MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, January 8, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Kenneth C. Crowley
Hon. Roger DeHoog
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Meredith Holley
Derek Larwick
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Scott O'Donnell
Tina Stupasky
Stephen Voorhees
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Nadia Dahab
Hon. Norman R. Hill
Drake Hood
Hon. David E. Leith
Margurite Weeks

Guests:

Erin Pettigrew, Oregon Judicial Department
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 on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7	ORCP 1	ORCP 71	ORCP 69		
ORCP 39	ORCP 4	Abatement			
ORCP 57	ORCP 14	Affidaviting judges			
Remote Hearings	ORCP 15	Arbitration/mediation			
	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 9:33 a.m.

II. Approval of November 13, 2021, and December 11, 2021, Minutes

Mr. Crowley asked whether any Council member had amendments to the draft November 13, 2021, minutes (Appendix A). Hearing none, he called for a motion to approve the minutes. Ms. Stupasky made a motion to approve the November 13, 2021, minutes. Judge Norby seconded the motion, which was approved by majority voice vote. Judge Oden-Orr abstained from the vote, as he was not present at the November meeting.

Mr. Crowley asked whether any Council member had amendments to the draft December 11, 2021, minutes (Appendix B). Hearing none, he called for a motion to approve the minutes. Ms. Stupasky made a motion to approve the December 11, 2021, minutes. Mr. O'Donnell seconded the motion, which was approved by majority voice vote. Judge Oden-Orr abstained from the vote, as he was not present at the December meeting.

III. Administrative Matters

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

Ms. Nilsson explained that Ms. Weeks had been in communication with the Office of Legislative Counsel regarding this issue. That office is very busy now with the start of the legislative short session, so it could be a while before any progress is made.

B. Article About Council in Oregon State Bar Bulletin

Judge Norby stated that she had begun work on what she hopes will be an engaging and informative article about the Council, and that she would likely have a draft to share by the March meeting.

IV. Old Business

A. Committee Reports

1. Service Committee

Mr. Goehler stated that the committee had not met since the last Council meeting, but that he had circulated a draft of proposed changes to Rule 7 (Appendix C) to committee members. The committee agreed to share the draft with the Council for a first look so that Council members could begin thinking about the concept and wording, and whether the proposed change might have any unintended consequences or ripple effects.

Mr. Goehler explained that the changes would solely be to Rule 7 D(3), and only with the portions of that subsection that deal with business entities, not with individuals, minors, incapacitated persons, or tenants of mail agents. He stated that the language in the existing rule requires, for service not requiring a follow-up mailing, that a registered agent be found in the county where the action has been filed. The committee's research found that this language has been in the rule from its inception, but the committee found no real explanation as to the reason for the requirement. The proposed amendment would not change the primary service method, which would remain personal service, but it would change the rule so that the alternatives do not require that the agent be present in the same county where the suit is filed as a condition precedent. Other than that, the alternative service methods are not changed at all. Changes are made in this regard for corporations and limited liability corporations. For limited partnerships, this method was taken out, because it seemed redundant.

Judge Peterson observed that the fact that the rule has read this way since the ORCP were first promulgated, and before that probably in a statute, does not necessarily mean that it makes sense now. He stated that the committee's approach makes sense, but asked that Council members read over the proposed amendment and bring it to the committee's attention if anything seems untoward or if it may be a bad idea. Mr. Crowley agreed.

Judge Bloom expressed some concern that the committee's draft proposed to remove the conditional language in subparagraph D(3)(b)(i). He stated that, as a lawyer, he would naturally want to see a connection that would take him away from the primary service method to the alternative method. With the removal of the language, "if a registered agent or general partner of a limited partnership cannot be found in the county where the action is filed," that nexus is lost. He did state, however, that the changed language is straightforward and would still serve the purpose of providing reasonable notice of litigation.

Mr. Goehler stated that the overall movement that the Council has had with the service rules is trying to preserve that reasonable notice but also not to make it too onerous on the party that is trying to serve. He also pointed out that alternative service methods must be accompanied by follow-up mailing, which is a backup safeguard.

2. Rule 55 Committee

Judge Norby stated that the committee had not met since the December Council meeting. She noted that she was glad that, at the last Council meeting, there had been some consensus about where the committee should be headed with the proposed language change. She stated that the committee would continue the discussion on whether to try to create a form motion to quash to be included on

the back of subpoenas. She thanked Mr. O'Donnell for providing information on Utah's simple motion to quash form and stated that the committee will also be looking at what other states are doing and bringing a recommendation back to the Council.

3. Rule 57 Committee

Ms. Holley explained that the committee/workgroup had a lot of activity since the last Council meeting, including learning that Oregon Representative Marty Wilde had proposed an amendment to ORCP 57. Rep. Wilde's amendment basically adds a sentence that states that the person who made a peremptory challenge that is subsequently objected to must identify an objectively reasonable basis for the challenge. Rep. Wilde's amendment does not address the burden shifting issue, which is one of the central issues that the Council has been asked to address in Rule 57. A member of Rep. Wilde's staff had attended a committee/workgroup meeting and Ms. Holley has also been in contact with him by e-mail. It sounded like Rep. Wilde would be open to other thoughts about how to amend the rule, but he was trying to propose his amendment in this year's short session of the Legislative Assembly, which would rush the Council's biennial process. Ms. Holley stated that Rep. Wilde did not believe that his amendment would interfere with the Council's work. If anything, he thought that it would make people aware of the issue so that, even if his amendment does not pass, people would be more aware of the importance of the issue if the Council makes an amendment later.

