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

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Hon. Benjamin Bloom
Troy S. Bundy
Kenneth C. Crowley
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Derek Larwick
Hon. David E. Leith
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Scott O'Donnell
Tina Stupasky
Margurite Weeks
Jeffrey S. Young

Members Absent:

Nadia Dahab
Hon. Thomas A. McHill
Stephen Voorhees
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 27	ORCP 1	ORCP 71	ORCP 7		
ORCP 55	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 9:31 a.m.

II. Approval of February 12, 2022, Minutes

Mr. Crowley asked for a motion to approve the February 12, 2022, minutes (Appendix A). Mr. Andersen made a motion and Ms. Holley seconded. The motion carried unanimously by voice vote.

III. Administrative Matters

Judge Norby reported that she had submitted to the *Oregon State Bar Bulletin* the article she had written about the Council's history, but that the publication was not welcoming of a humorous, entertaining take on the matter. The editor suggested that an article that was rewritten to be more serious and straightlaced might be considered for publication. Ms. Holley asked whether Judge Norby had told the *Bar Bulletin* editor that the Council loved her article. Judge Norby stated that she had let the editor know that, but that it did not seem to make a difference. She indicated that she had let the editor know that part of the point of the article was to show that, while the Council takes its work seriously, its individual members do not take themselves quite so seriously.

Judge Norby stated that she had spoken with Mr. Crowley, Judge Peterson, and Ms. Nilsson about the possibility of publishing the article in more targeted publications. She submitted the article to both the Oregon Association of Defense Counsel's (OADC) publication, *The Verdict*, and the Oregon Trial Lawyers' Association's (OTLA) publication, *The Trial Lawyer*. She let both organizations know that she was submitting the article to both, because periodicals typically prefer to be exclusive. *The Verdict* accepted the article and she has been editing it to meet their requirements. She had not yet heard from *The Trial Lawyer*, and she wrote again this week to let them know that *The Verdict* had accepted the article and apparently did not object to it being published in OTLA's publication in order to reach both sides of the bar. She expected to hear back the following week. Ms. Holley asked whether she had spoken to Michael Kesten from OTLA, and indicated that she could reach out to him as well. Mr. Andersen stated that he would also be happy to talk about the article with Faith Morse from his office, who is on OTLA's publication committee.

Judge Norm Hill stated that it was disappointing that the *Bar Bulletin* would not publish the article, because the defense bar and plaintiffs' bar attorneys that the OADC and OTLA publications reach is just a slice of bar members. For example, he pointed out that domestic relations and business lawyers would likely not see the article. He also wondered when the *Bar Bulletin* had become such a serious literary publication. Judge Norby stated that she had also sent her article to the previous, long-time editor of the *Bar Bulletin*, who had retired about a year ago, asking whether the humorous take seemed out of line to him. The former editor indicated that he would have advocated for publication of the article, but that the Bar and the new editor

seem to be taking a different tone now.

Council members agreed that Judge Norby's article was worthy of publication in the *Bar Bulletin*, with Ms. Holley positing that, after a long day of reading motions, most lawyers would not want to read a serious publication about the Council on Court Procedures. Mr. Larwick pointed out that the *Bar Bulletin* publishes a monthly article about legal writing that is often humorous.

Mr. Goehler suggested sending the article to one or more Bar sections for publication in their newsletters. Judge Norby stated that she would check with OTLA and OADC to make sure that they were open to having the article submitted elsewhere.

IV. Old Business

A. Committee Reports

1. Rule 55 Committee

Judge Norby reminded the Council that, at the previous meeting, a handful of requests for wordsmithery had been made, and that a decision had also been made to attempt a form motion to quash and include it as part of the rule amendment. The committee presented the Council with two options (Appendix B). Option A includes both the wordsmithery and the form motion to quash, while option B is only the wordsmithery. Judge Norby explained that the reason that the committee decided to provide alternative options is that, although a majority of the committee members liked the form that was created, once they saw it inserted into the rule, they became less sure that it was a good idea to include it. The committee wanted the Council to be able to see it on paper and decide for themselves whether to include it.

Mr. Crowley stated that he prefers option B. Judge Bloom agreed. He stated that the goal is for people to comply with subpoenas, but including a form motion to quash would seem to be saying, "We have included your ticket so that you do not have to comply." He pointed out that the rules already indicate the procedure for filing a motion to quash a subpoena and, as long as the procedure is clear in the rules, that is sufficient. Mr. Goehler stated that, at the last Council meeting, he was on the bandwagon of including a form in the rule, but that he is now thinking that option B is the better way to go.

Judge Norby stated that the committee, especially those members who had looked at Utah's subpoena, were thinking that perhaps a more stripped down and basic motion would be helpful without being scary. However, she stated that the motion included in option A would seem to be as stripped down as possible while still including the necessary elements, and it still feels a bit scary to her to include it. She stated that most committee members who had initially wanted a form

included had changed their minds. Judge Norby indicated that Mr. Larwick was still agreeable to including the form. Mr. Larwick clarified that his preference would be to have an actual form rather than providing simple check boxes that stated “privilege” or some other reason. He felt that it was important for the person filling out the motion to formally articulate the basis for their motion. He stated that he also liked the fact that the duty to comply with the subpoena was not obviated by filling out the form and that the judge had to rule on the motion before the recipient of the subpoena was off the hook. He also liked the stronger language in the proposed rule itself about how subpoenaed persons could be subject to court penalties or fines for non compliance. He stated that he thought that Judge Norby did an excellent job drafting the form and that he was agreeable to including it with the stronger language and safeguards in place.

