MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, February 12, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Kenneth C. Crowley
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Tina Stupasky
Stephen Voorhees
Margurite Weeks
Jeffrey S. Young

Members Absent:

Hon. Benjamin Bloom
Derek Larwick
Scott O'Donnell
VACANT POSITION

Guests:

Matt Shields, Oregon State Bar

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7	ORCP 1	ORCP 71	ORCP 7		
ORCP 27	ORCP 4	Abatement	ORCP 69		
ORCP 39	ORCP 14	Affidaviting judges			
ORCP 57	ORCP 15	Arbitration/mediation			
ORCP 58	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 9:35 a.m.

II. Approval of January 8, 2022, Minutes

Judge Leith pointed out that the draft minutes of January 8, 2022 (Appendix A), reflected him as being present, but he was not present. Judge Peterson noted two errors in the draft minutes: on page three, the third paragraph on the second line should read "subparagraph D(3)(b)(i)"; and on page 12, the first paragraph should read "ORS 45.400." Mr. Crowley asked for a motion to approve the January 8, 2022, minutes with these corrections. Ms. Dahab made a motion and Ms. Stupasky seconded. The motion carried unanimously by voice vote.

III. Administrative Matters

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

Ms. Nilsson reminded the Council that both she and Ms. Weeks had reached out to the office of Legislative Counsel regarding adding a link to the Council's website on the Legislature's ORCP web page. She noted that both Legislative Counsel and the Legislature's web administrators had been busy due to the publication of the new volumes of the ORS at the beginning of 2022 as well as the beginning of the short legislative session. However, Ms. Nilsson was happy to report that a link had now been added in the explanatory section of what the rules are and how they are enacted. She thanked Ms. Weeks for her assistance in this effort.

B. Article About Council in Oregon State Bar Bulletin

Judge Norby stated that her draft article about the Council intended for publication in the Oregon State Bar (OSB) Bulletin was attached (Appendix B). She noted that, although the OSB has excellent editors, she had run the draft by Mr. Crowley, Judge Peterson, Ms. Nilsson, and Ms. Holley to get some input on editing. The goal was to try to find a way to write an interesting and easily readable article to encourage readership and inform those who might not otherwise know about the important work of the Council. Judge Norby used pop culture references to achieve this goal while still including the information about the Council that the Council's biennial survey indicated many lawyers and judges did not know. She stated that she had received nice comments from those who have read the article that indicate that she may have succeeded, but that she is open for suggestions from the greater Council.

Mr. Crowley asked whether Council members had a chance to read the article. He stated that it was not what he was expecting, but that is an entertaining read that keeps the reader's attention. Judge Jon Hill stated that the article is informative and funny. Ms. Nilsson stated that any time she gets to be Ms. Moneypenny is fine with her. Ms. Holley

made a motion to ask Mr. Shields to submit the draft article to the OSB staff. Judge Leith seconded the motion, which passed unanimously by voice vote.

IV. Old Business

A. Committee Reports

1. Service Committee

Mr. Goehler reminded the Council that the committee has been looking at a potential change to Rule 7 D(3), specifically as it relates to business entities. The issue in question is that there are different procedures for service if the registered agent is located in the county in which the lawsuit was filed. The committee did some research and found that the requirement has been in the rule since its inception as well as in the statute that preceded it, and that it does not seem to serve a purpose. The committee drafted some changes to the rule (Appendix C), basically taking out the county requirement and leaving the service methods the same. The committee had brought some proposed language before the Council at the last meeting, but Judge Peterson had since suggested removing the word "also" in the alternative service section, because that would seem to make it not an alternative but, rather, a second primary method. Judge Bloom had also made that remark at the last Council meeting. Otherwise, the language is the same as the draft that the Council had reviewed at the January meeting. Mr. Goehler asked for any comments from Council members regarding the proposed change.

Judge Peterson noted that subparagraph D(3)(b)(ii) allows alternative service by personal service on a clerk or agent of the corporation, which makes him a bit uncomfortable. He envisioned a scenario where the lowest clerk on the organizational chart could accept said service and the documents would not make their way to an appropriate person. However, he pointed out that this language was in the statute before it became a rule and it apparently has not created any problems so far. Mr. Goehler agreed that, if this language had caused problems some time in the last 50 years, someone would have already raised it as an issue. Mr. Crowley agreed that any such issues can usually be worked through.

Mr. Crowley asked for a motion to move the proposed amendment to Rule 7 to the publication agenda at the Council's September meeting. Ms. Holley made a motion to do so. Ms. Dahab seconded the motion, which was approved unanimously by voice vote.

2. Rule 55 Committee

Judge Norby referred to the committee's latest draft of a potential change to Rule 55 (Appendix D). She reminded the Council that the committee had been working on "plugging a hole" that was left when the Council earlier reorganized Rule 55. The reorganization caused the Council to realize that there was only a process for challenging subpoenas to produce documents without testimony, with no language mentioning whether subpoenas for testimony or other types of subpoenas could be challenged. She stated that she believed that the committee's previous draft fixed that problem. However, that draft did not address the issue that had been brought up by Multnomah County Circuit Court Judge Marilyn Litzenberger, who hoped for a process that could be included in Rule 55 that would allow or create the ability to challenge a subpoena for occurrence witnesses without lawyers, who may not know that they can challenge a subpoena or how to do so. The change that was originally envisioned was to require the back of a subpoena to include a simple fill-in-the-blank motion to quash. The committee looked at the subpoena used in Utah and found it to be quite involved, with a long notice that explains all kinds of things about subpoenas and further points to a kind of motion to quash that comes along with the subpoena. The committee found that this motion to quash was not very clear and came to the conclusion that, perhaps, since the Council does not create forms, the motion to quash form might be a suggestion to pass along to the Uniform Trial Court Rules Committee. However, since the Council can require that something be included with a subpoena, there is a much simpler suggested change from the committee in a new subparagraph 55 A(1)(a)(vi) that requires the following in a subpoena:

> . . . alert the person to whom the subpoena is directed that they may ask a judge to excuse them from a subpoena that creates an unjustifiable burden to appear or contradicts a legal obligation to refrain from testifying, by filing a motion to quash on a form that is included with the subpoena and providing a written explanation; but that compliance is mandatory unless a judge orders otherwise, and noncompliance may be punished by a fine or jail time.

Judge Norby pointed out that, rather than using the word "contempt," which people may not understand without a lawyer's help, this language makes clear that a fine or jail time may be imposed if one does not comply with the subpoena.

Mr. Goehler opined that passing the rule as drafted without some form in place would create chaos for the practitioner. He suggested including required language for the form so that a practitioner could cut and paste a bare bones motion form, as opposed to having each person create their own. Ms. Nilsson suggested something along the lines of the notice language in Rule 7. Mr. Goehler stated

that the language does not have to be extensive, but that it would be helpful to have something, rather than just to say to use a form. Judge Norby stated that she had envisioned that another committee would create such a form but, if the Council likes the concept and agrees that it is worth pursuing language to maybe plug the hole between now and when another committee does create a form, she would be happy to craft that language.

Mr. Andersen supported the idea of form language in the rule. He also suggested that the language "contradicts a legal obligation to refrain from testifying" may not be understood by non lawyers. Judge Norby stated that she believes that most people know what the spousal privilege is, and that most social workers with clients, for example, know that they have a privilege with those clients that would entitle them to refrain from testifying. Therefore, she believes that the people to whom it would pertain would know what the language means. Judge Peterson remarked that one might need to show up at the time set to testify and exert a privilege when it comes time for questions that violate the privilege. He noted that it should be absolutely clear that one cannot simply say that they are not showing up, and that one must appear to exert a privilege. Judge Norby noted that this language was not in her original draft, but that the committee seemed to want to have it covered, so she included it. She stated that she would be happy to remove the language regarding privilege if the Council did not want it there. Judge Norm Hill suggested solving the problem by describing it as a right or obligation not to testify, so as to cover both a privilege that one holds and a privilege that someone else holds that needs to be resolved before one is actually required to testify. The Council crafted the following language: "because it creates an unjustifiable burden to appear, or the person has a right or obligation to refrain from testifying."

Judge Peterson reiterated that even a privilege does not excuse one from appearing, and that one could still potentially testify to matters that are not privileged. Judge Norby pointed out that the motion would be denied, unless the privilege was outright, like the spousal privilege. Judge Norm Hill noted that judges would still want witnesses with partial privilege to raise the privilege as soon as possible to create an avenue for the court to deal with it. He agreed that it should be very clear that the motion to quash does not relieve a witness of their obligation to appear and participate.

Judge Jon Hill thanked the committee for its excellent work. He stated that he believes that there should be two phases: 1) creating the rule; and 2) creating the form. He opined that slightly different language will be required in order to be understandable to everyone. He stated that the Council can agree on the first part, but the form might require another committee because he does not have the insight as to what it should contain. Judge Norby stated that she thought that any language should be prefaced with "as follows" or "in the following language."

She suggested that she could look at the language in Rule 7 and see how it leads into the required notice language there, and bring back a suggestion to the next Council meeting.

Judge Peterson stated that the committee did look at several other jurisdictions, including federal court, and a lot of them pull certain subsections of their subpoena rule and include them. He stated that he still liked the idea of a one page or half sheet for Oregon, as opposed to the many-page options used in other jurisdictions. Judge Norby agreed. She asked whether there was any opposition to the concept of adding the motion language, or any other part of the suggested amendment, from Council members.

Mr. Bundy stated that he did not necessarily have an objection to the new language, but that he wondered what the practical ramifications would be with respect to potentially having many completely illegitimate motions to quash filed. He also expressed concern about the timing of the motions, as he presumes that they apply to every kind of subpoena. He questioned whether those issuing subpoenas should be required to include a form when Multnomah County has so many forms already available and the subpoena recipient could potentially be directed to a court website to find the motion. Mr. Bundy asked Judge Peterson whether this is the kind of form that Holly Rudolph with the Oregon Department of Justice (OJD) would usually be responsible for creating. Judge Peterson stated that such a form could possibly be created by the OJD, but that this would be a higher threshold for the occurrence witness having been handed a subpoena to undertake than having the form included on the back of or with the subpoena. He agreed with Mr. Bundy that the floodgates argument is not an unreasonable concern.

Judge Norby stated that she had also been concerned about the floodgates, and that she had at first been resistant to including motion language in the rule. However, as she has thought more about it and listened to others talking about it, she realized that this is a frequent fear of all lawyers and that it does not always manifest. She opined that the Council should not avoid doing the right thing simply because it might lead to some people trying to take advantage.

Mr. Andersen stated that Mr. Bundy's point was a good one. He brought up the issue of sending subpoenas to medical offices to produce records, or other such subpoenas that are almost universally obeyed. He expressed concern that, in an effort to make it easy for a few people to be able to challenge a subpoena, the Council may be creating a bigger problem than it is solving. He recommended studying the experience of Utah and other states. If they are not having any problems, that is fine. However, sometimes problems do not surface in appellate decisions, and not necessarily even in published reports.

Judge Norby respectfully disagreed with the example of an organization potentially taking advantage of a change to the rule because, when organizations have lawyers, they consult with those lawyers and realize that they will have to produce documents or appear. It would be a waste of time and money to pay a lawyer to fight a subpoena. She opined that it would not become a problem that hospitals and other such organizations would suddenly start taking this as an invitation to not do their duty. Judge Bailey agreed with Judge Norby that the floodgates would not open. He recalled that, when a change to Rule 55 was originally discussed, the idea was to give an opportunity for some subpoena recipients to at least alert the person issuing the subpoena and the court that there may be a privilege out there but, at the same time, to make sure that person knows they need to appear and that there are consequences if they do not. He agreed with the proposed rule change. In terms of the form, he stated that he understood everyone's perspectives, but that he did not believe that the courts should be worried about the floodgates so much, because the change would actually open a dialogue and could prevent some of the issues where courts have to delay hearings or trials because a witness does not show up when they were properly subpoenaed.

Mr. Bundy stated that his concern is more about the low threshold and that, just by having the form there, a lot of lay people may assume that they can fill it out and not appear. He noted that it is already taking some time to get motions heard, and that including the form for the motion could delay proceedings even further. He also stated that some of the ORCP allow for "reasonable notice" for appearance and, without a rule further explaining the timelines involved with submitting a motion to quash, it could create problems. He stated that he does not have a problem alerting someone that they have rights, if they can be directed to a court website or something similar to access the form. Judge Norby stated that the committee had addressed Mr. Bundy's concern about a subpoenaed party misunderstanding that submitting the form gives them a valid reason not to appear by including language about not appearing being punishable by fines or jail time unless a judge has agreed. She noted that people are pretty motivated by wanting to avoid jail time.

Ms. Stupasky suggested changing the language in the draft to, "Alert the person to whom the subpoena is directed that they may file a motion to quash the subpoena by using a form, that is substantially similar to the form in Appendix ... , to excuse them from the subpoena if it creates an unjustifiable burden, but that compliance with the subpoena is mandatory unless a judge orders otherwise, and noncompliance may be punished by a fine or jail time." Judge Bailey supported this language and stated that it is a good way to ensure that the person being subpoenaed knows that their obligation still stands unless the court says otherwise. He stated that this was also part of the reason for the rule change.

Judge Norm Hill noted that Ms. Stupasky's suggestion blends the two concerns: alerting the subpoenaed person, but warning them of the obligation to appear and the consequences if they do not. He noted that Mr. Bundy did not object to a form but, rather, that the form should not be printed and attached to the subpoena. He stated that the question then becomes whether the Council wants to take Ms. Stupasky's view and create the form language and include it within the body of the rule, or whether it wants to leave that ostensibly to OJD's forms process to develop a form that would ultimately be used statewide. Judge Norm Hill stated that he thought the Council could have a fairly high expectation that this would happen.

Judge Norby suggested giving her a chance to put together some "motion to quash" language to include with a subpoena, because it may make a difference once the Council reviews that language. If it looks like the language is too much, too little, or that the language should not be included at all, it is easier to strike language than to add it back in. She stated that she felt that she had good direction, and that she very much appreciated hearing where the quasi opposition might lie, because that is very helpful. She also appreciated Ms. Stupasky's suggested language.

Judge Peterson stated that he thought that it was appropriate to contact a presiding judge or trial court administrator in Utah, and that he was happy to do so. He also mentioned that, under Rule 17, if one files something that is not well founded in fact or in law, one can be assessed attorney fees. One idea might be to include attorney fees in the motion as a disincentive for filing frivolous motions to quash.

Judge Norby stated that the committee would meet again to review any new language that she drafts, and that she looked forward to bringing a new draft to the Council in March.

3. Rule 57 Committee

Ms. Holley reported that the committee had met and that she had created a draft of potential amendments (Appendix E). She stated that Judge Norby has made some great edits to the proposed language in section D of the rule regarding peremptory challenges. Ms. Holley also received some individual suggestions that helped improve the amendments. She included Judge Oden-Orr's proposed language from the last Council meeting regarding rehabilitation of jurors in the "for cause" challenge area of the rule. She reported that the committee/workgroup had not yet met to consider the draft, nor potential changes to Rule 10, so she felt that everything was still in a preliminary phase.

