may still have a basis for objecting, but not be fairly tied to that deadline. He stated that this language change would address his immediate concern that the existing draft suggests that only the served person can object.

Judge Norby stated that she does not have any strong feelings about what the timelines are, but that Judge Norm Hill had made some interesting points about timelines at the last committee meeting. Judge Hill stated that his only issue with timelines is when someone files a motion to prevent someone else from testifying. From a judicial efficiency perspective, the court wants to know that sooner rather than later. If someone has been subpoenaed six months before trial and believes they should not appear, the court wants to know earlier. He would like to disincentivize people from waiting until the last possible moment, showing up the morning of trial, and saying that they received a subpoena, they are a material witness, but they want the judge to let them out of testifying. He acknowledged that there is no way to completely eliminate this situation, but that the rule should be written to minimize it.

Judge Norby stated that she views herself largely as a scrivener with Rule 55. She is not expressing opinions on the timelines so much as reducing what she is hearing from other Council members to writing and maintaining the rule's original organization, since she rewrote the original rule. She stated that she would like to hear any different ideas about timelines.

Mr. Crowley stated that he is on the other side of the issue from Judge Hill. He noted that the Oregon Department of Justice (OJD) often receives third-party subpoenas to state employees, but these subpoenas often do not come to the attention of the lawyers at the OJD until shortly before the time for appearance. The OJD lawyers must jump in right away to object, and it would become a real challenge if the timeline is expanded but there is an expectation to challenge the

subpoena promptly after service. This would be particularly problematic with trial subpoenas, which sometimes are not served until a week before trial. Some third-party subpoenas do not come to the attention of the DOJ until the day before trial, which makes it very difficult to object and get the issue before the court.

Judge Norby pointed out that the goal is not to make objecting to subpoenas impossible, but not to make it too easy either. She stated that the goal is to find a solution that balances the interests of all parties and the courts. She noted that she used to have the same issue as Mr. Crowley when she worked for the county counsel's office, but stated that the Council cannot resolve every problem.

Judge Brown asked about what appears to be three different timelines in the committee's proposed language. The first appears in paragraph A(6)(e): if the day to appear and testify is seven days then the motion to quash must be filed no later than the time to appear and testify. The second is for a written objection to the production, which is 14 days after service, and there is no statement there as to whether or not that is going to impact the date if it is right before trial. The third is in paragraph A(7)(b), and is no later than one day prior to the date specified for the appearance. Judge Brown stated that paragraph A(6)(e) and paragraph A(7)(b) especially appear to have a little bit of a conflict in that one has to be done on the day prior to the date set to appear, and the other has to be done at least by the day of the appearance. Judge Norby stated that many of the timelines are new and were discussed by last biennium's committee and are still up for discussion now. She noted that paragraph A(7)(a) already includes the "not later than 14 days after service" language.

Ms. Nilsson referred the committee to the September 26, 2020, minutes from last biennium, as the Council crafted the language for the timeline in paragraph A(7)(a) during that meeting. Judge Norby asked for a quick overview from those minutes. Ms. Nilsson stated that the discussion was extensive, so a quick overview might not be possible. She reviewed the discussion as follows. There was a concern that if someone were served with a deposition subpoena less than 14 days prior to the date to appear, it would not be reasonable. The one judicial day prior specified in the subpoena to appear and testify would trump any other calculation of dates. The following language was suggested, "If the date to appear is less than 14 days, as soon as possible, but not less than one judicial day prior to the date specified." It was noted that trial subpoenas are different and the Council did not want the rules to give parties the idea that they should be issuing deposition subpoenas three days before a deposition. It was agreed that the Council needed to clarify that "by one judicial day prior" applies to trial subpoenas, not deposition subpoenas. The point of the amendment is to make sure that witnesses who do not have counsel have some understanding of their

rights to object, not to create any barrier to a timeline that was forced upon the person serving the subpoena. Sometimes subpoenas get served in open court during trial for testimony that day or the next day. Former Council member Travis Eiva was nervous that the rule might inadvertently become a source of power with regard to getting people hauled into forums on a rapid schedule.

Judge Norby stated that what she heard in Ms. Nilsson's overview, as well as today, is that, although the process for issuing subpoenas for depositions can be and always has been the same as the process for issuing subpoenas for trial, the issues about timing sound like they are perceived as very different for depositions than for trial. So perhaps, instead of trying to make the timelines uniform because the process is uniform, the committee should be considering specifying one timeline for deposition subpoenas and another for trial subpoenas. She asked Council members how they felt about that idea.

