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

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Hon. Benjamin Bloom
Troy S. Bundy
Kenneth C. Crowley
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Meredith Holley
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Tina Stupasky
Jeffrey S. Young

Members Absent:

Nadia Dahab
Hon. Roger DeHoog
Hon. Norman R. Hill
Drake Hood
Derek Larwick
Hon. Melvin Oden-Orr
Stephen Voorhees
Margurite Weeks

Guests:

n/a

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 on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 55	ORCP 1	ORCP 71	ORCP 69		
ORCP 57	ORCP 4	Abatement			
ORCP 69	ORCP 14	Affidaviting judges			
Remote Hearings	ORCP 15	Arbitration/mediation			
Vexatious Litigants	ORCP 16	Collaborative practice			
	ORCP 17	Expedited trial			
	ORCP 18	Family law rules			
	ORCP 21	Federalized rules			
	ORCP 22	Interpreters			
	ORCP 23	Lawyer Civility			
	ORCP 27	Lis pendens			
	ORCP 32	One set of rules			
	ORCP 47	Probate/trust litigation			
	ORCP 52	Quick hearings			
	ORCP 55	Self-represented litigants			
	ORCP 57	Standardized forms			
	ORCP 58	Statutory fees			
	ORCP 60	Trial judges			
	ORCP 68	UTCR			
	ORCP 69				

I. Call to Order

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

II. Approval of October 9, 2021, and November 13, 2021, Minutes

Mr. Crowley asked whether any Council member had amendments to the draft October 9, 2021, minutes (Appendix A). Hearing none, he called for a motion to approve the minutes. Judge Bloom made a motion to approve the October 9, 2021, minutes. Ms. Holley seconded the motion, which was approved by majority voice vote. Ms. Stupasky abstained from the vote, as she was not present at the October meeting.

Judge Peterson suggested deferring the vote on the draft November 13, 2021, minutes, as the minutes were not made available to the Council for review until the morning of the current meeting. He apologized for not making the minutes available sooner, and stated that he and Ms. Nilsson would make a concerted effort to get back to their usual standard so that Council members have enough time to review the draft minutes in advance of meetings.

III. Administrative Matters

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

Ms. Nilsson noted that Ms. Weeks was not present at the meeting, and suggested deferring this topic until the January meeting. The Council agreed.

B. Article About Council in Oregon State Bar Bulletin

Judge Norby reported that, although her focus has been on the Rule 55 Committee, she has been working on the article as well. Her goal is to have it finished by February, 2022. She stated that she would like to make the article catchy to encourage readership. Mr. Crowley stated that he feels personally that the history of the Council is interesting. He suggested that it would be helpful for bar members to hear some of the "hot topics" that the Council has dealt with over the years. Mr. Crowley also offered his assistance with the article.

IV. Old Business

A. Rule 69

1. Staff Update

Judge Peterson reminded the Council that, at the November meeting, the attachment containing the staff-recommended rule amendments was missing pages and that the discussion regarding Rule 69 had been carried over to the

December meeting. He stated that the impetus for a change to Rule 69 was the fact that the rule includes a citation to the Servicemembers Civil Relief Act, federal legislation that puts some guardrails on taking defaults against persons on active duty. A change was made to the citation of the Act, which needs to be updated in Rule 69.

Judge Peterson noted that there are two versions of the proposed draft amendment provided to the Council (Appendix B): version 1A, which uses the language *et. seq.*; and version 1B, which actually lists out the parts of the law that are relevant to defaults and Rule 69. He stated that he prefers draft 1B, which covers the entire Act, since it is kind of an unwieldy patch of sections, some of which go directly to taking defaults and civil actions, and some of which talk about interest rates and the like. Judge Bloom agreed that version 1B is cleaner and better.

Judge Peterson explained that some additional changes had been suggested by staff in order to clean up the rule and make it conform with the Council's rule drafting standards. These changes included the addition of Oxford commas, some additional grammatical changes, and changes of the word "shall" to either "must" or "may." These changes are not intended to affect the meaning or operation of the rule. Judge Leith stated that he has no objection to the Oxford comma and that he is supportive of the clarifications made by changing the word "shall." However, he wondered whether the addition of the word "that" twice in subsection C(3) was necessary and stated that he preferred the current version of the rule in that respect. However, he stated that he did not have a strong objection and would not hold up moving forward on the draft for this reason.

Judge Peterson explained for new Council members that, as each committee works through the biennium, when that committee has finished its work and presented the Council with a completed, proposed rule amendment, the Council takes a vote on whether to put the amendment on the agenda for the September publication meeting. He stated that this does not mean that, if a Council member notices an issue with the draft amendment, it cannot come back to the committee or the full Council for further discussion and wordsmithery. However, it is important to have the draft amendments in good shape by the June meeting so that they are ready for voting in September.

Judge Norby made a motion to move the draft 1B proposed amendment of Rule 69 to the publication docket of the September, 2022, meeting. Mr. Crowley seconded the motion, which passed unanimously by voice vote.

B. Committee Reports

1. Discovery Committee

Mr. Crowley explained that the Discovery Committee had recently met to decide whether to proceed on any of the concerns that were raised in the survey regarding e-discovery, the cost of discovery, etc., as well as the topic of whether the idea of proportionality could be incorporated into the Oregon Rules of Civil Procedure (ORCP). He stated that it was fair to say that the committee universally, with the exception of himself, did not believe that proportionality was a viable issue to pursue this biennium. The committee also concluded that the other issues raised in the survey did not rise to the level of action by the Council at this time.

The Council agreed that the Discovery Committee should disband, barring any new suggestions regarding discovery that are brought before the Council during the biennium.

2. Service Committee

Mr. Goehler stated that the committee had not met since the last Council meeting. However, he had circulated a draft amendment to the committee members to try to address service on business entities and the distinction about whether the entity is registered in the county where the suit is filed. He stated that the committee would meet again before the next Council meeting to refine the draft and, hopefully, bring it to the full Council for discussion.

3. Rule 55 Committee

Judge Norby stated that the committee had a productive meeting since the last Council meeting. She reminded the Council that Mr. Young had previously done research on the history of making an objection to subpoenas that do not include an appearance but do include document production. The short story is that the Council had taken the procedure from Rule 43 and put it into Rule 55. At the last full Council meeting, there was an expansive discussion of the committee's proposed draft amendment. The committee revisited that discussion and the direction the Council had given to the committee, and went back to the drawing board and created a new proposed draft amendment. That draft amendment (Appendix C) is dramatically simplified compared to the one presented at the last Council meeting. It retains the objection process, because Judge Norby's interpretation of the Council's discussion was that the majority did not appear to want to move it back to Rule 43. The goal was to clarify that the objection response does not apply to subpoenas to appear and testify. The proposed amendment also clarifies that subpoenas to appear and testify are the only kind that may be challenged by a motion to quash. While there were several Council

members who did not like the word “quash,” the committee did not recall whether a different term was suggested as a replacement, so “quash” remains in the draft.