Ms. Holley stated that Representative Marty Wilde had reached out to her about

his new bill before the Legislature (Appendix E) that would include the jury selection language from ORCP 57 in the criminal jury selection statute (chapter 136 of the Oregon Revised Statutes). She noted that Rep. Wilde's bill ran counter to the committee/workgroup's and Council's preference to have criminal and civil jury selection track together. Ms. Holley let Rep. Wilde know that the bill does not go as far as the Council wanted to go, but that the real concern is that separating criminal and civil jury procedures could potentially create a situation where the rules are inconsistent and give the impression that it is acceptable to discriminate in civil trials, but not in criminal trials, or vice versa. Rep. Wilde stated that he had only separated criminal trials because he did not want to interfere with the Council's work, and he was fine with just making a proposal for changes to Rule 57. Ms. Holley reiterated that she does not believe that such a bill would interfere with the Council's work, as it is not contrary to what the Council is attempting to do, but that it just does not go as far as the Council would like it to.

Ms. Holley also spoke about Washington County District Attorney Kevin Barton's proposal (Appendix E) of a sort of two-tiered concept for peremptory challenges that attempts to implement a "blind" first step. This first step would consist of a questionnaire that, to the extent possible, does not include names or any indicators of any of a juror's protected characteristics. This would shield the parties from having any knowledge of a potential juror's race, sex, ability, disability, religion, etc. The parties would designate their potential challenges in the first, "blind" step of the process, and the second step would allow for voir dire and the exercise of peremptory challenges. The idea is to prevent, at the outset, discriminatory bias from being part of the process. If a party changes their decision during step two, it would be more obvious that the change might be for a prohibited reason.

Judge Norm Hill stated that there are issues with Mr. Barton's proposal, but acknowledged and appreciated that it had begun to move the ball forward and inject some objectivity into what is otherwise a inherently subjective process. Judge Norm Hill stated that the committee/workgroup had talked about trying to find a mechanism that allows for the determination of whether or not there is some implicit bias involved in the exercise of a challenge that goes beyond *Batson*. He noted that there is no rule that can tell a judge whether or not someone's decision was based on implicit bias, because that is inherently subjective. Mr. Barton's structure at least starts to provide a framework to have parties give their initial impressions up front and, if those initial impressions change later after gender, race, and other factors have been revealed, it helps narrow the judge's ability to pinpoint potential bias. While not perfect, it does create a concept to think about in moving forward.

Ms. Holley asked Judge Norm Hill his thoughts on the new proposed language in ORCP 57 D(4)(d), which she had changed since the committee/workgroup

discussion based on Judge Norm Hill's comments to have the standard be whether the challenge contributes to a heightened probability of implicit bias impacting the rights of the parties, rather than trying to read the mind of the person making the challenge. She noted that committee/workgroup member Aruna Masih had also suggested including language about impacting the rights of the jury, but that language had not made it into the draft before the Council. Ms. Holley noted that the real concern is a bias that would interfere with the judicial process, not people's secret thoughts, which are less of the problem. Judge Norm Hill stated that this language is better than prior language that said that judges must ferret out any bias. The flip side to that then becomes the question of why a litigant exercising their peremptory right should be obligated to take into account the impact that their decision would make on the larger community. While Judge Norm Hill felt that the language in the draft was better than previous language, he still felt that it needed work. He noted that the work is incredibly hard, but very important.

Judge Bailey talked about a process put in place by some symphony orchestras that has some relevance to the process proposed by Mr. Barton. Symphonies wondered whether they were making hiring decisions for reasons they should not be, so they started to put up a screen or have musicians who were auditioning sit in another room so that the hiring committees could not see or have a conversation with the auditioning individuals. The symphonies discovered that diversity was boosted when this blind audition process was used. (*https://www.theguardian.com/women-in-leadership/2013/oct/14/blind-auditions-orchestras-gender-bias*) This is similar to Mr. Barton's proposal, where there is a presumption, if you will, that certain individuals would have been removed "blindly," which creates a map for potentially biased reasons for removal in the next step.

Judge Jon Hill stated that he thought that the proposal was interesting, but that there might be some challenges in having the jury in one room and the attorneys and the client in another room in terms of whether a potential juror knows any of the participants. However, he stated that those logistical issues could likely be worked out. Judge Bailey noted that this would be taken care of in step two of the process. Step one would be to get the initial information about the juror that an attorney might use as criteria that they think would not make for a good juror for their client. Ms. Holley agreed and stated that phase one would be the blind phase, and phase two would be where the jury pool would be brought in to do the regular jury selection, where the jurors and participants can see each other. If someone changes a challenge from phase one to phase two, it calls more into question whether there is a bias that is implicated. Judge Oden-Orr noted that remote jury selection with blank computer screens could be another way to go. Ms. Holley agreed that this is true; however, some members of the committee/workgroup had raised the concern that names can sometimes identify

people based on nationality, and voices can sometimes identify people based on sex. There are a number of reasons that having just the worksheet as the preliminary blind step is more anonymous.

Judge Bailey stated that the committee/workgroup also had a question about whether there is a due process issue, especially in criminal cases, in terms of whether the defendant has a right to see the eyeballs of the jurors in making their jury selection decisions. He stated that this was also part of the reason that it was felt that there needed to be two steps. Judge Norm Hill stated that he wanted to clarify whether the blind questionnaire would be unique to each case – a document that the lawyers put together ahead of time so that the questions are not just generic. Judge Norm Hill opined that the current, generic jury questionnaires are almost useless, but that a case-specific document, where the parties would have to submit questions to the court that they might otherwise be asking in a live voir dire, might be more helpful. Judge Bailey stated that he did not recall a discussion of how the questionnaire would be formulated. He stated that he thinks that crafting case-specific questionnaires is an interesting concept because more serious cases already do have their own questionnaires.

Ms. Holley stated that Mr. Barton had indicated that his concept envisioned a form that could be available in Odyssey and distributed electronically. She noted that parties could potentially add questions to the standardized form. Judge Peterson agreed and pointed out that one of the bullet points in Mr. Barton's outline indicated that form could be standardized for a particular kind of trial so that the questions would be more useful.

Mr. Bundy stated that he submits detailed juror questionnaires like this routinely. He noted that some judges do not allow it, but he always tries to make the argument that it might help with jury selection. He pointed out that there are many timing issues associated with jury questionnaires and that there is rarely time to get through all of them. He stated that he is not necessarily opposed to Mr. Barton's idea. However, in his 27 years of experience, he did not recall looking at a jury questionnaire and absolutely ruling out a potential juror. He has used the questionnaires as a tool to make notes about follow-up questions to ask during voir dire. Therefore, in step two of Mr. Barton's process, all of his peremptory challenges at the time of voir dire might suggest that he was somehow changing his decision when he was not. However, he agreed that the idea was worth discussion. Judge Bailey agreed that the current, generic juror questionnaires are pretty unhelpful, and that Mr. Bundy's experience may be partly due to that. He stated that part of Mr. Barton's concept would be an attempt to make jury questionnaires more specific and more helpful. Mr. Bundy explained that he does create his own jury questionnaires that are very detailed, and he agreed that the standard forms are totally unhelpful in determining whether or not someone is going to be an appropriate juror in a case or not.

Judge Bailey stated that it has been 15 years since he had been an attorney in a trial. However, when using the questionnaires during child abuse cases in Washington County, he would presumptively bump people over 60 years of age and under a certain educational level because, statistically, they would not believe victims in child abuse cases. He stated that the proposed initial "blind" questionnaires would give some provisional ideas of who attorneys would already be prepared to strike. If a potential juror was on that list and the attorney challenged them, it was likely not based on a protected characteristic. This is easier for the court than the current method. He agreed with Judge Norm Hill that there are inherent biases that happen when judges try to read the minds of attorneys, and problems that arise when lawyers are accused of bias, which can be hurtful when that was not the intention.

Mr. Andersen stated that he is all in favor of the committee/workgroup's goal of eliminating potential bias based on protected characteristics from jury selection. However, he opined that the answer is not a lengthy questionnaire, or even a short questionnaire. He stated that he does not use juror questionnaires, simply because he wants to see the facial expressions of the potential jurors answering the questions.

Judge Oden-Orr pointed out that the questionnaire as "standard" practice would be problematic in a large county like Multnomah where, in non-pandemic times, 500 people show up to be sent out for trials randomly on the day of service. He stated that he thought it would be useful for special jury panels. Judge Jon Hill agreed that those logistics would be troublesome. Ms. Holley stated that her understanding of Mr. Barton's concept was that the questionnaire would somehow be sent out electronically to potential jurors ahead of time, and they would submit the answers ahead of time. She acknowledged that the reality of people actually doing that might be unlikely, but noted that potential jurors do sit in the jury selection room for some period of time. If the questionnaire was available electronically, people could complete it on their cell phones while waiting.

Judge Norby agreed that the questionnaires would have to be filled out in advance because, if there was going to be a rating system to be applied, the court would not want the jurors to be kept waiting while the court filled it out, gave it to the attorneys, and the rating system was applied. Judge Leith stated that, while this is an important project and a meritorious objective, the Council must keep in mind whether it is creating an overly cumbersome and time-consuming process. Right now, under the existing voir dire process, a one-day jury trial is not uncommon in many criminal cases. He stated that he worries a little bit about a blind questionnaire system being implemented and putting an end to efficient, one-day trials. Judge Norby agreed with Judge Leith's point. She suggested perhaps creating an option to waive whatever process is created for those who

just want their trial to get through. She stated that the main goal is to protect the parties and, while we want to be able to supply citizens with opportunities to be jurors, the key is that the parties get the justice that they deserve and seek. Ms. Holley stated that Ms. Masih had made a good point that the juror also does have a right to not be excluded based on a constitutionally illegal reason, so it is not just the parties to consider, it is also the jurors.

Judge Norby asked about the concept of juror rights. She pointed out that the judicial system was created for due process for parties and litigants. While jurors have a function, beyond the human rights that everyone holds, she did not know that becoming a potential juror invests a person with rights. Judge Norm Hill stated that there is case law on the issue [*Powers v. Ohio*, 499 U.S. 400, 406 (1991)]. He observed that serving on a jury is a citizen's civic right. Judge Bailey noted that U.S. Supreme Court Justice Neil Gorsuch also talks about the rights of potential jurors not to be excluded for certain reasons in *Ramos v. Louisiana,* 140 S.Ct. 1390 (2020).

Judge Norby wondered, if a juror has a right to serve, how the Council can justify parameters at all. She wondered what a potential juror's remedy would be if they felt discriminated against by having been excused, but neither party objected, and what the mechanism would be for a juror to manifest a request for remedy. Ms. Holley stated that, conceptually, it could be a 42 USC §1983 claim. However, the idea is that it is not just the blanket right to serve; it is the right to be free from discrimination under the equal protection clause. Judge Norby noted that people have equal protection rights as humans, period. Those rights do not arise because they are jurors. She stated that she would continue to think about where the line is between human rights, which exist for all of us, and rights one may have just because they received a jury summons.

Judge Bailey stated that an issue that arose during the committee/workgroup meeting was how much the Legislature is willing to pay for the diversity that it wants the Council to seek. For example, there has been discussion about expanding jury pools and juror pay to get a better cross section of the population, because there are many lower-income people who choose to ignore a jury summons because they cannot afford to lose a day or more of pay by showing up for jury duty. Another issue is that jurisdictions always feel like they are in such a crunch to get trials done and, in this rush to choose juries, the time is not taken that, if it were, might help to choose a better cross-section of the population.

Mr. Hood wondered whether the language prohibiting a party from exercising a peremptory challenge based on a status protected by discrimination law might also cause those topics to become off limits for any discussion with jurors in voir dire. If so, he stated that it seems to him that the use of any of these protected categories as a negative in order to exercise a peremptory challenge would be a

violation, whereas allowing someone to be included for one of these reasons would not be a problem. Ms. Holley stated that this had occurred to her. She noted that, ultimately, the point is to create a more equitable justice system and to acknowledge that it has had an oppressive effect in some ways. She wondered whether it would be valuable to make sort of a preliminary statement like some of the other states have done, such as, "Oregon recognizes that, historically, the justice system and jury selection has created some kind of oppressive effect, and this rule is intended to create more equitable administration, particularly regarding certain protected characteristics." She stated that she was not certain that this would resolve the concern but, to the extent that the discussion is about more equity with regard to the protected statuses, it does not seem like that would be a big problem. Judge Oden-Orr stated that he agreed with the concept of a simple preliminary statement in proposed paragraph D(4)(a) that could be as simple as, "Under the equal protection clause of the Constitution, citizens have the right to serve on a jury."

Judge Norm Hill stated that Ms. Holley's draft includes language about juror rehabilitation that, in his view, is unworkable because it means that he will never get a jury seated. He posited that, once a juror figures out the magic phrase, "I cannot be fair," it means that suddenly no juror can be fair, particularly in a four-day sex abuse case. He stated that he does understand the problem with juror rehabilitation, but expressed concern that taking away the judge's discretion to be able to truly inquire about a juror's ability to be fair is too broad of a brush. Ms. Holley stated that the number one concern she has heard from lawyers about amending the jury selection process is that there is too much juror rehabilitation. Judge Hill stated that they are not wrong about that, and that this is the case for many judges. He stated that, especially early in his career, he was much less likely to let a potential juror out and really tried to rehabilitate people because he had a burning desire to get the case going. As he has gotten a little more mature, he is much more likely to defer to the potential juror's decision making. However, he believes that this may be an issue of judicial education. Judge Norm Hill opined that the bigger picture issue is to get people serving on juries, and that most judges have the motivation of not wanting to declare a mistrial because only half of the people who were subpoenaed showed up. He stated that he thinks that some discretion for judges needs to be built into the rule. Judge Oden-Orr stated that, if the "no rehabilitation" language was based in part on his suggestion at the last Council meeting, that was part of a three-step process: (1) eliminating peremptory challenges; (2) limiting juror rehabilitation; and (3) increasing the categories for implied bias as reflected in ORCP 57 D(1)(c) through (f). He stated that limiting juror rehabilitation cannot be done in isolation.

Judge Oden-Orr noted that Mr. Hood had asked about whether talking about race and racism in a case where race and racism are likely issues would be off limits. Judge Oden-Orr gave the example of a Black potential juror who says in voir dire

that all police are mean and evil and hate Black people. In a criminal case, he thought it unlikely that this potential juror would stay in the pool, because they could not be fair. They would be stricken not because they are Black, but because of the views that they hold. He stated that the idea is that one cannot assume that a person has a particular view or will have a particular position on an issue simply because of their gender or their race, and a real voir dire and strike process would reflect that the lawyers are making their decisions based on expressed issues as opposed to bias based on a protected characteristic. Ms. Holley stated that, in the committee/workgroup, the example of a member of the Proud Boys organization had come up. A lawyer might strike that person because of stated beliefs that would impact their ability to be fair in the case, not because they are white. Judge Oden-Orr stated that, from his perspective, the goal is to have potential jurors be removed based on evidence that is determined in voir dire, not an impermissible basis.

Mr. Hood explained that his concern was more whether the process could be used in the other direction. For example, if it were a criminal case with an assault against a transgender woman, could a lawyer try to elicit testimony from prospective jurors about whether or not they are transgender? Can they even inquire about that as a means of selecting that person or not selecting them, so to speak? Ms. Holley stated that the committee/workgroup had discussed whether there should be language that applies the rule to retaining a juror as well as excluding a juror. She stated that she had not heard a strong reason to apply a *Batson*-type challenge to including a juror, but that she was open to hearing something like that. Mr. Hood stated that he was not necessarily suggesting language to that effect. However, he stated that the practical effect is whether there is any inquiry at all allowed in someone's objections as well. Judge Norm Hill stated that, if the question is about status and only status, that is different than if the question is designed to try and discover that person's lived experiences that may influence the way that they view the evidence. He stated that the latter type question should be fair game. Mr. Hood stated that this is a great point. He stated that the language that is used, if it is included, should reflect or make that distinction. Judge Oden-Orr stated that he thought that Mr. Hood's example would be fair, because it creates the record. For example, if Mr. Hood were asking him questions, there is nothing in the record that establishes that he is African American, so Mr. Hood might want to say or acknowledge race at some point, just for purposes of the record. So he might ask, "Do you identify as African American?" Or, in Mr. Hood's example, "Are you a transgender woman? Do you have friends or family who have this identity?"

