**MINUTES OF MEETING**
**COUNCIL ON COURT PROCEDURES**
Saturday, November 13, 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
Meredith Holley
Drake Hood
Derek Larwick
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Tina Stupasky
Stephen Voorhees
Margurite Weeks

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Hon. David E. Leith
Jeffrey S. Young

Guests:

Matt Shields, Oregon State Bar
Aja Holland, Oregon Judicial Department

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 |
|---|---|---|---|
| ORCP 47 Probate/trust litigation<br>ORCP 55 Quick hearings<br>ORCP 57 Remote hearings/trials<br>Abatement Self-represented litigants<br>Affidaviting judges Standardized forms<br>Arbitration/ mediation Statutory fees<br>Collaborative practice Trial judges<br>Expedited trial UTCR<br>Family law rules Vexatious litigants<br>Federalized rules Discovery<br>Interpreters Service<br>Lawyer Civility<br>Lis pendens<br>One set of rules | ORCP 1 ORCP 71<br>ORCP 4 Abatement<br>ORCP 14 Affidaviting judges<br>ORCP 15 Arbitration/mediation<br>ORCP 16 Collaborative practice<br>ORCP 17 Expedited trial<br>ORCP 18 Family law rules<br>ORCP 21 Federalized rules<br>ORCP 22 Interpreters<br>ORCP 23 Lawyer Civility<br>ORCP 27 Lis pendens<br>ORCP 32 One set of rules<br>ORCP 47 Probate/trust litigation<br>ORCP 52 Quick hearings<br>ORCP 55 Self-represented litigants<br>ORCP 57 Standardized forms<br>ORCP 58 Statutory fees<br>ORCP 60 Trial judges<br>ORCP 68 UTCR<br>ORCP 69 | | |

I. Call to Order

Mr. Crowley called the meeting to order at 9:31 a.m.

II. Approval of October 9, 2021, Minutes

Mr. Crowley explained that the draft October 9, 2021, minutes were not yet available, and suggested deferring this agenda item until the next meeting.

III. Administrative Matters

A. Introduction of New Council Member and Guest

Mr. Voorhees introduced himself and stated that he looked forward to working with his fellow Council members and, hopefully, to meeting them in person soon.

Ms. Holland introduced herself as an employee of the Oregon Judicial Department and the reporter for the Uniform Trial Court Rules (UTCR) Committee. She stated that she believes that it is important that the UTCR Committee and the Council have a relationship to ensure that the two sets of rules are meshing well. She noted that the UTCR Committee has received some questions about how the UTCR mesh with the ORCP, and stated that she understood that the Council has had similar questions. She stated that she would like to set up a liaison relationship between herself and the Council, and noted that Ms. Weeks had attended the October UTCR meeting. Ms. Holland pointed out that the UTCR Committee only meets twice a year, in April and October, so there are fewer opportunities for them to study issues in depth. The Committee considers amendments in the fall, and usually asks for suggestions to be submitted by August 30 each year, with public comment in the winter and reconsideration by the Committee the following spring.

Mr. Crowley agreed that the Council sees a lot of overlap between the ORCP and the UTCR. He stated that he appreciated Ms. Holland's presence at this meeting, and that it would be a good idea for the Council to try to have a presence at UTCR Committee meetings as well. Judge Peterson noted that there were a number of suggestions on the Council's biennial bench and bar survey that were specific to the UTCR. Ms. Holland stated that she would appreciate receiving those suggestions by e-mail as well. Mr. Crowley asked Ms. Holland to provide her contact information to Ms. Nilsson so that she could disseminate it to Council members.

B. Link to Council Website from Legislature's ORCP Web Page

Ms. Nilsson reported that Ms. Weeks, who was not present at the meeting, had been working with her contact at Legislative Counsel regarding linking to the Council's website from the Legislature's ORCP web page. She was unsure of what progress had been made.

C. Article About Council in Oregon State Bar Bulletin

Judge Norby stated that she had gotten a start on the article, with an assist on research from Ms. Nilsson. The most interesting information so far was an extremely long and in-depth law review article about the history of the rules in Oregon dating back about 175 years. What was most fascinating to her is that Oregon had the same rules that were borrowed from Utah over 150 years ago until the 1980s. Prior to that, in almost all states, the Supreme Court had total control and wrote all of the court rules. In Oregon, there was a sort of revolt, for lack of a better word. The attorneys decided they did not want judges alone writing the rules, and thus the Council was created. Judge Norby stated that she was trying to get salient points from that article and make it interesting. She stated that it will probably take her a few months to create something that is worth printing, but she is having a lot of fun working on it.

Judge Peterson stated that the Council appreciates Judge Norby's work on the article. He reminded the Council that part of the impetus for the article was comments from the biennial survey of lawyers and judges that boiled down to, "What is the Council?" as well as other comments that appeared to be based on a fair amount of ignorance about the Council's composition and charge.

D. Judge Brown's Resignation from the Council

Judge Brown explained that, when she was appointed, there was some desire expressed by the Council to have a more experienced judge appointed. She stated that she has thoroughly enjoyed becoming more involved and also learning about not just the Council, but the ORCP. Her discussions with fellow Multnomah County Circuit Court Judge Melvin Oden-Orr regarding the work of the Rule 57 Committee led her to recommend that Judge Oden-Orr replace her on the Council, given his interest in the work of that committee. She stated that, at the time the Council was looking for judge members, it is her understanding that Judge Oden-Orr was extremely busy working on putting together the Convocation on Equality, which was why he did not volunteer for the Council. Judge Brown offered to step down to make space for Judge Oden-Orr to be appointed, as a much-needed voice with a lot of wisdom. She noted that Judge Oden-Orr is also working on a project on peremptory challenges with the National Center of State Courts. She stated that she had spoken with Judge Kathleen Johnson with the Circuit Court Judges Association, who stated that it would not be a problem to appoint Judge Oden-Orr if she were to step down. She thanked the Council for the opportunity for the enjoyable and compelling work that she had experienced.

Ms. Holley stated that Judge Brown is still welcome to participate in Rule 57 workgroup meetings. Judge Brown stated that she would like to continue to do so. Mr. Crowley stated that he was sorry to see Judge Brown go, and thanked her for her time on the Council.

IV. Reports Regarding Last Biennium

A. Staff Comments

Judge Peterson referred the Council to the draft staff comments (Appendix A) for their review. He reminded the Council that there was a period of time when the comments were considered important but, with the decision in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993), the Council decided to cease the practice. However, staff comments resumed in 2015, with the inclusion of an introductory statement that the comments are the work of Council staff and are not passed by the Council itself, and that the legislative history is the official record and should always be consulted for more information. The comments merely serve as a quick overview as to the reasons for changes to the rules, to direct the reader as to whether further research is necessary.

Judge Peterson stated that the comments will also be circulated to members who have termed off of the Council. Staff is looking for feedback on any instances where the explanation does not accurately reflect the intent of the Council and may need to be restated, as well as any typographical or grammatical errors. He asked that members direct any feedback to him and Ms. Nilsson.

Mr. Crowley noted that the comments are definitely helpful because it is a lot easier to get a quick understanding of what was happening by reviewing them, and learning whether the minutes need to be researched. He also pointed out that the staff comments and the minutes are very accessible thanks to the Council's website, so he believes that it is likely that lawyers will be using these tools more often than has happened in the past, which makes the comments even more valuable. He thanked staff for putting the comments together.

V. Old Business

A. Committee Reports

Judge Peterson noted that four committees have been formed so far. He stated that Mr. Voorhees, as well as Judge Oden-Orr when he comes on board, should feel free to join any one of those committees, as the committees are all still in the early stages.

1. Discovery Committee (Mr. Crowley)

Mr. Crowley stated that his schedule had been extremely busy and that the committee had not met. However, he and Mr. Andersen had a conversation about having the plaintiffs' bar and defense bar work together on the issue of proportionality in the Oregon Rules of Civil Procedure. He stated that he would like to pursue that conversation by bringing a cross-section of Council membership

into the Discovery Committee to have that conversation. He opined that no progress would be made unless it is a joint effort, and stated that he would try to get a meeting invitation sent soon to all Council members.

Judge Peterson agreed with Mr. Crowley that the Council has had a few skirmishes where one side felt that they were not being treated well. He stated that the lesson from those occasions seems to be that a proposed change that is seen as favoring one side over the other may be able to get enough votes to publish, but probably cannot get enough votes to promulgate, since that requires a supermajority. Judge Peterson posited a legislative-type process where each side gives a little to make both sides amenable to a change that is not necessarily in the interest of one side.

Mr. Crowley agreed with Judge Peterson that certain changes will not happen unless both sides of the bar more or less bring them forward. He stated that he wanted to see if that conversation is possible between the plaintiffs' bar and the defense bar to move the issue forward. If it is not to be, the Council's attention can be focused elsewhere.

Judge Peterson asked whether the committee was working on any other suggestions regarding discovery. Mr. Crowley stated that the committee felt that there were no other issues that needed to be addressed at this point.

2. Service Committee (Mr. Goehler)

Mr. Goehler reported that the committee had met and discussed two issues. One is the idea of incentivizing acceptance of service or punishing refusal of service. He reminded the Council that this came up last biennium and did not go forward. One of the sticking points was the issue of how such a change might affect some of the response times for having a defendant appear. The committee's consensus was that the service rules work well in terms of allowing acceptance where needed and that having extra time for it is not something that is going to be acceptable to the plaintiffs' bar. The thought was that a change was not necessary. Mr. Goehler stated that the committee also discussed recovery of costs for someone who is dodging service. The committee felt that there is already a mechanism for recovery of costs for a prevailing party and that there is no need for an amendment. However, the committee did want to bring the issue to the full Council for comment.

Judge Peterson agreed that there is a real area of disagreement between the plaintiffs' bar and defense bar that could not be solved with the time to obtain service, which is statutory. His preference would be to give the court a tool, but the Council really worked through the issue last biennium and came up with language that was as close as possible, but could not get enough votes to publish

it. He also allowed that it might not be that big of a problem. Mr. Goehler stated that the committee had looked at the federal rule and, just from practitioner experience, the federal rule does not seem to be used that much. He pointed out that, where acceptance of service happens, it happens regardless of the rule, and the incentives in the federal rule do not seem to be used that much. He stated that all of these factors seem to add up to a well-reasoned position for the Council not to move forward with a rule change.

Mr. Goehler stated that the second issue the committee examined was primary and alternate service on corporations and other business entities, and whether it matters that there are different rules if the registered agent is or is not in the county where the suit is filed. He explained that he looked at the history of the rule, and that provision was in the original rule. The only change that was made was when the different business entities were added and partnerships were broken out differently. There used to be an ORCP 7 D(3)(b), and now there is an ORCP 7 D(3)(c) and 7 D(3)(d) as well, which all have the same language as far as primary and alternate service. The committee could not come up with a good reason why the rule would be different for registered agents. It is a little bit confusing, and the confusion is made clear by how the rule is applied. Some counties think that primary service is unavailable unless the entity is in the county where the suit is filed. The committee's idea is that, since it cannot conceive of why it matters, to attempt to remove it. Mr. Goehler stated that he is working on a draft amendment that would basically remove the different treatment for registered agents found in a different county, and clarify the rules for primary and alternate service. The amendment would specifically ensure that it is clear that, if primary service happens, it ought to be good wherever it happens and that, if there is some sort of follow-up mailing, to make sure that whoever needs to have notice of service really does have that notice.

3. Rule 55 Committee (Appendix B)

Judge Norby stated that the committee had met again. She noted that the Council had a long, robust discussion about the committee's most recent proposed amendment because she had not gone far enough into refreshing her memory about what happened last biennium. The committee has now refreshed its recollection by looking at last biennium's materials, including attorney Don Corson's objections to the published amendment due to his concerns about an objection process existing in the rule.

The committee came to the conclusion that the rule should clarify that anyone can move to quash, and that change should be made this biennium. The committee has been putting in a lot of time regarding the option to object and the suspension of the obligation to comply. Mr. Young did also do some research after the committee meeting. At first, the committee agreed that there should neither

be an option to object nor a suspension of an obligation to comply with subpoenas in ORCP 55. However, Mr. Young looked at the Council archives and saw that those options were added to ORCP 55 in 1990. Judge Peterson advised that the objection language was imported from ORCP 43, but was peripheral to the purpose that the Council intended to achieve even then, so that, in the ORCP 43 context, those objections make sense because objections are only allowed during discovery in association with requests for production of documents from parties, which are not subpoenas for production. When the language from ORCP 43 was imported, it created the potential for unintended strategic consequences, particularly the danger of being able to manipulate suspension of the obligation to comply, which should never happen with a court command in a subpoena. The committee thought that risk was probably diminished by the fact that the important language was also confusing until Rule 55 was reorganized.