Judge Norby stated that the committee had also discussed the issue of deadlines. She noted that Judge Norm Hill had been very interested in this topic; however, she was not able to find a committee meeting time that worked with Judge Hill’s schedule. She stated that Judge Peterson had brought up a valid point during the committee meeting: establishing a deadline for using a motion to quash to challenge a subpoena almost invites a strategic litigant to time their subpoena delivery at the last possible moment to forestall the possibility of a motion to quash. The committee was concerned about that, so this draft does not include a deadline but, rather, requires challenges to be filed without delay and, in the case of a court appearance, no later than one day before the appearance date [paragraph A(7)(a)]. To try to beef that up a bit, language was also added that requires a person issuing a subpoena to time the issuance in a way that allows time for a good faith challenge by the recipient, as well as language in section B(2) that requires good cause to challenge a subpoena. Judge Norby explained that the goal is twofold: first, to encourage parties to serve subpoenas promptly and to take into consideration whether or not a recipient would have time to challenge them; and, second, to encourage recipients to challenge without delay if that is their intention. She noted that this is a “fuzzier” approach than the one that the committee took in its prior drafts.

Ms. Holley stated that, during the discussion at the November Council meeting, she had been persuaded that just having motions to quash was the answer. She originally felt that the objection process allows for conferral, which allows a lawyer to hone what they are looking for in a subpoena; however, Mr. Larwick made the point that attorneys must confer before a motion anyway. Judge Norby apologized if she had misunderstood the Council’s intention that the objection process should be retained. Ms. Holley stated that she felt that she was likely a big part of that and apologized for any confusion. She stated that she now did not have a strong opinion about using either process, as long as the process chosen allows for conferral.

Judge Norby stated that her predisposition as a judge is that subpoenas are court orders and, therefore, a motion to quash is the only appropriate solution; however, she never used the process when she was in practice. She stated that she was relying on the feedback of the Council, which seemed to be indicating that the motion to quash is an entrenched process that many lawyers have become quite accustomed to using and that it may be earth shaking to remove it. She apologized if she misunderstood that feedback, and asked again for direction.

Judge Leith stated that he was not at the last Council meeting and missed that discussion. He asked for clarification about the practical difference between a traditional motion to quash a subpoena versus an objection to a subpoena, and whether it is just two names for two tracks that are actually identical. Ms. Holley explained that, if a party objects to a subpoena for records, the requesting party must file a motion to compel, which shifts the burden. Judge Norby explained that it is just a discovery process that used to be contained in Rule 43 that had been imported into Rule 55. Mr. Young explained further that this change to Rule 55 came about in the 1990 promulgation. The committee minutes indicate that these revisions occurred because there was concern about burden shifting to nonparties who might receive a subpoena for records, because the person moving to quash a subpoena takes on the burden of proving why the subpoena should be quashed or modified in some way. The Council at that time thought that it was unfair to shift that burden and effectively impose the obligation on a nonparty to have to move to quash a subpoena. The Council also based the change heavily on the federal rule, which has a similar objection procedure in it. Mr. Young stated that he believes that what was contemplated is that a non-party recipient of a subpoena for records could serve an objection, which would be sufficient, and the obligation to prove why those records should be produced would remain on the party serving the subpoena.

Mr. Andersen opined that, in practice, attorneys do not know whether to object or to move to quash. Often, it comes down to who wants to have the first and last word at a hearing. The moving party in a motion to quash gets the first and last word. The party that objects gets the middle word. He stated that he is not sure that there is a real, observed distinction between an objection and a motion to quash. He appreciated the change to paragraph A(7)(a), which adds the words "to produce and permit inspection," because that makes it very different than paragraph A(7)(c), which is for subpoenas to appear and testify. He stated that he believes that this is a necessary clarification of which he is very much in favor. Ms. Holley agreed and stated that her big concern was not to absorb the records procedure into the testimony procedure.

Mr. Goehler stated that he liked this version that retains the objection procedure, and agreed with Mr. Andersen about the clarifications. His only concern is that adding "without delay" seems aspirational, and he wondered whether it adds anything since it likely cannot be enforced. He asked about the committee's thinking on that. Judge Norby stated that the committee's initial thinking was about how objectionable every option of a deadline appeared to be to various members of the Council. The committee wanted to promote promptness and discourage strategic timing designed to create obstacles for the other party. Ultimately, the judge needs some guidelines about what to weigh when making an analysis on the rare occasions when this issue arises, and having language about promptness would be helpful in situations where a party was being

demonstratively strategic. That strategic timing of subpoenas and strategic timing of objections is a problem that a judge can count against a party, without the rule giving a deadline that could, unfortunately, encourage more strategy. Mr. Goehler asked whether this language is meant to help with determining the intent of the provision – read together with everything else, the intent is to encourage promptness and discourage strategic delays. Judge Norby agreed that this is the intent.

Judge Peterson stated that the "without delay" language was his suggestion. He proffered that, if a party has had a subpoena sitting on their desk for three weeks, and they come in with an objection at the last possible minute, a judge can certainly take that into consideration and ask for an explanation of why a subpoena that was not onerous, burdensome, and unreasonable three weeks ago suddenly is. He suggested that, with the "without delay" language, particularly read together with the language in section B(2), it is clear that a subpoena must be served without engaging in gamesmanship and allow the other side an opportunity to respond, including to object to the subpoena in some fashion. It is not aspirational to be able to ask the judge for some relief, or for the judge to reasonably ask a party why they waited so long.

Mr. Crowley stated that he appreciated the committee's work and liked the current draft's language. He stated that the objection process is valuable for subpoenas to produce documents, as it is less formal than filing a motion and it is easier to get an objection out there and then have a conversation and come to an agreement. He noted that his office handles a lot of third-party subpoenas and uses the objection process when they believe that too much is being requested, and many times they are able to work through the issues and get things resolved. He strongly favored the committee's current approach.

Judge Peterson noted that he is a strong proponent of trying to clarify the rule and remove the objection process; however, he is not willing to tank the proposed amendment over that. He allowed that there are some reasons to retain the objection along with the motion to quash: the burden shifting issue, the ease, and the fact that the duty to confer with a motion to compel is not completely clear. He noted that the Council may need to include some language that is similar to Rule 43 on e-discovery, because Rule 55 is not necessarily a discovery motion. He stated that he believes that the committee's latest proposal is a fair compromise. Mr. O'Donnell stated that he represents a fair number of hospitals, including smaller facilities, that sometimes receive subpoenas and need to object. Without in-house counsel, filing a motion to quash can be somewhat cumbersome. Mr. O'Donnell stated that, oftentimes, the issue can be resolved with communication, and he agreed that the objection process is very helpful in certain situations.