Judge Peterson stated that he was the original advocate of including the form. He understood that all Council members are reasonably a bit concerned that such a form might create problems. However, he pointed out that there is an access to justice issue to consider. He stated that he was not concerned about, for example, a hospital being subpoenaed for a deposition. His concerns lie more with occurrence witnesses who just happen to be at the wrong place at the wrong time. As an example, a witness who gets a subpoena for a day that falls in the middle of a planned trip to Europe, has no lawyer, and does not know what to do. Judge Peterson stated that, at the end of the last Council meeting, he had volunteered to contact someone in Utah to find out how their form is working. However, he had not had a chance to do so until a few days prior to this meeting. He had reached out to the chief executive and the presiding judge of the Salt Lake courts and had not yet heard back. He stated that he did not know how big of a problem it is, but that he would prefer to be able to share the experience of a state that uses such a form before jettisoning the concept. He stated that he likes the form very much, but agreed that the new language required by the amendment would itself be a huge improvement because it tells subpoenaed persons that they had better show up, while also letting them know that there is a method for asking to be excused.

Ms. Holley stated that it would be helpful to have a form available on the court’s website, rather than on the subpoena itself. She expressed concern that having the form on the subpoena itself would encourage people to just flip the subpoena over and go to the court. She also observed that she has never seen anyone have a problem calling the subpoenaing lawyer or the court and letting them know that they are unable to appear and trying to work it out. Judge Leith suggested that, rather than squandering the good work that was done on the form, the Council could forward the proposed form to Holly Rudolph with the Oregon Judicial Department for her consideration. Judge Jon Hill stated that, if the Council does not create a form, Law and Policy will. If Law and Policy does not, judges are probably going to receive handwritten documents and have to sort them out. He

stated that there is a pragmatic consideration of how judges want to receive such motions to quash.

Judge Norby pointed out that the committee had also done work on the language in the rule as well, and she did not want that piece to get overlooked. She wondered whether the Council would like to vote on that language. Ms. Nilsson suggested a simple voice vote on whether the Council agrees with the language in option B, and then continuing the topic on the agenda next month after Judge Peterson has had the opportunity to do research on how the form has played out in Utah. At that point, the Council can revisit whether to keep the form in the rule or to forward the form language on to Holly Rudolph, or to whoever else might be appropriate. Judge Norby made a motion to accept the new language in option B. Judge Bailey seconded the motion, which passed unanimously by voice vote.

2. Rule 57 Committee

Ms. Holley stated that she had received a lot of feedback at the last committee/workgroup meeting and that she had not yet incorporated it into a new draft amendment. She summarized the feedback as stating that there needs to be a clear stance, and that there were mixed standards in the language of paragraph D(4)(d). She stated that the agreement seems to be that "more likely than not under the totality of the circumstances" is the standard to use. She explained that she is trying to craft a new version of the amendment with some additional feedback from Judge Oden-Orr and Brooke Reinhardt.

Ms. Holley asked the Council for feedback about a concept in the current version of the amendment that, if an attorney expresses actual bias, rather than implicit bias, in a challenge, then the judge must sustain the objection. Her suggested language is, "if the court determines more likely than not that a protected status under Oregon or federal discrimination law was a subjective motivating factor in invoking the peremptory challenge, the objection must be sustained. Additionally, if the court determines more likely than not that a reasonable person would determine that sustaining the challenge contributes to implicit institutional or unconscious bias harming one or more of the parties or the excluded juror, and the reasons given to support the challenge are insufficient, the objection must be sustained." She explained that the committee/workgroup had concerns that past draft language had the tendency to say that, even if someone expresses actual bias, the court has to consider the totality of the circumstances and might not sustain the objection, which was not the intention.

Ms. Holley stated that she intended to take her proposed language back to the committee/workgroup, along with some suggestions for improvement of ORS chapter 10, including proposing increasing the per diem for jurors across the board to $40.

Judge Peterson thanked Ms. Holley for her work with the committee/workgroup. He also stated that Rep. Marty Wilde's bill did not pass in the recently concluded short session of the Legislature, and that the ball was once again in the Council's court.

3. Remote Hearings

Mr. Andersen stated that the committee had met and done some work on its former drafts of ORCP 39 and ORCP 58. He shared his screen with those in-progress drafts (Appendix C) and noted that they take into consideration the discussion from the February Council meeting, where it was wisely pointed out that trial depositions and depositions for testimony should not be conflated.

Judge Peterson stated that he likes the way the drafts read generally but, before the Council makes a final decision, he would like Ms. Nilsson to put them into standard Council format. He suggested that the first two sentences of Rule 58 A could probably be merged together as one sentence. He noted that, at some point, judges may want to encourage remote testimony by fiat. One other suggestion for the committee would be regarding ORS 45.400. He stated that it is not as badly written as he thought it was, but that this may be another biennium where it is appropriate for the Council to make a specific suggestion to the Legislature to amend a statute. He stated that he thinks it would be well received for the Council to suggest changing the 30-day requirement for notice. Mr. Andersen agreed that the first two sentences of section A are a bit clunky and could be merged. He stated that he would have no objection to Ms. Nilsson working a bit of editorial magic.