Judge Norby asked Judge Peterson how common it is for the Legislature to amend an ORCP working in conjunction with a recommendation from the Council. Judge Peterson stated that, every once in a while, the Legislature does amend the ORCP, sometimes without informing the Council. For example, the Legislature made a change in the notice language advising defendants about contacting the Oregon State Bar on the Rule 7 summons form without the Council's knowledge. On the other hand, with regard to cy pres, ORCP 32, and the class action rule, the legislators played it both ways; the opponents said that it was an issue for the Council, knowing full well that the Council thought that the issue was substantive, while proponents utilized the Council's deliberations to push a bill forward. Judge Peterson agreed that it would be a heavy lift for the Council to generate a draft amendment in time to submit it for the short legislative session.

Ms. Holley stated that the committee/workgroup had also taken votes on the main proposals of what to recommend to the Legislature, which may help give more direction to the work. The first vote was whether peremptory challenges should be eliminated. There were 18 "no" votes and eight "yes" votes, so it does not look like that proposal has support moving forward. Ms. Holley's instinct would be for the committee/workgroup to move on to trying to work on a different amendment, rather than elimination of peremptory challenges.

However, the committee also wanted the Council to also take a vote about the elimination of peremptory challenges. The second vote in the committee/workgroup was whether criminal and civil jury rules should be unlinked. That vote was almost a tie, with 13 "no" votes and 12 "yes" votes, so that topic may need more conversation. The third vote was whether amendments to chapter 10 of the Oregon Revised Statutes (ORS), where some of the procedural issues are housed, should be proposed to the Legislature. That vote had strong support, with 21 "yes" votes and five "no" votes.

Mr. Crowley asked for more information about what proposals regarding the amendment of chapter 10 of the ORS might be. Ms. Holley stated that the committee/workgroup had not come up with anything specific yet. The research shows, for example, that paying jurors $40 per day instead of $10 per day would lead to substantially greater jury participation from marginalized groups. Other ideas would include improvements to the process for obtaining the jury pool.

Judge Oden-Orr shared a recent experience on a panel working to put together a continuing legal education seminar (CLE) on implicit bias. They spent some time talking about whether or not to eliminate peremptory challenges, and one of the lawyers expressed concern about doing so because they would not be able to eliminate people who they believe would be bad jurors for their client. Judge Oden-Orr asked why that lawyer would not strike the potential juror for cause, if there was a reason that potential juror would be bad for the client. The lawyer responded that the reason could be one for which the judge would likely not find cause. For example, a judge might not excuse a potential juror for bias if the juror worked for a major corporation and the lawyer assumed they had a bias in favor of corporations and against the client. Judge Oden-Orr stated that the crux of the issue seems to be that judges are trying to find an impartial jury, while lawyers are trying to eliminate jurors that they *believe* would have an implicit bias against their client, instead of taking the time to actually explore any *actual* bias that would be a reason for a for-cause strike. He agreed that lawyers often eliminate potential jurors with peremptory challenges for reasons that are not based on bias; however, allowing peremptory challenges exacerbates the problem of some lawyers being able to hide their biased belief that people of color will have a particular view of the facts and, therefore, not want them on their juries. Judge Oden-Orr stated that, in his mind, this supports the elimination of peremptory challenges and the expansion of the areas of for-cause challenges. Thinking about expanding the areas of for-cause challenges under ORCP 57, if the list of for-cause criteria is insufficient, more could be added. If the Council believes that race is one reason that should be added to the list, then it should add it; otherwise, racism should not be able to be hidden behind a challenge for which a lawyer does not need to state a reason. Judge Oden-Orr stated that his belief is that, if a lawyer cannot explain why they want to remove a potential juror, they should not be able to remove that potential juror.

Ms. Holley stated that she appreciated Judge Oden-Orr's comments. She noted that she had sent the committee/workgroup the Harvard Implicit Association Test, which she believes is a pretty profound experience, because the point is that our own biases are often not obvious to ourselves. Those biases can come out in ways that end up having a greater impact on the community and that manifest injustice in ways that can be seen later. Having said that, based on the vote and the conversation within the committee/workgroup, she was not convinced that the Council would be able to move a recommendation to eliminate peremptory challenges forward in the legal community.

Mr. Voorhees stated that he did not want to detract at all from the important racial conversation. As a practical point, he stated that he has had several experiences where he has elicited a response from a prospective juror who stated that they would have bias against his plaintiff client. He then moved to strike for cause and, either through a combination of the other lawyer's questions or the judge's questions, the juror became rehabilitated, so to speak. The questions may have included whether the prospective juror would follow the judge's instructions and be able to hear the case fairly, even though they had indicated that they did have some bias. Mr. Voorhees explained that the juror was not eliminated, at which point he later ended up using one of his peremptory challenges on that juror. In the court's view, the bias did not rise to the level of Rule 57 standards. He stated that he did not know whether that might be a product of the plaintiff moving to strike jurors first and the judge being concerned about having enough jurors on the panel to fill out the jury box but, for whatever reason, his perception is that he always has a more difficult time striking jurors than the defense has.