Judge Brown stated that, as a new Council member, Judge Norby's suggestion would be very much appreciated and would make the rule more clear. She stated that, if one judicial day is the one that is going to trump all, maybe that needs to be included in the 14-day deadline for written objections as well. Ms. Nilsson recalled that the rub at the September 26, 2020, Council meeting seemed to be that there was a distinction between trial and deposition subpoenas, and the feeling was that a distinction needed to be made in the timelines.

Judge Norby apologized for forgetting about that part of the discussion last biennium, and stated that the committee would meet again and try to put together some new language bearing this distinction in mind.

Ms. Dahab asked to clarify whether the difference being discussed is between a subpoena to testify for a deposition and a subpoena to testify at trial. She wondered about the reason for the difference between the one judicial day timeline of paragraph A(7)(b) and the proposed timeline of no later than the time set to appear and testify of paragraph A(6)(e). Judge Norby stated that she was not certain and that the language in paragraph A(7)(b) may have been a sort of Frankenstein from the September 26, 2020, Council meeting. She stated that the committee would be more attentive to the timelines during future discussions.

Judge Norby asked the Council's opinion on the remaining suggestions from the survey regarding Rule 55. After brief discussion, the Council did not ask the committee to further investigate any of these suggestions. The Council agreed with the committee that clarifying that a registered agent may be served a subpoena to produce belongs in Rule 7. With regard to requiring notice to non parties whose documents are subpoenaed, the concern was that people who are

issuing subpoenas would not know who those people are until they receive documents. The Council agreed. Judge Peterson added that, among other things, litigation would take longer and be more expensive. Judge Norby stated that the committee felt that creating an option for a simplified notice to compel the testimony of an entity's officer, director, or managing agent instead of a subpoena, similar to that found in Washington Code CR 43(f), should perhaps be a separate, stand-alone rule if it were something the Council wanted to pursue. Since it is an alternative to a subpoena, it should not be in the subpoena rule. Judge Peterson noted that, last biennium, the Council had made a change [ORCP 55 B(5)] to make it possible to bring in a party who was subject to the jurisdiction of the court without having to effect service of a subpoena but, instead, just relying on Rule 9 service. He stated that he believes that this would often cover corporations.

Judge Norby stated that the committee would refocus and go back to the drawing board and work on the distinction between deposition and trial subpoenas and try to ensure that the timelines make sense not just within each section, but also among all of the subsections when read together.

4. Rule 57 Committee

Ms. Holley, chair of the committee, was not present at the meeting. Mr. Crowley stated that the committee had met and covered a lot of ground, although it had not come to any concrete conclusion. Judge Brown stated that Ms. Holley planned to have someone from Willamette University College of Law present to the committee some of the history of the changes to jury selection. Ms. Dahab stated that the committee meeting began with the task of deciding whether to actually form a task force to take on the issue. The conclusion that the committee raised was that it would start a task force, and that one initial step, as Judge Brown indicated, would be to have someone speak to the committee and get it up to speed on the issues before it undertakes concrete changes.

Mr. Crowley stated that the committee is not yet to a point where it knows what its purpose will be. It is still very much in an information gathering stage. There is obviously a lot of discussion about this issue across the bar, and it is uncertain what the end game is for the Council at this point, but it is important for the Council to be involved in this important issue.

B. Rule 69

1. Staff Update

Ms. Nilsson reported that Council staff had not yet drafted a proposed amendment to Rule 69 to reflect a new citation to the Servicemembers Civil Relief Act, but that they would do so by the next meeting.

VI. New Business

A. Potential Amendments Received by Council Members or Staff Since Last Biennium

1. Post-Covid Remote Appearances

Judge Peterson explained that the Council had received a suggestion from attorney Mark Kramer indicating that remote appearances should continue to be available after the pandemic was over. He stated that the remote procedures that are now freely allowed in the COVID-19 era are covered by UTCR 5.050. Although there is some consternation from some of the responders to the Council survey that they would like to find all of the rules in one place, Judge Peterson pointed out that the Council cannot likely make any change to either consolidate rules or facilitate remote appearances.

Mr. Crowley observed that there has certainly has been a lot of movement to allow remote appearances over the last year and a half out of necessity. However, that has been a pretty sudden change in Oregon practice, and he stated that he is not sure that there needs to be a rule change so soon, especially when it seems like people are managing to move back to in-person work. Judge Norm Hill strongly suggested that the Council not tackle this issue as a rule of civil procedure. He stated that he has been at the epicenter of discussions about remote appearances in the courts, and the one thing that comes through in those discussions is the dramatic disparity of resources and ability in different courthouses and judicial districts. It is so different across the state that trying to dictate how and when courts will handle appearances as a rule of civil procedure is a really bad idea. He stated that a civil rule is also unnecessary because the court system is already committed to moving in that direction, but in a way that makes sense for each jurisdiction, recognizing their disparity.