Mr. Andersen returned to the topic of juror rehabilitation. He stated that he can certainly appreciate the worry that Judge Norm Hill expressed that, once a juror is excused, it can create an easy exit for other jurors. He stated that he believes that there are two solutions to help prevent that, and he has not seen judges use

them. First, when a juror is challenged for cause by one of the attorneys, instead of the judge stepping in and try to rehabilitate, clothed with the power of the robe, why not let the opposing attorney attempt to rehabilitate, which is more likely to get an honest answer than the authority of the judge almost compelling an answer that will rehabilitate the juror? Second, take it under advisement until the end of jury selection, and then make those rulings. That way, other jurors do not know whether it is an exit or not. Mr. Andersen stated that he believes that it is crucial to reduce what he has experienced as judicial abuse of juror rehabilitation. Judge Norm Hill agreed, and stated that he has used the technique of deferring quite a bit. However, he stated that he believes that this is a judicial education problem. He stated that it is a judge culture that has gone back a long way and that, rather than trying to anticipate every issue that could come up and creating a rule that potentially and unnecessarily creates appealable issues, it is better to leave the issue of juror rehabilitation out and task the Oregon Judicial Department with making sure to provide the education to equip judges to be sensitive to the issues and have the kind of tools that Mr. Andersen is describing to make the jury selection process work.

Judge Oden-Orr asked the other judges about their process for voir dire. He stated that he does all of the strikes in chambers. He tells the lawyers in advance that, if there is someone that they want to challenge, they must say the magic words, "Does your honor wish to inquire?" He wondered whether all judges do that. Judge Jon Hill stated that he does the same thing and has the lawyers ask whether he wants to inquire or turn to look at him. He stated, however, that he is much more willing to release a potential juror who says that they cannot be fair and impartial. For example, if someone says they cannot be fair and impartial based on their views about alcohol and drinking and driving, he would not try to rehabilitate them. He stated that this is why he wondered about the language in the draft and that perhaps the workgroup/committee should think about how much judges try to rehabilitate. Judge Norm Hill tried to put into context what he means by "rehabilitate." He gave an example of a lawyer asking the panel how many people are uncomfortable and how many people think they cannot be fair and impartial. In a sex abuse case, there may be five people who raise their hands, and Judge Hill will explain that no one in the room really wants to be there, but dealing with such uncomfortable things is part of their job. He stated that he also talks about the importance of jury service, and defines what it means to be fair and impartial: if the potential juror cannot decide the case based on the evidence that they hear in the courtroom, and cannot apply the law that is going to be provided, it appears that the juror cannot be fair and impartial. There may be something in their background that will prevent fairness and impartiality. He will then have a conversation with each juror to ask them about it. Judge Hill noted that the one downside to not excusing a juror who cannot be fair and impartial is that it almost invites the other side to have to have a conversation with the judge, and sometimes that can poison the panel. That is the flip side to rehabilitation, and

each case is different because each juror's response is different. Judge Norm Hill stated that he is really concerned about the Council creating a formal structure because, inevitably, there will be situations that were not anticipated that will create bigger problems than simply giving judges the feedback that they are not doing what they think they are doing. He agreed that judges need to step up their game with regard to juror rehabilitation.

Ms. Stupasky recalled her first trial as a young attorney, where a potential juror was clearly biased and the judge instructed the potential juror, "If I tell you that you need to be fair, you will be fair." The juror, of course, agreed. Ms. Stupasky stated that she then lost the challenge for cause and she could not believe it. She stated that, throughout the next 30 years, she has seen the same thing happen time and time again, where it is clear that a potential juror cannot be fair, but the judge simply instructs them to be fair, and the juror agrees. She stated that, from what she is hearing from the judges on the Council, that may be changing, but she certainly has not seen it. She stated that she feels that it is something that needs to be addressed, because it is terribly unfair when a judge does that.

Ms. Holley stated that perhaps the language could be changed from "may not rehabilitate" to "may not instruct jurors to be fair," or something along those lines. Judge Leith agreed that this could make sense. He stated that his purpose in engaging with a juror who makes a statement that, on its face, makes it sound as though they could not be fair, is not to try to bully them into changing their opinion. However, he likes to clarify the statement. The potential juror may have been led down a primrose path by a questioning lawyer, and they did not really mean to say that they would believe every single thing a police officer said. They may have intended to say more generally that police officers probably have a lot of experience and training. Sometimes that clarification will reveal that the juror is not biased, and sometimes it will reveal that they are just trying to get out of jury duty. If it is the latter, the judge wants to at least put them on the spot and force them to say that out loud. Those jurors may then be excused, but every other juror gets to see that they were sort of shamed in the process, and they are less inclined to make similarly irrational claims.

Mr. Bundy stated that most trial lawyers have experienced Ms. Stupasky's situation. He explained that he has had the opposite experience, where it seemed like people were excused and he could not figure out the reason why there was cause. He stated that he believes that this also highlights how important it is to preserve peremptory challenges. He agreed with Judge Norm Hill that judicial education is important, and stated that it is really up to the bench to deal with this issue. He stated that he did not believe that creating any rule or language would fix the problem.

Judge Norm Hill stated that, as a lawyer, he had also experienced Ms. Stupasky's

situation of a judge rehabilitating a potential juror who was clearly biased. He noted that this resulted in a clearly irritated potential juror on whom he had to burn one of his peremptory challenges. He agreed that judges need to be better educated to not do that. The flip side, however, would be the example of a visiting judge in his county who was presiding over a two-day sex abuse case and requested 100 jurors. The first thing he did was to bring in the potential jurors, ask if any of them was uncomfortable and wanted to go home, and released anyone who raised their hand. The judge's thought was that he did not want any jurors who would not be comfortable with the facts of the case. Judge Hill stated that his immediate thought was that the composition of the jury panel was now changed to where the only remaining potential jurors were enthusiastic about serving on a sex abuse case. He stated that, if he were the defendant on that case, he would probably not like that panel. Judge Hill pointed out that juror rehabilitation cuts both ways. He stated that, to come back to the horse that he has beaten to death, the key to all of these issues is to get the courts better jury panels to start with.

Ms. Holley stated that the Council has had numerous conversations about the practices of reasonable attorneys. However, she posited that perhaps the rule needs to be take into account the outliers who are not engaging in fair practice. She noted that she had not talked to the committee/workgroup about potential changes to ORS 10 yet, and suggested postponing discussion on that until the next meeting. She thanked the Council for its helpful feedback and stated that she would take it back to the committee/workgroup.

4. Remote Hearings

Mr. Andersen stated that the committee had not met. He shared his screen to show a potential amendment in progress to ORCP 39 (Appendix F) that reflected both what the committee discussed at its last meeting and what the Council discussed at its last meeting. He explained that the changes would basically add "deposition or trial" and strike out "telephone," as well as add the words "remote means." A second section would be added to define "remote means," and replace "telecommunications" with "electronic communications," using section 3 of UTCR 5.050 to define "remote means." Paragraph (c) states that a request for remote location testimony must be made within the time allowed by ORS 45.400, which was a concern of the Council. Mr. Andersen also showed potential changes to ORCP 58 (Appendix F), which governs trial. The proposal is to add a new section to state that testimony may be taken either in person or by remote means as provided in ORCP 39 C(7).

Judge Peterson observed that Rule 39 concerns depositions, and that this potential amendment would be an expansion of that. He noted that the same effect might be achieved by just the amendment to Rule 58, which would say that the Rule 39 procedures would apply for remote testimony at trial. Mr. Crowley

seconded Judge Peterson's concern and noted that Rule 39 is a discovery rule and that it does not seem appropriate to have trial procedures incorporated into it. He stated that trial testimony should be dealt with separately in a different rule. Mr. Andersen stated that the point was well taken, and that it would be easy to modify the Rule 39 amendment and put the trial portion into Rule 58.

Judge Norm Hill pointed out that the amendment to Rule 39 A, as drafted, may mean that parties could stipulate to a remote trial even if the court does not agree. Mr. Andersen agreed that this could be an issue. Judge Norm Hill noted that there could be a situation where one party wants a remote trial and one party does not. He stated that there are concerns from a trial standpoint that may also apply to depositions. One such concern is very troubling: that people testifying remotely may not be alone. There is no effective way to police that. In some cases it may not be as big of a concern, but in others it is crucial. He stated that, the way the amendment is drafted, it is not certain there is a good avenue to ferret out such issues and ensure that a fair hearing occurs. Judge Peterson agreed that the court should probably have a bigger say in testimony at trial.

Mr. Crowley agreed with Judge Norm Hill and Judge Peterson. He stated that he had been present for video depositions where he had learned halfway through that there was someone else in the room. That is disconcerting, to say the least. After having been through that experience, his office has been very careful in addressing that concern in any subsequent video depositions, which have been very frequent over the last year or so due to the pandemic.

Judge Norm Hill stated that he had missed the previous meeting and wondered whether there had been any discussion about dealing with jury selection by remote means, particularly for civil cases. He observed that, even after the Covid-19 pandemic is over, there may be a move toward doing so, and that there are some advantages to it. He conceded that it may be too much for the Council to tackle at this time, but wondered if it was worth discussing. Judge Jon Hill opined that it would be a bridge too far right now, because the courts have many technological issues to work out simply regarding remote appearances. He did agree that remote jury selection would likely be an issue to address in the future but, with so many unanswered questions around the technology for both the courts and the potential jurors, this may not be the time. Judge Norm Hill stated that he had raised the issue because he knows that Multnomah County had done at least one or perhaps two civil trials during the pandemic when they had difficulty gathering people in person. He stated that the presiding judge and others are interested in starting to explore the possibility and that other jurisdictions, such as the Seattle area in Washington, have been doing it with some regularity and perceived success. He stated that he was not suggesting an amendment requiring it but, rather, exploring giving some guidelines on how it should be done. He noted that it may be that it is way too much for the Council to

do this biennium, but it may make sense to have a look at how it might work for civil cases. Judge Jon Hill agreed that Judge Norm Hill's points were valid. He suggested that the committee attempt to draft a rule, but observed that it is a pretty big lift. Judge Peterson stated that the committee could take a look and try to flesh it out and, if it is not viable this biennium, it could be put on the agenda for next biennium.

Judge Bailey agreed that the deposition and trial rules need to be separate, because the changes to the trial rule will probably need more details to be helpful for the court. He noted that, during the Covid-19 pandemic, the courts have been forced to expand on what is allowed, and he has been in favor of such expansion, while other judges have been resistant. He stated that the goal is to craft a good rule that gives details of how things need to be done and puts the requirements on the parties as to what resources they need to make sure their witnesses will have sufficient video capabilities and that they will be alone. The rule must also allow the courts to monitor and enforce things, and ultimately allow more video appearances to save parties and witnesses money and time. He stated that it is a burden on people to take off three or four hours from work, not knowing when or if they are going to testify, and not really getting paid a whole lot of money to do it. He emphasized the importance of passing an amendment this biennium.

Judge Norm Hill agreed and stated that he would be happy to join the committee and assist. He emphasized the importance of building an enforcement mechanism into the rule. He stated that his assumption as a young lawyer, and now as a judge, has been that judges have a lot of authority to monitor and to assess sanctions, to do things when people do not follow the rules, and to try and make things fair. However, recent cases are suggesting that, unless a judge has an actual order that specifically provides that they have the authority to, for example, strike someone's testimony if they do not follow through with the court's order, the judge may not have the authority to enforce that order. He stated that he strongly supports explicitly including the potential consequences for not complying and the court's authority to enforce whatever rule the Council drafts. Otherwise, the rule may end up being unenforceable if it goes up on appeal. Judge Norm Hill agreed with Judge Bailey that the rule should address how remote hearings are agreed to, how the testimony should appear, and an explicit enforcement mechanism.

Judge Bailey strongly endorsed adding an enforcement mechanism. He also stated that he would like to see a provision stating that testimony may not be delayed as a result of a party's witness not having the facilities or the resources to appear remotely. This would put the risk on the party to prepare their witness ahead of time and avoid situations where the attorney has not spoken with the witness regarding these issues and the court has to waste 15 or 20 minutes while the technology problems are worked out.

Mr. Bundy expressed concern about selecting juries remotely. He stated that there may be real issues with diversity and inclusion if such a change were to be made. He noted that the assumption is that everyone has a laptop, but many indigent people do not, nor do they necessarily have internet access, whether due to economic disparity or a lack of internet availability in their area. Judge Norm Hill pushed back gently. He stated that one of the reasons that he is in favor of remote jury selection is because he believes that it does allow for more inclusion. Currently, in order to participate in jury service, a potential juror must take time off work, usually the entire day. With remote jury selection, if a potential juror has a cell phone, which most people do, they would not have to take off the entire day. He noted that the inclusion issue cuts both ways, and that sometimes we think that the digital divide is bigger than it actually is. He stated that his experience on that is based on indigent people in criminal cases whose feedback indicates that they love the ability to be able to appear remotely by cell phone. Technology has had the effect of making court appearances easier for indigent persons. Mr. Bundy agreed that appearances for parties is fine, but that he has an issue with remote jury selection and jurors sitting in their homes watching trials. Judge Norm Hill agreed that there are issues that need to be explored to ensure fairness, but his point was that the inclusion issue bends more toward allowing people to participate, and that he thinks that we are sometimes overstating the digital divide impact.

Judge Bailey stated that he leaned more toward Mr. Bundy's opinion, but he understood Judge Norm Hill's view on remote jury selection. To him, the rule's focus should be more on witnesses appearing remotely. He opined that allowing the parties to appear remotely is still a court function and something that he hopes the court will expand and allow more readily. However, the Council's role should be really more focused on witnesses and having tools and mechanisms for court enforcement. Mr. Bundy agreed.

Mr. Crowley noted that the committee is the remote hearings committee, but that the deposition piece is a really good thing to also address, as well as witnesses at trial. He stated that he was not sure that it makes sense for the committee to get into the larger and quite different topic of jury selection.

Judge Jon Hill pointed out that the problem is that a rule on appearances by parties is needed, and that the issue does need to be talked through. He noted that most courts certainly are trying to accommodate people. As he talked about last month, there is an improvement to the access to justice issue and the availability of attorneys issue because it is so much easier with remote appearances. The cost is also less. He stated that it might be helpful to talk through those things and create rules, because COVID-19 forced a piecemeal system to evolve, but a consistent framework is really needed. He also opined that it is worth discussing the issues related to remote juries. He stated that his county

has areas with no cell service, and that issues with poverty are very real and prevalent. However, those issues need to be acknowledged and discussed. Although it is a heavy lift, he argued that it may be appropriate for the Council to tackle the issue.

Mr. Crowley stated that remote hearings and remote depositions are occurring now, so it makes sense from his perspective to try to have a framework of rules that works for those issues. However, he stated that he was not aware of any trials with either remote jury selection or a remote jury in Oregon. Judge Peterson stated that remote jury selection is occurring in Multnomah County now. He stated that, if the committee wants to look into remote juries and report back to the Council, he did not know that the Council should prevent that. With regard to voir dire, which is the part that Multnomah County is allowing remotely, in terms of inclusion, many are called to serve, but many fewer show up. Remote voir dire would allow for a wider pool of people, especially if facilities are provided at the courthouse for people who do not have access to technology. He stated that he is aware that many attorneys are not happy with the process, but it may be something that the courts are stuck with for a while. He observed that it can increase the diversity of jury panels.