Judge Jon Hill noted that the draft seems to be missing language that allows the court to just direct that remote testimony be used. Mr. Andersen stated that he believes that this language is in the second sentence: "Alternatively, the court may require that such testimony be allowed by remote means." Judge Norm Hill asked why there could not just be a provision that states, "The manner and means of appearance at trial will be up to the discretion of the trial judge." He stated that this would allow parties to stipulate, but the judge would still have control over it. Mr. Andersen stated that he believes that this language already exists in the third sentence: "If remote testimony is allowed, the court shall designate the conditions and manner of taking and recording the testimony, and may also include other provisions to ensure the testimony is accurately recorded and preserved." He asked whether something beyond this is needed. Judge Norm Hill stated that this language subsumes all of the other language in the draft, which is unnecessary if what is being said at the end of the day is that the trial judge is going to decide how remote testimony is handled. He stated that the parties can certainly stipulate, and that stipulation informs the trial judge, but that last sentence seems to swallow everything else. Mr. Andersen agreed that this sentence could swallow

everything else but, on the other hand, the first sentence really encourages the parties to stipulate, which the Council wants to do. Judge Bloom agreed with Mr. Andersen. He stated that he understood Judge Norm Hill's point, but noted that it is important to make clear that stipulation is allowed and get people to start planning when they are looking at the rules.

Judge Norm Hill stated that he had another concern that arose from the juvenile context. A few years ago, juvenile practitioners and judges were surprised when the Court of Appeals ruled that judges do not actually have control over how someone appears, and that it may infringe on a substantive right to force someone to appear in person as opposed to telephonically or otherwise. Judge Hill stated that he does not know of a corresponding rule that would apply to civil cases, but he expressed concern about a potential due process issue. Judge Leith noted that there could also be a statutory issue under ORS 45.400. He worried that the Council is in strange territory where it is clearly making a procedural change, but in an area where there is already a statute. He wondered whether the Council's change could be viewed as purporting to amend ORS 45.400. Judge Bloom stated that the committee's proposal starts with stipulation of the parties, and he believes that due process issues with ORS 45.400 arise when one party objects to remote testimony. Judge Leith stated that, if the Council is purporting to give the court broad discretion, ORS 45.400 looks like it put some sideboards on the sheer scope of discretion.

Judge Peterson noted that ORS 45.400 says that the court may allow written notice less than 30 days before trial for good cause shown, so the word "may" is already in the statute. He stated that he thinks that this is a case where the Council should adhere to the statute, but recommend a non-controversial change to ORS 45.400 to the Legislature. Judge Leith pointed out that ORS 45.400 also has good cause provisions and the factors to consider when deciding whether there is good cause. Judge Peterson agreed that the statute definitely has many considerations in terms of whether remote testimony should be allowed, but stated that it does not seem like it covers very much about a reason for shortening the 30 days.

Judge Norby stated that she likes the idea of encouraging stipulation. However, she expressed concern about timing, since people tend to plan for remote testimony ahead of time. In Clackamas County, 90% of the time the trial judge is unknown until the night before trial. If parties have planned ahead and stipulated for remote testimony of a witness, assuming that it will be agreed to by the court, and the trial judge then disagrees because they have the ultimate authority, how would that play out? Does the judge really have the leeway to overrule the stipulation? If not, it would remove all of the trial court's discretion because, ultimately, a judge really cannot tell someone they cannot call a witness who is important to their case. She stated that logistics are a real concern, especially in

jurisdictions where the trial judge is assigned at the end of the process.

Mr. O'Donnell stated that, irrespective of the precise wording of the amendment, any lawyer in any trial in which they are going to rely on remote testimony had better do a pretty good job of confirming a backup plan for witness testimony, because there is always going to be judicial discretion. He recalled a trial in Coos County where plaintiff's counsel tried to use remote testimony. The judge begrudgingly allowed them to attempt it, but warned against it because of poor bandwidth. The witness ended up testifying for five minutes, no one understood what they said, and the testimony was stricken. Mr. O'Donnell noted that there are always wildcards, but the onus is on the party that wants to present remote testimony to assess the risk factors. Further, in smaller cases, he noted that it may not be economical, but he did not know what other options are available. Mr. Andersen opined that the draft amendment is written broadly enough for a situation like that. The attorney wishing to present remote location testimony could present it by video ahead of time, download the recording, and play it at trial, which would bypass the limitation of limited bandwidth. Mr. O'Donnell stated that this is essentially the old-school method of perpetuating testimony.

Judge Bailey stated that whether the courts have adequate bandwidth or not is on the courts, and not necessarily the rule. This is part of the reason that he and Mr. Andersen discussed that the court needs to ultimately have the discretion to say yea or nay. He noted that Washington County's process for stipulated remote testimony is that such a request would go before the chief civil judge for approval, and the trial judge would then need to adjust the trial schedule to accommodate it. He stated that his hope is that, after two years of doing remote hearings, judges are starting to get comfortable with the practice. This is part of the reason that the Council is considering this rule change in the first place. Judge Bailey stated that his only issue with the draft is that it includes language requiring the court to record and store the testimony. However, the courts do not currently have the storage capacity to do so.

Judge Norby stated that she may have read the draft incorrectly, because she thought the first sentence was specifically saying that the testimony would be happening at trial. She noted that her court also has a process for a designated judge to approve these things before trial. Mr. Andersen stated that, when the committee drafted the amendment, its primary focus was on live remote testimony at trial. However, Mr. O'Donnell raised the very good point of courts without adequate bandwidth where remote testimony is still needed. He stated that, as the amendment is currently written, it seems broad enough to include playing a perpetuation deposition that has been obtained remotely. However, if any Council members feel that the draft, as written, would not allow that, the committee could consider changes to the language. Judge Norm Hill pointed out that this would not be remote testimony; it is perpetuation testimony, whether it

is on a video or otherwise. The rule does not need to address that because it does not fall within the category of remote testimony.