At first the committee agreed that objections do not belong in Rule 55 and that they should be removed and that ORCP 43 should continue to deal with them in the limited process that they are appropriate, which is not with a subpoena, but with a request. After his research, however, Mr. Young has stepped back and would like to do more research to make sure there is no meaningful purpose for retaining the objection language in some manner in ORCP 55. Mr. Young's research indicates that the original 1978 promulgation of the ORCP did not include objections in ORCP 55 because non-party production was obtained through a deposition. The commentary from 1978 explained that Rule 55 was a combination of existing ORS provisions and the federal rule FRCP 45 and that objections were intentionally omitted. In 1990, the Council adopted a rule change that allowed for non-party production without a deposition, and that was done in response to an appellate opinion in *Vaughan v. Taylor,* 79 Or App. 359, 718 P2d 1387 (1986), which held that production of documents in the hands of a non party could only be obtained by scheduling a deposition. When the Council changed the rule, they also amended it to include objections to subpoenas. The commentary stated that, "the non party subject to such subpoenas may either secure a court order to control production, or simply file objections to the requested production. If objections are filed, the party seeking production is required to secure a court order before any production is allowed."

Judge Norby stated that Judge Peterson feels strongly that the objection process still only works in ORCP 43 and should not be in ORCP 55. She said that she is leaning in that direction and that she believes that the two of the other three committee members are also leaning in that direction, but reiterated that Mr. Young still wants to do some more research before he decides where he stands. She noted that there may be a better way to include it and yet limit it so that it does not apply to any other sort of subpoena issued under ORCP 55. She explained that, for the time being, the language proposed by the committee does delete it entirely.

Judge Norby stated that the committee had also looked at the timing of motions to quash. She recalled that the full Council discussions trended toward a concern about having different timelines for challenging subpoenas for depositions and trial subpoenas. She stated that the language she had proposed attempted to make a connection or a parallel; however, subpoenas for depositions are allowed twice the time–14 days instead of seven (with caveats for up to the day of), while subpoenas for production and for appearing and testifying are both allowed seven days (with caveats). She explained that Judge Peterson had wisely suggested including that a judge can, in their sound discretion, choose to alter these timelines or deadlines. The current proposed language is based on the consensus of the most recent committee meeting is at the end of the committee report.

Judge Norby stated that it would be helpful to take the temperature of the Council on three separate points: 1) the need to clarify that anyone can move to quash; 2) the option to object in the rule and if that objection suspends the obligation to comply; and 3) the timing for motions to quash.

Ms. Holley asked for clarification about whether the proposed amendment would eliminate the process for objecting to subpoenas duces tecum. Judge Norby replied that subpoenas for production have a whole section in the rule and that there is still the ability to move to quash or modify one. Ms. Holley clarified that she was echoing Don Corson's concern last biennium about an amendment that unintentionally allows the person who was subpoenaed to appear for a deposition with documents to object and simply wipe out the testimonial deposition. Judge Norby explained that, the proposed language before the Council removes objection as an option, and does not change what kind of subpoenas can be issued, or for what purpose. She stated that the only change is that, in order to take issue with a subpoena, one must either file a motion to quash or a motion to modify and no longer would be able to file an objection and have that objection suspend anything. Ms. Holley asked whether non parties would be able to file a motion to quash. She stated that she had recently subpoenaed documents from the DOJ, which was willing to turn over the documents, but the defendant objected to the production, even though the records had been previously released as public records. The federal court determined that it was not a proper motion to quash, because the defendant was not the subpoenaed party. Ms. Holley expressed concern that this change would say that this defendant would have standing. Judge Norby replied that this change would not create a standing issue, which she believes was accidentally created in the published (but not promulgated) amendment last biennium. She stated that it is difficult to imagine every circumstance, or every person who might care to move to quash, but this proposed language does allow for more than just the party. By doing so, it is an attempt to cover everything and not be specific. Judge Norby noted that it would be pretty challenging to identify non parties who are allowed to file motions to quash and non parties who are not so allowed. Her understanding of the Council discussions,

both last biennium and at the last Council meeting, is that there are circumstances under which a non party can and should be allowed to file a motion to quash, so her perspective is that, if there are some, then we have to just leave it open.

Ms. Holley stated that it has been her understanding that, for example, when she subpoenas records from the DOJ, it is the DOJ's responsibility to understand their obligations and make their objections or their motion to quash based on their obligations, even if it is another party that actually has the privacy interest or other basis for objection. Judge Norby stated that there are other contexts for the use of subpoenas because this rule is used so broadly, in administrative law and family law, for example. She noted that there are many contexts in which a non party's documents are being subpoenaed, and they may have a right or an ability to quash. An example would be a parent whose child's records are being subpoenaed. Ms. Holley asked whether that would make it so that the doctor who holds the records would not have the burden to move to quash because the parent might be able to. Judge Norby stated that she does not believe that anyone has a burden to quash.

Mr. Andersen stated that he believes that the goal should be that the objection process should not be cloaked in technicalities. The goal is for people to comply. The last thing anyone wants is to have people ignore a subpoena and not show up, because that leads to all kinds of problems. He stated that he is in favor of an objection, or a motion to quash, or a letter to the court, however it is expressed–a non party ought to be encouraged to comply by being given an avenue that makes it clear that, as long as they exercise the right on that avenue, then they are being law abiding and complying. Mr. Andersen stated that he was uncertain about the mechanics of how to get there, but he voted that it needs to be easy to challenge a subpoena so that we do not end up with the alternative of people ignoring subpoenas.

Judge Norby stated that she presumes that Mr. Andersen's statements acknowledge that having the objection suspend the need to comply is not a good idea. She observed that Mr. Andersen seemed to be indifferent about whether to call it an objection or a motion to quash, whereas many other Council members feel very strongly about wanting it to be called a motion to quash. She pointed out that courts can of course liberally construe anything they receive, and they frequently do receive letters from self-represented litigants and construe them as motions. She observed that most Council members feel that, since a subpoena is a court order, and it says right in the rule that one cannot object to a court order, one would have to ask for the court order to be altered through a motion to quash. Mr. Andersen expressed trepidation about using "motion to quash" for lay persons and stated that he would prefer using ordinary language that explains how to comply with a subpoena.

Mr. Goehler stated that he is in favor of the current language that allows an objection that suspends production. He stated that, before the Council changes that language, it should look at the impact on non parties and whether having a motion to quash process is going to make it harder for them, as well as examine the impact on the court and judicial resources. As an example, he imagined sending a subpoena to the Department of Human Services (DHS) for records concerning a minor victim DHS would object, and that is when a dialogue starts. Oftentimes, the scope of the subpoena becomes narrowed, and sensitive materials are weeded out, and redacted records are sufficient for the purpose. If the dialogue happens and sensitive records are requested, it will typically move to an in camera review and potential involvement of a judge if the parties cannot agree. If that kind of a process did not exist and the non party being subpoenaed had to file a motion to quash, Judge Norby asked whether that would be a request to produce under Rule 43. She stated that she feels like there should be a difference between requests and subpoenas, just as there should be a difference between how you try to change a court order like a subpoena versus how you try to deal with a request and try to clarify the request and try to understand the parameters of the request. Ms. Holley pointed out that a request is just to a party, whereas this is a non-party process. Mr. Goehler stated that, if DHS is not a party, he must use ORCP 55. He stated that he would be curious about what the impact is going to be on the agencies that get subpoenas frequently and how much more onerous this process would be. He stated that it seems like that will cause a lot more attorney hours to be spent on filing motions to quash every time a subpoena comes in, rather than just sending a form letter objection.

Judge Norby stated that she was beginning to wonder whether the committee should be looking at making some changes to Rule 43 to expand the use of requests. She stated that she does not believe that requests and subpoenas are the same thing and, if there is a process for requests but it just does not extend to the people we want it to be extended to, perhaps the best thing is to work within that process. Ms. Holley stated that she does not believe that would work because the request does not legally bring the person into the process. Mr. Goehler stated that, with a Rule 43 request, the person is already there, because the court already has jurisdiction over the parties. The subpoena is needed in order to have that same power over a non party, so it has to be in Rule 55. He reiterated that the Council should look at the impact of taking away the objection option prior to making that change.

Mr. Crowley shared Mr. Goehler's concerns. He noted that DOJ handles a lot of third party subpoenas, and they are handled in his division, by his section. He stated that he thinks that the objection is a useful tool as a practical matter for doing exactly what Mr. Goehler described, and that is working out a reasonable response that is not overly burdensome, and doing so without having to do the extra work of filing a motion and so forth.

Judge Peterson remarked that Rule 55's disparate handling of different things was not at all obvious until the rule was laid out and rewritten in a in a logical fashion by Judge Norby. He noted that the suggestion for a simpler process for non parties to object to subpoenas came from now-senior Judge Marilyn Litzenberger. He stated that Utah and one other jurisdiction had a simple motion to quash or limit on the back of their subpoena form, and observed that these jurisdictions are using that process because it is unfair for someone who has no interest in the litigation, but is suddenly hit with a subpoena, to have to hire a lawyer to figure out what to do with it. Judge Peterson stated that Mr. Andersen's concern about plain language could be easily addressed, with perhaps the word "contempt" can appear prominently on the face of the subpoena to ensure that the recipient does not think it is an invitation that they can do attend or not attend. The equivalent of a UTCR 5.010 conferral obligation could also be included, so that the recipient could contact the person who issued the subpoena and discuss whether the date is problematic, whether they do not have the records, etc. He stated that, whether it is called an objection, a motion to quash, or a motion to limit, it is a subpoena from the court that somehow needs to be responded to. The Council just needs to make the response a low enough threshold so that the person who does not really have anything to do with the litigation can somehow get heard. Judge Peterson stated that he heeds Mr. Goehler's and Mr. Crowley's concern that a change may create administrative burden, and the Council needs to consider that. He expressed hope that the conferral requirement would eliminate much of that problem.

Mr. Larwick thanked Judge Norby for all of her work on this issue. He stated that he recently joined the committee and that it is clear that people have already put in years of work on Rule 55. He stated that he was struck by the fact that the current language in the rule about written objections does not require those objections to be filed with the court, just served on the party issuing the subpoena. He opined that this is a pretty low bar, and wondered whether an e-mail that just says, "I'm not available" would be a written objection that would obviate their need to comply with the subpoena. In light of Mr. Andersen's comments about having a low bar in substantively moving to quash, written objections that are filed with the court could be construed as a motion to quash by the judge. He noted that one big issue in the committee's discussions was the burden shifting nature of this written objection, where the written objection that is not even filed with the court appears to shift the burden to the party issuing the subpoena to now file a motion to compel. He stated that the objection may not even be well articulated as far as the basis for the subpoenaed party's desire not to comply. The committee came to the conclusion that it makes more sense for the party that is trying to be relieved from their obligation to produce documents and discovery to articulate the reasons why. He stated that there might be some overlap between Mr. Andersen's suggestion about keeping it in terms that the subpoenaed non party can understand, but also not making it so lackadaisical that it is just a written objection that can just be emailed to the subpoenaing party without the court being notified about the

objection.

Judge Bloom expressed concern about the interplay of Rule 55 and Rule 36 C, which allows parties and non parties to file motions for protective orders. The language in Rule 36 C(1), “On motion by a party or the person from whom discovery is sought,” does not limit it to parties. The Council wrote that rule: one must file a motion. He stated that he believes that it must be brought to the court's attention, whether by filing an objection or filing a motion. He opined that there has to be one rule so that there is a way to enforce subpoenas for non parties that decide not to comply. He agreed that the language needs to be easy, but strongly disagreed with the concept of someone being allowed not to comply with a court order by saying, “I'm not going.”

Ms. Holley stated that her understanding of the problem last biennium is that the objection component only applied to a subpoena that was only for records, not for an appearance. Judge Norby stated that this was correct.. Ms. Holley stated that her experience is that she will receive an objection, usually from an attorney, who says that they have some concerns about providing the entire record. Then she will say that she was not looking for the entire record, but that she does need certain things. This process gives her an opportunity to know what actually exists, which she would not necessarily know before the objection happens. If she sends a subpoena that asks for an appearance in a deposition with records, she usually has a different stance in mind of what she is looking for, what she needs, and what she knows exists. She stated that she does not necessarily think that there is a problem with the objection if it only applies to documents, and allows for some kind of conferral to happen.