Judge Peterson noted that the Council had unanimity at the January meeting that the 30-day requirement in ORS 45.400 is too long. He stated that he had taken a deeper look at that statute and that he would pass on a more fleshed-out suggestion to the committee. However, something along the lines of changing "at least 30 days" to "sufficiently in advance of the trial or hearing," would allow the non-movant to challenge those factors specified in paragraph (3)(c) of the statute and to advance those factors in paragraph (3)(b). He stated that 30 days' advance notice might allow too much time, but the statute should give the court the discretion to say that, if a party wants to have remote testimony, they must ask enough in advance so that the other side can size up the proposed remote testimony using the factors in ORS 45.400, which contains a pretty good list of the concerns identified by the Council. He stated that he might make a small change in in one of the factors, but that they are not badly written. He noted that ORS 45.400 is not an evidence rule but, rather, a matter of pure procedure, and he did not know why it is located in the statutes where most people would not know where to look for it, rather than in the ORCP.

Mr. Crowley asked whether the Council felt that it was appropriate for the committee to take on the issue of remote jury selection. Judge Norm Hill suggested that the committee should act sequentially: start with discovery and trial testimony rules, and then go to jury selection. Judge Jon Hill agreed that solving one problem before moving on to the next makes sense. Mr. Andersen agreed and stated that he would draft language to move trials out of depositions and add language to Rule 58 to empower judges to do what is best according to

the circumstances in their courtroom, regardless of how amenable the jury or the attorneys may be. He stated that the committee would meet to review the draft and that he hoped to provide language to the full Council by the March meeting.

Judge Oden-Orr stated that one of his colleagues in Multnomah County, Judge Eric Dahlin, had done a lot of work preparing Multnomah County for remote trials, including looking at the experiences of other states. He offered to reach out to Judge Dahlin and introduce him to Mr. Andersen. Mr. Andersen stated that this would be appreciated. Judge Norm Hill expressed interest in joining the Remote Hearings Committee. Mr. Andersen stated that he would include Judge Hill in the next committee meeting invitation.

5. Vexatious Litigants

Judge Jon Hill explained that the committee had met. He reminded the Council that the initial thought was to recommend a statute to the Legislature. However, the committee had decided to attempt to craft a workable rule under the ORCP that still protects substantive and procedural rights. This could be through changes to Rule 17 or 26, or through the creation of a new rule. Judge Jon Hill stated that Judge Norby had some ideas and, hopefully, the committee would have time to get together between now and the March Council meeting.

Judge Norby reported that her judicial clerk had spent about a week researching how the issue of vexatious litigants has been handled across the country, and she should have a memo prepared by the end of the following week. She stated that she would use that research to try to come up with a good solution for Oregon.

Judge Peterson stated that it is his assumption, based on no actual facts, that most vexatious litigants are people who are not of substantial financial means, or who ask to have the fees waived or deferred. He wondered whether that might be an avenue to helping to solve the problem. Judge Norm Hill stated that his sense is that it is not related to resources. He pointed out that many of the people who have really tied up the OJD over the last couple of years have access to resources, but just a little more time on their hands than most of us. Judge Norby stated that she believes that both people with means and people with limited means can be vexatious litigants, so Judge Peterson's idea is still interesting and it may be valuable to include whether to waive fees as a factor to be considered if the litigant has filed the same case against the same person several times.

V. New Business

A. Suggestion for Amendment of Rule 7

Judge Peterson explained that the Council had received a suggestion to amend Rule 7 (Appendix G) from Aaron Crowe of Nationwide Process Service. He stated that he believes that Mr. Crowe's suggestion calls for an amendment to some procedures in the foreclosure statute, ORS chapter 86, and that it seems like a very fine idea, but that it needs to be addressed to the Legislature.

Mr. Crowley asked Judge Peterson to respond to Mr. Crowe and let him know that the Council did not have the ability to amend a statute and that his suggestion would be better directed to the Legislature.

B. Suggestion for Amendment of Rule 27

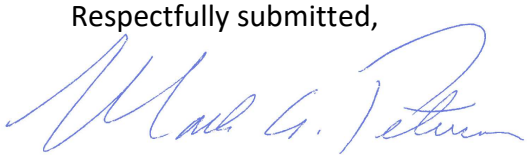
Judge Peterson explained that former Council chair Brooks Cooper had made a suggestion for a change to Rule 27 A (Appendix H). He stated that, to protect people on whom a guardian ad litem (GAL) might be imposed, there is a requirement to notify the person, their spouse, and a plethora of other people, unless that notice is waived. However, as Mr. Cooper points out, there is no right to an appeal for the person who has had a GAL imposed on them by a judge. Even if that judge was very careful to ensure that the proper notices were sent and the rules were followed, the person on whom the GAL was imposed may still think that the judge was incorrect. Mr. Cooper admits that it is a problem that does not happen very often. Mr. Cooper had cited one conservatorship case with a man who had two sons and three wives, serially, and the last wife that he married had multiple convictions. One son thought that this wife was taking his father on a path that was not good. The person who had a conservator appointed over him, the father, was a party to the appeal, and prevailed in the court of appeals. Judge Peterson stated that he was not sure that Rule 27, as written, precludes the person for whom the GAL is appointed from appealing that decision. But, if it does, and if it is worthy of the Council's time, he would suggest that a change not be added to section A but rather, in a new section I.

Mr. Crowley asked the Council whether it felt that a committee should be formed. Ms. Stupasky stated that she believes that the issue is worth exploring. Judge Peterson suggested leaving the issue on the agenda for the next Council meeting and making the decision about forming a committee at that time. Mr. Crowley and the rest of the Council agreed.

VI. Adjournment

Mr. Crowley adjourned the meeting at 11:58 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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. David E. Leith
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
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)(d)(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 ORCP 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.

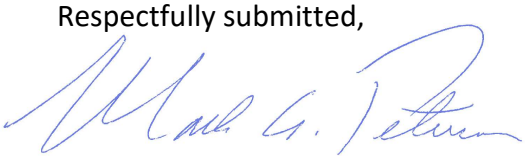
V. New Business

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

GHOSTBUSTERS MEETS GUARDIANS OF THE GALAXY

The Deady Coda: Giving Life to the Council on Court Procedures

"If There's Something Strange… in Your Neighborhood…"

A long time ago, in a legal system far, far away, Oregon had a canon of general laws so antiquated that it was aptly named "the Deady Code." This ghost of the past -- compiled and annotated by Judge Matthew Deady 160 years ago -- haunted civil procedure in our state from 1862 – 1977.

As early as the mid-1920s, Oregon's bench and bar recognized the need to exorcise that ghost and create a living, breathing civil procedure process. But recruiting a squad of ghostbusters to bury the Deady Code was not easy. The legislature had the power to change the procedure laws, but never effectively deployed their proton packs to put the past to rest. In 1939, a State Bar Committee on Judicial Administration suggested transferring civil procedure rulemaking power from the legislature to the Supreme Court. But that proposal was soundly vetoed at the 1940 state bar meeting, and the push for reform lay dormant again until 1959. In 1959, the legislature resuscitated the discussion about the need for procedural reform, and in 1962 a new state constitution again proposed that rulemaking be transferred to the Supreme Court. But the idea remained unpopular and met with its final demise.

"Who You Gonna Call?"

Finally, in 1975, Governor McCall's Commission on Judicial Reform, the Oregon State Bar, and the state judiciary deduced that a supreme squad of ghostbusters was not likely to be found suiting up in the Supreme Court's chambers, but that an ideal crew could be conscripted from diverse recruits with expert skills and perspectives. In 1977, the Council on Court Procedures was formed with 23 volunteer members: one Supreme Court Justice, one Court of Appeals Judge, eight trial court judges, six plaintiffs' bar litigation attorneys, six defense bar litigation attorneys, and one public member. ORS 1.730.[1] This first ghostbusting squad liquified the Deady Code with rule-reforming plasma guns and brought Oregon's civil procedure into a new era. Between September 1977 and January 1979, the squad created Rules 1-64 to guide general civil procedure through the completion of trial. The draft rules were published for public comment, acquiesced to by the legislature, and ultimately adopted, superseding the outdated laws of yesteryear. By 1981, Rules 65 – 85 were added, finally completing a comprehensive revision of Oregon's Code of Civil Procedure – the Deady coda.

Interface - The Final Frontier

After the original ghostbuster Council vanquished the Deady Code and breathed life into a more evolved approach to civil procedure, the goal was not just for our new rules to live but to thrive. It takes a village to nurture a new procedural code. And so it was that the legislation seamlessly transformed the Council members from a squad of ghostbusters into "Guardians of the Galaxy (of Civil Procedure Rules)." The Council's mission: to continually review Oregon laws relating to civil procedure, reexamine existing rules, and to seek out new ideas and new viewpoints.

[1] The 12 volunteer attorney members are appointed by the Board of Governors of the OSB to reflect geographic diversity and equal litigation expertise from both the plaintiffs' bar and the defense bar. The 8 volunteer trial judges are appointed by the Executive Committee of the Circuit Judges Association. The Court of Appeals appoints its member, and the Supreme Court appoints its member and the volunteer public member.

As diverse as the Council members are, even more inclusion is the key to fulfilling its mission. Every other year, the Council on Court Procedures broadly distributes an invitation to attorneys throughout Oregon to send in criticisms, ideas, and suggestions about ways to improve our rules of civil procedure. (Some of the criticisms received inspired this article – it seems that the Council's fabled history and the identities of its 23 sentinels have not yet spread throughout the realm!) As lawyers in the internet age, we all receive many surveys and polls on various topics by email each year – many of us wonder where our thoughtful responses (or scornful quips…) go when we hit "send" and whether they will ever be read by someone who cares. Surveys from the Council on Court Procedures are received by the Council's own Miss Moneypenny – an Executive Assistant with skills and aptitudes of epic proportions.[2] Dozens of suggestions for amendments are sent to the Council, both anonymously and by named members of the bench and bar, as well as by many lawyer and non-lawyer organizations that regularly work with state civil courts. Every single comment received is compiled into a chart and reviewed by the Council members in sequential meetings to decide which suggestions will become the focus of Council work in that biennium. Once those choices are carefully made, committees are formed, sleeves are rolled up, and the debates and re-writing begins.

We Ain't Afraid of No Consensus!

Oregon's Council on Court Procedures is anomalously democratic compared to other court civil procedure rulemaking overlords in the nation. The federal court's (and most state courts') procedural rulemaking powers are held exclusively by the highest-ranking judges in each jurisdiction. Even states that have rulemaking committees typically only invite judges to join. Oregon is different. By statute, there are fewer judge members on the Council than litigating attorney members. A quorum on any proposal can only be reached after the voices and perspectives of plaintiff attorney litigators, defense attorney litigators, and judges are all heard. The Council never approves a rule change for publication without that proposed change having first run the gauntlet of criticism lobbed by legal experts from all sectors of the courtroom arena.

Since the civil procedure ghosts of today are not nearly as old as the Deady Code was, each new proposed rule change receives a full and fair trial that can be protracted and adversarial. The existing rule language is often zealously defended by some, while others ardently argue the need for the proposed change. The Council's monthly meetings on Saturday mornings last for several hours. Sometimes a single rule change is debated over the course of many meetings, yet never reaches a point of consensus that would advance it for publication to the bar and presentation to the legislature. None of the Council's members are immune to the consequences of any rule change since all members must follow the rules as attorneys and judges if they become law. Council members are both volunteer "Guardians of the Galaxy (of Civ Pro Rules)" and inhabitants of the worlds affected by rule changes, who must live with those decisions in their own professional lives. That means that, no matter how incendiary a rule-change debate may be, the Council works relentlessly toward consensus on each new proposal.

The Time-Space Continuum.

Just as a two-hour feature film about superheroes takes years to produce, so does a rule change take two years to actualize. The Council has its own Steven Spielberg to coordinate and guide such

[2] Mere thanks are insufficient for Shari Nilsson's 15 years of dedicated service as Executive Assistant to the Council!

endeavors.[3] Executive Director Mark Peterson has harnessed the enthusiasm and harmonized the discord of impassioned Council members in wide-ranging discussions on policies and particulars of the rules for 17 years.[4] Council projects unfold within a structured framework to ensure that rule changes are never mercurial, arbitrary, or impulsive. For those who want rules to change, it can seem an eternity from the time the proposal is made to the time it is published with the Oregon Revised Statutes. But the power that civil procedure rules exert in trial courts is too vast to disrupt without careful deliberation.

The first step in the rule change process is action packed for the Council. Its arc stretches from August in odd numbered years to September of the following year. New projects are under construction in intensive collaborative efforts to refine rule change proposals that will improve existing rules. To approve a rule change proposal, a majority vote during a full Council meeting attended by a quorum of members must deem it worthy. Once a proposal is approved, Moneypenny works to convert it into final form for distribution in early November to all Oregon State Bar members so the Council can collect comments and concerns. In early December, the Council reviews every comment and concern received, then votes on whether to present each finalized amendment to the state legislature.

When the next long session of the legislature begins in February of the next year, neither the Senate nor the House votes on the Council's report or the amendments it contains. The law requires the Council's recommended amendments to be published with the Oregon Revised Statutes the following January. Of course, the legislature retains the option to legislate a new rule or rule change, to modify a recommended change, or to reject a Council recommendation. But for 45 years now, the mutual respect and deference that the Council and the legislature have for one another has not wavered. There has been no legislative rejection of the Council's creations. Since inception, the Guardians of the (Civ Pro Rule) Galaxy have found favor with the lawmakers who they perpetually strive to help.

Rulemaking Kryptonite

Though the Council's superpowers may seem infinite, there are two forms of kryptonite that will stop consideration of a rule amendment every time. The first form of kryptonite arises from limitations in ORS 1.735(1), which authorizes the Council to make rules "governing pleading, practice and procedure, … in all courts of the state **which shall not abridge, enlarge, or modify the substantive rights of any litigant**." When a rule change proposal attempts to stretch the rules beyond process to infringe or expand a litigant's substantive rights, the Council is powerless to approve it. Many comments the Council receives from the biennial surveys lament the Council's inaction on substantive issues, suggesting that Council members should be bolder with improvements to the essence of things that the rules can only create a procedural structure to support. Alas, only the legislature has the super-power to alter substantive law.

The second form of kryptonite arises from ORCP 1B, which requires: "These rules shall be construed **to secure the just, speedy, and inexpensive determination of every action**." Other comments from the biennial surveys question whether the Council purposely alters procedural rules to

[3] Although drastically under-compensated, the Executive Director and Executive Assistant's modest stipends are allocated by the legislature to the Judicial Department's budget and administered through Lewis & Clark Law School. The Law School also provides Human Resources services, an office, copy machine, computers, and storage space for Council archives, at its own expense. Without that administrative and financial support, it is highly unlikely that the Council would still exist. Without the Council, rulemaking power would revert to the legislature.

[4] Neither the Executive Director, nor the Executive Assistant, are voting Council members.

make litigants' lives more difficult. It does not. In fact, whenever a proposal seems to create risk that could undermine the just, speedy and inexpensive determination of any action, it is unceremoniously ditched. The Council members see this form of kryptonite often, know its danger, and back away unless there is no other means of creating a necessary rule improvement.