Judge Norby stated that she was pleased to hear that the committee was making progress in trying to reflect the wishes of the Council. She stated that the committee's next task would be to address Judge Peterson's idea of possibly including a basic motion to quash on the back of a subpoena. She stated that, provided that the Council thinks that the proposed draft amendment before it today was headed in the right direction, the committee would next begin creating that basic motion form. The Council agreed.

4. Rule 57 Committee

Ms. Holley explained that the Rule 57 committee/workgroup had met since the last Council meeting and identified four areas of consideration that impact biased jury selection. The first issue is a major one that the research reveals to be consistent across the country: procedural barriers. These hurdles include how mailings go out to jurors; barriers to accessing a courthouse, like transportation; and payment to jurors for days of service. Addressing these hurdles is not necessarily within the purview of the Council; however, the committee's and workgroup's entire consideration is not necessarily within the purview of the Council, because the larger issues of diversifying jury pools and addressing implicit bias tend to impact substantive law. Ms. Holley noted that many stakeholders feel that these procedural hurdles that impact marginalized communities are major factors that result in juries that are not racially or socioeconomically diverse, for example.

The second area of consideration is whether or not the committee wants to consider a change to "for cause" challenges. One suggestion that was raised would be to prohibit judges from rehabilitating jurors. Judge Norby helpfully shared with the committee/workgroup a process that she uses in "for cause" challenges to avoid embarrassment of the jurors, but also to avoid prejudice against the attorney who is asking for the "for cause" challenge.

The third area of consideration is whether to eliminate peremptory challenges. The committee/workgroup has been strongly encouraged to consider total elimination of peremptory challenges, for a number of reasons. Ms. Holley stated that she had included a Dropbox link to materials in the committee's latest report (Appendix D). Those materials include some research articles on the issue of peremptory challenges from the Pound Institute as well as a report from Connecticut. This information is pretty consistent about the steps that become barriers to having a diverse jury pool and then having an actual, selected jury that is diverse. The question of whether the Council should adopt any amendment to Rule 57 was raised, and this is discussed further in the committee's report. Included in the Dropbox materials is a spreadsheet that compares the amendments that have been made so far across the United States, as well as the recommendation that the Willamette University College of Law Racial Justice Task

Force made as to what they think an amendment that retains peremptory challenges could look like in Oregon.

The last area of consideration relates to the criminal versus the civil jury process: because peremptory challenges potentially have a different impact on criminal juries than civil juries, is there any benefit in recommending to the Legislature that it amend the statute that applies the Rule 57 civil jury process to the criminal process? Ms. Holley stated that the research she has seen largely relates to injustices that are created in the criminal process, and there have been arguments made that peremptory challenges play out differently in the civil process, resulting in a different impact. Some lawyers with experience in both civil and criminal law indicated that peremptory challenges play out on the criminal side in a slightly simpler fashion than on the civil side.

Ms. Holley explained that Judge Peterson had recommended returning to the Council and discussing and/or voting on whether any of these areas should be explored by the committee/workgroup. Judge Peterson stated that he had made this recommendation because making a proposal to, for example, remove peremptory challenges, may not get enough votes to publish let alone to promulgate. He stated that it may be wise to take the temperature of the Council, at least on that issue, now. Ms. Holley encouraged the Council to hold off on such a vote until the full Council has had the chance to review all of the materials provided in the Dropbox folder. She noted that some of the members of the committee/workgroup had come to the last meeting with the knee jerk reaction of never wanting to eliminate peremptory challenges, but that they had thought a bit differently about it after listening to the presentation at the committee/workgroup meeting and reviewing all of the materials.

Judge Peterson stated that he is certainly not opposed to waiting but that, at some point, the Council will have to make a determination as to whether it can propose a procedural change to Rule 57 that would make it less acrimonious if peremptory challenges remain in the toolbox. He opined that, if the Council makes some procedural change to Rule 57, which may or may not include peremptory challenges, the Council would be in a good position to make recommendations to the Legislature regarding the other issues that the committee/workgroup is discussing issues on which the Council, by statute, cannot take action.

Judge Bailey thanked Ms. Holley for her amazing work with the committee/workgroup, which has taken on a life of its own. He asked Judge Peterson about the idea of bifurcating civil and criminal jury selection. He noted that the research shows that the disparities are more on the criminal side than on the civil side, and almost all of the research that has been presented is related to the criminal side. He asked Judge Peterson whether such a bifurcation would be a procedural or substantive change and whether it is within the Council's purview. Judge Peterson replied that it would be a legislative change. He noted that the

only reason that Rule 57 applies to criminal matters is because the Legislature has said that it does [ORS 136.210]. He stated that he does believe that unconscious bias is pervasive and impacts both criminal and civil cases, and that it seems to him that, if the Council believes that unconscious bias is not a good idea in civil trials, obviously it is not a good idea in criminal trials either. And vice versa.

Ms. Holley stated that one idea is a potential recommendation for the elimination of peremptory challenges as to criminal trials, because of the risk of bias, but maintaining peremptory challenges in civil trials and allowing lawyers to navigate the unconscious bias process as they wish. One concern brought to the committee/workgroup by lawyers who handle police brutality cases, where bias is a forefront issue, is that restricting them from eliminating a "proud boy" from a jury pool that is going to consider race as the primary issue in the trial could potentially create obvious injustice would easily be solved by the use of peremptory challenges. Judge Peterson repeated his concern that, if the thought is that unconscious bias is not a good thing, it should not be desirable in either criminal or civil cases. While there are certainly some civil cases that are not very controversial, there are also civil cases where people have strong value judgments

Judge Jon Hill agreed that all of the issues of bias and all of the concerns will come into play whether it is a criminal defendant, a crime victim, a plaintiff, or a defendant. He stated that the committee/workgroup has really begun to discuss that there are systemic issues that need to be fixed that might have a bigger positive impact. However, he certainly believes that the process of peremptory challenges needs to be discussed as well. He stated that it is interesting that the "for-cause" challenges are handled so differently throughout the state. In Tillamook, for example, "for cause" challenges are much more likely to be granted, and there is less willingness to try and rehabilitate jurors who say that they are unsure whether they can be fair and impartial. He noted that the committee/ workgroup needs to address many issues, some of which are large and systemic.