Judge Norby proposed changing the language "testimony at trial" to "trial testimony." She stated that this would resolve her confusion where she thought the issue went to the trial judge. Broadening it to "trial testimony" is less confusing. Judge Jon Hill proposed changing the language to just "testimony" so that it covers everything. In the second sentence that discusses the judge's authority, he wondered whether qualifying language about the literal standard of admissibility is needed because the goal is to encourage the usefulness of testimony.

Mr. Goehler stated that the amendment seems to require a different recording standard for remote testimony than for normal testimony, and he was not sure that this is necessary. Since live witnesses are not video recorded, why would the court reporting for remote testimony be any different than for in-person witnesses? Mr. Andersen wondered where Mr. Goehler was reading that the recording was required to be a video. Mr. Goehler noted that section C states that electronic communications must be recorded. If electronic communications include basically everything in the stream, unless that language is narrowed down to say that only the audible portions of the electronic communications need to be recorded, it could be interpreted as the video needing to be recorded. Mr. Andersen stated that he understood Mr. Goehler's point.

Judge Norby wondered what would happen when a jury asked to take pre-recorded testimony back to the jury room and listen to it again. She expressed concern that this could make a remote testimony witness more important than all of the other witnesses because that witness got to be reviewed in the jury room. Mr. Goehler stated that such witnesses should be treated like any other live witness. Judge Bloom agreed. Mr. O'Donnell stated that it becomes a perpetuation issue at that point.

Mr. Crowley stated that remote testimony has been happening on the fly for the past two years and that it seems to have been working. While it may not be quite as preferable as in-person testimony, it certainly is better than not having the testimony at all. The question is how to best incorporate it into a rule. Mr. Andersen stated that he is happy to go back and attempt to re-draft the amendment with the suggestions from the Council. Judge Peterson stated that he has not heard any Council member who is against the concept, and that it has been looked at through a few lenses. He noted that there should not be concern for practitioners if it is clear that they need to do their homework beforehand, get a stipulation, fix any bandwidth issues, and have a backup plan. Thus, if a stipulation for recorded testimony gets assigned to a judge the day before trial, that judge will be aware that both the attorneys have done their homework and

feel comfortable allowing remote testimony to happen.

Judge Bailey asked whether there is any reason to have a provision in the rule that requires the court to record remote testimony. He stated that the court always has an obligation to record testimony and uses the "for the record" system (FTR) to do so. He pointed out that the provision could create confusion, and noted that it does not exist in the current rule. Mr. Andersen opined that, if recording is not addressed, it leaves a hole for both sides to speculate and then fight about who should record the testimony. Judge Bailey noted that the video is never going to go to the jury, and even the audio recording is not going to go back to the jury. The audio recording is only for purposes of a transcript later on, if a party wants to appeal to a higher court. He again expressed concern about a potentially confusing provision that may be unnecessary. Judge Norm Hill agreed with Judge Bailey. He stated that most courts have their systems configured so that testimony by video or telephone is connected directly to the FTR system and gets recorded. His fear is that, by referencing recording, it suggests that the court will be recording video testimony differently than any other testimony. He suggested simply removing the language. Mr. Crowley suggested language to the effect that video testimony would be recorded in a manner consistent with live testimony.

Mr. Young stated that his inclination is to leave out the recording requirement in the rule. He stated that he would not be surprised if there was a supplemental local rule that requires the court to use an audio recording system. Writing a redundant provision into the rule may not even be necessary, and may be inviting additional issues. Mr. Young stated that one of his concerns is, if the technological issues are going to vary from court to court, whether there should be some kind of requirement that parties need to make a request to the court in advance of trial for remote testimony at trial. ORS 45.400 requires 30 days' advance notice, and that language may be there to put the onus on the parties to make appropriate arrangements and check with the court beforehand to make sure that the request can even be accommodated. Whether it is 14 days or 30 days, Mr. Young felt that the onus should be on the litigants to get ahead of the issue, if remote testimony is something that they want.

Judge Peterson agreed with Mr. Young. He pointed out that there is a statute that governs recording. He suggested that the committee look at that statute before deciding what language to include or not include about recording. Mr. Andersen pushed back a little on the idea of removing the language about recording. He stated that he believes that what some Council members are asking for already exists in the draft. The third sentence reads, "If remote testimony is allowed, the court shall designate the conditions and manner of taking and recording the testimony, and may also include other provisions to assure the testimony is accurate and recorded and preserved." He pointed out that the judge can say that testimony can be recorded in the way that it usually is and, if a party for whatever

reason thinks that the actual video should be preserved, that language gives the judge the power to say whether that can happen or not.

Judge Peterson stated that he was not at all sure that the language should be removed; however, since is has become an issue that is being discussed, he again suggested looking at the statute and make sure that the rule and statute mesh. Mr. O'Donnell pointed out that the person who is using the remote testimony can always record it and have it available for later use. He stated that, a number of times, court reporters have had a problem with transcripts when cases have been on appeal and they have consulted with parties who have also recorded the proceedings. Ms. Stupasky asked whether parties need a judge's permission to separately record trial testimony. Judge Bailey agreed, which is why he raised the question of storing recording in the first place. Courts would record on the court's FTR system, which currently is audio only, so potentially requiring a court to save video testimony on a thumb drive would not likely be feasible.