Judge Norby stated that she was somewhat confused and was unsure as to how to translate the Council’s discussion into a proposed amendment. Because she is a judge and does not use the rule, she is always trying to understand how lawyers use it and how they think it needs to be used, and then try to make it work that way.

Ms. Stupasky raised Mr. Corson’s letter objecting to the published amendment to ORCP 55 last biennium. She stated that his concern related to, for example, a defense lawyer being in trial and realizing that they need to call a witness based on what the plaintiff has just admitted into evidence. The lawyer needs the witness to appear the next day, because that is the schedule of the proceedings. But the published amendment provided essentially that the party could just simply object and not show up. Ms. Stupasky stated that her question now is how Council members feel about at least fixing that part of it to avoid such a situation. To refresh the Council’s recollection, Judge Norby read aloud Don Corson’s letter dated December 7, 2020. (Appendix C).

Ms. Stupasky reiterated that Mr. Corson was referring to the published changes to Rule 55 last biennium, which the Council did not end up promulgating. However, his concerns do bring up the question about simply allowing a non party to object and then the party has to file a motion to compel. She stated that she does not believe it is a good idea to shift that burden, because it is very easy for people to have a knee-jerk reaction and file an objection if the process is easy enough. She opined that, if a non party really feels that they should not have to appear, why not file a motion to quash, especially since the courts will construe a letter to the court as a motion to quash? She stated that she does not know why the rules should make it easier on non parties to not comply.

Judge Peterson pointed out that one of the major concerns with Mr. Corson's timely and well-written comment was the suspension of the obligation, which creates a lot of problems. He stated that the Council would like to make it easier for people who are not involved in the litigation to somehow let the party issuing the subpoena and the court know that the time for appearance is not convenient or that there is an issue with the documents requested, hopefully without having to hire a lawyer for the purpose. It is partly to help the people that are uninvolved participants, and it's partly to take care of the needs of both plaintiffs and defendants when you need somebody to testify. He acknowledged that it may be a little difficult to do, but he thinks it can be done. The goal is to have parties subpoena people as soon as they reasonably know that they need them, and then give the people that are subpoenaed a reasonable opportunity to make their concerns known, but not to prejudice the person needing that testimony or those documents.

Mr. Larwick opined that it is not necessary the written objection language in the rule to have the benefits of talking through the scope of the subpoena. In fact, such conferral can let the subpoenaing lawyer know that the subpoenaed entity may be inclined to move to quash or move to modify the scope of the subpoena. Ms. Holley noted that this is true with any motion, and she does not believe that it is necessary to include conferral information in the language because parties are required to do that before filing a motion anyway.

Judge Norby noted that she had told the committee that, in reorganizing the rule, the goal is not perfection, because perfection is impossible. So the goal with every change is improvement. This can be difficult to explain to a group of strong-willed attorneys and judges who like perfection. She stated that the committee will meet again and hopefully make some progress to report to the Council at the next meeting. on that.

4. Rule 57 Committee (Ms. Holley)

Ms. Holley stated that the committee and workgroup met and that the meeting included a presentation and question and answer session with Taylor Hurwitz, a member of the Willamette Law Review Task Force, on the jury selection bias issue. There were some good questions about the idea of eliminating peremptory challenges entirely, and it was a productive discussion. Ms. Holley stated that the next step is probably to take a vote of Council members about whether elimination of peremptory challenges is even on the table as an option. Her sense is that it is not, but it is important to not waste time continuing that discussion if that is not really going to be a viable option. After that is determined, the committee can start talking about language for amendments. Judge Brown stated that she felt that the meeting was very helpful and that both Ms. Hurwitz's presentation and the question answer session provided a good discussion about the issues and the pros and cons.

Mr. Crowley asked how many states do not allow peremptory challenges. He stated that this seems pretty drastic to him. Ms. Holley stated that only Arizona has eliminated peremptory challenges. One of Ms. Hurwitz's points that she found interesting was that peremptory challenges came from Britain, but that Britain eliminated them a really long time ago. Either Canada or Australia has also eliminated peremptory challenges. Judge Brown agreed that it was interesting to hear about how peremptory challenges originated with kings as their royal challenges which could not be questioned. In the United States, they have a colonial and quite inequitable history. Ms. Holley stated that Ms. Hurwitz had said that the research shows that peremptory challenges inevitably, whether it is intentional or not, lead to biased decisions.

Mr. Andersen stated that he is absolutely, unequivocally against any elimination of peremptory challenges, because the unintended consequences are enormous. As an example, he is representing a person of color in Klamath Falls on a medical malpractice case. One of his concerns is that she may be judged not on the merits of her case, but by the color of her skin. Mr. Andersen stated that this can be explored with jurors in ways that challenges for cause could never reach. He stated that peremptory challenges can unmask subtle things about jurors that would prevent his client from getting a fair trial on the merits. He advised caution about throwing away something that is a vital part of every trial to solve a problem that is real, but occasional and not pervasive. Mr. Andersen stated that he had attended the last committee/workgroup meeting and that he did not see any data from Oregon. He was not persuaded that the data points from other states create any kind of a mandate for change. He agreed that the rule could be modified, perhaps to make it clear how peremptory challenges cannot be used. He also stated that he believes that judges can challenge attorneys who appear to be using peremptory

challenges improperly, and the burden should be on the attorney to prove that he or she has not used a peremptory challenge improperly.

Judge Norm Hill stated that Mr. Andersen had raised some good points. He stated that he did not believe that anyone would disagree that there is a problem, an imbalance, if you will, in the judicial process that is leading to statistically significant results that need to be addressed. However, he agreed that only looking at peremptory challenges in a vacuum is a problem. He noted that it tends to be looked at from the sense of a defendant of color and a prosecutor's use of peremptory challenges in a way that either intentionally or unintentionally is creating a bias. That is a problem, and Judge Hill believes that Mr. Andersen did a good job of illustrating that it does not always play out that way. This raises a larger question about not just the parameters, but the entire way that juries are chosen. He stated that his concern, which has been shared by other judges on his court, is that jury service is entirely voluntary in Oregon. The only people who serve on juries are the people have some interaction with the Department of Motor Vehicles (DMV) and who voluntarily respond to their summons. People who do not respond to the summons are not in the jury pool. Wrestling with the mechanics of peremptory challenges are part of a larger, more systemic problem about how Oregon formulates jurors. Judge Hill observed that there has been a reluctance to look this in a holistic sense, because it is a terrifying prospect because it is so complicated. However, he is coming to the conclusion that, if real progress is to be made, we need to get our hands around the whole problem. He is not certain that Just striking or not striking more people without solving a larger problem gets us to where we want to be. Oregon is still stuck with the more fundamental problem of getting more participation in juries, which raises additional questions like juror compensation. He stated that he is aware that these questions necessarily take the issue way beyond the scope of this committee; however, perhaps it should be part of the discussion and a piece of what the Council brings to the Legislature.

Ms. Holley stated that the Connecticut Task Force and a few of the articles from the Pound Institute went into the issue Judge Hill described. Several other states have been looking at the entire jury process. Some of the concerns included whose addresses are included in DMV records, and the likelihood of marginalized groups not even having an address registered with the DMV, or moving more frequently so having an incorrect address listed. There are also considerations such as whether the mailing is only in English and at what grade level it is written. She stated that she would like to send an e-mail to all Council members and get a vote about whether elimination of peremptory challenges is even on the table so that the committee will know if that can be taken off the table. Judge Jon Hill stated that he believes that both for cause challenges and peremptory challenges will have to be looked at together because, although some judges like himself are very willing to do for cause challenges, some are not. He stated that he does not think

there can be one conversation over the other. And he agreed that Judge Norm Hill brought up good points.

Judge Peterson noted that there were several components to the last committee meeting, including what constitutes the jury pool. He observed that the Council cannot fix that, but that it should be fixed. How do courts fill in for potential jurors who simply blow off the requirement to appear, and do they get replaced by people who might be similar to them? There is also the fact that in some courts, for cause challenges are not allowed. He stated that his feeling as a lawyer is that sometimes peremptory challenges are helpful because one can get a gut feeling that a potential juror would not be helpful to their client and do not want to see their client's point of view.

Mr. Hood pointed out that any changes to this rule will necessarily impact criminal cases, where a lot of the case law in the history is directed. He stated that one of the questions he raised in the last committee/workgroup meeting was whether that issue has been looked at separately. He wondered whether there is some kind of distinction that can be developed. He stated that it seems to him that most of the case law on this is directed to criminal defendants of color, and that is obviously an issue. He stated that it is probably an issue in civil cases to an extent as well, but the implications are not the same, as he tries to conceptualize them, anyway.

Judge Norm Hill stated that the point he was trying to make is that, if the Council is going to expand what is available in for cause challenges, it must also address the jury piece. The reason that judges are rehabilitating jurors whose responses in voir dire make them susceptible to for cause challenges is that they are looking at how many possible jurors they have, and trying not to have a mistrial. One issue cannot be solved without solving the other. It is not that judges want biased people on their juries; they are just trying to run the railroad and have enough people on their juries. He stated that he feels strongly that the issues cannot be looked at in isolation because they are part of an overall, bigger problem that has to be dealt with head on. He stated that he would love to see come out of the Council a proposal that can start really shaping what this looks like in the next biennium. The Council will be able to say that it has looked at the big picture and is recommending a comprehensive fix. His sense is that it must include how juries are chosen and compensated. Judge Hill opined that the Council is the best group to do this, with its mix of lawyers and judges from different areas of the state and different practices.

Ms. Holley reiterated that she would send an e-mail asking Council members' opinions on eliminating peremptory challenges. The committee will then begin talking about actual language for an amendment, and for some kind of proposal to the Legislature about the broader problem.

B. Rule 47

1. Staff Update (Judge Peterson)

Judge Peterson stated that, pursuant to the Council's request at the last meeting, he and Ms. Nilsson had done some research on the history of Rule 47 (Appendix D). He stated that he was surprised to learn that, at one point, motions for summary judgment could be heard on the day of trial. Because the affidavits contra to the motion for summary judgment had to be served before the day of the motion hearing, those could be put in the mail two days before the hearing, and the movant might not even see them. There were some comments to the Council about that, so the time for filing the motion was moved out to 45 days prior to trial, with 20 days to respond, and five days to reply. Ultimately, the 45 days became 60 days. However, the Council did not make any changes with regard to the response and reply times. That is the short history of the rule.

Mr. Crowley noted that the main question from the Council was where the five day limit for filing the reply brief came from. Judge Peterson stated that it apparently got pulled out of thin air when when the decision was made that it should be required that motions for summary judgment be filed earlier so they would be heard before trial, not on the day of trial. Mr. Crowley stated that he did not recall there being any interest in changing that five day rule. Ms. Nilsson reminded the Council that the issue was raised by a comment in the survey that stated, "the time to reply for summary judgment is way too short. It doesn't even give people time to get a lawyer."

Ms. Holley pointed out that, if someone filed a response, they probably already have an attorney. Judge Bloom agreed. He stated that he was on the Council when the time was changed from 45 to 60 days. Judge Barron was the driving force behind that change, because he thought that 45 days was not enough time before trial for judges to review the record, listen to the arguments, and make a ruling. He noted that judges frequently grant dispositive motions in the interest of justice, because Oregon does not have a "gotcha" court system. Judge Bloom opined that the time frame does not need to be changed. In terms of the reply, it is not up to the person replying to raise new issues, merely to counteract the things raised in opposition. If a lawyer does need more time, they can ask for it in a timely fashion and the court can change those timelines.

Judge Norm Hill pointed out that there are seven days to reply on a motion, and he has always wondered why the reply time for a motion for summary judgment is not the same. He stated that he does not feel strongly one way or the other, but it is just that the lack of symmetry is puzzling. He stated that he might be in favor of just tacking on a couple of extra days. Judge Peterson noted that, several biennia ago, a movement began to make all timelines be in multiples of seven so that

people did not have to figure out how to count holidays that sometimes come in the middle of a week. He stated that there is some merit to that and, in this case, it would mean 21 days to respond and 7 days to reply. However, applying the multiples of seven system to all rules would also mean that the time to respond to a summons would be 28 or 35 days, so it has been honored in the breach.

The Council decided not to make any changes on Rule 47.

C. Rule 69

1. Staff Update (Judge Peterson)

Judge Peterson began to review the two staff draft amendments on Rule 69. The impetus for changing the rule is to update the citation to the Servicemembers Civil Relief Act; however, staff made some additional suggestions for improvement to the rule. Unfortunately, only the first page of each draft was sent to Council members, so they were unable to see all of the suggested changes. Ms. Nilsson stated that she would send complete copies to Council members so that they would be able to review them before the November meeting. This agenda item was postponed until the November meeting.