Judge Norby asked whether the process of sending jury summonses is statutory or whether it is an administrative process set up by the Trial Court Administrator's office or the Supreme Court. Judge Bailey stated that it is statutory and that each county calls an office in Salem to let that office know how many summonses they will need for a certain time period. Salem pulls the names from voter rolls and Department of Motor Vehicles records. He stated that the research shows that diversity in jury panels has more to do with who is in the jury pool and what jurors are paid than with any changes to peremptory challenges. To many people, loss of a day's pay with only a per diem as compensation is a huge loss. Paying jurors more leads to a more diverse pool from which to choose.

Mr. Andersen stated that he is very much against eliminating peremptory challenges. He noted that even "for cause" challenges are laden with unconscious bias. He admitted that all lawyers have unconscious biases and prejudices, but he

did not think that the Council or committee/workgroup could solve that. However, he stated that he is not opposed to allowing more time for people to read all of the material that has been submitted, even though almost nothing comes from Oregon and virtually everything is from 50 or 60 years ago. He agreed that jurors should be paid more and that the base of jurors should be widened but, at some point, responsible citizenship dictates that citizens should obey a jury summons. He stated that he was not sure how far the Council should go in mandating the burden of citizenship to actually comply with a subpoena for jury service.

Mr. Bundy agreed with Mr. Andersen. He stated that he has no problem helping a more diverse group make it into the general jury pool. However, with respect to selecting a jury, he could not imagine a trial lawyer on the planet who would say that peremptory challenges should be eliminated. He stated that there have been many reasons that he has removed someone from the jury, including for looking at his client in a in a way that he did not like, and he has been happy with that. He believes that anyone who has not picked a jury cannot really understand what it would mean to eliminate peremptory challenges entirely. The whole purpose of a peremptory challenge is to make sure the client is getting a fair shot. There are people who lie because they want to be on the jury, and they will answer questions in the way that they think they need to answer them for this purpose. A good trial lawyer has to understand that and see through the ruse, and then consider using a peremptory challenge against that juror. He stated that he has also used peremptory challenges to eliminate jurors who may be good jurors, but who have asked the judge to be excused and were refused. In a technical case that requires a lot of consideration, a juror who is distracted or disinterested is a disadvantage to a client. The nuances of choosing a jury are impossible to explain to somebody who has not done it before.

Ms. Holley stated that Mr. Bundy's points about complex litigation were some of the factors that led to the conversation about separating criminal and civil cases in terms of eliminating peremptory challenges. With regard to Mr. Andersen's point about the research not being from Oregon, it is important to note that Oregon has a very low Black population, so it would be difficult to do any kind of research on race in Oregon. In fact, Oregon is largely white because Oregon was planned as a state that Black people were not allowed to enter. Because Oregon has been so effective at racism in the past, it is important to ask how to make the state more inclusive. With regard to Mr. Bundy's point about no trial lawyer on the planet agreeing to eliminate peremptory challenges, Ms. Holley noted that the United Kingdom and Canada have eliminated them. Judge Jon Hill pointed out that, when he attended an international prosecutor conference in Vancouver, BC, years ago, there was a discussion regarding the problems with juries that resulted from the lack of peremptory challenges. He pointed out that criminal cases are very complex and affect people's liberties, and that the Council cannot really discount any kind of case or the overall value of the jury system.

Judge Peterson stated that he believes that the Council can improve the process substantially in terms of the burden and how the peremptory challenges are handled, which would be a Rule 57 process change. He noted that some work had been done on that last biennium. With regard to these larger issues, that could be handled much like the change regarding the statute of limitations problem that the Council asked the Legislature to address last biennium, where the Oregon State Bar (OSB) added the Council's suggestion as a part of its law improvement package. He stated that he could not think of something that is more of an improvement to the law than improving the quality of jury panels. This recommendation process has also been used by the Council in the past with regard to the class action rule. With the Council making whatever changes it can make to Rule 57, with or without the elimination of peremptory challenges, he thinks that the Legislature might be interested in the Council's suggestions about making it possible to have a better jury pool.

Judge Norby stated that there are other procedural parts of Rule 57 that could use improvement as well. The rule still states that peremptory challenges must be submitted in writing on slips of paper, but virtually no judge uses that process any more. However, judges do have to remember to get a waiver on the record if they want to handle these challenges orally outside of the presence of the jury. She stated that there are other parts of the rule that are antiquated, and it would be helpful to change as well, to reflect current practices.

Ms. Holley asked whether the Council should take a vote about whether the committee/workgroup should continue to consider comprehensive changes overall. Judge Peterson noted that a lot of work has been done and some good discussion has been had, including the fact that judges are rehabilitating witnesses because they do not have a big enough pool of jurors who have shown up. He opined that the Council should try to give someone the benefit of that work, even if it is beyond the Council's pay grade. Ms Holley stated that she had looked up the statute regarding jurors and that, if the Council were to make recommendations to the Legislature, these recommendations would be fairly straightforward.

Ms. Holley asked whether a motion that the committee/workgroup continue to consider comprehensive changes to how citizens get on a panel would be appropriate. Mr. Andersen suggested making a specific motion so that Council members know what they are voting on, because there had been quite a bit of discussion. He also suggested that more than one motion may be required.

Ms. Holley made a motion that the committee/workgroup continue to consider process changes regarding how jurors get to a panel. Judge Jon Hill seconded that motion. Ms. Holley asked if there was any further discussion. Mr. Crowley stated that his personal feeling is that the committee/workgroup would be well served to focus on this question, rather than peremptory challenges, because he does not

believe that the bar will support the idea of eliminating peremptory challenges. Ms. Holley stated that she thinks that is a legitimate point of view, but that she also believes that it is a serious enough issue that having a robust conversation about peremptory challenges serves everyone's interest. Mr. Crowley stated that he feels that it will be a big enough task to try to get any procedural changes through and make a case to the Legislature.

Mr. Crowley called the question of Ms. Holley's motion for the committee/ workgroup to continue to consider process changes regarding how jurors get to a panel. The motion passed with a majority by voice vote.

Judge Norby asked Ms. Holley whether, if the Council did not ultimately endorse the recommendations of the committee/workgroup, whether the workgroup would be disbanded. She stated that it would be a shame to waste all of the time, effort, energy, and research that has been put into creating this expansive group and exploring all of these issues. Ms. Holley stated that she did not believe that the workgroup would drop everything, but pointed out that there are a number of groups that are also considering changes regarding jury bias. She stated that, if the Council voted to disband the workgroup, it would possibly reconstitute under a different name. Judge Norby stated that she was unsure why the Council was taking votes at this time, because it seemed like, with the workgroup having so many non-Council members, the Council may not have a real say any longer. Ms. Holley noted that the workgroup is the Rule 57 committee, not a separate entity. Judge Norby suggested perhaps discussing whether to continue to have the committee consider changes to Rule 57 and then, to the extent that the workgroup exceeds that mandate, how much more time and effort should be put into those separate recommendations or whether those recommendations would be an independent product of the workgroup.