The Edge of Tomorrow

The Council on Court Procedures busted the ghosts of the past, guards the galaxy of civil procedure in the present, and looks to the future in shaping Oregon's trial court processes. It can feel like a mission of galactic proportions. Cinematic action hero alliances include only four Ghostbusters, and only five Guardians of the Galaxy. Even after adding Agent 007 and Superman, the Council does not have an imaginary quorum. It would take a dozen *more* action heroes to populate our 23-member Civil Justice League. The Council members' (*not-at-all secret*) identities are ever-changing; each is appointed for four years[5] of service and may not serve more than eight years before passing their cape on to a new crusader. The balance of leadership power is struck by electing a plaintiff's attorney as Chair one biennium, then a defense attorney the next. When the Chair is a plaintiff's attorney, the Vice-chair is a defense attorney and vice-versa. To balance perspectives, geographic diversity is a criterion when appointing members.

Every volunteer who joins the Council on Court Procedures agrees that Oregon's Rules of Civil Procedure are not perfect. It is a perpetual challenge to protect, revise, and harmonize the rules while striving to modernize parts that no longer function well, and to balance the interests of all who work for civil justice in Oregon's courts. Serving on the Council is a unique privilege, and an opportunity to improve the experiences of all who brave the civil litigation frontier. Beyond that, volunteering on the Council is a unifying pursuit, not unlike jury service. The Council brings unlikely collaborators together: dedicated people from divergent legal standpoints and dissimilar communities. These protectors, critics, and visionaries clash and collaborate over the rules in a cacophony of voices expressing different points of view, rising and falling intermittently for hours, as members passionately debate whether particular rule changes would bring clarity or calamity. Then, at each meeting's end, the dissonance resolves into conviviality, as the combatants retreat into friendships forged in the verbal fire.

Oregon civil procedure has come a long way since the exorcism of the Deady Code 45 years ago. Members of the Council on Court Procedures may not be cinematic action heroes unifying to protect people from threats by mythic creatures. But they are steadfast allies bound together by a shared mission to protect and improve Oregon's procedural code from the threat of obsolescence. No one need buy a ticket to spend time with the Council or pay money to read stories of the Council's adventures. All Council meetings are open to the public and all meeting minutes are posted on its website. You don't need a superpower to present yourself as a potential future Council member either -- just litigation experience, a steadfast nature, and a love of the law. For the Council on Court Procedures, a sense of duty is mandatory, but capes and intergalactic ancestry are always optional.

NOTE ABOUT AUTHOR: Judge Susie L. Norby is a trial judge in the Clackamas County Circuit Court, first elected in 2006. She was appointed to the Council on Court Procedures in 2017. While on the Council, she spearheaded the overhaul of ORCP 55, in response to a survey comment that read: "ORCP 55 is a mess. Can't you do something about that?" When asked what action hero she most identifies with on the Council, she replied: "We are Groot."

[5] Four years is a standard appointment term. A member can be appointed for a shorter term, if necessary, to fill the remainder of a term that another member was unable to complete.

SUMMONS

RULE 7

A Definitions. For purposes of this rule, "plaintiff' shall include any party issuing summons and "defendant" shall include any party upon whom service of summons is sought. For purposes of this rule, a "true copy" of a summons and complaint means an exact and complete copy of the original summons and complaint.

B Issuance. Any time after the action is commenced, plaintiff or plaintiffs attorney may issue as many original summonses as either may elect and deliver such summonses to a person authorized to serve summonses under section E of this rule. A summons is issued when subscribed by plaintiff or an active member of the Oregon State Bar.

C Contents, time for response, and required notices.

C(1) **Contents.** The summons shall contain:

C(1)(a) **Title.** The title of the cause, specifying the name of the court in which the complaint is filed and the names of the parties to the action.

C(1)(b) **Direction to defendant.** A direction to the defendant requiring defendant to appear and defend within the time required by subsection C(2) of this rule and a notification to defendant that, in case of failure to do so, the plaintiff will apply to the court for the relief demanded in the complaint.

C(1)(c) **Subscription; post office address.** A subscription by the plaintiff or by an active member of the Oregon State Bar, with the addition of the post office address at which papers in the action may be served by mail.

C(2) **Time for response.** If the summons is served by any manner other than publication, the defendant shall appear and defend within 30 days from the date of service. If the summons is served by publication pursuant to subparagraph D(6)(a)(i) of this rule, the defendant shall appear and defend within 30 days from the date stated in the summons. The date so stated in the summons shall be the date of the first publication.

Council on Court Procedures
February 12, 2022, Meeting
Appendix C-1

C(3) **Notice to party served.**

C(3)(a) **In general.** All summonses, other than a summons referred to in paragraph C(3)(b) or C(3)(c) of this rule, shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" in this case or the other side will win automatically. To "appear" you must file with the court a legal document called a "motion" or "answer." The "motion" or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the plaintiffs attorney or, if the plaintiff does not have an attorney, proof of service on the plaintiff.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

C(3)(b) **Service for counterclaim or cross-claim.** A summons to join a party to respond to a counterclaim or a cross-claim pursuant to Rule 22 D(1) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You must "appear" to protect your rights in this matter. To "appear" you must file with

the court a legal document called a "motion," a "reply" to a counterclaim, or an "answer" to a cross-claim. The "motion," "reply," or "answer" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

C(3)(c) **Service on persons liable for attorney fees.** A summons to join a party pursuant to Rule 22 D(2) shall contain a notice printed in type size equal to at least 8-point type that may be substantially in the following form:

NOTICE TO DEFENDANT:

READ THESE PAPERS

CAREFULLY!

You may be liable for attorney fees in this case. Should plaintiff in this case not prevail, a judgment for reasonable attorney fees may be entered against you, as provided by the agreement to which defendant alleges you are a party.

You must "appear" to protect your rights in this matter. To "appear" you must file with the court a legal document called a "motion" or "reply." The "motion" or "reply" must be given to the court clerk or administrator within 30 days along with the required filing fee. It must be in proper form and have proof of service on the defendant's attorney or, if the defendant does not have an attorney, proof of service on the defendant.

If you have questions, you should see an attorney immediately. If you need help in finding

an attorney, you may contact the Oregon State Bar's Lawyer Referral Service online at www.oregonstatebar.org or by calling (503) 684-3763 (in the Portland metropolitan area) or toll-free elsewhere in Oregon at (800) 452-7636.

D Manner of service.

D(1) **Notice required.** Summons shall be served, either within or without this state, in any manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend. Summons may be served in a manner specified in this rule or by any other rule or statute on the defendant or upon an agent authorized by appointment or law to accept service of summons for the defendant. Service may be made, subject to the restrictions and requirements of this rule, by the following methods: personal service of true copies of the summons and the complaint upon defendant or an agent of defendant authorized to receive process; substituted service by leaving true copies of the summons and the complaint at a person's dwelling house or usual place of abode; office service by leaving true copies of the summons and the complaint with a person who is apparently in charge of an office; service by mail; or service by publication.

D(2) **Service methods.**

D(2)(a) **Personal service.** Personal service may be made by delivery of a true copy of the summons and a true copy of the complaint to the person to be served.

D(2)(b) **Substituted service.** Substituted service may be made by delivering true copies of the summons and the complaint at the dwelling house or usual place of abode of the person to be served to any person 14 years of age or older residing in the dwelling house or usual place of abode of the person to be served. Where substituted service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode, together

with a statement of the date, time, and place at which substituted service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, substituted service shall be complete upon the mailing.

D(2)(c) **Office service.** If the person to be served maintains an office for the conduct of business, office service may be made by leaving true copies of the summons and the complaint at that office during normal working hours with the person who is apparently in charge. Where office service is used, the plaintiff, as soon as reasonably possible, shall cause to be mailed by first class mail true copies of the summons and the complaint to the defendant at defendant's dwelling house or usual place of abode or defendant's place of business or any other place under the circumstances that is most reasonably calculated to apprise the defendant of the existence and pendency of the action, together with a statement of the date, time, and place at which office service was made. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, office service shall be complete upon the mailing.

D(2)(d) **Service by mail.**

D(2)(d)(i) **Generally.** When service by mail is required or allowed by this rule or by statute, except as otherwise permitted, service by mail shall be made by mailing true copies of the summons and the complaint to the defendant by first class mail and by any of the following: certified, registered, or express mail with return receipt requested. For purposes of this paragraph, "first class mail" does not include certified, registered, or express mail, return receipt requested, or any other form of mail that may delay or hinder actual delivery of mail to the addressee.

D(2)(d)(ii) **Calculation of time.** For the purpose of computing any period of time provided by these rules or by statute, service by mail, except as otherwise provided, shall be complete on the day the defendant, or other person authorized by appointment or law, signs a receipt for the mailing, or 3 days after the mailing if mailed to an address within the state, or 7 days after the mailing if mailed to an address outside the state whichever first occurs.

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, true*] **True** copies of the summons and the complaint may 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, true*] **True** copies of the summons and the complaint may 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, true*] **True** copies of the summons and the complaint may 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)*] **D(3)(d)(ii)(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)*] **D(3)(d)(ii)(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.

D(4) **Particular actions involving motor vehicles.**

D(4)(a) **Actions arising out of use of roads, highways, streets, or premises open to the public; service by mail.**

D(4)(a)(i) In any action arising out of any accident, collision, or other event giving rise to liability in which a motor vehicle may be involved while being operated upon the roads, highways, streets, or premises open to the public as defined by law of this state if the plaintiff makes at least one attempt to serve a defendant who operated such motor vehicle, or caused it to be operated on the defendant's behalf, by a method authorized by subsection D(3) of this rule except service by mail pursuant to subparagraph D(3)(a)(i) of this rule and, as shown by its return, did not effect service, the plaintiff may then serve that defendant by mailings made in accordance with paragraph D(2)(d) of this rule addressed to that defendant at:

D(4)(a)(i)(A) any residence address provided by that defendant at the scene of the accident;

D(4)(a)(i)(B) the current residence address, if any, of that defendant shown in the driver records of the Department of Transportation; and

D(4)(a)(i)(C) any other address of that defendant known to the plaintiff at the time of making the mailings required by parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule that reasonably might result in actual notice to that defendant. Sufficient service pursuant to this subparagraph may be shown if the proof of service includes a true copy of the envelope in which each of the certified, registered, or express mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule was made showing that it was returned to sender as undeliverable or that the defendant did not sign the receipt. For the purpose of computing any period of time prescribed or allowed by these rules or by statute, service under this subparagraph shall be complete on the latest date on which any of the mailings required by parts D(4)(a)(i)(A), D(4)(a)(i)(B), and D(4)(a)(i)(C) of this rule is made. If the mailing required by part D(4)(a)(i)(C) of this rule is omitted because the plaintiff did not know of any address other than those specified in parts D(4)(a)(i)(A) and D(4)(a)(i)(B) of this rule, the proof of service shall so certify.

D(4)(a)(ii) Any fee charged by the Department of Transportation for providing address information concerning a party served pursuant to subparagraph D(4)(a)(i) of this rule may be recovered as provided in Rule 68.

D(4)(a)(iii) The requirements for obtaining an order of default against a defendant served pursuant to subparagraph D(4)(a)(i) of this rule are as provided in Rule 69 E.

D(4)(b) **Notification of change of address.** Any person who; while operating a motor vehicle upon the roads, highways, streets, or premises open to the public as defined by law of this state; is involved in any accident, collision, or other event giving rise to liability shall forthwith notify the Department of Transportation of any change of the person's address occurring within 3 years after the accident, collision, or event.

D(5) **Service in foreign country.** When service is to be effected upon a party in a foreign country, it is also sufficient if service of true copies of the summons and the complaint is made

in the manner prescribed by the law of the foreign country for service in that country in its courts of general jurisdiction, or as directed by the foreign authority in response to letters rogatory, or as directed by order of the court. However, in all cases service shall be reasonably calculated to give actual notice.

D(6) **Court order for service by other method.** When it appears that service is not possible under any method otherwise specified in these rules or other rule or statute, then a motion supported by affidavit or declaration may be filed to request a discretionary court order to allow alternative service by any method or combination of methods that, under the circumstances, is most reasonably calculated to apprise the defendant of the existence and pendency of the action. If the court orders alternative service and the plaintiff knows or with reasonable diligence can ascertain the defendant's current address, the plaintiff must mail true copies of the summons and the complaint to the defendant at that address by first class mail and any of the following: certified, registered, or express mail, return receipt requested. If the plaintiff does not know, and with reasonable diligence cannot ascertain, the current address of any defendant, the plaintiff must mail true copies of the summons and the complaint by the methods specified above to the defendant at the defendant's last known address. If the plaintiff does not know, and with reasonable diligence cannot ascertain, the defendant's current and last known addresses, a mailing of copies of the summons and the complaint is not required.

D(6)(a) **Non-electronic alternative service.** Non-electronic forms of alternative service may include, but are not limited to, publication of summons; mailing without publication to a specified post office address of the defendant by first class mail as well as either by certified, registered, or express mail with return receipt requested; or posting at specified locations. The court may specify a response time in accordance with subsection C(2) of this rule.

D(6)(a)(i) **Alternative service by publication.** In addition to the contents of a summons as described in section C of this rule, a published summons must also contain a summary statement of the object of the complaint and the demand for relief, and the notice required in

subsection C(3) of this rule must state: "The motion or answer or reply must be given to the court clerk or administrator within 30 days of the date of first publication specified herein along with the required filing fee." The published summons must also contain the date of the first publication of the summons.

D(6)(a)(i)(A) **Where published.** An order for publication must direct publication to be made in a newspaper of general circulation in the county where the action is commenced or, if there is no such newspaper, then in a newspaper to be designated as most likely to give notice to the person to be served. The summons must be published four times in successive calendar weeks. If the plaintiff knows of a specific location other than the county in which the action is commenced where publication might reasonably result in actual notice to the defendant, the plaintiff must so state in the affidavit or declaration required by paragraph D(6) of this rule, and the court may order publication in a comparable manner at that location in addition to, or in lieu of, publication in the county in which the action is commenced.

D(6)(a)(ii) **Alternative service by posting.** The court may order service by posting true copies of the summons and complaint at a designated location in the courthouse where the action is commenced and at any other location that the affidavit or declaration required by subsection D(6) of this rule indicates that the posting might reasonably result in actual notice to the defendant.

D(6)(b) **Electronic alternative service.** Electronic forms of alternative service may include, but are not limited to: e-mail; text message; facsimile transmission as defined in Rule 9 F; or posting to a social media account. The affidavit or declaration filed with a motion for electronic alternative service must include: verification that diligent inquiry revealed that the defendant's residence address, mailing address, and place of employment are unlikely to accomplish service; the reason that plaintiff believes the defendant has recently sent and received transmissions from the specific e-mail address or telephone or facsimile number, or maintains an active social media account on the specific platform the plaintiff asks to use; and facts that

indicate the intended recipient is likely to personally receive the electronic transmission. The certificate of service must verify compliance with subparagraph D(6)(b)(i) and subparagraph D(6)(b)(ii) of this rule. An amended certificate of service must be filed if it later becomes evident that the intended recipient did not personally receive the electronic transmission.

D(6)(b)(i) **Content of electronic transmissions.** If the court allows service by a specific electronic method, the case name, case number, and name of the court in which the action is pending must be prominently positioned where it is most likely to be read first. For e-mail service, those details must appear in the subject line. For text message service, they must appear in the first line of the first text. For facsimile service, they must appear at the top of the first page. For posting to a social media account, they must appear in the top lines of the posting.