Judge Norby stated that she had heard Mr. Voorhees' position expressed before. She stated that it may be "chicken and egg" kind of conversation, because the crux of the argument is that judges comprise a wide spectrum concerning whether they are likely to allow a for-cause challenge or to reject it, and part of that analysis is whether there are enough available jurors. She pointed out that, if each side did not have peremptory challenges, there would always be enough potential jurors because the judge would know exactly how many people they could excuse. Currently, a judge needs to do an analysis: if each lawyer uses all six peremptory challenges, twelve jurors already need to be subtracted from the pool and, if for-cause challenges are then granted, they would be granted from a fraction of the original panel. If there were no peremptory challenges, and the entire jury pool was still available, judges would be much more likely to grant for-cause challenges, because they would not already be mentally subtracting the possible 12 jurors that were about to be removed by peremptory challenges. Judge Norby opined that the whole analysis of cause right now has a second layer within a judge's mind because of peremptory challenges, so many judges are harder on for-cause challenges knowing that, if they deny them, lawyers are probably going use a peremptory challenge anyway. She posited that, if peremptory challenges

were eliminated, the cause analysis would change dramatically, and many judges who may be reluctant to grant them now would be much more likely to grant them. She also stated that she believes that the analysis would change for every judge, not just judges who were previously amenable to for-cause challenges.

Ms. Holley stated that, during her time working on this issue, one of the most consistent complaints that she has heard from lawyers is juror rehabilitation by judges. She stated that she has experienced it herself, in a case where a potential juror told the judge that she could not be fair because the criminal defense counsel in the case had represented her brother in a murder case. She stated that she knew that her brother was a liar and was guilty, but the defense counsel had "gotten him off." The judge repeatedly asked the potential juror if she could be fair if she was so instructed, and she answered "no" every time. The judge did not excuse the juror, and the whole process infected the entire jury panel. She stated that one potential for-cause amendment that could be proposed is a limitation on rehabilitation.

Judge Jon Hill stated that his observation is that many practitioners view peremptory challenges as their ability to have a fair trial and as a sort of check on the judiciary where, if they do not agree with a judge's decision, they have some ability to eliminate a juror that may be biased against their side. They therefore find peremptory challenges to be a fundamental element of fairness that needs to exist in order for them to have a fair trial. He stated that peremptory challenges are a way for lawyers to feel that they received a fair trial, even if they disagreed with a judge's decision on a for-cause challenge, without the need to go through the appellate process. Ms. Holley agreed that this is something that she has consistently heard from lawyers. She stated that one danger of relying only on for-cause challenges is the potential for a situation where bias has to be explored in depth, which could create more bias on the jury panel. She stated that Judge Norby had previously offered one possible solution to that problem.

Mr. O'Donnell related his experience with a trial in Lane County where the judge interviewed each juror one by one, and he and the plaintiff's attorney went through 23 jurors who were removed for cause. Each juror saw what had happened with the previous juror and that, if they said they could not be fair, the judge would release them. He stated that another challenge with eliminating peremptory challenges is that jury selection could get very contentious, with lawyers becoming more than lawyers should be by challenging potential jurors, risking tarnishing their credibility with the panel before the jury is ever selected. Mr. O'Donnell expressed concern that, if peremptory challenges were eliminated, the whole voir dire process would have to be re-evaluated, perhaps examining each juror one by one in a closed courtroom in order to not affect other potential jurors on the panel. He opined that eliminating peremptory challenges would potentially put the lawyer in a position against the judge as well as against the

panel, which is a scary proposition.

Mr. Andersen agreed with Mr. O'Donnell, and stated that for-cause challenges have an entirely different tone than peremptory challenges. He stated that he did not believe that the two could be conflated, nor that the problem could be solved by expanding for-cause challenges. He pointed out that, in the case of for-cause challenges, a juror has to at least admit a bias or prejudice to the issues in the case. He gave the hypothetical of a retired insurance claims adjuster as a potential juror in a personal injury case. The plaintiff's attorney would be worried that the claims adjuster would be very negative regarding the value of the case or on liability, and ask whether the juror could be fair. If the claims adjuster said that they have seen both sides and could be fair, the attorney would have every right to be suspicious of that juror, but would not want to risk getting into a fistfight on a for-cause challenge. Mr. Andersen stated that, whatever the solution is, he did not believe that conflating for-cause challenges and peremptory challenges is a good idea, as they are like apples and oranges.

Ms. Stupasky stated that it is a difficult issue. She agreed that the racial inequities in jury selection must be addressed, and that she appreciates the work of the committee. She also agreed that getting rid of peremptory challenges concerns her for the reasons that had already been discussed, but that the committee/workgroup and entire Council should continue working on finding an answer.

Judge Norby observed that, in most of the conversations for which she has been present, many judges have been in favor of eliminating peremptory challenges, but very few lawyers. She wondered whether Ms. Holley had observed this trend as well. Ms. Holley noted that the polling conducted with the committee/workgroup was anonymous, as it is a charged topic and she wanted people to feel comfortable. She did note that, when she has suggested the idea to lawyers, there has been a pretty consistent, immediate response of shock and fear. Judge Norby agreed with Judge Jon Hill that it does seem like this is one place where lawyers really do have the feeling that they retain some power and control in the courtroom, so she could understand their reluctance. Ms. Holley pointed out that she has perceived a general support of amending the rule to make for-cause challenges easier, with no pushback on that idea.