Judge Peterson added that remote appearances are currently governed by an evidence rule [ORS 45.400] and are statutory, so the Council does not have the authority to change that. Mr. Crowley noted that, right now, flexibility is important, but that may not be true down the road, so it is perhaps too early to

try to put easier access to remote proceedings in a rule.

B. Potential Amendments Received from Council Survey

Mr. Crowley began to examine the remaining suggestions for amendments that were received from respondents to the Council's biennial survey.

ORCP 15

Judge Peterson stated that the first suggestion from the survey was to clarify which are procedural motions and which are substantive motions. He stated that he had spent a fair amount of time working on that last biennium and had come to the conclusion that it is not really clear. Such a change would have required creating an appendix into the rule, and the entire Council would have had to agree to that appendix. However, the Council did make clear in Rule 15 D that one cannot get an extension of time for everything. Some things are substantive, and certainly new trial motions [Rule 64] would be an example of that. With regard to the last suggestion, it is a fair question about whether one is supposed to ask for permission or ask for forgiveness, and the Council changed Rule 15 D to make it clear that one can ask for permission and, if it is too late, ask for forgiveness, and both are acceptable.

Mr. Crowley stated that it seems to him that it is very difficult for there to be complete certainty throughout the rules, and that seems to be what many of these comments are looking for. The Council did not form a committee on Rule 15.

ORCP 17

Mr. Crowley stated that the next item was a desire to strengthen the penalties for Rule 17 issues. Judge Brown stated that the comment appeared to be more of a implementation issue than an actual rule writing issue, so the Council would not be the appropriate forum. The Council did not form a committee on Rule 17.

ORCP 18

Mr. Crowley stated that there was a suggestion that there is some language in various statutes that requires a more particularized pleading, and that those statutory requirements ought to be specified in ORCP 18. It was thought that not including them in the ORCP could possibly create a malpractice trap. Judge Norm Hill noted that the particular statutes that are being referred to in the comment have to do with construction and design issues and real estate licensing. He disagreed strongly with this suggestion. ORCP 18 is a rule of civil procedure, not a law library. There are lots of allegations in one's claim that have to be included to state the claim, and it would be

impossible for the Council to try to characterize those. It would also be an improper use of the rule. Judge Norm Hill agreed that it might be malpractice if one does not properly plead a case and blows a statute of limitations, but that is a "welcome to the practice of law" moment and that is also why the Professional Liability Fund exists. Judge Peterson suggested that Rule 18 would need to be a lot longer if the Council includes the particulars for the various kinds of claims that can be filed. There are many kinds of cases.

Mr. Crowley stated that the other suggestion regarding Rule 18 had to do with having the onus on plaintiffs to know damages before filing suit and providing as much as possible as early as possible to keep cases moving more quickly. Judge Norby stated that she did not know that this could be handled in Rule 18. She explained that she did understand where the suggestion was coming from, because she sees so many cases even at the judicial settlement conference stage where the plaintiff does not really know what their damages are. It is really hard to conduct a settlement conference when the plaintiff and plaintiff's counsel do not know how much they are asking for. But, while she feels the pain of the person making the suggestion, she does not know how a rule can require that when so many damages tend to come up later. The Council did not form a committee on Rule 18.

ORCP 21

Mr. Crowley explained that one comment suggests that there needs to be language in Rule 21 to allow for motions to dismiss based on prior settlement agreement or waiver. The other comment has to do with clarification of the time for filing a Rule 21 motion against a reply asserting affirmative allegations.

Judge Peterson stated that, with regard to the first suggestion, that is in Rule 19 B, which deals with affirmative defenses, and he did not know that it needed to be moved to Rule 21. Mr. Crowley stated that he did not see an obstacle to raising an argument that a settlement agreement bars a case. Judge Bloom stated that, to the extent that it relies on documents outside of the pleadings, it is a motion for summary judgment anyway. The Council did not form a committee on Rule 21.

ORCP 22

Mr. Crowley explained that there was one suggestion that indicated that the third-party practice rule in its current form is unworkable and made recommendations to change that rule. Judge Norm Hill stated that the Council had examined this rule two biennia ago and there was a push by the defense bar to at least leave it up to the discretion of the court without requiring agreement of all parties. It was determined that, at the end of the day, the Council could not get sufficient votes to promulgate that amendment. Unless the plaintiffs' bar was to suddenly agree to that change, Judge Hill strongly suggested that the Council not waste its time forming a committee.