VI. New Business

A. Remaining Potential Amendments Received from Council Survey & Appointment of Any New Committees (Mr. Crowley) (Appendix E)

Mr. Crowley asked Judge Peterson and Ms. Nilsson whether the Council is responding to survey respondents who had made suggestions. Ms. Nilsson stated that not every respondent left identifying information, and it is difficult to match up suggestions with those who did leave contact information. However, anyone who made a suggestion via e-mail or other in-person means will be contacted to let them know whether the Council would be taking action on their suggestion.

<u>Abatement</u>

Ms. Holley wondered whether the commenter was saying that they had been not allowed to abate a case in other jurisdictions. Judge Norm Hill wondered whether the abatement was not being allowed because the court did not think it had the authority to grant one, or because it is a bad idea, because those are two different things. Ms. Holley stated that she had never had a problem obtaining an abatement if both parties stipulated to it. Judge Peterson observed that one frustration with survey comments is that sometimes the suggestions do not include enough context for the Council to fully appreciate the concern.

Judge Norm Hill stated that he does not know about other judges, but he believes that he has the inherent authority to abate a case. He pointed out that this does not necessarily mean that he will do it; there will need to be a compelling argument. He stated that he does not believe that judges or lawyers need the rules to tell them that. Judge Bloom agreed that a rule change was not needed. Mr. Crowley stated that he tends to agree as well. He stated that he has always viewed abatement as a discretionary matter for the court. Mr. Larwick noted that he has had a few occasions where the trial judge just postpones the trial date or sets it over and, even though it might be styled as a motion for abatement, the judge says that it is not necessary to formally put the case into abatement but, rather, just reset the trial date.

Judge Peterson noted that, several biennia ago, there was a move to tighten Rule 54 A that allowed the plaintiff to dismiss five days before trial. One of the comments back then from one of our Council members was that they chose to voluntarily dismiss the case because the judge would not extend the trial time for them. He stated that apparently it does happen, but that he did not know whether it happens because the judge thinks that the case needs to move forward, or whether there is no real reason to delay.

The Council did not form a committee on abatement.

Affidaviting Judges

Judge Norm Hill stated that the process for affidaviting judges is found in a statute, not in a rule. He believes that it would require a substantive change that is not something that the Council can address. He did observe that, when he became a lawyer, lawyers would not affidavit a judge unless they had a really good reason to do so. It seems like the bar today has adopted the use of the affidavit as a forum shopping tool, and it has become far more socially acceptable to file an affidavit to try and get to the judge that the lawyer wants. This creates problems in big courts, and Judge Hill has had to deal with those as part of his role as chair of the Judicial Conduct Committee. However, it can be devastating in small courts, where there are just two or three judges, so lawyers can always get the judge that they want. Judge Hill stated that he believes that it has come to a point where the judicial system is going to have to have a way to address the problem. He noted that the Oregon court system for so long has been built on the goodwill of trial lawyers, and he suspects that is a cultural phenomenon that is going away. However, he does not believe that there is anything the Council can do to address the problem with a rule change, because it is a statutory provision,

Ms. Holley stated that she thinks that the only potential procedural change is specifying whether a lawyer must walk an affidavit to the presiding judge's chambers versus filing it online. She pointed out that there are different rules that

can be a little bit sensitive in different courts and, if there was a uniform procedure, it might be a bit less political.

Judge Norby stated that, during their statewide CLEs, the Commission on Professionalism had received many questions and concerns about professionalism with judges. Last year, the Commission asked her to write an article for the Oregon State Bar Bulletin on the topic. She stated that, in her research, she learned that there is a pretty broad disparity in how each county handles it, and it is important that the county courts can retain the ability to identify how they handle it, because its impact on various courts is quite different. If there is an eastern county with just one or two judges, and the statute still says you can affidavit up to two judges, then the process for doing that, and whether the judges will know about it is at one end of the spectrum versus if you do it in Multnomah County, with so many judges to cover for it. She noted that timelines are different, particularly for smaller counties that might have to call in a visiting judge or a retired judge and line that up well in advance. While there are legitimate concerns that need to be addressed, the Council definitely cannot do anything to change a process that is delineated in both a statute and in supplementary local rules, and sometimes in presiding judge orders.

The Council did not form a committee on affidaviting judges.

Arbitration/Mediation

The Council agreed that arbitration and mediation is not a topic for the Council, and is more appropriately handled through the UTCR or local rules. Judge Peterson pointed out that it is also a statutory process.

The Council did not form a committee on arbitration and mediation.

Collaborative Practice

Ms. Holley stated that the suggestions appear to be about adoption of a law, which is outside the Council's purview. Mr. Crowley stated that he thinks that the concept of collaborative practice is something that everyone on the Council supports and, hopefully, the ORCP are designed to promote that. However, he did not know that there is a particular change that the suggestions would be directed toward.

The Council did not form a committee on collaborative practice.

Expedited Trials

Judge Peterson noted that the suggestion is in regard to self-represented litigants, and he was not sure that anyone wanted self-represented litigants to be forced

into an expedited jury trial. Judge Norby stated that there is a similar opt-in process for family law trials. She observed that, with pandemic life in the courts being what it is, she was unsure that the Council would want to get involved in telling the courts which cases they have to try faster than others. The courts are just trying to catch up right now.

Ms. Holley stated that she has used the expedited trial process before and it is actually pretty interesting. It limits the amount of depositions and requests for production, and can be quite useful. However, usually one party has the motivation to do it and the other party does not. She stated that she believes that it is a statutory process. Mr. Andersen opined that the whole suggestion of expedited trials, as phrased in the suggestion, is dripping with constitutional problems. It does not recognize that people do have a constitutional right to a jury trial.

The Council did not form a committee on expedited trials.

Different Rules for Family Law

Judge Peterson pointed out that family law cases are civil cases. The Council agreed that the rules should not be different for family law, and did not form a committee on the matter.

Federalize the Oregon Rules

After a brief discussion regarding the Council's history on this subject, the Council did not form a committee on the matter.

Interpreters

Judge Norby agreed that this issue is important. She stated that anyone who has worked with interpreters knows the spectrum of skills that they bring to the job. At the same time, this is not an issue that is the Council's purview. She noted that there are a lot of people interested in this problem, and that it is already being raised with the state and the interpreter services division.

The Council did not form a committee on interpreters.

Lawyer Civility

After a brief discussion, the Council came to the conclusion that, while lawyer civility is a worthy goal, it cannot be enforced through the ORCP. The Council did not form a committee on this matter.

Lis Pendens

Judge Hill stated that the comment referred to the process when there is an issue in the case that implicates title to real property. Mr. Hood pointed out that one can get a judgment for less than all of the issues in the case under Rule 67. Judge Hill agreed that it is already inherent in the rule.

The Council did not form a committee on lis pendens.

One Set of Rules

Mr. Crowley stated that the Council can try to address coordination with other rules and statutes where there is overlap. Judge Peterson stated that there is no way that the Council can meld all of the rules and statutes into one, if that is even a good idea. The Council now has a liaison relationship with UTCR Committee. As for the supplemental local rules, the courts are so tremendously different from county to county that the rules have to be different in each one.

The Council did not form a committee on this matter.

Probate and Trust Litigation

Judge Norm Hill stated that he was not aware of any confusion. He stated that he did not see a reason for the Council to go through and try to create a new special set of nomenclature to deal with probate or trust cases because it is not really a problem. He handles a lot of probate litigation as a judge, and practiced it as a lawyer, and he never had 10 minutes worth of confusion about what the proper procedural way to go about it was. He noted that interesting questions about the court's jurisdiction come into play, but they are not procedural issues. An example is the difference between small states and large states and how certain things are adjudicated, but that is statutory and based on subject matter jurisdiction, not on the procedure of how to get it in front of the court.

Judge Peterson agreed. He stated that it is his understanding that probate procedure is civil procedure.

The Council did not form a committee on probate and trust litigation.

Quick Hearings

Mr. Crowley observed that there are mechanisms for getting a quick hearing if it is needed, and he did not think that the Council needs to make any changes. The Council did not form a committee on this matter.

Remote Hearings

Mr. Crowley noted that the Council had received many comments about remote hearings, and the group could probably have a huge discussion about the issue. He stated that his thought is that the courts are doing the best they can to deal with the situations that everyone is facing right now, and that it is too early to make changes to the ORCP.

Judge Peterson pointed out that UTCR 5.060 allows for remote hearing if a party is more than 25 miles away from the courthouse. He stated that it is an oddly written rule, because it requires the information to be put it in the caption, but that does not make it a motion. And it does not seem that there is an opportunity to object to it. He stated that he would think that the UTCR Committee should take a look at that rule and maybe make it more liberal, as there are many proceedings that lawyers and the courts are figuring out can be done remotely. He opined that it is a UTCR issue.

Mr. Andersen stated that he believes that the Council should also take a look at the issue. It may be a UTCR issue but, the way it stands right now, the rules on calling a witness to testify remotely are only connected to a telephone. The rule does not even acknowledge Zoom. Mr. Andersen also stated that he believes that the fact that a motion needs to be filed with the court 20 days before the trial date needs to be revised. Judge Peterson stated that he believes that there was a statutory amendment last biennium clarified that one must ask for permission and that various forms of testimony, not just telephone, are allowed. Mr. Andersen volunteered to look into the issue of remote hearings and report back to the Council.

Rules, Generally

Mr. Crowley stated that the next set of suggestions are about the rules generally. The Council agreed that, while the goal of some of the suggestions may be worthy, there is no rule change that the Council could make to effect any of the desired changes. The Council did not form a committee regarding these matters.

Self-Represented Litigants

Mr. Crowley stated that he did not believe that the issue raised in the survey is one that can be remedied with a change to the ORCP. Judge Bloom stated that it is a substantive issue and not within the purview of the Council. The Council did not form a committee regarding this matter.

Standardized Forms

The Council agreed that forms are not a part of the ORCP and did not form a committee on this matter.

Statutory Fees

The Council agreed that forms are not a part of the ORCP and did not form a committee on this matter.

Trial Judges, Authority of

The Council agreed that this issue is not within the purview of the Council and did not form a committee on this matter.

UTCR

The Council agreed to pass along the suggestions regarding the UTCR to the UTCR Committee, and did not form a committee on this matter.

Vexatious Litigants

Judge Norby stated that the Clackamas County court has encountered a few particularly problematic litigants in the last few years, and has been doing research to see if the presiding judge could designate someone a vexatious litigant. That is a designation in other states and jurisdictions, but not in Oregon. One of these litigants currently has 24 open cases right now, with six on appeal, and each case is about the same thing. Judge Norby wondered whether this might be an issue for the Council to research because, on occasion people are so prolific and abusive in their filings, and it would be nice to have a tool to deal with it.

Mr. Crowley stated that, in the DOJ's practice, a large part of what they do concerns prisoner litigation, and there are some definite serial filers when it comes to prison litigation. The federal courts do have a precedent for handling litigants who file frivolous claims over and over. They refer to it more or less as a three strikes, you're out kind of situation. However, there have been very few times when the DOJ has been able to put together enough information to have somebody so designated.

Judge Norby stated that the particular litigant in her county has filed probate, eviction, restraining orders, and family law cases, all between the same parties, who have filed other cases back. Some of the restraining orders that were denied in Clackamas county were actually filed again, based on the exact same events, in two other counties, with the litigant making false claims that it happened in those

counties because the restraining order had been denied in the county that it happened in. Those restraining orders were granted, likely because judges tend to give a presumption to folks applying for restraining orders that they are accurately representing where the events happened. But if there was a way to get a designation in the system, that would have prevented a couple of other counties from having to undo restraining orders that were already being enforced by law enforcement in those counties.

Judge Jon Hill agreed that the Council should probably have some discussions about this matter, because he believes that it happens in every court. Judge Peterson wondered whether it is a substantive issue, as it may take a claim away from someone. He agreed that this is fortunately a rare problem, but it is a problem. Judge Norby posited that a rule could be written in a way that would not take a claim away. Mr. Crowley stated that, if the issue is substantive, the Council could make a recommendation to the Legislature. Mr. Goehler suggested that Rule 17 might be a place to tie this in. Judge Peterson suggested ORS 20.105.

Judge Jon Hill agreed to chair a committee. Mr. Crowley, Judge Norm Hill, Mr. Hood, and Judge Norby joined the committee.