Mr. Bundy stated that he is very concerned about straying away from Rule 57 and into the ORS, which he is adamantly opposed to getting into. He stated that, if the committee were just called the "Diversity Committee," he would have no problem with that committee looking into the Oregon Revised Statutes (ORS) and making recommendations. However, if it is going to be a sanctioned ORCP 57 committee, he feels that it should stick to that topic or it becomes a slippery slope. Judge Bloom agreed.

Judge Jon Hill stated that he understood from the committee/workgroup meeting that it would be helpful for Ms. Holley to get some guidance from the Council as far as the scope of the discussion, which is, he believes, why the four different areas were being brought up. If the Council is going to uniformly say no to one of those four areas, maybe a different group would need to be formed to further discuss any of the four areas the Council declines to pursue. Ms. Holley stated that she certainly did not want to create a rogue entity that takes over court processes. She agreed with Judge Peterson's comment that the Council has recommended

amendments to the ORS that do impact court procedures, which is in the purview of the Council. She noted that the Council has already voted to make a recommendation to the Legislature one way or another, so she believes that considering everything that impacts the decisions that are being made about Rule 57 is within of the purview of the committee/workgroup.

Judge Leith stated that he is pretty sympathetic to the idea that the Council is not just stepping outside of its mission, all for good, altruistic purposes, obviously, but that it is straying outside of its mission in a way that is a bit of a fruitless exercise. He opined that there will not be a majority or supermajority to advocate the removal of peremptory challenges, unlike with the statute of limitations work last biennium where all members agreed that it was the right thing and a non-controversial recommendation was able to be made to the Legislature. He opined that this issue is a big deal, and that it will be a controversial issue in the Legislature as well. He suggested that, if the elimination of peremptory challenges is going to be taken up, which he did not advocate in favor of or against, it might be a good idea to move it over to the Oregon Law Commission (OLC). In fact, the other potential changes to the ORS seem like they might be a part of something that the OLC would be interested in looking at. He stated that the Council started last biennium to look at whether to beef up the procedures for how a court should review peremptory challenges, which is within the Council's purview, to sort of invite courts to be more proactive in inquiring what is going on with a peremptory challenge. He explained that, when he has done that as a judge, he has encountered some offense, but that this does not stop him. If the rule were more clear that a judge should be asking why a peremptory challenge is being exercised, it may not eliminate all deliberate or implicit bias, but it would cause lawyers to at least reflect a little bit on how they are exercising their peremptory challenges. Judge Leith stated that he does not oppose the committee going forward with a lot more work to see what recommendations come of it; however, the committee should not lose sight of the basis in the ORCP that started the Council talking about this issue last biennium.

Judge Peterson pointed out that this issue was punted to the to the Council by the Court of Appeals as a result of an ugly situation that happened in a Washington County trial. He reiterated that he believes that there are some procedural changes that the Council can make to Rule 57 that can be helpful. He stated to Mr. Andersen, Mr. Bundy, and Judge Bloom that he knows that the Council can make changes to Rule 57 that have nothing to do with eliminating peremptory challenges, changes that he feels that they would probably agree with, so he asked them not to draw a line in the sand just yet. He also stated that he was not certain that the Council could not get a super majority to agree that certain legislative changes might be appropriate. He noted that the workgroup exists mostly because changes to Rule 57 will impact criminal practice, and most Council members do not practice criminal law. The Council has formed workgroups before when the issue will have an impact beyond the scope of the practice and

experience of the Council members. He suggested going forward with both looking at the procedures within Rule 57 as well as the larger process issues.

Judge Bailey stated that he has always said that what people really want regarding this issue is above the Council's head. He noted that it was Judge Norm Hill who thought that the Council would keep it nonpartisan, but he himself thought that was probably not going to happen. But ultimately, Judge Bailey stated that he thinks that the committee/workgroup should stay together because of all of the effort put into it. The Council does not necessarily want to get out of it because the effort might result in substantive changes; the Council wants to provide the workgroup with its input as Council members. He stated that he would not put a parameter on what the committee/workgroup does at this point in time until a few more meetings go by. There is still time before the June meeting. Judge Bailey made a motion for the committee/workgroup to stay together and continue to pursue whatever avenues it takes. Judge Leith seconded the motion, which was approved unanimously by voice vote.

5. Remote Hearings

Mr. Andersen explained that ORS 45.400 addresses remote testimony and requires 30 days' written notice before trial. Rule 39 C covers deposition testimony by telephone. He stated that there is nothing in the ORCP or the ORS that addresses testimony by WebEx or by Zoom, which are both ubiquitous now. He recounted that he recently had a jury trial with witnesses lined up to appear by WebEx, and the judge indicated that he would only allow them to appear by stipulation, not by motion. Mr. Andersen stated that, in practice, WebEx is being used by the courts and Zoom is being used by attorneys in depositions, but they are ahead of any ORCP or ORS that is actually empowering them to do so, so it is all happening by stipulation. If one side were to decide that they did not want testimony by WebEx at trial, there is really nothing that empowers such testimony to take place. He suggested that this is a deficiency that should be addressed.

Judge Peterson stated that he believes that the Legislature amended the statute last biennium specifically to change the language from telephone testimony to remote testimony. He agreed that there are still some problems, like the need to get permission in advance, which is kind of cumbersome in today's era. Mr. Andersen agreed that the current law does say "remote location testimony," but that he expected something a little more specific.

Mr. Crowley wondered whether some of the emergency orders from the Supreme Court and presiding judges may deal with this topic. Mr. Andersen stated that he believes that they do; however, those emergency orders are not quite as accessible as a rule or statute. Judge Bailey pointed out that there is a difference of opinion in Washington County about whether or not there is a Presiding Judge Order (PJO) that allows WebEx testimony and whether it points back to the

statute. He stated that he absolutely believes that the committee should proceed and look at tightening up the rules to allow for remote hearings, and having visual remote methods be the first preferred method. He stated that it would be better to address the issue by rule so that constant referring back to PJOs is not necessary.

Judge Jon Hill stated that his recollection is that an emergency Chief Justice Order is in place right now and that the discussion was that the Chief Justice was going to extend the remote portion of it. He stated that he did not recall whether the Oregon Judicial Department (OJD) was going to suggest future legislation or how that was going to be solved. Judge McHill stated that he did not recall that either, but that the emergency order was going to be extended. Judge Bloom recalled that the emergency orders were being extended 60 days past March, 2022. He stated that the OJD may be seeking a fix in the short legislative session, but that he thought that the Council should still pursue a rule change. Judge Hill thought that OJD may be seeking legislation in the short session, but he certainly agreed that a change to make everything uniform across the state would be helpful and make it easier for practitioners. Judge Bailey agreed that a tool that allows for remote testimony that is universal across the state is needed that is not based on emergency orders, or probably even a Uniform Trial Court Rule (UTCR), because judges should not be legislating in the way of emergency orders or UTCR.