Mr. O'Donnell stated that, from the perspective of the defense bar, especially with COVID, they are receiving essentially no information. He stated that it is odd, and a unique feature of the ORCP, that the plaintiff's consent is required, as it takes away from the discretion of the judge. Obviously a plaintiff can object and make arguments, but giving the plaintiff complete control seems unusual.

Judge Peterson remarked that this issue had come up at his very first Council meeting about 16 years ago. The issue has been heavily discussed, and it was former Council chair Bob Keating who had carried the water on this two biennia ago. Mr. Keating had pointed out that he frequently does not find out that his clients have been sued and who might be potential third-party defendants until it is too late. Judge Peterson acknowledged that this is the only place in the ORCP where the judge does not have discretion, so it is an anomaly in that respect. However, he did not know whether a proposed change would ever receive the 15 votes necessary for promulgation.

Mr. Goehler noted that, in terms of practice, he has never had a party not agree to join a third party, because the option of filing a new action and then moving for consolidation is a lot more cumbersome and a bigger pain for everybody. So generally how this works out is that all parties agree to bring more people to the party. Mr. O'Donnell stated that he has had quite a few people object. Mr. Crowley agreed. Mr. O'Donnell stated that for a defendant to "third party" in another provider or entity is a big deal that takes a lot of analysis, and filing a separate action is also a big deal, and the time frame is kind of severe. He stated that he did understand the history of it, however.

Mr. Andersen noted that if there is a viable third party that needs to be brought in that the plaintiff did not know about, most of the time the plaintiff is going to welcome that. He stated that the problem with changing the rule is that it creates still more extensions of deadlines, especially when parties are trying to meet the one-year trial date deadline. He opined that a change to the rule is unnecessary. The Council did not form a committee on Rule 22.

ORCP 23

Mr. Crowley explained that the first comment regarding Rule 23 is one that seeks to allow for the correction of the identified plaintiff or defendant. The second comment has to do with issues related to rights of successors in interest. Judge Peterson reminded the Council that, last biennium, the Council had made a recommendation to the Legislature to change ORS 12.190 with regard to misidentified defendants who had passed away without the knowledge of the plaintiff that led to the plaintiff losing their claim due to the statute of limitations. The Legislature made the statutory change. The Council felt that this type of issue was substantive and that a change could not be made by the Council.

With regard to the successor in interest issue, Judge Norm Hill stated that an example would be where Party A is doing a foreclosure and, before the litigation is pending, or at least right before that, that loan is sold on the secondary market, so the security goes with it. It is now a different plaintiff. It is no different than a case where the owner of a house sues for a construction defect but, at some point, sells the house to someone else. There is now a different party. Judge Hill stated that he believes that most courts would say that it is a different person who needs to file a different action, rather than allowing them to amend the complaint and pretend the original party no longer exists. He stated that he does not know that there is a way to fix the problem, because it is just literally that the person does not have the cause of action any more because the property has been sold and they are no longer a real party in interest.

Mr. Goehler asked whether this would be taken care of with intervention. He stated that he would expect that, if there is a successor in interest, they would be able to intervene as someone having a stake in the matter, and then there would be a viable claimant as basically an intervener plaintiff. He stated that he did not know that an amendment was necessary since the rules exist to allow someone to intervene if they have a stake in the matter. The Council did not form a committee on Rule 23.

ORCP 27

Mr. Crowley explained that the suggestion regarding Rule 27 was that the rule should be clarified to allow parents to represent minor children in court without a separate appointment of a guardian ad litem. The Council agreed that this idea was rife with problems, including conflicts of interest. Members also pointed out that a guardian ad litem must be suitable, and not all parents are suitable to represent their children's best interests. The Council did not form a committee on Rule 27.

ORCP 32

Mr. Crowley stated that one comment recommended eliminating ORCP 32 H, I, J, and M(2). The other recommends amending ORCP 32 B to add a factor for the court to consider whether the policy behind the law sought to be prosecuted as a class is furthered by the class determination. The final comment was that ORCP 32 needs some help because the procedure for issuing the notice and the content of the notice is not clear.