B. Potential New Publication from Legislative Counsel (Ms. Nilsson)

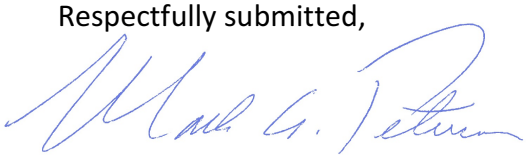
Ms. Nilsson stated that a lawyer friend had forwarded her an email from Legislative Counsel with a survey about a publication that they are considering that would contain the ORCP, the UTCR, the rules of evidence, and the appellate rules. Creating such a publication, minus the appellate rules, was Judge Peterson's idea, so it looks like that may have some traction, which is exciting. Judge Peterson opined that the Thomson Reuters book is too expensive, with font that is too small for older readers, with a lot of rules that are not generally pertinent to Oregon lawyers. He stated that he was not certain whether the rules of appellate procedure need to be in the book, but having a relatively inexpensive book with the rules that a trial lawyer need is a great thing. He thinks that Legislative Counsel will make money on it.

Judge Norby stated that she had taken the poll and, while it may be a pie in the sky wish, she suggested that the book also contain all of the supplementary local rules of the state courts. Ms. Holley stated that she had made the same suggestion. She also stated that the appellate rules would be helpful for those occasions when an appeal happens. Judge Norby pointed out that there are not very many appellate rules, so that section would be fairly small. Judge Peterson encouraged anyone who received the poll to take it.

VII. Adjournment

Mr. Crowley adjourned the meeting at 12:03 p.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

# STAFF COMMENTS TO
# THE AMENDMENTS TO THE
# OREGON RULES OF CIVIL PROCEDURE
# PROMULGATED 12-12-20

## Introduction

These staff comments are provided as a convenience to those who read the Oregon Rules of Civil Procedure and have a general question as to the impetus for a particular amendment during the 2019-2021 biennium. Language in the staff comments was circulated to members of the Council on Court Procedures, but was not voted on or approved by the Council. The comments are neither legislative history for purposes of construction, as in statutory construction, to determine the intent of the Council in making any amendment, nor do they establish the meaning of any rule that has been amended. For the purpose of construing the Oregon Rules of Civil Procedure, the only authoritative legislative history is found in the Council's minutes of its deliberations. The Council's minutes can be found at www.councilоncourtprocedures.org. If the Legislative Assembly amended a rule, the legislative history for the Legislature's amendment can be found at www.oregonlegislature.gov.

**ORCP 15**

Rule 15 was amended in the 2017-2019 biennium, partly at the request of the Oregon State Bar's Procedure and Practice Committee, to clarify that the rule applied to all pleadings subsequent to the complaint and to better specify the timing for filing responsive pleadings. A concern that was not then resolved was the phrasing of section D that appeared to allow the court to extend the time for the filing of all pleadings and motions. The only hint that section D did not authorize extensions of the time in responding to all pleadings and motions was the phrasing, "after the time limited by the procedural rules . . . ." Some deadlines are substantive, and a court is without authority to allow an extension, e.g., a motion for judgment notwithstanding the verdict pursuant to Rule 63 or a motion for new trial pursuant to Rule 64. In some instances, the deadline imposed by a rule is made subject to the court's discretion to modify that deadline, e.g., Rule 15 B, Rule 43 B(2), and many others. Compiling a list of deadlines that can, or cannot, be modified was considered unwieldy for inclusion in Rule 15. Further, whether a deadline can be modified may not be clear in a given case. To alert readers that section D will not allow for an extension in all cases, the first sentence now begins, "[e]xcept as otherwise prohibited by law . . ." as a "red flag" to warn readers that it would be wise to research whether a particular request for an extension is available.

The lead line in section D was amended in keeping with the title of Rule 15 and the other sections. The rule covers the time for filing pleadings and motions. The "or do other acts" phrase in the lead line, long present in earlier formulations of the rule, was deleted; the rule governs the timing of the filing of pleadings and motions. The unintentional limitation of section D's applicability to answers and replies was amended to make clear that the section applies to all pleadings (subsequent to the complaint), and to motion practice. Although UTCR 5.030 provides the timing for motion practice, section D authorizes the court to modify the time for responses and replies. Rather than an expansion of the court's authority, the amendment is in keeping with how the courts, and the parties, handle modifications of the schedule for filing pleadings and for motion practice.

**ORCP 21**

It is not uncommon for a party, usually a plaintiff, to amend the party's pleading shortly prior to trial, once discovery is completed and the issues have sometimes narrowed and come into clearer focus. Such amendments often update the amount of damages sought. It is then incumbent on the opposing party to respond to the amended pleading. A concern was raised that the amending party can be at a disadvantage when the response to the amended pleading does not simply respond as necessary to the new or modified allegations in the amended pleading but, instead, raises defenses that were not previously raised, sometimes even denying liability for the first time. Either the trial must be postponed, or the amending party is proceeding to trial on new issues. There may be a request to re-open discovery and expert

witnesses may need to be rescheduled. As provided in Rule 21, the amending party is required to obtain consent from the opposing party or from the court to file the amended pleading; the opposing party is entitled to file a responsive pleading and may do so without the need for obtaining consent from the amending party or the court.

The amendment adding subsection E(3), is intended to give the court authority to strike any part of the response to the amended pleading that raises new issues that will unfairly prejudice the amending party or that will delay the trial. The new language in section E allowing motions to strike "any response to an amended pleading, or part thereof, that raises new issues, when justice so requires . . . " incorporates the factors to be considered in allowing amendments expressed in *Ramsey v. Thompson,* 162 Or App 139 (1999), *rev* den, 329 Or 589 (2000). The right to amend "shall be freely given when justice so requires." ORCP 23 A. The same should be true for a response to an amendment. However, if the response to an amendment raises new issues, the most significant factor in determining whether the response should be stricken will generally be the amount of time from the filing of the new pleading until the scheduled start of the trial.

The more visible change to Rule 21 is a reorganization of section A, which was previously one long block of text that included quasi-subsections (1) through (9) that were inconsistent with the manner in which the rules are organized. That monolith is now broken into two subsections, and those subsections are further broken into correctly formatted paragraphs, enabling improved citation to that part of the section that is relevant. Lead lines are added to read in a more logical sequence. The amendments to section A are not meant to affect the meaning or operation of the section.

Section C was amended to make the references to the defenses in section A correspond with the new organization of section A. Also, the word "shall" was replaced with "must" in keeping with modern drafting standards. The word "application" was replaced with "motion," as a request for relief from the court is a motion.

Changes in section D include moving a comma and adding three commas to improve readability. The word "upon" is replaced with "on" three times to improve language usage. The word "charge" is replaced with "claim," as we have claims (*see* Rule 18), not charges in civil litigation. Finally, the use of the word "such" in the last sentence is avoided, as that word is overused in stilted legal prose and is often imprecise.

Section E also contained quasi-subsections that were not formatted in a manner consistent with the rules. The subsections are now formatted consistently and, of course, the new basis for a motion to strike, as discussed in the opening two paragraphs of this comment, is added. Also, the word "upon" is replaced four times with the more standard usage term "on."

Section F Includes a grammar-influenced substitution of the word “that” for “which,” as well as a substitution of “cannot” for “shall not” in keeping with modern drafting conventions.

Section G again contained quasi-subsections not formatted in a manner consistent with the rules, and reformatting the subsections required deleting the sentence prohibiting raising the enumerated defenses by amendment. Instead, the bar to raising these defenses by amendment is included in a sentence preceding the subsections. The word “shall” is replaced by “will” on two occasions and by the word “must” on one occasion in keeping with modern drafting conventions. The word
“upon” is replaced with the more standard word, “on.” The word “such” is replaced with a more precise “the” and two commas are added and the disjunctive “or” is deleted to improve readability.

The amendments, other than the addition of subsection E(3), are technical changes in part to improve clarity and consistency within the rules and are not meant to affect the meaning or the operation of Rule 21.

**ORCP 27**

The primary change to Rule 27, in section A, is to clarify for nonlawyers attempting to use the rules the purpose and role of a guardian ad litem and to distinguish a guardian ad litem who acts for a minor or incapacitated party in a particular legal action from a guardian appointed under ORS 125.300-125.330 to act generally for a ward.

The other changes are found in the title of the rule, the lead line for section B, and the first sentence of section B where the word “unemancipated” is added as an adjective modifying the word “minor,” as an emancipated minor would not require appointment of a guardian ad litem. Also, the word “mandatory” is added to the lead line in section B. Appointment of a guardian ad litem is mandatory for unemancipated minors, incapacitated persons, and financially incapable persons. This is in contrast to a discretionary appointment of a guardian ad litem for a litigant who is disabled but who is not an unemancipated minor or an incapacitated or financially incapable person.

**ORCP 31**

Issues with Rule 31 were raised as to whether interpleader may be used by defendants in litigation as well as by a plaintiff seeking to resolve potentially conflicting claims that may be brought by multiple defendants. The rule does allow a complaint, a counterclaim, or a cross-claim to be filed in interpleader. However, section C appeared to authorize an award of attorney fees only to plaintiffs filing the suit or action in interpleader. Section C was completely rewritten and amended to make clear that a plaintiff, a counterclaimant, or a cross-claimant would be eligible for an award of attorney fees. However, an automatic award of attorney fees

to a litigant filing a claim in interpleader appeared misplaced. In some cases, the party utilizing the interpleader device may be an innocent stakeholder. In other cases, the party filing an interpleader claim may be far from disinterested and far from blameless in the dispute. Since the award of attorney fees is paid from the property or funds ordered interpled, there is incentive for the competing parties to resolve their claims as expeditiously as possible. But, if the party filing an interpleader claim is responsible for the dispute, it is unclear why that party should profit from filing the claim while depleting the corpus available for distribution to the rightful owners. Therefore, the court is given discretion to utilize the ORS 20.075 factors as well as three additional factors noted in the literature of interpleader in determining whether to deny a claim for attorney fees in whole or in part. Those factors, identified in paragraphs C(1)(a) through C(1)(c), require to the court to inquire into issues of exposure, fault, and equity in determining whether fees should be awarded and the amount of fees to be awarded.

In section A the words “a” and “are” added as well as two commas to improve readability. A superfluous use of the word “such” is deleted. The amendments to section A are to improve clarity and consistency within the rules and are not meant to affect the meaning or operation of section A.

**ORCP 55**

A complete re-write of Rule 55 was undertaken in the 2017-2019 biennium. In order to explain the Rule 55 amendments promulgated this biennium, some recent history from the 2017-2019 biennium is helpful. Rule 55 was overly long, and a series of amendments over time had resulted in a rule that had little organizational flow and contained redundancies. In an attempt to successfully replace the former rule, a conscious effort was made to maintain all of the elements of that prior rule and to avoid changing what parties and their attorneys relied on in Rule 55, even if they could not readily locate that portion of the rule that authorized their reliance on it. Certain opportunities for improving practice under Rule 55 were noted and deferred until the re-written rule successfully made it through the promulgation process and became effective.

This biennium two small but noteworthy improvements were approved. One issue was addressed with an amendment concerning witness fees and milage that is found in a new subparagraph A(1)(a)(v). A subpoenaed witness is not required to obey the subpoena and appear to testify or to produce documents unless a witness fee and milage are tendered when the subpoena is served. The witness may be an occurrence witness having no interest in the litigation, and with no lawyer with whom to consult. Such a witness would likely be unaware that compliance with the subpoena is contingent on the tender of a witness fee and milage. There have been examples of self-represented litigants arguably abusing the use of subpoenas to seemingly compel attendance of witnesses without the tender of fees. Subparagraph A(1)(a)(v) requires the form of the subpoena to alert the person served that attendance is

contingent on payment of those fees.

The other improvement, found in subsection B(5), relates to serving an opposing party with a subpoena. If a party has already appeared in a case (clearly the plaintiff, but also a defendant who has already been served with summons or who has entered an appearance), Rule 7-type service and the tender of the witness fee and milage are no longer required. Efficiency and economy are served by eliminating the need to locate a party to effect service of a subpoena and to tender the witness fee and milage when that party is already subject to the jurisdiction of the court. Service of such witnesses can be effected as provided in Rule 9. The amendment is based in part on Illinois Supreme Court Rule 237(b) and Washington State Superior Court Civil Rule 43.