D(6)(b)(ii) **Format of electronic transmissions.** If the court allows alternative service by an electronic method, the summons, complaint, and any other documents must be attached in a file format that is capable of showing a true copy of the original document. When an electronic method is incapable of transferring transmissions that exceed a certain size, the plaintiff must not exceed those express size limitations. If the size of the attachments exceeds the limitations of any electronic method allowed, then multiple sequential transmissions may be sent immediately after the initial transmission to complete service.

D(6)(c) **Unknown heirs or persons.** If service cannot be made by another method described in this section because defendants are unknown heirs or persons as described in Rule 20 I and J, the action will proceed against the unknown heirs or persons in the same manner as against named defendants served by publication and with like effect; and any unknown heirs or persons who have or claim any right, estate, lien, or interest in the property in controversy at the time of the commencement of the action, and who are served by publication, will be bound and concluded by the judgment in the action, if the same is in favor of the plaintiff, as effectively as if the action had been brought against those defendants by name.

D(6)(d) **Defending before or after judgment.** A defendant against whom service pursuant to this subsection is ordered or that defendant's representatives, on application and sufficient cause shown, at any time before judgment will be allowed to defend the action. A defendant against whom service pursuant to this subsection is ordered or that defendant's representatives may, upon good cause shown and upon any terms that may be proper, be allowed to defend after judgment and within one year after entry of judgment. If the defense is successful, and the judgment or any part thereof has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold upon execution issued on that judgment, to a purchaser in good faith, will not be affected thereby.

D(6)(e) **Defendant who cannot be served.** Within the meaning of this subsection, a defendant cannot be served with summons by any method authorized by subsection D(3) of this rule if service pursuant to subparagraph D(4)(a)(i) of this rule is not applicable, the plaintiff attempted service of summons by all of the methods authorized by subsection D(3) of this rule, and the plaintiff was unable to complete service; or if the plaintiff knew that service by these methods could not be accomplished.

E By whom served; compensation. A summons may be served by any competent person 18 years of age or older who is a resident of the state where service is made or of this state and is neither a party to the action, corporate or otherwise, nor any party's officer, director, employee, or attorney, except as provided in ORS 180.260. However, service pursuant to subparagraph D(2)(d)(i), as well as the mailings specified in paragraphs D(2)(b) and D(2)(c) and part D(3)(a)(iv)(B) of this rule, may be made by an attorney for any party. Compensation to a sheriff or a sheriff's deputy in this state who serves a summons shall be prescribed by statute or rule. If any other person serves the summons, a reasonable fee may be paid for service. This compensation shall be part of disbursements and shall be recovered as provided in Rule 68.

F Return; proof of service.

F(1) **Return of summons.** The summons shall be promptly returned to the clerk with

whom the complaint is filed with proof of service or mailing, or that defendant cannot be found. The summons may be returned by first class mail.

F(2) **Proof of service.** Proof of service of summons or mailing may be made as follows:

F(2)(a) **Service other than publication.** Service other than publication shall be proved by:

F(2)(a)(i) **Certificate of service when summons not served by sheriff or deputy.** If the summons is not served by a sheriff or a sheriffs deputy, the certificate of the server indicating: the specific documents that were served; the time, place, and manner of service; that the server is a competent person 18 years of age or older and a resident of the state of service or this state and is not a party to nor an officer, director, or employee of, nor attorney for any party, corporate or otherwise; and that the server knew that the person, firm, or corporation served is the identical one named in the action. If the defendant is not personally served, the server shall state in the certificate when, where, and with whom true copies of the summons and the complaint were left or describe in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate may be made by the person completing the mailing or the attorney for any party and shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(a)(ii) **Certificate of service by sheriff or deputy.** If the summons is served by a sheriff or a sheriffs deputy, the sheriffs or deputy's certificate of service indicating: the specific documents that were served; the time, place, and manner of service; and, if defendant is not personally served, when, where, and with whom true copies of the summons and the complaint were left or describing in detail the manner and circumstances of service. If true copies of the summons and the complaint were mailed, the certificate shall state the circumstances of mailing and the return receipt, if any, shall be attached.

F(2)(b) **Publication.** Service by publication shall be proved by an affidavit or by a declaration.

F(2)(b)(i) A publication by affidavit shall be in substantially the following form:

_____

Affidavit of Publication

State of Oregon)

) ss.

County of)

I, _____ being first duly sworn, depose and say that I am the (here set forth the title or job description of the person making the affidavit), of the a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the a printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published).

Subscribed and sworn to before me this ___ day of-------. &.,2 _ _

_____

Notary Public for Oregon

My commission expires

-- day of-------. 2-.

_____

F(2)(b)(ii) A publication by declaration shall be in substantially the following form:

_____

Declaration of Publication

State of Oregon)

) ss.

County of)

I, ---------. say that I am the _____ (here set forth the title or job description of the person making the declaration), of the -------. a newspaper of general circulation published at _____ in the aforesaid county and state; that I know from my personal knowledge that the --------. a

printed copy of which is hereto annexed, was published in the entire issue of said newspaper four times in the following issues: (here set forth dates of issues in which the same was published). I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

_____

__ day of------. 2 _

_____

F(2)(c) **Making and certifying affidavit.** The affidavit of service may be made and certified before a notary public, or other official authorized to administer oaths and acting in that capacity by authority of the United States, or any state or territory of the United States, or the District of Columbia, and the official seal, if any, of that person shall be affixed to the affidavit. The signature of the notary or other official, when so attested by the affixing of the official seal, if any, of that person, shall be prima facie evidence of authority to make and certify the affidavit.

F(2)(d) **Form of certificate, affidavit, or declaration.** A certificate, affidavit, or declaration containing proof of service may be made upon the summons or as a separate document attached to the summons.

F(3) **Written admission.** In any case proof may be made by written admission of the defendant.

F(4) **Failure to make proof; validity of service.** If summons has been properly served, failure to make or file a proper proof of service shall not affect the validity of the service.

G Disregard of error; actual notice. Failure to comply with provisions of this rule relating to the form of a summons, issuance of a summons, or who may serve a summons shall not affect the validity of service of that summons or the existence of jurisdiction over the person if the court determines that the defendant received actual notice of the substance and pendency

of the action. The court may allow amendment to a summons, affidavit, declaration, or certificate of service of summons. The court shall disregard any error in the content of a summons that does not materially prejudice the substantive rights of the party against whom the summons was issued. If service is made in any manner complying with subsection D(1) of this rule, the court shall also disregard any error in the service of a summons that does not violate the due process rights of the party against whom the summons was issued.

RULE 55

A Generally: form and contents; originating court; who may issue; who may serve; proof of service. Provisions of this section apply to all subpoenas except as expressly indicated.

A(1) Form and contents.

A(1)(a) General requirements. A subpoena is a writ or order that must:

A(1)(a)(i) originate in the court where the action is pending, except as provided in Rule 38 C;

A(1)(a)(ii) state the name of the court where the action is pending;

A(1)(a)(iii) state the title of the action and the case number;

A(1)(a)(iv) command the person to whom the subpoena is directed to do one or more of the following things at a specified time and place:

A(1)(a)(iv)(A) appear and testify in a deposition, hearing, trial, or administrative or other out-of-court proceeding as provided in section B of this rule;

A(1)(a)(iv)(B) produce items for inspection and copying, such as specified books, documents, electronically stored information, or tangible things in the person's possession, custody, or control as provided in section C of this rule, except confidential health information as defined in subsection D(1) of this rule; or

A(1)(a)(iv)(C) produce records of confidential health information for inspection and copying as provided in section D of this rule; and

A(1)(a)(v) alert the person to whom the subpoena is directed of the entitlement to fees and mileage under paragraph A(6)(b), B(2)(a), B(2)(b), B(2)(d), B(3)(a), or B(3)(b) of this rule.

A(1)(a)(vi) alert the person to whom the subpoena is directed that they may ask a judge to excuse them from a subpoena that creates an unjustifiable burden to appear or contradicts a legal obligation to refrain from testifying, by filing a motion to quash on a form that is included with the subpoena and providing a written explanation; but that compliance is mandatory unless a judge orders otherwise, and noncompliance may be punished by a fine or jail time.

This is a rough draft idea for a way to modify traditional jury selection by building in safeguards against potential bias issues.

Generally

- Interpreters shall be available for jurors who speak any language qualifying as a "safe harbor"[1] language for the county where the trial is set to occur
- Jurors shall be compensated at (or above?) minimum wage rate

Jury Selection

- Questionnaires shall be standardized
    - Each circuit court presiding judge shall, in consultation with the local bar, develop a uniform written questionnaire that is designed to determine the qualifications of a juror.
        - The questionnaire shall be constructed in such a manner that that does not identify the juror by name or provide identifying information related to protected class status.
        - The questionnaire shall be used in all criminal and civil cases.
        - Upon a good cause showing, the court may use a different questionnaire that is developed for a particular case or type of case. (e.g., murder trials or complex civil trials)
- Jury selection is divided into 2 separate phases
- Phase 1 (prior to the jurors entering courtroom)
    - Prospective jurors complete and return questionnaire
    - Completed questionnaires are provided to the court and parties
    - The parties are required to rank each prospective juror on a 1-5 scale and provide a record of their rankings to the court *ex parte* for the court to maintain.
- Phase 2 (during traditional voir dire process in courtroom)
    - Voir Dire process occurs in traditional manner
    - At the conclusion of oral examination of jurors, the parties are required to rank the jurors again in the same format, this time with the benefit of both the questionnaires and the voir dire
    - When a party wishes to exercise a peremptory challenge, prior to the court allowing the challenge, the court shall *sua sponte* review and compare the attorney's first and second rankings and after considering that comparison and the

[1] Safe Harbor Language – Provisions of federal regulations whereby 1) a language other than English is preferred by individuals within a given geography and 2) the group of people relying on a particular non-English language exceeds 5 percent of that geography's total population or is greater than 1,000 individuals, whichever is less. As stated in federal regulations, "a 'safe harbor' means that if a [federal grant] recipient provides written translations under these circumstances, such action will be considered strong evidence of compliance with the recipient's written translation obligations" (67 C.F.R. 41463 (2002)).

record available to the trial judge, shall determine whether additional inquiry into the challenge is warranted.

- Example, if an attorney's two rankings are close in value to each other (such as a "1" and a "1"), then there's no further need for inquiry because the first ranking eliminated the possibility of bias. However, if the two rankings are different (such as a "4" and a "1") and if the judge believes the prospective juror is a member of a protected class, then additional inquiry may be warranted

- Time
  - Each party shall be provided a minimum amount of time to engage in voir dire (phase 2) based on the number of potential jurors
  - Proposed formula: 4 minutes per potential juror
  - Example: 30 potential jurors = 120 total minutes minimum provided to each party to engage in phase 2 voir dire

House Bill 4073

Sponsored by Representative WILDE; Representatives HELM, HUDSON, PHAM, REYNOLDS, SCHOUTEN, Senator DEMBROW (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced.**

Modifies provisions relating to peremptory challenges to jurors.

Modifies standard for disqualification of judges. Provides that prosecution in criminal case may not move to disqualify judge solely on basis that prosecution cannot have fair and impartial trial or hearing before judge.

Provides that justifiable use of physical force in self-defense or in defending third person is affirmative defense when defendant engaged in, directed or otherwise participated in wrongful conduct that was intended to cause victim to be unavailable as witness, and did cause victim to be unavailable.

A BILL FOR AN ACT

Relating to courts; creating new provisions; and amending ORS 14.210, 14.250, 14.260 and 136.230.

Be It Enacted by the People of the State of Oregon:

PEREMPTORY CHALLENGES

SECTION 1. ORS 136.230 is amended to read:

136.230. (1) If the trial is upon an accusatory instrument in which one or more of the crimes charged is punishable with imprisonment in a Department of Corrections institution for life or is a capital offense, both the defendant and the state are entitled to 12 peremptory challenges, and no more. In any trial before more than six jurors, both are entitled to six. In any trial before six jurors, both are entitled to three.

(2) Peremptory challenges shall be taken in writing by secret ballot as follows:

(a) The defendant may challenge two jurors and the state may challenge two, and so alternating, the defendant exercising two challenges and the state two until the peremptory challenges are exhausted.

(b) After each challenge the panel shall be filled and the additional juror passed for cause before another peremptory challenge is exercised. Neither party shall be required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time.

(c) The refusal to challenge by either party in order of alternation does not prevent the adverse party from exercising that adverse party's full number of challenges, and such refusal on the part of a party to exercise a challenge in proper turn concludes that party as to the jurors once accepted by that party. If that party's right of peremptory challenge is not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called.

(3) Notwithstanding subsection (2) of this section, the defendant and the state may stipulate to taking peremptory challenges orally.

[*(4) Peremptory challenges are subject to ORCP 57 D(4).*]

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

(4)(a) A party may not exercise a peremptory challenge on the basis of race, ethnicity, sex, religion, sexual orientation or gender identity. Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.

(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge. The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, sex, religion, sexual orientation or gender identity.

(c) If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, sex, religion, sexual orientation or gender identity, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, sex, religion, sexual orientation or gender identity, and that the peremptory challenge was exercised on another objectively reasonable basis. The adverse party may examine the challenged juror further in support of the challenge. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.

(d) If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, sex, religion, sexual orientation or gender identity, and not on another objectively reasonable basis, the court shall disallow the peremptory challenge.

DISQUALIFYING JUDGES

SECTION 2. ORS 14.210 is amended to read:

14.210. (1) A judge shall not act as such in a court of which the judge is a member [*in*] **when a reasonable person would question the judge's impartiality, including but not limited to** any of the following circumstances:

(a) The judge shall not act as judge if the judge is a party to or directly interested in the action, suit or proceeding, except that the judge shall not be disqualified from acting as such in a case in which the judge is added as a party after taking any official action as a judge in the action, suit or proceeding, and in that case the judge shall be dismissed as a party without prejudice.

(b) Except as provided in ORS 2.111 and 2.570, a judge shall not act as judge if the judge was not present and sitting as a member of the court at the hearing of a matter submitted for its decision. A judge may sign an order or judgment reflecting a decision made by another judge if, for good cause, the judge who made the decision is not available.

(c) A judge shall not act as judge if the judge is related to any party, or to the attorney for any party, or to the partner or office associate of any such attorney, by consanguinity or affinity within the third degree.

(d) A judge shall not act as judge if the judge has been attorney in the action, suit or proceeding for any party.

(e) If appeal is made from a decision of another court, or judicial review of a decision of an administrative agency is sought, a judge shall not act as judge on appeal if the judge participated in making the decision that is subject to review.

(2) This section does not apply to an application to change the place of trial, or the regulation of the order of business in court. In the circumstances specified in subsection (1)(c) and (d) of this section, the disqualification shall be deemed waived by the parties unless a motion for disqualification of the judge is made as provided by statute or court rule.

SECTION 3. ORS 14.250 is amended to read:

14.250. **(1) Except as provided in subsection (2) of this section,** no judge of a circuit court shall sit to hear or try any suit, action, matter or proceeding when it is established, as provided in ORS 14.250 to 14.270, that any party or attorney believes that such party or attorney cannot have a fair and impartial trial or hearing before such judge. In such case the presiding judge for the judicial district shall forthwith transfer the cause, matter or proceeding to another judge of the court, or apply to the Chief Justice of the Supreme Court to send a judge to try it; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action or suit is of such a character that a change of venue thereof may be ordered, the presiding judge may send the case for trial to the most convenient court; except that the issues in such cause may, upon the written stipulation of the attorneys in the cause agreeing thereto, be made up in the district of the judge to whom the cause has been assigned.

(2) The prosecution in a criminal case may not disqualify a judge under this section. This subsection does not limit the ability of the prosecution in a criminal case to seek to disqualify a judge under ORS 14.210.