Judge Peterson stated that the Council had made some very tepid changes to Rule 32 that members determined were probably substantive, so the Council got the Legislature to approve them. He pointed out that this is the only time during his tenure on the Council that he recalls lobbyists attending Council meetings and threatening to have the Council defunded. He stated that Oregon is a state that requires a pre-notice in a class action for

damages, and it is sort of like self-serve gasoline and no expert discovery: uniquely Oregon. Mr. Crowley stated that the Department of Justice has been seeing more class actions under both state and federal law during the pandemic, but he has not heard anyone in the DOJ Trial Division suggesting that Oregon's class action rules need to be overhauled. The Council agreed that an overhaul of the class action rule would be substantive and not within the Council's purview, and did not form a committee on Rule 32.

ORCP 47

Mr. Crowley stated that there were several comments relating to ORCP 47. summary judgment practice. Some had to do with the absence of expert evidence in the summary judgment process; some had to do with the concern that summary judgments are not as viable in state court as in federal court.

Judge Bloom stated that he would not change either of those two provisions. He stated that, since there is no expert discovery, Rule 47 E is necessary. We have to assume people are submitting those affidavits in good faith. If people are not submitting them in good faith, there are consequences. He stated attempts have been made to "federalize" the rule several times, and the Supreme Court has responded accordingly, so the Council cannot change the rule: it is what it is. Judge Peterson observed that Rule 47 E is another thing that is sort of unique. He noted that one comment suggested making Rule 47 E unavailable to non attorneys because, at least if an attorney is disingenuous with their Rule 47 E declaration, their license is on the line. However, he stated that he does not know if there has been much of a problem with self-represented litigants invoking rule 47 E. Judge Bloom stated that he does not believe that the rule is even available to non attorneys. Mr. Hood stated that it is not, and that there is case law on it.

Mr. Crowley stated that there was another comment had to do with the Rule 54 E timing for offers of judgment and summary judgment decisions. He asked whether any Council members had concerns about the two situations mentioned in the comment. Mr. Goehler pointed out that summary judgment can happen any time, even nine months before trial, so that is just a practice and timing issue for the attorney.

Mr. Crowley explained that another comment was in regard to the short 5-day time frame for filing a reply brief. Judge Hill stated that he has always been curious as to why the movant has seven days to file a reply on a Rule 21 motion, but only five days on a motion for summary judgment. He stated that he has never understood the distinction between the two, particularly where both could be dispositive. Judge Peterson suggested that, given the common lack of success of motions for summary judgment, if one cannot re-bolster their case in five days, one probably will not be successful. Judge Norm Hill stated that the need for more time is not necessarily dictated by the quality or availability

of one's arguments, but more the time that one has to prepare, given the other obligations of one's schedule. He pointed out that this seems to be the shortest response period in the ORCP or the Uniform Trial Court Rules, yet the substance is kind of the most important, and that seems incongruous to him.

Judge Peterson added that, some time ago, the Council had determined that, when it put timelines in the rules, those timelines should be in multiples of seven to avoid worrying about counting weekends and holidays that occur midweek. He wondered whether this deadline should be changed simply to make it a multiple of seven and make it consistent with the other deadlines in the rules. Judge Brown agreed with Judge Hill that lawyers are very busy, especially in current times where they are caring for their children while working. She opined that the deadline should be changed both for consistency and in recognition of busy schedules. She was not certain whether that multiple should be seven or 14.

Mr. O'Donnell pointed out that motions for summary judgment are probably not going to be heard for 45-60 days after they are filed, so the 5-day response rule does seem odd. It is much easier to get extensions for Rule 21 motions than for summary judgment motions. He stated that he is not necessarily comfortable asking for an extension because he does not know if the court is going to allow it. Mr. Andersen noted that the rule does state that the court shall have discretion to modify the stated times. Judge Jon Hill pointed out that there is frankly a really good argument to add two days just for consistency purposes, when there is not a strong reason why it is only five days now.

Ms. Nilsson asked the Council if they would like for her and Judge Peterson to do some research into where the five day deadline came from and report back next month. The Council agreed that this was a good idea, and held over forming a committee on Rule 47 until the November meeting.

ORCP 52 and 54

Mr. Crowley stated that the suggestion regarding Rule 52 posits that there should be less discretion given 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. Mr. Andersen stated that he does not have a strong view one way or the other, but that he believes that the suggestion arose from some judges on the coast who would not allow a postponement even though both the plaintiff and the defendant agreed to one.

Judge Peterson segued into the suggestions for Rule 54 A(1) and stated that, apparently, some attorneys in the situation that Mr. Anderson described have actually voluntarily dismissed their case before the ruling from the judge and then later re-filed their case.