Various technical amendments were also made. In subsection A(7), a redundancy from the previous re-write is addressed by deleting the words "as provided." The lead line for section B is amended to add "parties" to account for the new procedure to subpoena parties as provided in the new subsection B(5). The word "nonparty" is added to the lead line for subsection B(2) for the same reason. Also, in subsection B(2), "required" is replaced with "specified in the subpoena" for clarity in referring to the location of the deposition. In subparagraph B(2)(c)(iii), "the" is replaced with "than" to correct a drafting error from the previous amendment. In paragraph B(2)(d), a potential inconsistency was remedied by making clear that subpoenas directed to nonparty organizations must be accompanied with the appropriate witness fee and milage. In subsections B(3)(a) and B(3)(b), the statement of fees and milage is modified to be consistent throughout the rule and to eliminate any concern that a different meaning should be attributed between the various provisions of the rule because of minor differences in the phrasing of the requirement to tender fees and milage. In part B(3)(b)(ii)(8), "identified" is replaced with "specified," as in subsection B(2). In subsection C(3), "do" is replaced with "comply with" for clarity. The foregoing technical amendments are not meant to affect the meaning or operation of the rule.

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

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

Summary

The focus of this meeting was on refining the goals for this effort to improve and clarify the language in §A(7) that provides for the options to object, move to quash or modify subpoenas. The Committee members considered Don Corson's letter that was received late in the last biennium, and the comments of Council members at our last meeting. Specifically, we discussed these points:

(1) The Need to Clarify that Anyone Can Move to Quash.
(2) The Option to Object & the Rule that Objections Suspend the Obligation to Comply.
(3) The Timing for Motions to Quash.

**Clarification that Anyone Can Move to Quash.** We believe the Council agreed with the Committee consensus on the need to clarify that anyone can move to quash subpoenas, not merely the person who receives the subpoena. **The Committee recommends that the Council clarify that "anyone can move to quash" this biennium.**

**Option to Object & Suspension of Obligation to Comply.** The Committee members also agreed that neither an "option to object" nor a "suspension of the obligation to comply" belong in ORCP 55. Jeff looked at the Council archives and saw that that these options were added to ORCP 55 in 1990. Mark advised that the objection language was imported from ORCP 43 but was peripheral to the purpose the Council intended to achieve then. In the ORCP 43 context, objections make sense, because they are only allowed under limited circumstances, during discovery, in association with requests (not subpoenas) for production. When the language was imported, it created the potential for unintended strategic consequences, particularly from the danger of being able to manipulate the suspension of the obligation to comply – which should never happen with a court command in a subpoena – but the risk was probably diminished by the fact that the imported language was itself confusing until ORCP 55 was re-organized.

The Committee agreed with Don Corson's point in his letter that it is not proper, and potentially harmful, to include an "objection" process in ORCP 55. While the Council retained it in the last biennium, that was only because the Council did not have sufficient time to review the original reason for its inclusion, or to meaningfully evaluate whether it serves a useful purpose. Initially, we reached a consensus that it does not serve a purpose, creates a risk that unfair gamesmanship could result, and it should be removed from ORCP 55. ORCP 43 is the only place the objection process makes sense.

However, thereafter Jeff looked further into the history for written objections to subpoenas. He discovered that it appears that the original 1978 promulgation of the ORCP initially did not include objections in ORCP 55 because non-party production was obtained through a deposition. The

commentary from 1978 explains that ORCP 55 was a combination of existing ORS provisions and the federal rule, FRCP 45, and that objections were intentionally omitted from the rule: "The second paragraph of Federal Rule 45(d)(1) was intentionally omitted, and a witness who objects to a subpoena must seek a protective order under ORCP 36 C."

In 1990, the CCP adopted a rule change that allowed for non-party production without a deposition. This was done in response to Vaughan v. Taylor, 79 Or App 359 (1986), which held that production of documents in the hands of a non-party could only be obtained by scheduling a deposition. When they changed the rule, they also amended the rule to include objections to subpoenas. The commentary states that: "the non-party subject to such subpoena may either secure a court order to control production or simply file objections to the requested production. If objections to production are filed, the party seeking production is required to secure a court order before any production is allowed." I attempted to access the committee and meeting minutes from that biennium, but the links on the CCP website did not work. Jeff expects that the reason for the rule change will be explained in those minutes.

Jeff noted that the rule change appears to be based on the federal rule. He said that, according to the Rutter Federal Practice Civil Procedure Practice Guide, the federal rule recognizes that discovery from non-party witnesses may be both intrusive and expensive. As such, the rule imposes a burden on the party issuing the subpoena to justify the basis for the subpoena and allows for a variety of procedures for a non-party challenge to a subpoena. It appears that the federal rule was intended to minimize burdens on non-parties, since only non-parties may serve a written objection to a subpoena. Parties must move to quash or to modify a subpoena.

Jeff's preference in practice has been to move to quash or to modify subpoenas that are directed to his clients, when appropriate. He has not been comfortable with merely serving a written objection, even if that is what has been permitted under the rule. That said, he suggests that we should endeavor to consider the wider implications of any rule change. ORCP 55 has very broad application, not just in civil cases but also in administrative proceedings, probate cases, and domestic relations matters. He expects that many unsophisticated and unrepresented persons who are served with a subpoena do not know and do not have the resources to move to quash a subpoena. He wonders if that is why the CCP amended the rule in 1990 to allow for written objections. At this time, Jeff thinks that the committee should look into the meeting minutes from that biennium to understand the reason for the change, and he volunteered to take this on with Mark and Shari's help.

Thereafter, Mark weighed in briefly before leaving for a trip, to say that Jeff's observations are consistent with his knowledge of the history of the objection process being brought into ORCP 55, but Mark continues to believe that it is improper for an objection process to exist in ORCP 55. It belongs only in ORCP 43. Meanwhile, Shari was able to successfully provide access to the missing meeting minutes, and Jeff's offer to take a deeper dive was enthusiastically embraced. More to come. But in the meantime, the proposed language below removes the objection option from ORCP 55, subject to further review by the committee.

**Timing for Motions to Quash.** Full Council discussions seemed to trend toward concern about the potential need for different timelines for challenging subpoenas for depositions in contrast with those for trial subpoenas. Our Committee discussion tentatively reached consensus that the timelines to move to quash deposition and trial subpoenas should be the same, but perhaps the timelines to move to quash should differ for discovery subpoenas in contrast with urgent trial subpoenas. The Committee continues to favor creating timelines for motions to quash, though Mark suggested that language establishing timelines in the Rule should be modifiable by the court upon request. **The Committee recommends the creation of timelines for motions to quash that vary for the discovery phase and the trial phase of proceedings and allow flexibility through the court's ability to modify upon request.**

Proposed Amendments

**SUBPOENA**

**RULE 55**

* * *

**A(6) Recipient obligations.**

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

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

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

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

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

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

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

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

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

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

~~**A(7)(b) Motion to quash or to modify.**~~ A motion to quash a subpoena or to modify ~~the command for production~~a subpoena for production must be served and filed with the court ~~no later than the deadline set for production~~within these timelines.

**A(7)(a)(i) Subpoena to appear and testify.** A motion to quash a subpoena to appear and testify must be served and filed with the court before the time set for the court testimony, but not later than 7 days after service on the person subpoenaed.

**A(7)(a)(ii) Subpoena for production of discovery.** A motion to quash or modify a subpoena for production of discovery must be served and filed with the court within 14 days after service of the subpoena.

**A(7)(a)(iii) Subpoena for production at a court proceeding.** A motion to quash or modify a subpoena for production at a court proceeding must be served and filed with the court before the time set for production, but not later than 7 days after service on the person subpoenaed.

**A (7)(b) Enlarging time to challenge subpoena; Allocation of costs incurred to comply with subpoena.** The court may, in its discretion, enlarge the timelines in this Rule. The court may quash or modify ~~the~~ a subpoena if the subpoena is unreasonable and oppressive. The court~~or~~ may require that the party who served ~~the~~ a subpoena pay the reasonable costs ~~of production~~incurred to comply with the subpoena, including costs of production.

**A(8) Scope of discovery.** Notwithstanding any other provision, this rule does not expand the scope of discovery beyond that provided in Rule 36 or Rule 44. B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, prisoners, and parties.

THE
CORSON & JOHNSON
LAW FIRM

DON CORSON, J.D.
Trial Attorney
dcorson@corsonjohnsonlaw.com

LARA C. JOHNSON, J.D.
Trial Attorney
ljohnson@corsonjohnsonlaw.com

BEATRICE GRACE, R.N., J.D.
Trial Attorney
bgrace@corsonjohnsonlaw.com

BRANDON T. MOORE, J.D.
Trial Attorney
bmoore@corsonjohnsonlaw.com

940 Willamette Street - Suite 500
Eugene, Oregon 97401

Bus: (541) 484-2525

Fax: (541) 484-2929

WENDY JO CRAIGMILES
Paralegal
wendy@corsonjohnsonlaw.com

STACY WHIDDON
Legal Assistant
swhiddon@corsonjohnsonlaw.com

JENNIFER MALONEY
Paralegal
jmaloney@corsonjohnsonlaw.com

KARA STANTON
Legal Assistant
kstanton@corsonjohnsonlaw.com

December 7, 2020

***Via email and mail***

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

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

Dear Judge Peterson and Ms. Nilsson:

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

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

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

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

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

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

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

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

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

Sincerely,

Don Corson

DC:sw
cc: Jennifer Gates

To: Council on Court Procedures Members

From: Mark Peterson, Executive Director

Date: November 7, 2021

Re: History of 5-day timeline for movant's reply to motion for summary judgment

Rule 47 as promulgated (1978) was based on ORS 18.105 and allowed, in section C, the MSJ to be served at least 10 days before the hearing (on the motion). The 1982 amendment to the rule added section E but made no change to section C.

It is clear from subsequent Council legislative history material (attached) that the hearing on the motion could occur as late as the day scheduled for trial. The non-movant was required to serve opposing affidavits prior to the day set for the hearing. The legislative history intimated that, in some cases, the movant would not have seen the opposing affidavits prior to the hearing.

It was in 1984 that section C's timelines were changed to require that the MSJ be filed at least 45 days prior to the date set for trial and, also, required the non-movant's response within 20 days and the movant's reply within five days. The staff comments make clear that the court retained discretion to modify the timelines, presumably to allow a later filing in case ripe for a summary judgment determination.

In 2002 the previous requirement that the MSJ be filed at least 45 days prior to trial was amended to require the filing of the motion at least 60 days prior to the scheduled trial, without modifications to the times for the response and the reply. The 2016 amendments to section C made only stylistic changes to improve uniformity within the rules and no changes to the timelines.

* * * * * *

# NOTICE OF MEETING

* * * * * *

The Oregon Council on Court Procedures will hold a public meeting on SATURDAY, APRIL 14, 1984, at 9:30 a.m., at the RED LION/JANTZEN BEACH (Burnside Room), 909 North Hayden Island Drive, Portland, Oregon.

The Council welcomes suggestions from the bench and bar regarding possible modifications to the Oregon Rules of Civil Procedure.

3/30/84

# M E M O R A N D U M

TO: **COUNCIL ON COURT PROCEDURES:**

Joe D. Bailey
John H. Buttler
J. R. Campbell
John M. Copenhaver
William M. Dale
Jeffrey P. Foote
Robert H. Grant
John J. Higgins
John F. Hunnicutt
William L. Jackson
Roy Kilpatrick
Sam Kyle
Douglas McKean
Edward L. Perkins
James E. Redman
E. B. Sahlstrom
William F. Schroeder
J. Michael Starr
Wendell H. Tompkins
John J. Tyner
James W. Walton
William W. Wells
Bill L. Williamson

FROM: DOUGLAS A. HALDANE, Executive Director

## R E M I N D E R

**COUNCIL MEETING**

**Saturday, April 14, 1984, 9:30 a.m.**

**RED LION/JANTZEN BEACH (Burnside Room)**

909 North Hayden Island Drive

Portland, Oregon

3/30/84

# A G E N D A

## COUNCIL ON COURT PROCEDURES

## Meeting

9:30 a.m., Saturday, April 14, 1984

RED LION/JANTZEN BEACH (BURNSIDE ROOM)

909 North Hayden Island Drive

Portland, Oregon

1. Public comments

2. Proposed rule changes:

    (a) ORCP 7 C.(2)
    (b) ORCP 16 B.
    (c) ORCP 21 E.
    (d) ORCP 32 H.
    (e) ORCP 47 C.