Judge Oden-Orr stated that he could appreciate the concern about judges rehabilitating potential jurors. He summarized his position as follows: (1) eliminating peremptory challenges; (2) limiting juror rehabilitation (perhaps with language such as "If a juror expresses concerns about their ability to be fair, a judge may not rehabilitate and must release the juror"); and (3) increasing categories for implied bias as reflected in ORCP 57 D(1)(c) through (f).

Mr. Young noted that Arizona's elimination of peremptory challenges in both civil and criminal cases became effective on January 1, 2022. He stated that he would prefer to monitor how that plays out and learn whether or not Arizona expanded for-cause challenges. Ms. Holley stated that she did not believe that Arizona's for-cause changes were expanded. She noted that Arizona's rule process is different from Oregon's, with their Supreme Court changing the rules sua sponte. Connecticut, California, and Washington have made amendments, but have not eliminated peremptory challenges.

Ms. Nilsson created an anonymous poll for Council members to vote on whether they support eliminating peremptory challenges. Three members were in favor, and 12 against.

Judge Jon Hill stated that Judge Norm Hill had previously expressed, and he agreed, that, although it is not a procedural matter, it is very important to discuss how much jurors are paid and how they are summoned, because that really impacts the makeup of the jury panel. Ms. Holley agreed and reiterated that the committee/workgroup had voted strongly in favor of making recommendations to the Legislature about these issues. Her suggestion was to move forward with proposing an amendment to Rule 57 D(4) that does not eliminate peremptory challenges. She stated that she has a draft based on the Council's work last biennium that she would continue to modify. She stated that she would attempt to roll unconscious implicit, structural bias language into the amendment in a less awkward way than the Council proposed last biennium. She explained that the committee/workgroup will also work on recommendations for changes to chapter 10 of the ORS. With regard to un-linking criminal and civil jury practices, she posited that committee/workgroup members may have been voting on whether to do that based on whether peremptory challenges were being eliminated or not, so they may need to circle back around on that issue.

Judge Bloom echoed concerns about issues of implicit bias and agreed that the Council should take action, as the Court of Appeals directed. He wondered whether the Council could build on Rep. Wilde's proposed amendment to address when someone makes a challenge and there is an objection that it is for an improper purpose. He suggested that it is an appropriate change to require that there be some burden on the person making the peremptory challenge to demonstrate neutral reasons. He expressed concern about elimination of peremptory challenges based on his experience with attorneys making challenges based not on an improper purpose but, rather, for example, wanting to eliminate a person they see as a "leader" who could sway the panel. A lawyer might not want that person on the jury regardless of race, gender, or ethnicity; it is just a calculation that an attorney makes.

Ms. Holley stated that Washington's amendment was the original one that the Court of Appeals recommended to the Council as a model, and that Justice Mary

Yu on the Washington Supreme Court had actually made a statement that, in her opinion, Washington's amendment did not go far enough. She noted that the Council can always revisit the rule if it decides later that its amendment did not go far enough.

Judge Norby noted that, when she was a litigator, she had a degree of mistrust of juries, even though she won a lot. She stated that lawyers know so little about juries, and juries know so little about the case during voir dire, that they are each making predictions about the other, and there tends to be a general sense of mistrust. Lawyers base their decisions on gut instincts from one affiliation or one statement made before the trial commences, and everyone is operating from a somewhat unknown place. She stated that it is interesting that judges are the only ones who are allowed to talk to jurors after cases. Since she has started the practice of speaking with jurors after trial, her position on who jurors are and how they make decisions has changed 180 degrees. She stated that she is now a strong believer that 98% of jurors, 99% of the time, are doing the right thing, setting aside their biases, and acting impartially. She wondered whether the rule that disallows lawyers from talking to jurors should perhaps also be revisited. She noted that she understands that the genesis of that rule was protection of jurors from harassment, particularly in gang-type cases; however, perhaps if more lawyers got to talk to jurors after decisions, it might bridge some of the gap and it might, over time, create more of a sense of confidence and trust between the parties.

Ms. Holley stated that this information will be helpful in crafting some kind of comprehensive recommendation to the Legislature. Another idea that has been raised in the committee/workgroup is a mechanism for the parties to stipulate to, or a judge to create at their discretion, a process that makes the jury selection process more blind in order to promote greater justice. She observed that there are many creative options that can go into a good proposal.

Erin Pettigrew from the Oregon Judicial Department informed the Council that Rep. Wilde would be presenting and posting his bill in the House Judiciary Committee on Tuesday, January 11, at 2:30 p.m. As far as she knows, there is not any immediate plan to change the draft. She stated that it is likely that the bill will be introduced as drafted and that there will be quick action if it either passes or fails.

Ms. Holley explained that Rep. Wilde's proposed amendment to Rule 57 states that, after an objection to a peremptory challenge, the burden shifts to the adverse party to show that the peremptory challenge was exercised on another objectively reasonable basis, not race, ethnicity, or sex. She noted that Oregon Supreme Court Justice Lynn Nakamoto had an issue with this type of change last biennium because it does not address the underlying problem with the rule, which is that the court should presume that a peremptory challenge does not violate this

paragraph, which puts the burden on the objecting party. Judge Norby asked whether an objectively reasonable basis would include that a potential juror is likely to favor the other person's client, for reasons that the lawyer cannot articulate. Ms. Holley stated that would be up to the judge to decide. She noted that most of the rule/statute amendments that the committee/workgroup has seen state that the court needs to make a record as to the reason that it is upholding the challenge, or that there must be some kind of record as to why the court is ruling one way or another. Many rule/statute amendments include language about unconscious, implicit, institutional bias. Ms. Holley stated that she has also received suggestions from a number of groups that Rule 57 D(4) should track with discrimination law and protect all statutorily protected classes, such as disability.