Judge Jon Hill expressed concern about the timelines, because this rule is also used for divorces, restraining orders, stalking orders, and other matters, some of which involve self-represented litigants. He stated that the committee had discussed whether timelines should be included or whether it should be up to the local courts. He asked for Council members' opinions. Judge Bailey suggested leaving it up to the local courts. He stated that it is always better if requests come in earlier rather than later because of logistics. Currently, in his court, he has a special stamp that he puts on the orders that states that it is up to the parties to make sure their client or their witness knows how to use the system. He stated that court likely will not delay if someone does not know how to use the system.

Mr. Young stated that one way to address it would be to not write in a requirement in the rule. If individual circuit courts want to adopt a different provision because of their particular technological issues, they can always adopt a supplemental local rule that requires advance notice depending on the circumstances. Judge Norby wondered if there could be a provision requiring parties to file a notice of anticipated stipulation to remote testimony or something along those lines as soon as they know that they are going to be requesting it. This way, when the trial judge gets the case and is looking at the file the night before, they can see that this will need to be ruled on.

Judge Norm Hill stated that he understands the need to encourage people to stipulate. However, he was struggling with why the Council is trying to write a rule on this at all. He explained that the courts are already holding a lot of video hearings. The courts already consider whether testimony will be in person, by telephone, by video, or any combination of the three when they are setting the hearing date. He wondered whether people are encountering difficulties and arguing about the process. Judge Norby stated that she believes that she and

Judge Hill may be looking at the issue from the perspective of people who do trials every day. However, the rules are written not just for those people but, also, for those who might do a trial twice a year, or twice in their life. From a judge's perspective, this may seem superfluous but, from the perspective of practitioners who need to go to the rules to figure out how to try their case, maybe not. Judge Norm Hill stated that he could see that point; however, that begs the question of whether the Council should be writing rules for the people who try cases only twice in their career or, rather, for the people that are "regular customers."

Judge Bailey stated that there are some judges who believe that, if there is no rule, they may be unable to do something. With this change, there would at least be some of those judges who may have otherwise been afraid to allow remote testimony who would now be willing to do so. Judge Norm Hill stated that, if letting judges know that they have this authority is the goal of the amendment, he would prefer to simplify the rule and say that, subject to ORS 45.400, the court has control over the means and manner on remote testimony and and leave it at that. Judge Bailey stated that he believes that the amendment does this already, although he may be incorrect and that it is just the notice section that refers back to the statute. Judge Norm Hill stated that perhaps the problem is that the draft seems clunky to him because it seems like it is trying to be educational, as opposed to prescriptive.

Mr. Andersen attempted to address some of Judge Norm Hill's concerns. He stated that he tried a case in November of 2020, at the height of the pandemic. He wanted to have an out-of-state witness testify remotely, and the judge said that, if both sides stipulate, he would allow it. Otherwise, every witness needed to testify in person. This rule amendment would tell judges that remote testimony is allowed. Many judges do not need that, but some judges do. As to the recording of remote testimony, there may only be a recording if it was a perpetuation deposition, so he felt that it is important that the rule address the recording and state that the court can designate how it is to be done.

Mr. O'Donnell noted that many experts in malpractice cases are from out of state. There is no expert disclosure in Oregon, so there is some gamesmanship that goes on in terms of whether an attorney wants to provide notice of a remote witness, because the expert may then get investigated by the other side. He noted that this is one challenge with giving notice, depending on what kind of notice is necessary. Oftentimes, people make decisions during trial, and it is hard to get an expert to come back in to testify. He stated that he thinks that flexibility is a good thing, and that he does not believe that a judge would require stipulation. Judge Bailey stated that, coming from the criminal law world, he does not understand "hidden discovery" when it comes to expert witnesses. As a judge, he just requires that lawyers bringing in an expert witness have the expert's complete file transferred to the other attorney for the other attorney to go through. He noted that this is

the beauty of the notice requirement, because the other party is on notice that the expert will be testifying, and it actually saves time at trial.

Judge Peterson stated that it seems like there is still a lot of work for the committee, and that he would like to see the committee take the concerns that have been raised and come back with a new draft. Mr. Andersen asked for a vote on the third sentence about recording of remote testimony, because he did not want to spend time re-drafting a sentence if the consensus is that it does not need to be included. Judge Jon Hill added the caveat that the proceedings would be recorded by the FTR system anyway. Judge Peterson reiterated that he feels that the committee should look at the statute that that governs recording of testimony in trial, rather than to take a vote at this time. He noted that the language might need to be adjusted based on that statute. Judge Leith suggested that the entire rule should be subject to ORS 45.400 so that it is clear that the Council is not trying to go sideways on that. He asked whether it would be possible for him to join the committee. Mr. Andersen stated that he would include him the next meeting invitation. Ms. Stupasky also asked to join the committee.

4. Vexatious Litigants

Judge Jon Hill referred the Council to the committee's draft of ORCP 35 (Appendix D). He reminded the Council that the committee's first inclination was to recommend legislation, but that Judge Norby had suggested an attempt to draft a new ORCP. He stated that Judge Norby had done a phenomenal job putting together ORCP 35, which is an open rule number reserved for expansion. It defines a vexatious litigant and provides a process for dealing with vexatious litigants, based mostly on case law with one additional suggestion. He asked Judge Norby for any further explanation before turning to the Council for feedback, particularly any concerns about the potential new rule's effect on either substantive or procedural rights.