3. Proposed legislation (HB 2309 and HB 2370)

4. Proposed Uniform Trial Court Rules

5. Meeting schedule

6. New business

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held April 14, 1984

RED LION/JANTZEN BEACH (BURNSIDE ROOM)

909 North Hayden Island Drive

Portland, Oregon

| | | |
|---|---|---|
| Present: | Joe D. Bailey | James E. Redman |
| | John H. Buttler | E. B. Sahlstrom |
| | William M. Dale, Jr. | J. Michael Starr |
| | John F. Hunnicutt | Wendell H. Tompkins |
| | William L. Jackson | John H. Tyner, Jr. |
| | Roy Kilpatrick | James W. Walton |
| | Sam Kyle | William W. Wells |
| | Edward L. Perkins | Bill L. Williamson |
| Absent: | J. R. Campbell | John H. Higgins |
| | John M. Copenhaver | Douglas McKean |
| | Jeffrey P. Foote | William F. Schroeder |
| | Robert H. Grant | |

(Also in attendance were: Bob Hasson, Diana Godwin, Bill Galbreath, Don McEwen, Frank Pozzi, Gary Ebert, Ray Conboy, Jim Spickerman, and Douglas Haldane, Executive Director)

The meeting was called to order at 9:30 a.m., April 14, 1984. Judge Hunnicutt moved the adoption and approval of the minutes of the meeting of October 15, 1984. The minutes were approved unanimously.

Mr. Kilpatrick explained to the members of the Council that he had just recently received the proposed Uniform Trial Court Rules which had been distributed to members of the Council. He stated that he invited the Chief Justice to appear at the Council meeting to discuss the proposed Uniform Trial Court Rules but that the Chief Justice was out of town and could not attend. He also announced the receipt of a letter from John Hutchins of the Oregon State Bar seeking the Council's comments on the proposed Uniform Trial Court Rules.

Since a number of members of the public had appeared to address the question of the Uniform Trial Court Rules, Mr. Kilpatrick then invited public comment.

Gary Ebert, of the Malheur County Bar, addressed two areas of concern. First was the concern regarding the source

of the Chief Justice's rulemaking authority. He stated the position that the types of rules proposed would be best taken up by the Council as many of them appear to be procedural as opposed to administrative.

Secondly, he expressed the concern of the Malheur County Bar that many of the rules appeared to be drafted for the administrative convenience of the courts but that they would increase costs to the litigants. Specific examples were the preparation of written jury instructions for the jury, the requirement that counsel write the trial judge when a matter has been under consideration for more than sixty days, and the requirement that counsel meet twenty-four hours in advance of trial to work out appropriate stipulations for trial.

Mr. Frank Pozzi next addressed the rules. He had submitted a letter outlining the concerns that he and the members of his firm had regarding the rules, a copy of which is attached to these minutes as Exhibit A. He stated that his office was opposed to the rules as proposed primarily because they appeared to be designed not for litigants or lawyers but for the sole convenience of the courts. Like Mr. Ebert, Mr. Pozzi was concerned about the additional costs that would be involved to litigants.

Mr. Galbreath, too, stated the position that the rules as proposed present unnecessary burdens for litigants.

Judge Tompkins stated that the rules do not appear to him to be designed for the administrative convenience of the courts because the enforcement of such rules present a nuisance for trial courts.

Judge Buttler stated his understanding that these proposed rules had come about because of conflicts in local rules from county to county. It was his understanding that the Chief Justice's intention was to make the trial court rules more uniform. He also stated the position that the concern of the Council ought solely to be any conflict that the proposed rules presented with the Oregon Rules of Civil Procedure.

Mr. McKeown stated the position that the rules should not be uniform from county to county. The variety of practice and diversity of the counties, as well as the volume of litigation are so different that attempts at uniformity are doomed to failure. He gave as an example the local rules in Multnomah County where the Rule 4 and two-week call systems appear to work well for that metropolitan area. When asked what the function of the Council concerning these rules might be, Mr. McKeown's

response was that the rules appear to be for docket control and administration and not rules of procedure. He stated the position that no more new rules are needed; the more rules you get, the more expensive it is for litigants. He objected to the proposal for arbitrary time limits stating that they caused great problems of docket control in the law office. He also stated that the rules should be studied closely prior to adoption.

Mr. Conboy stated his belief that the rules were being rushed through. He mentioned that initial dissemination of the rules asked that objections be raised by May 1. He suggested that if haste is to be made, it should be made slowly. He objected particularly to the rules on extensions of time granted by plaintiff's counsel to defense counsel and what he saw as direct conflicts with the Oregon Rules of Civil Procedure.

Mr. Walton stated that if you compare the rules with the currently existing local court rules, you will find that most of them exist in some county. He stressed the need for uniform rules, describing moves from court to court as a nightmare.

Mr. Spickerman stated the position that the attempt to make uniform the local court rules appears to be unworkable. His experience with the Judicial Administration Committee of the Bar had demonstrated that when attempting to arrive at some basic rules for counties, it was almost impossible to agree on what, in fact, was basic.

Judge Jackson suggested that the procedure for adoption of the Uniform Trial Court Rules should be slowed down with more opportunity for discussion.

Judge Dale moved the following resolution with Judge Buttler's second:

> "BE IT RESOLVED, that the Council on Court Procedures takes the position that the content of the proposed Uniform Trial Court Rules is not within the jurisdiction of the Council on Court Procedures except to the extent that the proposed rules impinge on the Oregon Rules of Civil Procedure or on the statutory authority of the Council."

The resolution was adopted unanimously.

Mr. Kilpatrick then appointed Mr. Sahlstrom to chair a committee to study the proposed rules to determine if there were, in fact, conflicts with the Oregon Rules of Civil Procedure. That committee is made up of Mr. Sahlstrom, Chairman, Judge Hunnicutt, Mr. Schroeder, Mr. Kyle, and Mr. Walton.

Judge Dale suggested that Mr. Kilpatrick write the Chief Justice a letter expressing the adoption of the foregoing resolution and expressing the sentiments of the people who had appeared to speak before the Council.

Mr. Pozzi raised the question of the Council acting on proposed changes to the ORCP without sufficient advance notice to the public. Mr. Kilpatrick assured Mr. Pozzi that no action would be taken on proposed rule changes at the April 14 meeting and that he would attempt to assure that there was adequate opportunity for public comment before rule changes were adopted.

Mr. Haldane then presented and described the proposed rule changes to Rules 7, 16, 21, 32, and 47.

There was a brief discussion concerning the proposed changes to Rule 21. Judge Dale commented that the amendments that had been made to Rule 21 by the legislature were designed to deal with the problem of completely frivolous lawsuits. Judge Buttler stated that once you go outside the pleadings on a motion, one may as well use the Rule 47 summary judgment procedure. Judge Hunnicutt commented that most litigants do not go to a Rule 47 procedure until after discovery has been completed and that this rule was designed to halt frivolous lawsuits prior to incurring expense of discovery. Judge Dale commented that, like many things, these changes the legislature had made to Rule 21 were directed toward curing a particular evil but that the use of the rule would carry over to everything else.

Regarding the proposed changes to Rule 47, Judge Wells expressed the sentiment that something should also be included to require a more timely filing of a motion for summary judgment. He suggested something similar to that in the proposed Uniform Trial Court Rules. Mr. Haldane was asked to draft a proposed rule change which would incorporate Judge Wells' suggestions.

Mr. Haldane then presented what was House Bill 2309 in the 1983 Legislative Session, a copy of which is attached to these minutes as Exhibit B. This proposed rule change was proposed by the Bar's committee on practice and procedure; was rejected by the Council; and was rejected by the legislature. The Bar's committee on practice and procedure was again proposing a rule change similar to that contained in House Bill 2309 and was seeking Council action on it. Since the Council and the Bar committee seemed to be at odds regarding the issues raised by this proposal, Judge Dale suggested that the Council invite the committee to appear before the Council to explain their position on this proposal.

Mr. Haldane then presented what was House Bill 2370 in the last legislative session regarding curbing the extent of voir dire examinations.

A discussion followed in which lengthy voir dire examinations and the delays caused thereby were uniformly condemned. The only objections to the proposals in House Bill 2370 were that perhaps they were too equivocal and that the court's authority should be made even clearer. Mr. Haldane was asked to draft a proposal along the lines suggested by the Council.

Judge Wells then moved, with Judge Tompkins' second, that the Council adjourn. The motion was adopted, and the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

SUMMARY JUDGMENT

RULE 47

C. Motion and proceedings thereon. The motion shall be served at least ~~10~~ 20 days before the time fixed for the hearing. The adverse party, not less than five days prior to the day of the hearing, may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

# PROBLEMS FOR 1983-85 BIENNIUM

| | |
|---|---|
| ORCP 7 C.(2) | Clerical error in ORCP 7 C.(2). Reference in subparagraph 7 C.(2) should be to D.(6), not D.(5). (Letter from Edward Heid) |
| ORCP 7 C.(3)(c) | Attorney James M. Campbell has suggested a new form of summons. |
| ORCP 32 H. | Attorney Martha C. Evans requests that the Council consider modifying or eliminating ORCP 32 H., which requires notice of a class action suit to potential defendants. At a minimum, ORCP 32 H.(2) "ought to provide for notice fo foreign corporations pursuant to ORCP 7 B.(3)(b)." |
| ORCP 47 C. | Attorney Bruce Hamlin suggests that ORCP 47 C. "ought to be amended to require actual receipt of any opposing affidavits or memorandum prior to the day of hearing. The remedy of a continuance is unsatisfactory because the moving party has already prepared for the hearing, and possibly traveled some distance to argue the motion." Hamlin also feels that the problem of considering late-filed affidavits could be corrected by making the second sentence of ORCP 47 C. mandatory and not discretionary. |
| ORCP 57 C. | Modify to reduce time expended in selection of a jury and insure that voir dire examinations are limited to matters bearing upon qualifications of prospective jurors. (Don McEwen and James Walton) |
| ORCP 73 | Problem regarding JUDGMENTS BY CONFESSION. (Barbara Heller, Trial Court Clerk, Columbia County Courthouse, St. Helens) |
| INTERPRETERS | (Letter from Justice Lent) |
| ORCP 22 | Amendment which would prohibit a third party complaint against a party's insurance company or the joinder of a party's insurance company in all cases except those where the plaintiff's complaint seeks a declaration of insurance coverage (letter from James Tait of 10/7/83). |
| ARABIC NUMBERS RATHER THAN ROMAN NUMERALS | Suggestion by Williams Stiles that rules be amended to make it mandatory that Arabic numbers rather than Roman numerals be used in pleadings to denote separate paragraphs. |

# A G E N D A

## COUNCIL ON COURT PROCEDURES

Meeting

9:30 a.m., Saturday, December 8, 1984

HOOD RIVER INN

Hood River, Oregon

---

1. Approval of minutes of October 13, 1984 meeting

2. Final action on proposed amendments to ORCP:

| | |
|---|---|
| RULE 7 C.(2) | RULE 32 H. |
| RULE 16 B. | RULE 47 C. |
| RULE 17 A. | RULE 57 C. |
| RULE 21 E. | RULE 68 A.(2) |

3. Proposed amendments to RULE 54 A. and RULE 69 B.(3)

4. NEW BUSINESS

# # #

COUNCIL ON COURT PROCEDURES

Minutes of Meeting Held December 8, 1984

Hood River Inn

Hood River, Oregon

| | | |
|---|---|---|
| Present: | Joe D. Bailey | James E. Redman |
| | John H. Buttler | R. William Riggs |
| | John M. Copenhaver | E. B. Sahlstrom |
| | Jeffrey P. Foote | J. Michael Starr |
| | Robert H. Grant | Wendell H. Tompkins |
| | William L. Jackson | John J. Tyner |
| | Roy Kilpatrick | James W. Walton |
| | Sam Kyle | William W. Wells |
| Absent: | J. R. Campbell | Edward L. Perkins |
| | John J. Higgins | William F. Schroeder |
| | John F. Hunnicutt | Bill L. Williamson |

(Also present were: Douglas Haldane, Executive Director of the Council; The Hon. John Jelderks, Judge of the Circuit Court for Wasco County; Roger Stroup, liaison representative from Oregon State Bar Procedure and Practice Committee.)

The meeting was called to order at 9:30 a.m. by Chairman Roy Kilpatrick. Chairman Kilpatrick moved the adoption and approval of the minutes of the meetng of October 13. The minutes were approved unanimously.

The Council immediately proceeded to the consideration of proposed amendments to the Oregon Rules of Civil Procedure.

Rule 7 C.(2). The proposal to correct an incorrect reference in this rule was adopted. A copy of the approved rule as amended is attached to these minutes.

Rule 16 B.. The proposals to require the use of Arabic numerals in pleadings and to rewrite the last sentence of Rule 16 B. was moved by Mr. Sahlstrom, with Judge Jackson's second. The proposal carried. A copy of the approved language as amended is attached to these minutes.