Mr. Crowley asked the judges on the Council how they would handle instances under the current state of the law where there is a concern over a peremptory challenge and the other side objects. Judge Norby stated that it probably depends on the way the objection is brought. If the objection is specifically that the peremptory was made for an improper reason, she believes that, under case law, a judge must ask the lawyer to justify it. Mr. Crowley pointed out that this is more or less what Rep. Wilde's proposed change does. Ms. Holley agreed, and stated that Rep. Wilde's motivation for the amendment was to reflect and acknowledge that the current rule has not solved bias issues in jury selection. His goal was to reflect the research that shows that these issues disproportionately affect black jurors. The Council agreed to remain neutral on Rep. Wilde's bill.

4. Remote Hearings

Mr. Andersen stated that the committee had a productive meeting since the last Council meeting. He explained that ORS 45.400 had been changed recently to allow for remote location testimony; however, it retained the requirement to ask for permission 30 days prior to trial and it is still discretionary with the court. ORS 45.400(8) defines what remote location testimony means. On the other hand, ORCP 39 C(7) still limits remote deposition testimony to telephone appearances only. Proposed UTCR 5.050 uses the phrase "telecommunication" rather than "remote location testimony."

Judge McHill stated that one of the main things the committee discussed at its last meeting was coming up with an appropriate definition of "remote." He stated that the UTCR Committee was proposing a new subsection (7) to UTCR 1.110, which reads "remote proceeding means the use of telephone, telecommunication, video, other two way electronic communication device, or simultaneous electronic transmission in a manner that permits all participants to hear and speak with each other." The committee felt that this was a fairly comprehensive definition and that it might be an appropriate way to at least define what "remote" means for purposes of the ORCP.

Mr. O'Donnell noted that concerns include wanting to make sure that all of the different rules fit together and are consistent and easily accessible, as well as ensuring that practitioners are able to understand that there are different sources of law: statutory, the UTCR, and the ORCP. Mr. Young also mentioned that the committee had discussed the concern that some practitioners may not know that they need to give 30 days' advance notice to request remote testimony, so any rule change may need to include a reference to ORS 45.400. The committee also discussed the possibility of eliminating the 30-day notice requirement, which seems to be an archaic holdover from a different time where it was necessary to make advance arrangements for remote testimony. Mr. Young observed that almost all lawyers have been dealing with remote technology for a while now, and the Covid-19 pandemic has given most lawyers the capability of making accommodations for remote testimony without the need for that advance notice.

Judge McHill pointed out that a change to the 30-day notice requirement would require a change to the statute, which would be the purview of the Legislature. He stated that, generally speaking, the proposed changes to the UTCR would require at least some kind of advance notice. These two factors, along with the fact that there may be presiding judge orders and chief justice orders that affect notice requirements, will require coordination, and that may be one of the most difficult factors in the Council getting to a reasonable amendment. He stated that he believes that the Chief Justice is moving in the direction of holding remote hearings whenever possible. Judge Jon Hill agreed. He stated that a big issue is bandwidth, especially in rural areas, but noted that this is a conversation for another day. He pointed out that each county is currently using slightly different procedures, and stated that it is a good idea to try to synchronize the different statutes, rules, and orders as much as possible. He agreed that remote appearances are better for the public at large.

Mr. Andersen summarized that the committee agrees about the need to make remote testimony as accessible as possible, and that it should not be something that a court has to begrudge but, rather, that the court should embrace to the extent technology will allow. The goal now is to massage the definitions into Rule 39. The committee also discussed the possibility of adding a reference to ORS 45.400 in Rule 58. Mr. Andersen stated that he did not immediately find a place in that rule that lends itself to that possibility, so the committee may have to look for the best place to put it so that practitioners are reminded they need to go to the ORS for remote location testimony.

Judge Peterson stated that this appears to be another instance where the Council is not all powerful and may need to make a reasoned, thoughtful recommendation to the Legislature, as it has in the past. He stated that it seems to him either that remote testimony should simply be absolutely allowed, which he is not sure that he agrees with, or that there should be some kind of limit, but that the onus should be on the person who does not want remote testimony. He

assumed that there would certainly be hearings and trials where in-person testimony would be preferred, if possible. He also acknowledged that there are some issues with technology.

Judge Norby stated that she has had to continue many trials in which experts or otherwise expensive witnesses with expensive travel requirements were unable to appear in person. She stated that, when parties have witnesses that are traveling from a great distance and are going to cost a lot of money, and there is a high risk of reset, she believes that the equation is different. She admitted that she is very much in favor of in-person testimony as much of the time as possible, but she also wants to avoid resetting trials. She stated that she thinks that the equation is both one of how much the Council should embrace technology and, also, one of how much the Council should recognize the impediments that need to be overcome before insisting on old practices. She did not know how much a rule or statute could incorporate all of that.