Judge Norby stated that her wonderful judicial clerk had collected everything she could find across state jurisdictions and federal law regarding vexatious litigants, and that Mr. Crowley had found some case law in other jurisdictions, as well as an Oregon case. She filtered out what appeared to her to be substantive approaches, and just took the few that seemed clearly procedural, and used those as the foundation for the drafting process. She stated that the Oregon case, which she did not see until after she drafted the new rule, provided essentially, but more loosely and informally, the same process that she had drafted, which was encouraging. Judge Norby stated that she was careful to make sure that this was something that was already, arguably, within the court's purview. She stated that, when Clackamas County had a problem with a potentially vexatious litigant, they spent so much time just trying to figure out what to do, without any luck, that she felt that having a rule to aid the courts would be very helpful.

Judge Norm Hill thanked Judge Norby for her amazing draft, which moves the ball forward tremendously from the status quo. He put forward a scenario in which it was not a serial plaintiff who was the vexatious litigant but, rather, a respondent in a child custody case. He wondered how the rule, as drafted, would address that person, since they are technically not the plaintiff. Judge Norby stated that section B uses the language, "the court or any party." Judge Norm Hill pointed out that the vexatious litigant designation seems to be as to plaintiffs only. Judge Norby stated that the intent is to prevent people from filing cases. She stated that, in the domestic relations world, someone who is a respondent kind of becomes a petitioner if they file a contempt or show cause order or a new motion. Judge Norm Hill pointed out that, in the underlying case, that party is still the respondent. He noted that the goal is to still capture those people, and he did not want the language in the rule to preclude that. Judge Norby noted that section B uses the language, "prohibiting a vexatious litigant from commencing new action," not petitioner or plaintiff. Judge Norm Hill explained that section B and section C do not have parallel language, and opined that they should. Judge Norby wondered whether changing "plaintiff" to "filing party" in section B would resolve the problem. She stated that she can work on this language with the committee. Judge Norm Hill stated that the goal is just making sure not to presuppose that the person initiating vexatious litigation will, in all cases, be the plaintiff.

Judge Peterson suggested changing the word "papers" to "documents" in section A.1.b. He also noted that section C includes small claims actions, which are not governed by the ORCP according to ORCP 1 A. He said that, while he would like to knock out vexatious small claims litigants, he does not know that it is possible.

Mr. Goehler asked about whether the definition of a vexatious litigant can be a bit more precise. For example, how many times would a matter need to be relitigated before the litigant is considered vexatious? He also wondered whether the language should be in the past tense rather than the present tense, because the designation is based on past conduct, to say they are this because they did this, not necessarily that a person is constantly doing this thing. He stated that he feels that it is important for the person to have done conduct that gives them this label or status, and then the consequences come from that status.

Judge Norby stated that Mr. Crowley had found an interesting case about a person who was wheelchair bound and went to restaurants without accessible restrooms, used those restrooms, hit his arm against the small door opening on his way, and sued the restaurants. He filed something like seven cases in a five-day period; in each case he alleged the same injury from the same behavior due to the same problem. In that scenario, he was found to be a vexatious litigant. However, he was not suing the same person but, rather, multiple people for the same cause. Judge Norby stated that she wanted to encompass that kind of situation. Mr. Crowley added that, in the case law, one can be successful on a "three strikes,

you're out" type of analysis. Three examples of non-meritorious litigation are enough for arguing for a vexatious litigant designation.

Ms. Holley agreed with Mr. Goehler. She stated that "non-meritorious" might be the word that it is important to include, because it might solve the "repeatedly" problem. She stated that there are times where the same issue is relitigated after a final determination, like in a motion for a new trial or even after a motion to dismiss. If a motion to dismiss was denied, the same issue might be raised in a motion for summary judgment, for example, and that is clearly not what is meant in this rule. The question is how to make clear that, for example, just raising the same objection as to testimony multiple times in a trial does not necessarily make one a vexatious litigant.

Judge Norby stated that she was trying to understand the direction she is being given in terms of drafting. She understood Judge Norm Hill's idea of clarifying the language to describe the person, as well as the conflict about whether small claims are included. However, she was a bit unclear about how to clarify "repeatedly" and the language used to describe what a vexatious litigant is. Justice Garrett wondered whether the word "unmeritorious" is meant to mean something other than "frivolous." Judge Norm Hill stated that he believes this is the key question. Is "unmeritorious" intended to capture a larger scope of conduct than "frivolous"? Justice Garrett stated that his concern is that, by using "unmeritorious," the rule could be read to encompass someone who just repeatedly files losing claims or makes losing arguments. He stated that he suspects that the Council is trying to get to the word "frivolous" but, by using a different word, it will be understood to have a different meaning.

Judge Norby stated that the committee would meet again and discuss the draft, and would bring a new draft to the Council at the April meeting.

B. Suggestion for Amendment of Rule 27

Judge Peterson reminded the Council that this issue (Appendix E) was discussed briefly at the end of the fairly long February meeting. The suggestion came from former Council chair Brooks Cooper, who does a lot of probate work. His concern is that, although the Council has fine tuned Rule 27, there may still be a hole in it: that someone who has a guardian ad litem (GAL) appointed over them who disagrees with the appointment may not have the right to appeal. Mr. Cooper acknowledged that it probably is not a common occurrence. However, his suggestion was to make a change to section A of the rule to make it clear that an appeal of the GAL appointment is possible. Judge Peterson suggested that, if a change were to be made, it would be better to create a new section at the end of the rule, since section A has been fine tuned to be pretty readable at this point.