This process is used as an escape valve work around if the judge was going to deny a continuance. Mr. Andersen stated that he has also heard anecdotally of cases where the judge would not grant a continuance requested by both sides because it was important to the judge to maintain continuity on the one-year trial deadline, so the plaintiff dismissed with the defendant's permission, re-filed with the defendant waving the statute of limitations, and then came back to court later.

Judge Norm Hill stated that he has two different perspectives on the issue. As a practitioner, he had to do exactly what Mr. Andersen described at a time when Washington County was taking a position that under no circumstances would a lawyer get a continuance, even if a lawyer for one of the parties was in the hospital. Now, having been a trial judge and a presiding judge, he is a little more sympathetic to the Washington County judges, because his experience is that civil practitioners are very, very busy and cases can end up getting continued forever. The judicial perspective is that the timing and pace of litigation needs to be driven by the court, with a reasonable period of time to do discovery, and then a trial, because otherwise the case drifts. A lot of times trials take three years to get to court not because the court's dockets are so backed up but, rather, because of the party's and the lawyer's schedules. The Council did not form a committee on either Rule 52 or Rule 54.

ORCP 58

Mr. Crowley stated that the suggestion regarding Rule 58 is to allow instruction on the legal claims to the jury before opening statements. He wondered whether that is prohibited in state court. Judge Norby stated that It is not prohibited and that many judges instruct before. The Council did not form a committee on Rule 58.

ORCP 60

Mr. Crowley explained that the suggestion regarding Rule 60 is to allow courts to consider a directed verdict on its own motion sua sponte. Judge Norby stated that she thinks that there are many times that a judge might prompt someone by saying, "Do you have any motions for the court at this time?" but if the lawyer does not take the bait, there is not much that a judge can do about it. The Council did not form a committee on Rule 60.

ORCP 69

Ms. Nilsson pointed out that Rule 69 was accidentally included in the meeting materials, but had already been dealt with in the September meeting. The Council took no action.

ORCP 71

Mr. Crowley stated that there seem to be some questions about whether the rule regarding motions for relief from judgment should be clarified. Judge Peterson explained that this is simply a scriveners error that has been fixed by Legislative Counsel through a revisers bill and would become effective in January, 2022.

Mr. Crowley stated that the Council had now gone through all suggestions related to specific rules, and suggested carrying over the rest of the survey comments to the November meeting. The Council agreed.

VII. Appointment of committees regarding any items listed in VI

See discussion in Item VI.

VIII. Adjournment

Mr. Crowley adjourned the meeting at 12:08 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT 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.

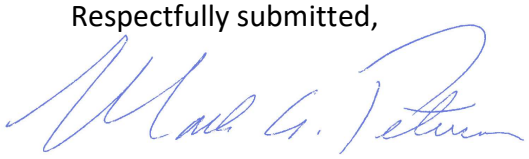
X. Appointment of committees regarding any items listed in VIII-IX

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

ORCP 7/9 Service Committee Notes from 9/30/21 Meeting

- The group looked at comments sheet and addressed the key issues

- One of the items was different procedures for Corp./LLC and partnership and need to do follow up mailing if registered agent is not in the county of filing. Agreed that this was curious and Barry volunteered to do some research on ORCP 7D(3)(d)(ii) to see what the origin was.

- Many of the comments involved eService concerns and it was agreed that these are in the purview of the UTCR committee.

- There were concerns regarding USPS service and the impact of COVID and it was agreed that temporary impacts on USPS functions do not warrant changes in the rules.

- Discussion was held on the issue of "incentivizing" acceptance of service. During the last biennium, changes were proposed, but bogged down over the issue of extending the time to respond. There was also interest expressed in having a penalty for deliberate evasion of service. Before working on these issues, it was decided to bring them to the full council for discussion to see if it would be worthwhile to reconsider or if it would likely bog down again.

Council on Court Procedures

Remaining Agenda Items for October 9, 2021, Meeting, Plus Committee Assignments and Issues for Which No Committees Were Formed During September 11, 2021, Meeting

Committee?	Rule #	Topic	Suggestion
TO BE DISCUSSED DURING OCTOBER MEETING			
	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."
	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.

Committee?	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.
	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!

Committee?	Rule #	Topic	Suggestion
	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.
	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.

Committee?	Rule #	Topic	Suggestion
	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.
	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.

Committee?	Rule #	Topic	Suggestion
	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.
	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
	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.
	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.

Committee?	Rule #	Topic	Suggestion
	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).
		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.

Committee?	Rule #	Topic	Suggestion
		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.
		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.
		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.
		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

Committee?	Rule #	Topic	Suggestion
		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.
		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...