Judge Leith asked for clarification on whether the committee is considering a statutory change, because that would take the Council back to another proposal to send a recommendation that the Legislature amend a statute. Judge Peterson stated that Mr. Andersen had identified Rule 39 on depositions, which the Council can certainly modify. The enabling statutes for the Council do not, however, allow it to change the rules of evidence. It may be again that the Council would make a suggestion to the Legislature for a change to the ORS, this time to ORS 45.400, in its transmittal letter.

Mr. Crowley proposed forming a committee to at least look at Rule 39 and updating it to include video depositions, which have become very common in the last two years. Mr. Andersen agreed to chair the committee. Mr. Bundy, Judge Jon Hill, Judge McHill, Mr. O'Donnell, and Mr. Young agreed to serve on the committee.

6. Vexatious Litigants

Judge Jon Hill stated that the committee had met and wanted to get the Council's point of view on the committee's thoughts. He stated that there may be a need to form a task force and bring in additional interest groups or parties. The majority of the committee thought that a substantive change would be necessary, as opposed to a procedural change that would be in the Council's purview. Judge Norby wanted to have more discussion about whether a change could be made with an ORCP change versus legislation.

Judge Jon Hill stated that the committee thought that any legislation should be based on a person and the person's actions. More or less by consensus, committee members thought that a frivolous filer would be someone who had three prior filings that had been found by a judge to be frivolous. If the person was then designated as a frivolous filer, a judge would need to review a new case to determine whether the case had some merit before the case would be allowed to proceed. Judge Hill stated that the committee did not have a consensus as to whether this would just be applied to pro se litigants or to members of the bar as well. The committee wanted to meet again and then bring in representation from the OJD, the Professional Liability Fund, the OSB, and possibly others.

Judge Norby stated that, unfortunately, she had to leave the committee meeting early and she missed the rest of the committee's conclusion that this was a legislative issue. She stated that, at the beginning of the meeting, the committee was looking at a piece of legislation that died on the vine pretty quickly in the Legislature in 2013, and which did not look anything at all like what she thought the committee was going to be working on. She stated that she had been contemplating that the committee would be working on creating a procedure for the presiding judge of each county to identify and have some sense of control over repeat filers on the same issues and litigants who engage repeatedly over the same issue. She stated that, to her, it is a procedural issue in the sense of creating a procedure through which a court or a presiding judge can be allowed to watch for such filings and have some ability to at least promote an early hearing rather than letting it play all the way out multiple times, as has happened in her county. This would be an alternative to designating a party as a frivolous filer for all future purposes and limiting their right to file lawsuits, which would be a lot more significant and would certainly be a legislative issue. Judge Norby stated that her staff had done a lot of research and found procedural rules in three other states, along with one state with a statutory approach. She stated that she was looking at those three rules as jumping off points.

Judge Bailey stated that he thinks that the court has inherent authority, and that federal law has a procedure for this that he used once when a plaintiff was filing multiple cases in Clackamas County. He ended up writing the plaintiff a letter indicating that the court was not going to accept any more litigation from her on that particular subject matter. He stated that he believes that there is a Court of Appeals or Supreme Court case that states that the court has inherent authority, but that there were a lot of steps that had to be taken to give the plaintiff fair warning before finally not accepting any more filings for that subject matter. Judge Jon Hill asked Judge Bailey to send him the relevant case. Judge Bailey agreed to search for the case and send it to Judge Hill.

Judge Jon Hill asked for the Council's opinion on whether a change would be substantive and a suggestion to the Legislature would be needed, or whether the committee should look at a change to the ORCP. He stated that the committee's

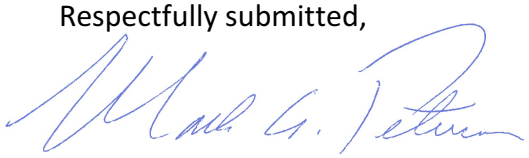
consensus was that a legislative change would be necessary. Judge Norby stated that her sense is that it would depend on what the change was: to limit a person's ability to file would definitely be legislative; to create a procedure for a court to use to try to manage cases would be procedural. Judge Peterson agreed that, if someone is precluded from bringing a claim, it is probably substantive. If a screening procedure is being created with some right to appeal, it is probably a procedural.

Mr. Crowley suggested that, if Judge Norby has a procedural angle, the committee should meet again and talk about how the problem could be approached from a procedural perspective. If there is a way to make a fix with a rule change, that is definitely preferable. Judge Hill agreed that the committee will follow Mr. Crowley's suggestion.

V. Adjournment

Mr. Crowley adjourned the meeting at 11:28 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

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

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Hon. Adrian Brown
Kenneth C. Crowley
Nadia Dahab
Hon. Roger DeHoog
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Drake Hood
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Margurite Weeks

Members Absent:

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

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

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

I. Call to Order

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

II. Approval of September 11, 2021, Minutes

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

III. Reports Regarding Last Biennium

A. Staff Comments

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

IV. Administrative Matters

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

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

B. Article on the Council in Oregon State Bar Bulletin

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

V. Old Business

A. Committee Reports

1. Discovery Committee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Service Committee (Appendix B)

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

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

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

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

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

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

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

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

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

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

anything.

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

3. Rule 55 Committee (Appendix D)

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

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

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

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

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

Another survey taker suggested, "simplify subpoena process; clarify timelines for service; develop method to avoid lengthy delays in producing medical information in cases where Plaintiff puts medical condition at issue by pleadings." Judge Norby stated that committee members were confused by that suggestion, as well as by the nature of the delays that were being referred to and the precondition that some confidential health information documents may be put at issue by pleadings and others may not. The committee therefore did not recommend acting on that suggestion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Rule 57 Committee

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

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

B. Rule 68

1. Staff Update

Ms. Nilsson reported that Council staff had not yet drafted a proposed amendment to Rule 68 to reflect a new citation to the Servicemembers Civil Relief Act, but that they would do so by the next meeting.

VI. New Business

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

1. Post-Covid Remote Appearances

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

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

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

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

B. Potential Amendments Received from Council Survey

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

ORCP 15

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

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

ORCP 17

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

ORCP 18

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

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

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

ORCP 21

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

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

ORCP 22

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

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

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

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

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

ORCP 23

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

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

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

ORCP 27

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

ORCP 32

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

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

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

ORCP 47

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

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

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

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

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

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

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

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

ORCP 52 and 54

Mr. Crowley stated that the suggestion regarding Rule 52 posits that there should be less discretion given to the court when requesting a postponement of a trial or hearing date when it is the first request for postponement and the parties stipulate to the postponement. Mr. Andersen stated that he does not have a strong view one way or the other, but that he believes that the suggestion arose from some judges on the coast who would not allow a postponement even though both the plaintiff and the defendant agreed to one.