SECTION 4. ORS 14.260 is amended to read:

14.260. (1) Any party to or any attorney appearing in any cause, matter or proceeding in a circuit court**, other than the prosecution in a criminal case,** may establish the belief described in ORS 14.250 by motion supported by affidavit that the party or attorney believes that the party or attorney cannot have a fair and impartial trial or hearing before the judge, and that it is made in good faith and not for the purpose of delay. No specific grounds for the belief need be alleged. The motion shall be allowed unless the judge moved against, or the presiding judge for the judicial district, challenges the good faith of the affiant and sets forth the basis of the challenge. In the event of a challenge, a hearing shall be held before a disinterested judge. The burden of proof is on the challenging judge to establish that the motion was made in bad faith or for the purposes of delay.

(2) The affidavit shall be filed with the motion at any time prior to final determination of the cause, matter or proceedings in uncontested cases, and in contested cases before or within five days after the cause, matter or proceeding is at issue upon a question of fact or within 10 days after the assignment, appointment and qualification or election and assumption of office of another judge to preside over the cause, matter or proceeding.

(3) A motion to disqualify a judge may not be made after the judge has ruled upon any petition, demurrer or motion other than a motion to extend time in the cause, matter or proceeding. A motion to disqualify a judge or a judge pro tem, assigned by the Chief Justice of the Supreme Court to serve in a county other than the county in which the judge or judge pro tem resides may not be filed more than five days after the party or attorney appearing in the cause receives notice of the assignment.

(4) In judicial districts having a population of 200,000 or more, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270.

(5) In judicial districts having a population of 100,000 or more, but less than 200,000, the affidavit and motion for change of judge shall be made at the time and in the manner prescribed in ORS 14.270 unless the circuit court makes local rules under ORS 3.220 adopting the procedure described in this section.

(6) A party or attorney may not make more than two applications in any cause, matter or proceeding under this section.

JUSTIFIED USE OF PHYSICAL FORCE

SECTION 5. Section 6 of this 2022 Act is added to and made a part of ORS 161.195 to 161.275.

SECTION 6. Notwithstanding ORS 161.190, the justifiable use of physical force in self-defense or in defending a third person under ORS 161.205 (5) is an affirmative defense when the defendant engaged in, directed or otherwise participated in wrongful conduct that was intended to cause the victim to be unavailable as a witness, and did cause the victim to be unavailable.

SECTION 7. Section 6 of this 2022 Act applies to conduct alleged to constitute an offense occurring on or after the effective date of this 2022 Act.

CAPTIONS

SECTION 8. The unit captions used in this 2022 Act are provided only for the convenience of the reader and do not become part of the statutory law of this state or express any legislative intent in the enactment of this 2022 Act.

JURORS
RULE 57

A Challenging compliance with selection procedures.

A(1) **Motion.** Within 7 days after the moving party discovered, or by the exercise of diligence could have discovered, the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury.

A(2) **Stay of proceedings.** Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk or court administrator; any relevant records and papers not public or otherwise available used by the clerk or court administrator; and any other relevant evidence. If the court determines that in selecting the jury there has been a substantial failure to comply with the applicable provisions of ORS chapter 10, the court shall stay the proceedings pending the selection of a jury in conformity with the applicable provisions of ORS chapter 10, or grant other appropriate relief.

A(3) **Exclusive means of challenge.** The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

B Jury; how drawn. When the action is called for trial, the clerk shall draw names at random from the names of jurors in attendance upon the court until the jury is completed or the names of jurors in attendance are exhausted. If the names of jurors in attendance become exhausted before the jury is complete, the sheriff, under the direction of the court, shall summon from the bystanders, or from the body of the county, so many qualified persons as may be necessary to complete the jury. Whenever the sheriff shall summon more than one person at a time from the bystanders, or from the body of the county, the sheriff shall return a list of the persons so summoned to the clerk. The clerk shall draw names at random from the list until the jury is completed.

C Examination of jurors. When the full number of jurors has been called, they shall be examined as to their qualifications, first by the court, then by the plaintiff, and then by the defendant. The court shall regulate the examination in such a way as to avoid unnecessary delay.

D Challenges.

D(1) **Challenges for cause; grounds.** Challenges for cause may be taken on any one or more of the following grounds:

D(1)(a) The want of any qualification prescribed by ORS 10.030 for a person eligible to act as a juror.

D(1)(b) The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.

D(1)(c) Consanguinity or affinity within the fourth degree to any party.

D(1)(d) Standing in the relation of guardian and ward, physician and patient, master and servant, landlord and tenant, or debtor and creditor to the adverse party; or being a member of the family of, or a partner in business with, or in the employment for wages of, or being an attorney for or a client of the adverse party; or being surety in the action called for trial, or otherwise, for the adverse party.

D(1)(e) Having served as a juror on a previous trial in the same action, or in another action between the same parties for the same cause of action, upon substantially the same facts or transaction.

D(1)(f) Interest on the part of the juror in the outcome of the action, or the principal question involved therein.

D(1)(g) Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in reference to: the action; either party to the action; the sex of the party, the party's attorney, a victim, or a witness; or a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although it should appear that the juror challenged has formed or expressed an opinion upon the merits of the cause from what the juror may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all of the circumstances, that the juror cannot disregard such opinion and try the issue impartially. **If a juror expresses concerns about their ability to be fair, a judge may not rehabilitate and must release the juror.**

D(2) **Peremptory challenges; number.** A peremptory challenge is an objection to a juror for which no reason need be given, but upon which the court shall exclude such juror. Either party is entitled to no more than three peremptory challenges if the jury consists of more than six jurors, and no more than two peremptory challenges if the jury consists of six jurors. Where there are multiple parties plaintiff or defendant in the case, or where cases have been consolidated for trial, the parties plaintiff or defendant must join in the challenge and are limited to the number of peremptory challenges specified in this subsection except the court, in

its discretion and in the interest of justice, may allow any of the parties, single or multiple, additional peremptory challenges and permit them to be exercised separately or jointly.

D(3) **Conduct of peremptory challenges.** After the full number of jurors has been passed for cause, peremptory challenges shall be conducted by written ballot or outside of the presence of the jury as follows: the plaintiff may challenge one and then the defendant may challenge one, and so alternating until the peremptory challenges shall be exhausted. After each challenge, the panel shall be filled and the additional juror passed for cause before another peremptory challenge shall be exercised, and neither party is required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time. The refusal to challenge by either party in the order of alternation shall not defeat the adverse party of such adverse party's full number of challenges, and such refusal by a party to exercise a challenge in proper turn shall conclude that party as to the jurors once accepted by that party and, if that party's right of peremptory challenge is not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called. The court may, for good cause shown, permit a challenge to be taken as to any juror before the jury is completed and sworn, notwithstanding that the juror challenged may have been previously accepted, but nothing in this subsection shall be construed to increase the number of peremptory challenges allowed.

D(4) **[*Challenge of*] Objection to peremptory challenge exercised on basis of [*race, ethnicity, or sex.*] protected status.**

D(4)(a) A party may not exercise a peremptory challenge on the basis of [*race, ethnicity, or sex.*] status **protected by Oregon or federal discrimination law.** [*Courts shall presume that a peremptory challenge does not violate this paragraph, but the presumption may be rebutted in the manner provided by this section.*]

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on. a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise of the challenge. [*The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*] **The court may also raise this objection on its own. Objection should be made by simple citation to this rule. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empanelled. Discussion of the objection must be made outside of the presence of the jurors.**

D(4)(c) [*If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.*] **Upon objection to the exercise of a peremptory**

challenge under this rule, the party exercising the peremptory challenge must articulatereasons that support the peremptory challenge. The objecting party may then present evidence or argument that the stated reason for the objection is pretextual or historically associated with discrimination, whether that discrimination is intentional, implicit, institutional, or unconscious.

D(4)(d) [*If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.*] **The court must evaluate the propriety of the peremptory challenge in light of the totality of the circumstances. If the court determines that a protected status under Oregon or federal discrimination law was a factor in invoking the peremptory challenge, then the objection must be sustained. The court shall apply an objective reasonable person standard when ruling on the objection. The court need not find that the peremptory challenge was subjectively believed to be discriminatory, but may find that an objectively reasonable person would perceive the challenge contributes to a heightened probability of implicit, institutional, or unconscious biasharming one or more of the parties, and that the preferential reasons stated to support the challenge are insufficient to outweigh the risk of unconscious bias. The court shall explain the reasons for its ruling on the record.**

E Oath of jury. As soon as the number of the jury has been completed, an oath or affirmation shall be administered to the jurors, in substance that they and each of them will well and truly try the matter in issue between the plaintiff and defendant and a true verdict give according to the law and evidence as given them on the trial.

F Alternate jurors.

F(1) **Definition.** Alternate jurors are prospective replacement jurors empanelled at the court's discretion to serve in the event that the number of jurors required under Rule 56 is decreased by illness, incapacitation, or disqualification of one or more jurors selected.

F(2) **Decision to allow alternate jurors.** The court has discretion over whether alternate jurors may be empanelled. If the court allows, not more than six alternate jurors may be empanelled.

F(3) **Peremptory challenges; number.** In addition to challenges otherwise allowed by these rules or any other rule or statute, each party is entitled to: one peremptory challenge if one or two alternate jurors are to be empanelled; two peremptory challenges if three or four alternate jurors are to be empanelled; and three peremptory challenges if five or six alternate jurors are to be empanelled. The court shall have discretion as to when and how additional peremptory challenges may be used and when and how alternate jurors are selected.

F(4) **Duties and responsibilities.** Alternate jurors shall be drawn in the same manner; shall have the same qualifications; shall be subJect to the same examination and challenge rules; shall take the same oath; and shall have the same functions, powers, facilities, and

privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror shall not attend or otherwise participate in deliberations.

F(5) **Installation and discharge.** Alternate jurors shall be installed to replace any Jurors who become unable to perform their duties or are found to be disqualified before the jury begins deliberations. Alternate jurors who do not replace jurors before the beginning of deliberations and who have not been discharged may be installed to replace jurors who become ill or otherwise are unable to complete deliberations. If an alternate juror replaces a juror after deliberations have begun, the jury shall be instructed to begin deliberations anew.

ORS 10 Fees

10.061 Fees payable to jurors; required waiver. (1) The fee of jurors in courts other than circuit courts is $[*1*]40 for each day that a juror is required to attend.

[*(2)(a) The fee of jurors for the first two days of required attendance in circuit court during a term of service is $10 for each day that a juror is required to attend.*

(b) The fee of jurors for the third and subsequent days of required attendance in circuit court during a term of service is $25 for each day that a juror is required to attend.]

(3) Unless otherwise provided by the terms of an employment agreement, a juror must waive the juror's fee provided for in subsection (1), (2) or (4) of this section if the juror is paid a wage or salary by the juror's employer for the days that the juror is required to attend a court, including a municipal or justice court. The provisions of this subsection do not affect any claim a juror may have for mileage reimbursement under ORS 10.065.

(4) In addition to the fees and mileage prescribed in subsection (1) of this section and ORS 10.065 for service in a court other than a circuit court, the governing body of a city or county may provide by ordinance for an additional juror fee and for city or county reimbursement of jurors for mileage and other expenses incurred in serving as jurors in courts other than circuit courts. [1999 c.1085 §4 (enacted in lieu of 10.060); 2001 c.761 §3; 2001 c.779 §13; 2002 s.s.1 c.10 §3]

10.065 Mileage fee and reimbursement of other expenses. (1) In addition to the fees prescribed in ORS 10.061, a juror who is required to travel from the juror's usual place of abode in order to execute or perform service as a juror [*in a court other than a circuit court shall*] must be paid mileage at the standard rate for mileage reimbursement issued by the federal Internal Revenue Service [*of eight cents a mile*] for travel in going to and returning from the place where the service is performed.

[*(2) In addition to the fees prescribed in ORS 10.061, a juror who is required to travel from the juror's usual place of abode in order to execute or perform service as a juror in a circuit*

court shall be paid mileage at the rate of 20 cents a mile for travel in going to and returning from the place where the service is performed.] Mileage paid to a juror shall be based on the shortest practicable route between the juror's residence and the place where court is held.

[*(3) In addition to the fees prescribed in ORS 10.061, the State Court Administrator may reimburse a juror who uses public transportation to travel from the juror's usual place of abode in order to execute or perform service as a juror in a circuit court, without regard to the distance traveled by the juror.*]

(4) In addition to the fees prescribed in ORS 10.061, a juror serving in circuit court may be paid for lodging expenses, dependent care expenses and other reasonable expenses that arise by reason of jury service. Expenses under this subsection may be paid only upon written request of the juror, made in such form and containing such information as may be required by the State Court Administrator. The State Court Administrator shall establish policies and procedures on eligibility, authorization and payment of expenses under this subsection. Payment of expenses under this subsection is subject to availability of funds for the payment.

(5) A juror shall be paid the mileage and other expenses provided for in this section for each day's attendance at court.

(6) The State Court Administrator shall establish policies and procedures on eligibility, authorization and payment of mileage and expenses under subsections (2) to (4) of this section. [1957 c.676 §1; 1971 c.358 §2; 1981 c.509 §2; 1999 c.1085 §5; 2002 s.s.1 c.10 §4]

ORS 10 DISCRIMINATION

10.030 Eligibility for jury service; discrimination prohibited.

(1) Except as otherwise specifically provided by statute, the opportunity for jury service may not be denied or limited on the basis of [*race, religion, sex, sexual orientation, gender identity, national origin, age, income, occupation or*]any [*other*] factor that discriminates against a cognizable [*group*] status in this state except as expressly provided in this section.

(2) Any person is eligible to act as a juror in a civil trial unless the person:

(a) Is not a citizen of the United States;

(b) Does not live in the county in which summoned for jury service;

(c) Is less than 18 years of age; or

(d) Has had rights and privileges withdrawn and not restored under ORS 137.281.

(3)(a) Any person is eligible to act as a grand juror, or as a juror in a criminal trial, unless the person:

(A) Is not a citizen of the United States;

(B) Does not live in the county in which summoned for jury service;

(C) Is less than 18 years of age;

(D) Has had rights and privileges withdrawn and not restored under ORS 137.281;

(E) Has been convicted of a felony or served a felony sentence within the 15 years immediately preceding the date the person is required to report for jury service; or

(F) Has been convicted of a misdemeanor involving violence or dishonesty, or has served a misdemeanor sentence based on a misdemeanor involving violence or dishonesty, within the five years immediately preceding the date the person is required to report for jury service.

(b) As used in this subsection:

(A) "Felony sentence" includes any incarceration, post-prison supervision, parole or probation imposed upon conviction of a felony or served as a result of conviction of a felony.

(B) "Has been convicted of a felony" has the meaning given that term in ORS 166.270.

(C) "Misdemeanor sentence" includes any incarceration or probation imposed upon conviction of a misdemeanor or served as a result of conviction of a misdemeanor.

(4) [*A person who is blind, hard of hearing or speech impaired or who has a physical disability is not ineligible to act as a juror and may not be excluded from a jury list or jury service on the basis of blindness, hearing or speech impairment or physical disability alone.*] **The opportunity for jury service may not be denied on the basis of disability to a juror who is able to fulfill the essential functions of jury service. A juror must be offered reasonable accommodation to the known physical or mental limitations of a qualified individual with a disability, unless the accommodation would impose an undue hardship on the operation of the courts or on the juror.**

(5) A person is ineligible to act as a juror in any circuit court of this state within 24 months after being discharged from jury service in a federal court in this state or circuit court of this state unless that person's service as a juror is required because of a need for additional jurors. [Amended by 1971 c.630 §1; 1975 c.781 §4; 1977 c.262 §1; 1985 c.703 §2; 1989 c.224 §3; 1997 c.313 §8; 1997 c.736 §1; 2007 c.70 §4; 2007 c.100 §13; 2009 c.484 §13; 2021 c.367 §2]

10.115 [*Jurors with disabilities.*] Communication Assistance (1) As used in this section:

(a) "Assistive communication device" means any equipment designed to facilitate communication [*by a person with a disability*].