Judge Jon Hill stated that he also prefers in-person appearances more than video, and again acknowledged the issues with technology. However, given expert witnesses, or just the availability of witnesses in general, he opined that the 30-day delay or burden to obtain permission for remote testimony is unnecessary. To some degree, remote testimony just needs to be made to work; perhaps through modifications like making a place in the courthouse for appearances by WebEx if a person does not have the bandwidth at their home. He advocated for problem solving rather than limiting the mode of appearance, and cited the example of a client who may be able to afford to hire a lawyer if they did not have to pay for travel time to and from the courthouse.

Mr. Crowley noted that this is an access to justice issue because, without remote testimony, cases are getting even more backlogged, with even more cases being filed all of the time. He stated that the question is how to fit a change to the ORCP in with the other rules and statutes and make them work together. Judge Peterson proposed that one solution would be to suggest factors that the court should consider, including cost, convenience of the parties, and the advantages of remote versus in-person testimony. Mr. O'Donnell agreed. He stated that Oregon has varied counties with varied internet access, and that he has been in trials in Lane County and Coos County where out-of-state experts were unable to testify remotely because of technology problems. He stated that he believes that judges need to have a lot of wiggle room to work with the parties to make sure that everything goes according to plan. He agreed that allowing remote testimony is favorable and should be the rule, not the exception, but how that is implemented and what discretion is used should be pretty broad for the trial court.

Mr. Young pointed out that ORS 45.400, as it stands now, maintains the discretion on this issue with the trial court. Within that broad discretion, the trial judge can use a lot of different factors that they may deem necessary to make that decision.

The current statute states that the person seeking remote location testimony must show good cause, and that the non-moving party must show why they would be prejudiced by remote testimony. He stated that this standard is pretty good.

Ms. Stupasky stated that she agreed with the idea of getting rid of the 30-day notice because it does not really have a place any more, given that most of Oregon's courtrooms are now equipped for remote testimony, and lawyers can adapt to remote testimony with much less than 30 days' notice. She stated that believes that the Council should encourage remote testimony being allowed, and that it is helpful in many instances, including travel costs and disability.

Judge Norby expressed concern about the clarity of the court record, and stated that she is curious to see where appellate cases start coming down in three or four years. She is concerned that many cases may not even get a real shot at an appeal because the record is so unclear due to technological problems. She stated that she has experienced occasions where testimony is broken up and has to be repeated different times, and even several occasions where an entire direct examination has had to be re-conducted because someone had dropped off the WebEx event and it was not recognized immediately, so not all parties were able to hear all of the testimony. On one hand, she agreed that remote testimony is possible and it is happening, and it should be provided in the best way possible. On the other hand, she questioned whether embracing it fully is the correct path, because of the concerns she expressed.

Judge Oden-Orr echoed support for the elimination of the 30-day notice. He stated that language such as "reasonable notice of not less than 24 hours" would allow the parties to coordinate who will be responsible for setting up the relevant technology, while also taking into account that not all courtrooms are equipped with the most up-to-date technology. Judge Peterson stated that, while everyone on the Council would probably agree that 30 days is too long, he believes that 24 hours may be a little short, because there may not be enough time for the other party to make its objection known to the judge and have the judge rule on that objection.

Mr. Andersen noted that one complication of using WebEx for remote testimony in a courtroom with just one screen is that it is impossible to show both the remote witness and an exhibit on the screen at the same time. Mr. Larwick agreed and stated that he had a recent trial where he was cross-examining a remote expert witness. One of the considerations was how to show an exhibit to the witness and also display it to the jury, and he had to hire an outside trial technology consultant to solve the dilemma. He stated that, generally speaking, he is in favor of remote testimony, but he thinks that there are some factors that need to be considered, and that the burden should be on the moving party in providing the ability to show exhibits or to resolve similar issues.

Mr. Andersen stated that he believes that it is important to identify the factors that need to be considered and to give judges pretty wide discretion because the judge knows the capability of their courtroom. He noted that it would be good to at least identify some of the factors that a judge is to consider, if for no other reason than to provide a kind of checklist of the items that need to be cleared. Judge Oden-Orr agreed that factors for judges should be identified, and suggested that two elements of good cause could include prior conferral and identification of technology that is accessible to the parties, the witnesses, and the court.

5. Vexatious Litigants

Judge Jon Hill explained that the committee had not met since the last Council meeting. He stated that the committee will meet and discuss the possibility of suggesting legislation based on a proposed 2013 bill that was not passed, as well as a possible amendment to the ORCP. Judge Hill stated that he had received additional information from Judge Bailey regarding some federal case law he relied on as a presiding judge that he would share with the committee.

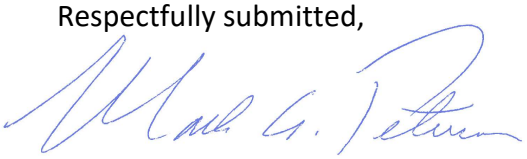
V. New Business

No new business was raised.