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

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

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

ORCP 58

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

ORCP 60

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

ORCP 69

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

ORCP 71

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

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

VII. Appointment of committees regarding any items listed in VI

See discussion in Item VI.

VIII. Adjournment

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

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A In general.

A(1) When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to appear by filing a motion or answer, or otherwise to defend as provided in these rules or applicable statute, the party seeking affirmative relief may apply for an order of default and a judgment by default by filing motions and affidavits or declarations in compliance with this rule.

A(2) The provisions of this rule apply whether the party entitled to an order of default and judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a counterclaim or cross-claim.

A(3) In all cases a judgment by default is subject to the provisions of Rule 67 B.

B Intent to appear; notice of intent to apply for an order of default.

B(1) For the purposes of avoiding a default, a party may provide written notice of intent to file an appearance to a plaintiff, counterclaimant, or cross-claimant.

B(2) If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance, then notice of the intent to apply for an order of default must be filed and served at least 10 days, unless shortened by the court, prior to applying for the order of default. The notice of intent to apply for an order of default cannot be served before the time required by Rule 7 C(2) or other applicable rule or statute has expired. The notice of intent to apply for an order of default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must be filed with the court and served on the party against whom an order of default is sought.

C Motion for order of default.

C(1) The party seeking default must file a motion for order of default. That motion must

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be accompanied by an affidavit or declaration to support that default is appropriate**,** and **must** contain facts sufficient to establish the following:

C(1)(a) that the party to be defaulted has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court;

C(1)(b) that the party against whom the order of default is sought has failed to appear by filing a motion or answer, or otherwise to defend as provided by these rules or applicable statute;

C(1)(c) whether written notice of intent to appear has been received by the movant and, if so, whether written notice of intent to apply for an order of default was filed and served at least 10 days, or any shortened period of time ordered by the court, prior to filing the motion;

C(1)(d) whether, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is or is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005; and

C(1)(e) whether the party against whom the order is sought is or is not a person in the military service, or stating that the movant is unable to determine whether or not the party against whom the order is sought is in the military service as required by [*section 201(b)(1) of*] the Servicemembers Civil Relief Act, [*50 U.S.C. 3931, as amended.*] **50 U.S.C. section 3901 through section 3959.**

C(2) If the party seeking default states in the affidavit or declaration that the party against whom the order is sought:

C(2)(a) is incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005, an order of default may be entered against the party against whom the order is sought only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27; or

C(2)(b) is a person in the military service, an order of default may be entered against the

party against whom the order is sought only in accordance with the Servicemembers Civil Relief Act.

C(3) The court may grant an order of default if it appears **that** the motion and affidavit or declaration have been filed in good faith and **that** good cause is shown that entry of [*such an*] **the** order is proper.

D Motion for judgment by default.

D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration. Specifically, the moving party must show:

D(1)(a) that an order of default has been granted or is being applied for contemporaneously;

D(1)(b) what relief is sought, including any amounts due as claimed in the pleadings;

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case a party may include costs, disbursements, and attorney fees to be awarded pursuant to Rule 68.

D(2) The form of judgment submitted [*shall*] **must** comply with all applicable rules and statutes.

D(3) The court, acting in its discretion, may conduct a hearing, make an order of reference, or **make an** order that issues be tried by a jury, as it deems necessary and proper, in order to enable the court to determine the amount of damages**,** [*or*] to establish the truth of any averment by evidence**,** or to make an investigation of any other matter. The court may determine the truth of any matter upon affidavits or declarations.

E Certain motor vehicle cases. No order of default [*shall*] **may** be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(i) unless, in addition to the requirements in Rule 7 D(4)(a)(i), the plaintiff submits an affidavit or a declaration showing:

E(1) that the plaintiff has complied with Rule 7 D(4)(a)(i);

E(2) whether the identity of the defendant's insurance carrier is known to the plaintiff or

could be determined from any records of the Department of Transportation accessible to the plaintiff; and

E(3) if the identity of the defendant's insurance carrier is known, that the plaintiff not less than 30 days prior to the application for an order of default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, registered, or express mail, return receipt requested; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

F Setting aside an order of default or judgment by default. For good cause shown, the court may set aside an order of default. If a judgment by default has been entered, the court may set it aside in accordance with Rule 71 B and C.

DEFAULT ORDERS AND JUDGMENTS

RULE 69

A In general.

A(1) When a party against whom a judgment for affirmative relief is sought has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court and has failed to appear by filing a motion or answer, or otherwise to defend as provided in these rules or applicable statute, the party seeking affirmative relief may apply for an order of default and a judgment by default by filing motions and affidavits or declarations in compliance with this rule.

A(2) The provisions of this rule apply whether the party entitled to an order of default and judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a counterclaim or cross-claim.

A(3) In all cases a judgment by default is subject to the provisions of Rule 67 B.

B Intent to appear; notice of intent to apply for an order of default.

B(1) For the purposes of avoiding a default, a party may provide written notice of intent to file an appearance to a plaintiff, counterclaimant, or cross-claimant.

B(2) If the party against whom an order of default is sought has filed an appearance in the action, or has provided written notice of intent to file an appearance, then notice of the intent to apply for an order of default must be filed and served at least 10 days, unless shortened by the court, prior to applying for the order of default. The notice of intent to apply for an order of default cannot be served before the time required by Rule 7 C(2) or other applicable rule or statute has expired. The notice of intent to apply for an order of default must be in the form prescribed by Uniform Trial Court Rule 2.010 and must be filed with the court and served on the party against whom an order of default is sought.

C Motion for order of default.