[*(b) "Juror with a disability" means a person who is hard of hearing or speech impaired, who is summoned to serve as a juror and whose name is drawn for grand jury or trial jury service.*]

(c) "Qualified interpreter" means a person who is readily able to communicate with a juror [*with a disability*], accurately communicate the proceedings to the juror, and accurately repeat the statements of the juror.

(2) The court to which a juror [*with a disability*]is summoned, upon written request by the juror and upon a finding by the court that the juror requires the services of a qualified interpreter or the use of an assistive communication device in examination of the juror as to the juror's qualifications to act as a juror or in performance by the juror of the functions of a juror, shall appoint a qualified interpreter for the juror and shall fix the compensation and expenses of the interpreter and shall provide an appropriate assistive communication device if

needed. The compensation and expenses of an interpreter so appointed and the cost of any assistive communication device shall be paid by the public authority required to pay the fees due to the juror.

(3) An oath or affirmation shall be administered to a qualified interpreter appointed for a juror [*with a disability*], in substance that the interpreter will accurately communicate the proceedings to the juror and accurately repeat the statements of the juror.

(4) A qualified interpreter appointed for a juror [*with a disability*], or a person operating an assistive communication device for a juror [*with a disability*], shall be present during deliberations by the jury on which the juror serves. An interpreter or person operating an assistive communication device may not participate in the jury deliberations in any manner except to facilitate communication between the juror with a disability and the other jurors or other persons with whom the jurors may communicate, and the court shall so instruct the jury and the interpreter.

(5) When a juror with a disability serves on a trial jury, the court shall instruct the jury on the presence of the qualified interpreter or person operating an assistive communication device. [1985 c.703 §9; 1989 c.224 §4; 1991 c.750 §6; 2007 c.70 §6; 2007 c.96 §1]

C(7) **Deposition by telephone.** Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.

OR R RCP ORCP 39, Effective: May 1, 2020West's Oregon Revised Statutes Annotated

C(7) *Deposition by Telephone.* The court may, upon motion, order that testimony at a deposition be taken by telephone or other remote means, in which event the order will designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy.

OR R TAX CT REG DIV TCR 39, Effective: January 1, 2021West's Oregon Revised Statutes Annotated

(3) "Telecommunication" must be by telephone or other electronic device that permits all participants to hear and speak with each other and permits official court reporting when requested. When recording is requested, telecommunications hearings must be recorded by the court if suitable equipment is available; otherwise, it will be provided at the expense of the party requesting recording.

UTCR 5.050

Proposed ORCP 39 (C) (7) DEPOSITON BY REMOTE MEANS

a. Parties may agree by stipulation or the court may order that testimony at a deposition or trial be taken by ~~telephone~~ "remote means." If testimony at a deposition or trial is taken by ~~telephone~~ remote means pursuant to court order, the order shall designate the conditions of taking testimony and, the manner of recording ~~the deposition~~, and may also include other provisions to assure that the ~~recorded~~ testimony will be accurately recorded and trustworthy. If testimony at a deposition or trial is taken by ~~telephone~~ remote means other than pursuant to court order or stipulation made a part of the record, then objections as to the taking of testimony by ~~telephone~~remote means, the manner of giving the oath or affirmation, and the manner of recording ~~the deposition~~ are waived unless seasonable objection thereto is made at the taking of the deposition or at the time of trial. The oath or affirmation may be administered to the ~~deponent~~witness, either in the presence of the person administering the oath or ~~over the telephone~~by remote means, at the election of the party taking the deposition.

b. "Remote means" is defined as any form of electronic communication that permits all participants to hear and speak with each other and permits official court reporting when requested. When recording is requested at trial, electronic communications must be recorded by the court if suitable equipment is available; otherwise, recordings must be made at the expense of the party requesting the recording.

c. A request for "remote location testimony" must be made within the time allowed by ORS 45.400 (2).

RE: Proposed addition to ORCP 7

1 message

Aaron Crowe <aaron.crowe@nationwideprocess.com> Mon, Jan 31, 2022 at 4:
To: Shari Nilsson <nilsson@lclark.edu>
Cc: Mark Peterson <mpeterso@lclark.edu>

Thank you, Shari. I want to point out that I erred by gratuitously adding an extra (d) in my proposed rule below. The intent was to reference substituted service [ORCP 7D(2)(d)] instead of service by mail [ORCP 7D(2)(d)], in the very first sentence of the proposed rule addition.

I may observe on 1/12/2022, in case someone has a comment and/or question. What I failed to add in my email, for the benefit of attorneys/judges present who are not involved in judicial foreclosures, is the frequency that occupants are served in a Judicial foreclosure. An occupant is served in each and every judicial foreclosure.

Thanks again,

Aaron

Aaron J. Crowe
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From: Shari Nilsson <nilsson@lclark.edu>
Sent: Monday, January 31, 2022 10:39 AM
To: Aaron Crowe <aaron.crowe@nationwideprocess.com>
Cc: Mark Peterson <mpeterso@lclark.edu>
Subject: Re: Proposed addition to ORCP 7

Hi Aaron,

I will be sure to include your thoughtful proposal on the next Council agenda for discussion by the service committee at the February 12 meeting.

Best,
Shari

Shari Nilsson
Executive Assistant
Council on Court Procedures

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On Thu, Jan 27, 2022 at 5:59 PM Aaron Crowe <aaron.crowe@nationwideprocess.com> wrote:

> Hi Shari,
>
> My first inclination was to send this email to Judge Norby, whom I believe chaired the Rule 7/9/10 committee the last time I was asked to attend one of their working sessions. I'm sure you know what to do with it. We are entering a turbulent time where foreclosures, both judicial and non-judicial are expected to hit the pavement running. The numbers of residential loans in default is mind numbing and have been held at bay due to both legislative stays and executive order, which seemingly have come to an end. Evidence that this will be a tsunami of foreclosures is beginning to find expression in my office. I am currently president of the Oregon Association of Process Servers and the membership in Oregon are bracing for what has started and what is ahead. My proposed rule addition relates only to an occupant or party in possession in connection with a judicial foreclosure. Rarely have I seen a proposed rule meth serve both as a cost saving mechanism AND, at the same time, serve to heighten notice to a defendant. The Oregon legislature has already essentially weighed in on the noticing issue up an occupant by this proposed method of service in ORS 86.774 (notice to occupant in a non-judicial foreclosure), which essentially provides the same measure of notice by essentially iden means. Some minor nuance differences in the language of the proposed new rule exist when compared to the language of ORS 86.774. Such changes are reasonably necessary and deliberate. Following the proposed rule addition below, I've provided my thoughts.
>
> The proposed rule addition for service upon a defendant occupant or parties in possession in connection with a judicial foreclosure is as follows:

(1) (a) Service may be made upon an individual who is an occupant of a dwelling house or specific unit therein pursuant to ORCP 7D(2)(a) or ORCP 7D(2)(d) and as hereinafter prescribed if unable to serve by personal or substituted service during the first attempt.

(b) (A) If an occupant cannot be served by either personal or substituted service during the first attempt, the person that attempts to effect service shall post a true copy of the summons and complaint in a conspicuous place on the property on the date of the first attempt.

(B) If service cannot be effected on an occupant as provided in paragraph (a) of this subsection on the first attempt, a second attempt at personal or substituted service shall thereafter be made not less than 48-hours after the first attempt.

(C) If service cannot be effected on an occupant as provided in paragraph (a) of this subsection on the second attempt, a true copy of summons and complaint shall be posted in a conspicuous place on the property on the date of the second attempt. A third attempt shall then be made to effect serv on a day that is not less than 48-hours after the second attempt.

(D) If service cannot be effected on an occupant as provided in paragraph (a) of this subsection on the third attempt, plaintiff shall cause to be mail true copy of the summons and complaint, bearing the word "occupant" as the addressee, to the property address by first class mail with postage prepaid.

(c) Service on an occupant is effected on the earlier of the date that summons and complaint is served as provided in paragraph (a) of this subsection or the date of mailing as described in paragraph (b)(D) of this subsection.

Why: 1. Heightened level of notice to an occupant or parties in possession.

2. Substantial cost savings, eliminating the standardized alternative by publication.

An occupant must pass through the entrance to a subject dwelling in order be identified as an occupant. Currently, to provide notice to any occupant in a judicia foreclosure, such occupant must be served with the summons and complaint by a primary service method. Such occupant cannot be reasonably served anywhere else. I such occupant cannot be served at the dwelling house by a primary service method, the court is motioned to issue an order for publication. This additional cost to obtai adequate notice upon an occupant is clearly not reasonably calculated to result in actual notice. When you compare the reasonableness of notice between publication an the proposed new method of service, this is a no-brainer. The unnecessary cost of publication could be avoided altogether with an improved measure of notice by implementing the proposed new service rule.

In ORS 86.774, the calculation as to when service is deemed effected is the date of the first attempt. The spirit of that calculation is the fact that service must be effected prior to 120 days from the date of the future sale/auction. In a judicial setting, the sale date is dictated pursuant to a court order in a writ of execution and not established prior to making any attempt at service, as in a non-judicial service upon an occupant. I'm not sure that expediting the calculation as to when service is deem effective upon an occupant by tying to the first attempt/posting (such as the calculation in publication tied to date of first publication) is reasonably necessary in this proposed rule. It seems more reasonable to tie to the date of mailing, as is the case in most methods of service in ORCP 7.

The use of the term "not less than two days" in ORS 86.774 is not as precise as "not less than 48-hours," given the legislative intent. Additionally, the use of the same process server for all attempts has created problems when initial attempt is made by one sheriff's deputy or private process server and only that deputy or private process server must make the remaining attempts and mailing. Nowhere else in any method of service in Oregon rules are each and every step of service tied to a singu person, as opposed to having one or more professionals having each step for which they were involved reflected in a separate declaration or affidavit memorializing compliance with that particular step.

Though the 48-hour minimum exists between attempts at service by a primary service method, this is not intended to prevent someone from attempting two days a row if, for instance, a neighbor states that the occupant is seen every Sunday morning, but the server obtains this information from a neighbor on a Saturday. It would merely mean that you can't use the Sunday attempt if it was unsuccessful, relative to compliance with the proposed rule. Of course, if the Sunday attempt (two attempts consecutive days) is successful, the Certificate of Service would be reflected as personal service upon the occupant on that Sunday. Compliance with every provision of rule would only be necessary to constitute service IF service is not accomplished by a primary service method on any particular day.

INTENT: The intent of service upon a defendant pursuant to this proposed rule is upon the occupant, often named in the foreclosure complaint as Parties in Possession. While such occupant may be a grantor, the intent of this proposed rule is to provide notice to an occupant who is otherwise not a grantor. It is not reasonab that this proposed rule apply to a named grantor, who may occupy the premises and may be served by other specific methods available in ORCP 7 at this or another address, or publication. Though, publication on a named individual first requires evidence to the court of due diligence to locate such named grantor and to demonstrate that no other address can reasonably be found at which to attempt service upon grantor by a primary service method before motioning the court for an order to serve by publication. A big issue here is that an occupant or parties in possession cannot reasonably be served anywhere else for obvious reasons.

My office has been involved with hundreds of thousands of services upon occupants in judicial and non-judicial foreclosures. I am happy to discuss any objecti that might exist. In my view, adoption of a rule similarly drafted seemingly would reasonably serve to heighten the likelihood of actual notice to a defendant occupant, while substantially reducing service costs where service upon the occupant or parties in possession become problematic.

Thank you for your consideration.

Aaron

Aaron J. Crowe
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From: Shari Nilsson <nilsson@lclark.edu>
Sent: Saturday, September 11, 2021 1:26 PM
To: Aaron Crowe <aaron.crowe@nationwideprocess.com>
Cc: Mark Peterson <mpeterso@lclark.edu>
Subject: Today's Council Meeting

Dear Mr. Crowe,

Thanks for making an appearance at today's Council meeting. I apologize that I didn't acknowledge your entrance; we were in the middle of a discussion and I admitted you from the waiting room and then promptly moved back to what I was doing and forgot to do so. Zoom etiquette for public meetings is something I'm still mastering.

Was there a particular rule or suggestion you were interested in? We may have covered a matter at the beginning of the meeting before you signed in. Please let me know if there's any information I can provide or anything I can do to be helpful.

Best regards,
Shari

Shari Nilsson
Executive Assistant
Council on Court Procedures

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Mark L. Huglin

Of Counsel:
Robert S. Perkins

January 10, 2022

Via Email

Honorable Mark A. Peterson
Multnomah County Circuit Court
1200 SW 1st Ave.
Portland, OR 97204
mpeterso@lclark.edu

Re: ORCP 27

Dear Judge Peterson:

I write with a potential modification to this rule, which I would ask the Council to consider in due course.

ORCP 27A makes it clear that a person subject to a guardianship or conservatorship may not appear in litigation as a party in their own name alone. They must appear through the guardian, through the conservator, or through a guardian ad litem appointed in the case. This makes logical sense because the imposition, especially of a guardian, carries with it the implication that the person does not possess capacity to understand and make reasonable decisions in matters far less complicated than are often involved in litigation.

However, there is one situation not contemplated by the rule where the rule, as written, would deny fundamental due process rights to protected persons in the State of Oregon writ large.

In a situation where a person opposes the appointment of a guardian or conservator over themselves on the grounds that they are not sufficiently impaired to require the appointment of the fiduciary and the court disagrees and appoints the fiduciary, the person has the right to appeal the limited judgment.

It is obvious that a fiduciary appointed by the court cannot be expected to appeal the very order appointing them. This is quickly a snake eating its tail.

Routinely, as is seen in many cases including Brown v MacDonald and Associates, 260 Or App 275, 317 P3d 301 (2013), and others, the protected person, themselves, is the party appellant in the appeal.

I'm handling a matter, now, in which the opposing parties have raised ORCP 27A as a bar to the protected person's right to appeal in his own name.

Council on Court Procedures
February 12, 2022, Meeting
Appendix H-1

While this is admittedly a limited circumstance which does not occur very often, if a court were to agree, this would utterly bar the court of appeals to any protected person who felt that their fundamental liberties were being deprived in a way which violates Oregon law.

Given how careful our protective proceeding scheme is to protect the liberties and rights of the protected persons in this state, I think an amendment is worth considering even if it will not be used very frequently.

Should the Council wish, I am happy to propose language below, which it could consider to potentially modify the rule.

As always, should the Council wish to hear from me, I stand ready to attend any Council meeting at your invitation. I hope you and the current members of the Counsel are well and thank you for your work.

I would modify the end of the first sentence of ORCP 27A to now say "in which the action is brought, except that a person subject to a protective proceeding imposed under Chapter 125 of these statutes retains the rights to appeal the appointment of a fiduciary in their own name alone and to retain counsel as the appellant in their own name alone."

Sincerely yours,

DRANEAS HUGLIN COOPER, LLC

/s/ Brooks Cooper
Brooks Cooper

cc: Kenneth Crowley, Chair
Kelly Andersen, Vice Chair

Council on Court Procedures
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