Committee?	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.
		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

Committee?	Rule #	Topic	Suggestion
		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
		UTCR 7.010	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 .

Committee?	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.
ASSIGNED/PASSED ON DURING SEPTEMBER MEETING			
NO	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.
NO	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?
NO	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.
NO	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.
NO	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.

Committee?	Rule #	Topic	Suggestion
NO	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."
NO	68		Depositions should be considered a recoverable cost.
NO	68		Prior biennium: 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.
NO		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.
NO		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
NO		Clear language	Do a complete overhaul for plain English as the federal rules did a while back.
NO		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.
NO		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.
NO	1		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.

Committee?	Rule #	Topic	Suggestion
NO	4		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. 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."
NO	14		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.

Committee?	Rule #	Topic	Suggestion
NO	16		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.
NO	69		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.

Committee?	Rule #	Topic	Suggestion
SERVICE COMMITTEE	7		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.

Committee?	Rule #	Topic	Suggestion
SERVICE COMMITTEE			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).
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	7		ORCP 7 D(4)(a) service should be made available for more than just car crash cases.
SERVICE COMMITTEE	7		Ability to shift the cost of personal service to defendant if defendant refuses to waive personal service like the FRCP.
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	7		Service rules need to be updated
SERVICE COMMITTEE	7		Amend Rule 7 to have penalties for refusal to accept service of the summons.

Committee?	Rule #	Topic	Suggestion
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	9		9C4 Electronic service rarely works for us, and it would be great if that could be improved.
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	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."
SERVICE COMMITTEE	9		Also, as a new attorney, I would like to see other attorneys comply with ORCP 9 and SERVE their motions prior to filing.
SERVICE COMMITTEE	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).
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	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).

Committee?	Rule #	Topic	Suggestion
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	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.
SERVICE COMMITTEE	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.
SERVICE COMMITTEE		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.
SERVICE COMMITTEE		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.
SERVICE COMMITTEE		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.
DISCOVERY COMMITTEE	36	Proportionality	ORCP 35-add "proportionality" consideration to production request, similar to Federal Court
DISCOVERY COMMITTEE	36	Proportionality	Need to make discovery expressly proportionate to the needs/size of the case and give judges tools and expectations to enforce limits.
DISCOVERY COMMITTEE	36	Proportionality	Include "proportionality" in discovery rules.

Committee?	Rule #	Topic	Suggestion
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	36	Proportionality	There should be a proportionality rule for discovery.
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	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."
DISCOVERY COMMITTEE	36	Proportionality	We should adopt the "proportionality" standard for discovery that the Federal Courts adopted a few years ago.
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	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)
DISCOVERY COMMITTEE	39		ORCP 39: extinguish the distinction of a perpetuation deposition (39I). All deposition testimony generally admissible at trial.
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	43		ORCPs fail to account for (1) complexity and quantity of e-discovery
DISCOVERY COMMITTEE	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.

Committee?	Rule #	Topic	Suggestion
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	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.
DISCOVERY COMMITTEE	46		Amend ORCP 46 to make discovery sanctions mandatory where the party failed to comply with a discovery order.
DISCOVERY COMMITTEE		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 COMMITTEE		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 COMMITTEE		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 COMMITTEE		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.
DISCOVERY COMMITTEE		Discovery (generally)	end trial by ambush
DISCOVERY COMMITTEE		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.

Committee?	Rule #	Topic	Suggestion
DISCOVERY COMMITTEE		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 COMMITTEE		Discovery (generally)	Disclosure of Witnesses prior to trial.
DISCOVERY COMMITTEE		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 COMMITTEE		Discovery (generally)	Discovery should be modernized.
DISCOVERY COMMITTEE		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.
DISCOVERY COMMITTEE		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.
DISCOVERY COMMITTEE		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.
DISCOVERY COMMITTEE		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.
DISCOVERY COMMITTEE		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.

Committee?	Rule #	Topic	Suggestion
DISCOVERY COMMITTEE		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.
RULE 55 COMMITTEE	55		Simplified Subpoena process, particularly for pro se litigants, or litigants in Family Law
RULE 55 COMMITTEE	55		Should only require objection period for documentary subpoenas for bank accounts in the other parties name or sensitive personal information.
RULE 55 COMMITTEE	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
RULE 55 COMMITTEE	55		ORCP 55: The rule is cumbersome and could use some updates.
RULE 55 COMMITTEE	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.
RULE 55 COMMITTEE	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.
RULE 55 COMMITTEE	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.
RULE 55 COMMITTEE	55		Simplified Subpoena process, particularly for pro se litigants, or litigants in Family Law
RULE 55 COMMITTEE	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.