C(1) The party seeking default must file a motion for order of default. That motion must

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be accompanied by an affidavit or declaration to support that default is appropriate**,** and **must** contain facts sufficient to establish the following:

C(1)(a) that the party to be defaulted has been served with summons pursuant to Rule 7 or is otherwise subject to the jurisdiction of the court;

C(1)(b) that the party against whom the order of default is sought has failed to appear by filing a motion or answer, or otherwise to defend as provided by these rules or applicable statute;

C(1)(c) whether written notice of intent to appear has been received by the movant and, if so, whether written notice of intent to apply for an order of default was filed and served at least 10 days, or any shortened period of time ordered by the court, prior to filing the motion;

C(1)(d) whether, to the best knowledge and belief of the party seeking an order of default, the party against whom judgment is sought is or is not incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005; and

C(1)(e) whether the party against whom the order is sought is or is not a person in the military service, or stating that the movant is unable to determine whether or not the party against whom the order is sought is in the military service as required by [*section 201(b)(1) of*] the Servicemembers Civil Relief Act, [*50 U.S.C. 3931, as amended.*] **50 U.S.C. section 3901, et. seq.**

C(2) If the party seeking default states in the affidavit or declaration that the party against whom the order is sought:

C(2)(a) is incapacitated as defined in ORS 125.005, a minor, a protected person as defined in ORS 125.005, or a respondent as defined in ORS 125.005, an order of default may be entered against the party against whom the order is sought only if a guardian ad litem has been appointed or the party is represented by another person as described in Rule 27; or

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party against whom the order is sought only in accordance with the Servicemembers Civil Relief Act.

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D(1) A party seeking a judgment by default must file a motion, supported by affidavit or declaration. Specifically, the moving party must show:

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D(1)(b) what relief is sought, including any amounts due as claimed in the pleadings;

D(1)(c) whether costs, disbursements, and/or attorney fees are allowable based on a contract, statute, rule, or other legal provision, in which case a party may include costs, disbursements, and attorney fees to be awarded pursuant to Rule 68.

D(2) The form of judgment submitted [*shall*] **must** comply with all applicable rules and statutes.

D(3) The court, acting in its discretion, may conduct a hearing, make an order of reference, or **make an** order that issues be tried by a jury, as it deems necessary and proper, in order to enable the court to determine the amount of damages**,** [*or*] to establish the truth of any averment by evidence**,** or to make an investigation of any other matter. The court may determine the truth of any matter upon affidavits or declarations.

E Certain motor vehicle cases. No order of default [*shall*] **may** be entered against a defendant served with summons pursuant to Rule 7 D(4)(a)(i) unless, in addition to the requirements in Rule 7 D(4)(a)(i), the plaintiff submits an affidavit or a declaration showing:

E(1) that the plaintiff has complied with Rule 7 D(4)(a)(i);

E(2) whether the identity of the defendant's insurance carrier is known to the plaintiff or

could be determined from any records of the Department of Transportation accessible to the plaintiff; and

E(3) if the identity of the defendant's insurance carrier is known, that the plaintiff not less than 30 days prior to the application for an order of default mailed a copy of the summons and the complaint, together with notice of intent to apply for an order of default, to the insurance carrier by first class mail and by any of the following: certified, registered, or express mail, return receipt requested; or that the identity of the defendant's insurance carrier is unknown to the plaintiff.

F Setting aside an order of default or judgment by default. For good cause shown, the court may set aside an order of default. If a judgment by default has been entered, the court may set it aside in accordance with Rule 71 B and C.

CCP Summary – Rule 55 Committee Mtg
December 7, 2021 @ 12:15 PM

Members Attending: Judge Norby, Jeffrey S. Young, Judge Peterson

Absent: Judge Hill, Derek Larwick

Summary

The Committee went back to the drawing board. After the November CCP meeting, on balance, it appeared that the Council favors retaining the objection process in ORCP 55 for the limited process of subpoenaing documents without an appearance. The Council appeared opposed to removing that process back to ORCP 38. The proposal below retains that process but clarifies that it does not apply to subpoenas to appear and testify, which can only be challenged by a Motion to Quash. Also, new language requires that any Motion to Compel be served on all parties who have appeared, not just the objecting party.

The Committee discussed the "deadline to move to quash" issue, but was ultimately concerned that any deadline created for raising concerns will be misused as a tool to time the actual subpoena service in a way that precludes the possibility of objection. Therefore, the proposal below contains new language that requires challenges to be filed "without delay" but in the case of a court appearance, no later than one day before the appearance date. To further encourage fair timing of service and challenges, Section B(2) now proposes new language that requires a person issuing a subpoena to time it in a way that allows time for a good faith challenge by the recipient.

Proposed Amendments

SUBPOENA

RULE 55

* * * * *

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

A(7) Option to move to quash subpoena to appear and testify. A subpoena to appear and testify, whether or not it contains a requirement for production, may only be challenged by a motion to quash, as provided in subsection A(7)(c) of this rule.

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

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

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

A(7)(b~~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 and all parties who have appeared.

A(7)(c~~b~~) Motion to quash or to modify. A motion to quash or to modify a subpoena to appear and testify must be served and filed with the court without delay, but no later than one (1) judicial day prior to the date set to appear and testify, or the deadline specified for production. A motion to quash or to modify a subpoena for a deposition must be served and

filed with the court without delay. The court may quash or modify the subpoena if the subpoena is unreasonable ~~and~~ or oppressive or may require that the party who served the subpoena pay the reasonable costs of appearance or production.

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

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

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

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

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

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

Rule 57 Committee Report: Bias in Jury Selection

The Rule 57 Committee Workgroup meets monthly to consider what recommendation to make to the legislature regarding bias in jury selection. The workgroup consists of members of the criminal bar, civil bar, and judiciary. The meetings are open to any participants.

Materials the workgroup has considered and meeting recordings for those meetings are available here: https://www.dropbox.com/sh/iwpf4frhincz64i/AAC06s9FF2twfx2z-amL24vYa?dl=0

On December 2, 2021, the workgroup met and identified four primary areas of concern as listed below. The workgroup decided to return to the Council in order to ask the Council to vote regarding its ongoing work.

1. **Process.** All of the research articles and common experience point to process areas that contribute to juries that are not representative of communities. Process issues include how lists of potential jurors are created, how summonses are mailed, how replacements are selected for jurors who do not respond to summonses, jury pay, and other accessibility issues for jurors like transportation and translation.

   Should the workgroup continue to consider recommending process changes as part of its work?

2. **For cause challenges.** Many attorneys have identified judge rehabilitation of jurors as an issue that contributes to unfairness on jury panels. Judge Norby offered a process she follows in order to handle for-cause challenges, which avoids embarrassment to the juror being excluded or the attorney asking for the exclusion.

   Should the workgroup continue to consider a recommendation regarding for-cause challenges?

3. **Peremptory challenges.** The workgroup is currently considering elimination of peremptory challenges based on the studies included in the resources and the Willamette Law Task Force. In the alternative to

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elimination of peremptory challenges the workgroup is considering an amendment to Rule 57D.

Civil/Criminal. Currently ORS 136.210 requires criminal jury selection to follow the process in ORCP 57D. The workgroup has questioned whether ORCP 57 should continue to govern both criminal and civil trials or whether to recommend the legislature amend this statute to separate the processes.

Judge Peterson recommended we return to the Council for a vote on whether to consider all of these broad issues or narrow the focus of the workgroup.

Meredith Holley
Workgroup Chair