Judge Peterson explained that the only case that Mr. Cooper cited in his letter to the Council was from a conservatorship case where the person who had a conservator appointed over them was able to appeal. He asked for opinions from the Council about whether appointments of GAL are able to be appealed. Judge Bloom stated that the current case which has Mr. Cooper's attention was in front of him. Mr. Cooper appealed on behalf of his client and there was some issue about whether he could do that. Judge Norby asked whether the client was a minor or had a disability. Judge Bloom explained that it was an adult with a cognitive disability who was unable to make decisions or to take care of himself. He stated that he believes that the protected party can appeal the appointment of a GAL. Judge Norby asked if the question is whether the preliminary decision to appoint the GAL can be appealed, because of course the conclusion of the case can be appealed. Judge Bloom stated that he thinks that Mr. Cooper is concerned that, once the court rules that the person needs a GAL because they cannot take make their own financial decisions in a case, a person cannot appeal, because they have been deemed to be unable to make that decision. However, he stated that he believes that the answer is that the person can appeal, because it is a challenge to a trial court's decision and the Court of Appeals has to look at it.

Mr. Goehler stated that this would seem to be an Oregon Rules of Appellate Procedure (ORAP) issue, rather than an ORCP issue. ORAP covers who can appeal and how to appeal, and contains all of the rules for appeal, whereas nothing in Rule 27 deals with an appeal or prohibits an appeal. He suggested that Mr. Cooper raise this with the committee or agency that writes the ORAP. Judge Norby agreed. Judge Peterson noted that Chapter 19 of the Oregon Revised Statutes (ORS) states that issues affecting the substantial rights of the litigant give the right to go to the Court of Appeals. He noted that an alleged incapacitated person who does not like that determination could ask to stay the proceedings and raise the issue with the Court of Appeals, which would decide whether it affects the substantial rights of that person. He stated that he would respond to Mr. Cooper and suggest that this is covered in Chapter 19 of the ORS.

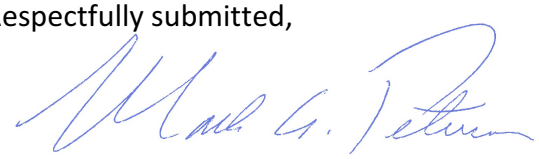
V. New Business

No new business was raised.

VI. Adjournment

Mr. Crowley adjourned the meeting at 11:14 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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

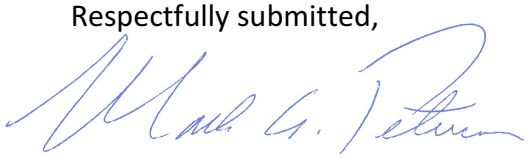
Judge Peterson explained that former Council chair Brooks Cooper had made a suggestion for a change to Rule 27 A (Appendix H). He stated that, to protect people on whom a guardian ad litem (GAL) might be imposed, there is a requirement to notify the person, their spouse, and a plethora of other people, 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

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) state the following in substantively similar terms:

A(1)(a)(vi)(A) that the recipient may file a motion to quash the subpoena with the court, to ask a judge to cancel a subpoena that creates an unjustifiable burden or violates a right not to testify;

A(1)(a)(vi)(B) that compliance with a subpoena is mandatory unless a judge orders otherwise, and

A(1)(a)(vi)(C) that disobedience of a subpoena is punishable by a fine or jail time.

A(1)(a)(vii) A motion to quash must be included with the subpoena in substantially the following form:

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

[*Case Caption to be Inserted by Party Issuing Subpoena]*	)	Case No. _____
	)	MOTION AND DECLARATION TO QUASH SUBPOENA

MOTION

The subpoenaed witness whose signature appears below respectfully asks this court to issue an order quashing the subpoena that I received on this date: _____ for the reasons given in the DECLARATION included below. (Attach a copy of your subpoena.)

DECLARATION

The subpoena creates an unjustifiable burden or violates a right not to testify because: (*Subpoenaed witness MUST fill in a specific explanation here.*)_____
_____.

I declare that the statements above are true and are intended to be used as evidence in court, under penalty of perjury. **I understand that making a Motion that is not supported by facts and law may result in a judgment against me for any attorney fees paid to oppose my Motion.**

DATED: _____ SIGNATURE:_____

PRINTED NAME(S):_____

ADDRESS: _____

PHONE NUMBER: _____ EMAIL ADDRESS: _____

[Court Name and Address to be Inserted by Party Issuing Subpoena]

NOTICE: IF YOU FILE THIS MOTION WITH THE COURT, YOU MUST ALSO GIVE A COPY OF THE FILED MOTION TO THE PERSON WHO INITIATED THE SUBPOENA.

RULE 55

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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) state the following in substantively similar terms:

A(1)(a)(vi)(A) that the recipient may file a motion to quash the subpoena with the court, to ask a judge to cancel a subpoena that creates an unjustifiable burden or violates a right not to testify;

A(1)(a)(vi)(B) that compliance with a subpoena is mandatory unless a judge orders otherwise, and

A(1)(a)(vi)(C) that disobedience of a subpoena is punishable by a fine or jail time.