Rule 17 A.. The amendment to Rule 17 to require all parties or their attorneys to sign pleadings was adopted. A copy of the approved language as amended is attached to these minutes.

**Rule 21 E.** The adoption of the proposal to amend Rule 21 E. by striking the language added during the 1983 Legislation Session was moved by Judge Tompkins, with Judge Buttler's second. The proposal was adopted. A copy of Rule 21 E. as amended is attached to these minutes.

**Rule 32 H.(2).** The proposal to amend Rule 32 H.(2) to require an attempt to make actual notice on a potential defendant in a class action on the basis of reasonable inquiry was moved by Judge Wells, seconded by Mr. Sahlstrom, and adopted. The rule as amended is attached to these minutes.

**Rule 47 C.** The Council considered three proposals regarding amendments to Rule 47 C.: the proposal adopted at the October 13 meeting by the Council; the proposal adopted by the Bar's Practice and Procedure Committee and approved by the membership of the bar at its general meeting, and a draft submitted by Mr. Haldane. It was pointed out that the amendment adopted at the October 13 meeting did not provide a deadline prior to a hearing on a motion for summary judgment by which responsive documents would have to be served and filed. The Bar's proposal did not provide a deadline prior to the trial date by which a motion for summary judgment must be filed and served. Attempts were made to achieve both of these purposes, with a variety of views being expressed.

Mr. Stroup expressed the Bar Committee's position that no good reason existed why a motion for summary judgment, if appropriate, could not be heard immediately pre-trial and, if well taken, avoid the time and expense of trial.

The view was expressed that late filings of motions for summary judgment sometimes cause difficulties for court docketing. A motion filed a short time before a trial might reflect nothing more than counsels' inadequate pre-trial preparation and could thus work a hardship on opposing counsel and the court.

A consensus was reached that, in an appropriate case, the court should have discretion to hear a motion for summary judgment immediately prior to trial but it should not be done as a matter of course.

Mr. Sahlstrom suggested that definite times be set by which actions in a motion for summary judgment should be taken and that the court should be provided with discretion to modify those times in appropriate cases. Judge Wells moved, with Mr. Grant's second, that Mr. Sahlstrom's proposal be approved. The motion carried. A copy of the approved language as amended is attached to these minutes.

**Rule 57 C.** It was moved by Mr. Bailey, with Mr. Sahlstrom's second, that the proposal (previously adopted at the October 13 meeting) to add the following sentence to the end of Rule 57 C. be adopted:

**"The court shall regulate the examination in such a way as to avoid unnecessary delay."**

The motion carried. The full text of Rule 57 C. as amended is attached to these minutes.

Rule 68 A.(2). The proposal to delete the necessary expenses of taking depositions from Rule 68 A.(2) and to explicitly state that the expense of taking depositions shall not be allowed had been approved at the October 13, 1984 meeting. Mr. Stroup, of the Bar Committee, pointed out that there were other rules which allowed reimbursement for expenses for taking depositions in situations other than those contemplated by Rule 68 A.(2). He suggested that, in order to avoid confusion, Rule 68 A.(2) provide an exception for those provisions. With those comments in mind, the Council added to Rule 68 A.(2) a final sentence which will read:

**"The expense of taking depositions shall not be allowed, even though the depositions are used at trial, except as otherwrise provided by rule or statute."**

The entire text of Rule 68 A.(2) as amended is attached to the original of these minutes.

Rule 54 A. The Council had received from the Law Improvement Committee a copy of a Bill for an Act, which would amend Rule 54 A. by adding a subsection (3) to read:

**"When an action is dismissed under this section, the judgment may include any costs and disbursements, including attorney fees, provided by rule or statute. Unless the circumstances indicate otherwise, the dismissed party shall be considered the prevailing party."**

This proposed rule change was moved by Judge Wells, seconded by Judge Jackson, and adopted by the Council.

A proposal to amend 69 B.(3) regarding the filing of non-military affidavits in cases where they are not required under the Soldiers and Sailers Relief Act of 1940 was discussed. Judge Jelderks commented that he was not aware of any requirement in the federal law that such affidavits be filed. He further stated that if an incorrect or false affidavit were filed, due to the provisions of the federal law, the affidavit would have no effect and the default could be set aside. In a case where a person, in fact, is not a member of the military services, an affidavit simply represents an unnecessary step for parties to take. The Council recognized that further study might be required. Judge Riggs moved, with Mr. Walton's second, that Rule 69 B.(3) be amended to delete the requirement for the filing of a non-military affidavit, except in those cases where required by federal law. The motion was adopted. Mr. Bailey undertook the task of determining if the federal law, in fact, requires

affidavits and agreed to report back to Mr. Haldane in order that appropriate amending language might be drafted in time for submission with the Council's final report for the 1985 Legislative Session.

The work of the Council for the biennium having been concluded, Mr. Haldane was directed to draft its report to the 1985 Legislative Session. Mr. Haldane stated that the draft report will be submitted to all members of the Council prior to its submission. Chairman Kilpatrick appointed a committee composed of Mr. Sahlstrom and Mr. Walton to specifically review the draft report and communicate any discrepancies in that report and Council action to Mr. Haldane in order that corrections might be made prior to submission.

Mr. Haldane reported that the budget process for the Council is continuing. Although one budget document indicated an increase in the Council's budget of $8,000.00 for the the next biennium, he had not requested nor was he seeking any increase in the Council budget. Without increases, the budget will remain at the approximate $57,000.00 level for the biennium.

As requested, Mr. Haldane distributed the Council membership list (including term expiration dates) and explained that terms expire on June 30 of the year listed.

There being no further business before the Council, the meeting was adjourned at 11:30 a.m.

Respectfully submitted,

Douglas A. Haldane
Executive Director

DAH:gh

CASS, SCOTT, WOODS & SMITH
ATTORNEYS AT LAW
SOUTH PARK BUILDING, SUITE 200
101 EAST BROADWAY
EUGENE, OREGON 97401

PHIL CASS, JR.
MALCOLM H. SCOTT
ROBERT D. WOODS
BRUCE E. SMITH
NICK E. RAUCH
DOUGLAS R. SCHULTZ
THOMAS J. MURPHY
FRANK C. GIBSON
ROGER M. SAYDACK
MICHAEL R. CHELLIS
JACQUELYN ROMM
DOUGLAS S. MITCHELL

OF COUNSEL
ORLANDO JOHN HOLLIS

TELEPHONE 687-1515
AREA CODE 503

December 3, 1984

Douglas Haldane
Executive Director
Council on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

HAND DELIVERED

Dear Doug:

The Oregon State Bar Procedure and Practice Committee met on December 1, 1984 and looked at the Council on Court Procedures' proposed amendments to the Oregon Rules of Civil Procedure. The Committee recommended the following:

(1) That your proposed change to ORCP 47(C) not be adopted at this time. It has serious, potentially undesirable effects on summary judgment practice, and should be further considered by the Bar before you act.

(2) That the Council adopt the enclosed amendment to ORCP 47(C) which was proposed by last year's Procedure and Practice Committee and adopted by the Bar membership at the 1984 annual meeting. Unlike the enclosed amendment, the Council's proposed amendment does not deal with the problem of tardy service of responsive material.

(3) That if the Council decides to eliminate recovery of any deposition expenses as costs, the language should clearly specify that the court still has authority to order payment of deposition costs under ORCP 36(C), 39(E), 39(H) and 46.

If I can provide any further information on this, please contact me.

Sincerely yours,

Frank C. Gibson, Secretary
Oregon State Bar Procedure
and Practice Committee

FCG/ld
Enclosure
cc: Frank H. Lagesen, Chair
Fred Merrill, Member

AMENDMENT TO ORCP 47C
Recommended to OSB by
OSB Committee on Practice & Procedure
(Passed at 1984 Annual Meeting)

The motion, together with supporting affidavits, if any, shall be served at least 14 days prior to the time fixed for the hearing. The adverse party may serve opposing affidavits. Service of the motion and any affidavits shall be in the manner provided by Rule 9 of the Oregon Rules of Civil Procedure provided, however, that all affidavits must be actually received by the opposing counsel not less than 7 days prior to the date of the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

# PROPOSED AMENDMENTS

# TO

# OREGON RULES OF CIVIL PROCEDURE

ROUGH DRAFT

December 8, 1984

C. **Motion and proceedings thereon.** The motion **and all supporting documents** shall be served **and filed** at least [10] **45** days before the [time fixed] **date set** for [the hearing] **trial.** The adverse party[, prior to the day of the hearing, may serve opposing affidavits] **shall have 20 days in which to serve and file opposing affidavits and supporting documents. The moving party shall have five days to reply. The court shall have discretion to modify these stated times.** The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.



Council on Court Procedures
November 11, 2021, Meeting
Appendix D-20

**Council on Court Procedures**

**Remaining Agenda Items for November 13, 2021, Meeting, Plus Committee Assignments and Issues for Which No Committees Were Formed During September October Meetings**

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| **TO BE DISCUSSED DURING NOVEMBER MEETING** | | | |
| | | 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. |
| | | 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. |

**Council on Court Procedures**

**Remaining Agenda Items for November 13, 2021, Meeting, Plus Committee Assignments and Issues for Which No Committees Were Formed During September October Meetings**

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| | | 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 |
| | | Lawyer Civility | https://www.utcourts.gov/courts/sup/civility.htm<br>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.<br>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. |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| | | 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... |
| | | 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. |

**Council on Court Procedures**

**Remaining Agenda Items for November 13, 2021, Meeting, Plus Committee Assignments and Issues for Which No Committees Were Formed During September October Meetings**

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| | | 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 |
| | | 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. |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| | | 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 . |
| | | 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. |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| **ASSIGNED DURING SEPTEMBER & OCTOBER MEETINGS** | | | |
| 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).<br><br>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.<br><br>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.<br><br>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.<br><br>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<br>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.<br><br>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.<br><br>Those hurt by this method of litigation are the ones lawyers have the highest duty to, the clients.<br><br>Oregon needs to take that leap to the 22nd century; make disclosure mandatory.<br><br>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<br>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. |
| STAFF RESEARCH | 47 | | The time to reply for Summary Judgment is way too short, it doesn't even give people time to get a lawyer. |
| **PASSED ON DURING SEPTEMBER & OCTOBER MEETINGS** | | | |
| 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. |
| 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.<br>Thank you for your review of this question.<br>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."<br>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 | | 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. |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| 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 | 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.<br>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.<br>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. |
| NO | 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. |
| NO | 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? |
| NO | 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? |
| NO | 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." |
| NO | 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." |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| 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 | 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.<br>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.<br>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.<br>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.)<br>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 | 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 |
|---|---|---|---|
| NO | 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:<br><br>RULE 18<br>A pleading which asserts a claim for relief, whether an original claim, counterclaim, cross-claim, or third party claim, shall contain:<br><br>A A plain and concise statement of the ultimate facts constituting a claim for relief without unnecessary repetition.<br><br>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.<br><br>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.<br><br>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.<br><br>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 |
| NO | 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 |
| NO | 21 | | I would like to see an option in ORCP 21 to move to dismiss based on a prior settlement agreement, waiver, etc. |
| NO | 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? |
| NO | 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 |
|---|---|---|---|
| NO | 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. |
| NO | 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. |
| NO | 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. |
| NO | 32 | | Eliminate 32H, I, and J and M(2). |
| NO | 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. |
| NO | 32 | | ORCP 32 needs some help. The procedure for issuing notices and the content of the notices is not clear. |
| NO | 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. |
| NO | 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. |
| NO | 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 |
|---|---|---|---|
| NO | 47 | | Summary judgment rules need to be updated. |
| NO | 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. |
| NO | 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. |
| NO | 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. |
| NO | 47 | | Summary Judgment motions should have a required notice setting out the timelines and what happens if you miss the deadline. |
| NO | 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. |
| NO | 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. |
| NO | 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. |
| NO | 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. |
| NO | 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. |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| NO | 58 | | ORCP 58 should allow instruction to the jury before opening on the legal claims. |
| NO | 60 | | ORCP 60-allow Court to consider directed verdict on its own motion, sua sponte |
| 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. |
| 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. |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| NO | 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.<br>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. |
| NO | 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.” |
| NO | 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. |
| NO | 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 |
| NO | 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. |
| NO | 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)!<br><br>However, there is no Rule 7D(6)(f)! |

| Committee? | Rule # | Topic | Suggestion |
|---|---|---|---|
| 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 | 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. |