VI. Adjournment

Mr. Crowley adjourned the meeting at 11:15 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, November 13, 2021, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

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

Members Absent:

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

Guests:

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

Council Staff:

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

ORCP/Topics Discussed this Meeting		ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 47	Probate/trust litigation	ORCP 1	ORCP 71 Abatement		
ORCP 55	Quick hearings	ORCP 4	Affidaviting judges		
ORCP 57	Remote hearings/trials	ORCP 14	Arbitration/mediation		
Abatement	Self-represented litigants	ORCP 15	Collaborative practice		
Affidaviting judges	Standardized forms	ORCP 16	Expedited trial		
Arbitration/ mediation	Statutory fees	ORCP 17	Family law rules		
Collaborative practice	Trial judges	ORCP 18	Federalized rules		
Expedited trial	UTCR	ORCP 21	Interpreters		
Family law rules	Vexatious litigants	ORCP 22	Lawyer Civility		
Federalized rules	Discovery	ORCP 23	Lis pendens		
Interpreters	Service	ORCP 27	One set of rules		
Lawyer Civility		ORCP 32	Probate/trust litigation		
Lis pendens		ORCP 47	Quick hearings		
One set of rules		ORCP 52	Self-represented litigants		
		ORCP 55	Standardized forms		
		ORCP 57	Statutory fees		
		ORCP 58	Trial judges		
		ORCP 60	UTCR		
		ORCP 68			
		ORCP 69			

I. Call to Order

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

II. Approval of October 9, 2021, Minutes

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

III. Administrative Matters

A. Introduction of New Council Member and Guest

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

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

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

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

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

C. Article About Council in Oregon State Bar Bulletin

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

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

D. Judge Brown's Resignation from the Council

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

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

IV. Reports Regarding Last Biennium

A. Staff Comments

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

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

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

V. Old Business

A. Committee Reports

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

1. Discovery Committee (Mr. Crowley)

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

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

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

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

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

2. Service Committee (Mr. Goehler)

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

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

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

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

3. Rule 55 Committee (Appendix B)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

objection.

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

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

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

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

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

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

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

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

4. Rule 57 Committee (Ms. Holley)

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

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

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

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

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

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

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

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

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

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

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

B. Rule 47

1. Staff Update (Judge Peterson)

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

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

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

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

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

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

C. Rule 69

1. Staff Update (Judge Peterson)

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

VI. New Business

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

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

<u>Abatement</u>

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

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

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

The Council did not form a committee on abatement.

Affidaviting Judges

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

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

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

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

The Council did not form a committee on affidaviting judges.

Arbitration/Mediation

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

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

Collaborative Practice

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

The Council did not form a committee on collaborative practice.

Expedited Trials

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

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

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

The Council did not form a committee on expedited trials.

Different Rules for Family Law

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

Federalize the Oregon Rules

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

Interpreters

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

The Council did not form a committee on interpreters.

Lawyer Civility

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

Lis Pendens

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

The Council did not form a committee on lis pendens.

One Set of Rules

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

The Council did not form a committee on this matter.

Probate and Trust Litigation

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

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

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

Quick Hearings

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

Remote Hearings

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

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

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

Rules, Generally

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

Self-Represented Litigants

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

Standardized Forms

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

Statutory Fees

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

Trial Judges, Authority of

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

UTCR

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

Vexatious Litigants

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

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

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

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

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

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

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

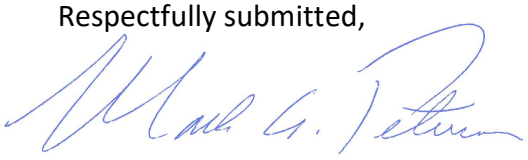
Ms. Nilsson stated that a lawyer friend had forwarded her an email from Legislative Counsel with a survey about a publication that they are considering that would contain the ORCP, the UTCR, the rules of evidence, and the appellate rules. Creating such a publication, minus the appellate rules, was Judge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

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

VII. Adjournment

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

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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				

Council on Court Procedures
January 8, 2022, Meeting
Appendix B-1

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

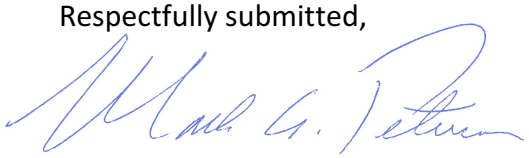
consensus was that a legislative change would be necessary. Judge Norby stated that her sense is that it would depend on what the change was: to limit a person's ability to file would definitely be legislative; to create a procedure for a court to use to try to manage cases would be procedural. Judge 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

D(3) **Particular defendants.** Service may be made upon specified defendants as follows:

D(3)(a) **Individuals.**

D(3)(a)(i) **Generally.** Upon an individual defendant, by personal delivery of true copies of the summons and the complaint to the defendant or other person authorized by appointment or law to receive service of summons on behalf of the defendant, by substituted service, or by office service. Service may also be made upon an individual defendant or other person authorized to receive service to whom neither subparagraph D(3)(a)(ii) nor D(3)(a)(iii) of this rule applies by a mailing made in accordance with paragraph D(2)(d) of this rule provided the defendant or other person authorized to receive service signs a receipt for the certified, registered, or express mailing, in which case service shall be complete on the date on which the defendant signs a receipt for the mailing.

D(3)(a)(ii) **Minors.** Upon a minor under 14 years of age, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the minor; and additionally upon the minor's father, mother, conservator of the minor's estate, or guardian, or, if there be none, then upon any person having the care or control of the minor, or with whom the minor resides, or in whose service the minor is employed, or upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iii) **Incapacitated persons.** Upon a person who is incapacitated or is financially incapable, as both terms are defined by ORS 125.005, by service in the manner specified in subparagraph D(3)(a)(i) of this rule upon the person and, also, upon the conservator of the person's estate or guardian or, if there be none, upon a guardian ad litem appointed pursuant to Rule 27 B.