Committee?	Rule #	Topic	Suggestion
RULE 55 COMMITTEE	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.
RULE 55 COMMITTEE		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.

CCP Summary – Rule 55 Committee Mtg
October 1, 2021 @ 12:15 PM

Members Attending: Judge Norby, Judge Hill, Jeffrey S. Young, Derek Larwick

Absent: Judge Peterson

Summary

The CCP Survey results this year contained several thoughts about improvement of ORCP 55. The Committee met to review the issues identified from that CCP survey, in the order that they appeared on the survey summary chart.

1. **Creating a Motion to Quash process for subpoenas to appear and testify.** (Carried over from last biennium.) – The consensus of the committee members was that this addition may be unnecessary, but no one had a strong adverse reaction to the possibility of incorporating such language into the Rule. The committee members noted that attorneys are generally aware that a motion to quash can be filed to challenge any subpoena. But since there is currently language in the rule that mentions this method for challenging subpoenas to produce, the absence of language for subpoenas to appear could be misunderstood to imply that it isn't an option for those kinds of subpoenas. Judge Hill indicated that he would be more likely support the requested language if it includes a timeline for submitting the motion to quash a subpoena to appear. **(See the committee's initial effort to address this in a new section §A(6)(e) at the end of these minutes.)**

2. **Adding language to allow others to seek copies of non-CHI documents at their own expense, as we currently allow for CHI documents in Section D(6)(b).** The consensus of the committee members was that this addition is unnecessary because the practice is so common already that there is no need to reiterate it in the rule.

3. **Clarifying timelines for service, a method to minimize delays in production of CHI documents when they are "put at issue by pleadings."** The committee members found this suggestion confusing. Specifically, the nature of the delays is unclear, and the pre-condition that CHI documents may sometimes be "put at issue by pleadings" is puzzling.

4. **Clarify that a registered agent may be served a subpoena to produce.** The consensus of the committee members is that this pertains to Rule 7, and need not be repeated in Rule 55, especially when so many surveyed attorneys request simplification of the Rule, not expansion.

5. **Require notice to non-parties whose documents are subpoenaed.** The consensus of the committee is that this is unwise. Those who issues subpoenas for documents are unlikely to know what references to non-parties may appear in the documents, so it is unfair to require them to anticipate that and generate notice to non-parties whose identities are not easily identifiable. In cases where entities are subpoenaed for documents about specified non-parties, the entities typically already notify those people before releasing their documents in response to the subpoena.

6. **Create an option for a simplified "notice to compel the testimony of an entity's officer, director or managing agent" instead of a subpoena, a la Washington Code CR 43(f).** ORCP 55 already has a section on subpoenas to adverse parties-§B(2)(d). The committee members agreed that, If an informal "notice" is to be created as an alternative to a subpoena, it may merit a separate rule -- not an expansion of Rule 55.

7. **Clarify that anyone can object or move to quash subpoenas, not merely the person who receives the subpoena.** The committee members agreed that this is an inadvertent issue created by the last minute fix to refine broader unacceptable language proposed into more limited acceptable language. There was also a consensus among the members that the issue should be fixed. **(See the committee's initial effort tp address this in sections §A(6)(e) and §A(7) at the end of these minutes.)**

The committee members agreed to submit the following proposed amendments to the Council for consideration, to respond to items #1 and #7 above. The committee members agreed to seek the Council's guidance about whether to move ahead with creating the language requested in #2 or not.

Proposed Amendments

SUBPOENA

RULE 55

* * *

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(6)(e) Motion to quash subpoena to appear and testify; timing. A subpoena to appear and testify may be challenged by filing a motion to quash and declaration with the court and serving a copy to all parties. If the date to appear and testify is 7 days or more after the subpoena is served, then the motion to quash must be filed within 7 days after the subpoena is

served. If the date to appear and testify is less than 7 days after the subpoena is served, then the motion to quash must be filed no later than the time set to appear and testify.

A(7) ~~Recipient's o~~Option to object, to move to quash, or to move to modify subpoena to produce. 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 be challenged by filing and serving an objection, or motion~~ve~~ to quash, or motion~~ve~~ to modify the subpoena, as provided as follows.

A(7)(a) Written objection to subpoena for production; 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 a subpoena must be served and filed with the court no later than one (1) judicial day prior to the date set to appear and testify, or the deadline specified for production. The court may quash or modify the

subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of appearance or production.