Proposed ORCP 58

F. Testimony by Remote Means

a. Subject to Court approval, the parties may stipulate that testimony at trial be allowed by "remote means." Alternatively, the court may require that such testimony be allowed by remote means. If remote testimony is allowed, the court shall designate the conditions and manner of taking and recording the testimony and may also include other provisions to assure the testimony is accurately recorded and preserved. The oath or affirmation may be administered to the witness either in the presence of the person administering the oath, or by remote means, at the discretion of the court.

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.

c. Electronic communications must be recorded by the court if suitable equipment is available; otherwise, electronic communications must be recorded at the expense and by the party requesting the remote testimony. The method and manner of recording is subject to the approval of the court.

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

Proposed ORCP 39 (C) (7)

Deposition by Remote Means

a. Parties may agree or the court may order that testimony at a deposition be taken by "remote means." If such testimony is taken by remote means pursuant to court order, the order shall designate the conditions of taking and the manner of recording the testimony and may include other provisions to assure the testimony will be accurately recorded and preserved. If testimony at a deposition is taken by 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 remote means, the manner of giving the oath or affirmation, and the manner of recording are waived unless objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the witness either in the presence of the person administering the oath or 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.

ORCP 35. Vexatious Litigants

A. Definitions.

1. For purposes of this rule, "vexatious litigant" shall include:
   a. A person who is a party to a civil action or proceeding who, after the litigation has been finally decided against the person, repeatedly relitigates, or attempts to relitigate, either:
      i. The validity of the decision against the same defendant or defendants who prevailed in the litigation; or
      ii. The cause of action, claim, controversy or any of the issues of fact or law determined or concluded by the final decision against the same defendant or defendants who prevailed in the litigation.

      An action is not deemed to be "finally decided" if an appeal is still pending.

   b. A person who repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

   c. A person who has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

2. For purposes of this rule, "Prefiling Order" means a Presiding Judge Order that is independent of any case within which it may have originated, and that continues in effect after the conclusion of any case in which it may have originated.

3. For purposes of this rule, "security" means an undertaking by a vexatious litigant to ensure payment to a defendant in an amount deemed sufficient to cover the defendant's anticipated reasonable expenses of litigation, including attorney fees and costs.

B. Issuance of Prefiling Order. The court in any judicial circuit may, on its own motion or on the petition of any person who has previously defended against vexatious litigation filed by another, enter a Prefiling Order prohibiting a vexatious litigant from commencing any new action in the courts of that circuit without first obtaining leave of the Presiding Judge. Upon entry, a copy of the Prefiling Order shall be sent by the court to the person designated to be a vexatious litigant at the last known address listed in court records, and to the petitioner, if any. Disobedience of such an order may be punished by contempt of court. A vexatious litigant's request to commence a new action may be made by a petition accompanied by a declaration and shall only be granted upon a showing that the proposed action is meritorious and is not for the purpose of delay or harassment. The Presiding Judge may condition the filing of the proposed action upon a deposit of security as provided in this rule.

C. Designation & Security Hearing. In any action pending in any court of this state, including small claims actions, a defendant may move the court for an order to recognize the plaintiff as a vexatious litigant and require the plaintiff to post security. At the hearing on the motion, the court shall consider any evidence, written or oral, by witness or affidavit, or through judicial notice, that may be relevant to the petition. To determine whether a plaintiff is a vexatious litigant, the court may consider:

1. the plaintiff's history of litigation and whether it entailed vexatious, harassing, or duplicative suits;
2. the plaintiff's motive in pursuing the litigation;
3. whether the litigant is represented by counsel;
4. whether the plaintiff has caused unnecessary expense to the parties or placed a needless burden on the courts;
5. whether other sanctions would be adequate to protect the courts and other parties; and
6. any other considerations that are relevant to the circumstances of the litigation.

If, after considering all the evidence, the court determines that the plaintiff is a vexatious litigant and not reasonably likely to prevail on the merits against the moving defendant, then the court shall order the plaintiff to post security in an amount and within such time as the court deems appropriate. A determination made by the court in such a hearing shall not be admissible on the merits of the action, nor deemed to be a decision on any issue in the action.

D. Failure to Deposit Security; Judgment of Dismissal. If the plaintiff fails to post security in the time required by an order of the court under this section, the court shall immediately issue a Judgment dismissing the action with prejudice as to the defendant for whose benefit the security was ordered.

E. Motion for Hearing Stays Defendant's Pleading Deadline. If a motion for an order to designate a vexatious litigant and deposit security is filed prior to the defendant's first appearance in an action, then the moving defendant need not plead or otherwise respond to the complaint until ten (10) days after the motion is denied. If the motion is granted, the moving defendant shall respond or plead not later than ten (10) days after the required security has been deposited.

F. Cases Filed in Error After a Prefiling Order is Entered. The Clerk of the Court shall reject for filing any new action by a vexatious litigant unless the vexatious litigant has obtained an order from the Presiding Judge allowing the action to the filed. If the Clerk of the Court mistakenly permits a vexatious litigant to file an action after a Prefiling Order has been entered, then any party to the action mistakenly filed may file a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order. The notice must be served on all parties who have appeared or been served in the action. The filing of such a notice shall stay the litigation against all defendants to the action. The Presiding Judge shall dismiss the action with prejudice within ten (10) days after the filing of such a notice unless the plaintiff files a motion for leave to file the action. If the Presiding Judge issues an order allowing the action to be filed, then the plaintiff must serve a copy of the order granting leave to file the action upon each defendant. Each defendant shall have ten (10) days after the date of service of the Presiding Judge Order to plead or otherwise respond to the complaint.

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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
March 12, 2022, Meeting
Appendix E-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