D(3)(a)(iv) **Tenant of a mail agent.** Upon an individual defendant who is a “tenant” of a “mail agent” within the meaning of ORS 646A.340, by delivering true copies of the summons and the complaint to any person apparently in charge of the place where the mail agent receives mail for the tenant, provided that:

D(3)(a)(iv)(A) the plaintiff makes a diligent inquiry but cannot find the defendant; and

D(3)(a)(iv)(B) the plaintiff, as soon as reasonably possible after delivery, causes true copies of the summons and the complaint to be mailed by first class mail to the defendant at the address at which the mail agent receives mail for the defendant and to any other mailing address of the defendant then known to the plaintiff, together with a statement of the date, time, and place at which the plaintiff delivered the copies of the summons and the complaint. Service shall be complete on the latest date resulting from the application of subparagraph D(2)(d)(ii) of this rule to all mailings required by this subparagraph unless the defendant signs a receipt for the mailing, in which case service is complete on the day the defendant signs the receipt.

D(3)(b) **Corporations including, but not limited to, professional corporations and cooperatives.** Upon a domestic or foreign corporation:

D(3)(b)(i) **Primary service method.** By personal service or office service upon a registered agent, officer, or director of the corporation; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(b)(ii) **Alternatives.** ~~If a registered agent, officer, or director cannot be found in the county where the action is filed, t~~Tᵀrue copies of the summons and the complaint may also be served:

D(3)(b)(ii)(A) by substituted service upon the registered agent, officer, or director;

D(3)(b)(ii)(B) by personal service on any clerk or agent of the corporation ~~who may be found in the county where the action is filed~~;

D(3)(b)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the corporation, if any, as shown by the records on file in the office of the Secretary of State; or, if the corporation is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the corporation; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(b)(ii)(D) upon the Secretary of State in the manner provided in ORS 60.121 or 60.731.

D(3)(c) **Limited liability companies.** Upon a limited liability company:

D(3)(c)(i) **Primary service method.** By personal service or office service upon a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(c)(ii) **Alternatives.** ~~If a registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company cannot be found in the county where the action is filed, t~~Tᵀrue copies of the summons and the complaint may also be served:

D(3)(c)(ii)(A) by substituted service upon the registered agent, manager, or (for a member-managed limited liability company) member of a limited liability company;

D(3)(c)(ii)(B) by personal service on any clerk or agent of the limited liability company ~~who may be found in the county where the action is filed~~;

D(3)(c)(ii)(C) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited liability company, as shown by the records on file in the office of the Secretary of State; or, if the limited liability company is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited liability company; and, in any

case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(c)(ii)(D) upon the Secretary of State in the manner provided in ORS 63.121.

D(3)(d) **Limited partnerships.** Upon a domestic or foreign limited partnership:

D(3)(d)(i) **Primary service method.** By personal service or office service upon a registered agent or a general partner of a limited partnership; or by personal service upon any clerk on duty in the office of a registered agent.

D(3)(d)(ii) **Alternatives.** ~~If a registered agent or a general partner of a limited partnership cannot be found in the county where the action is filed, t~~True copies of the summons and the complaint may also be served:

D(3)(d)(ii)(A) by substituted service upon the registered agent or general partner of a limited partnership;

~~D(3)(d)(ii)(B) by personal service on any clerk or agent of the limited partnership who may be found in the county where the action is filed;~~

D(3)(d)(ii)(~~C~~B) by mailing in the manner specified in paragraph D(2)(d) of this rule true copies of the summons and the complaint to: the office of the registered agent or to the last registered office of the limited partnership, as shown by the records on file in the office of the Secretary of State; or, if the limited partnership is not authorized to transact business in this state at the time of the transaction, event, or occurrence upon which the action is based occurred, to the principal office or place of business of the limited partnership; and, in any case, to any address the use of which the plaintiff knows or has reason to believe is most likely to result in actual notice; or

D(3)(d)(ii)(~~D~~C) upon the Secretary of State in the manner provided in ORS 70.040 or 70.045.

D(3)(e) **General partnerships and limited liability partnerships.** Upon any general partnership or limited liability partnership by personal service upon a partner or any agent authorized by appointment or law to receive service of summons for the partnership or limited liability partnership.

D(3)(f) **Other unincorporated associations subject to suit under a common name.** Upon any other unincorporated association subject to suit under a common name by personal service upon an officer, managing agent, or agent authorized by appointment or law to receive service of summons for the unincorporated association.

D(3)(g) **State.** Upon the state, by personal service upon the Attorney General or by leaving true copies of the summons and the complaint at the Attorney General's office with a deputy, assistant, or clerk.

D(3)(h) **Public bodies.** Upon any county; incorporated city; school district; or other public corporation, commission, board, or agency by personal service or office service upon an officer, director, managing agent, or attorney thereof.

D(3)(i) **Vessel owners and charterers.** Upon any foreign steamship owner or steamship charterer by personal service upon a vessel master in the owner's or charterer's employment or any agent authorized by the owner or charterer to provide services to a vessel calling at a port in the State of Oregon, or a port in the State of Washington on that portion of the Columbia River forming a common boundary with Oregon.