MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, April 9, 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
Meredith Holley
Derek Larwick
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Tina Stupasky
Stephen Voorhees

Members Absent:

Nadia Dahab
Drake Hood
Hon. Norman R. Hill
Hon. David E. Leith
Hon. Melvin Oden-Orr
VACANT POSITION
Margurite Weeks
Jeffrey S. Young

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 35 (Vexatious Litigants)	ORCP 4	Abatement	ORCP 69		
ORCP 39	ORCP 14	Affidaviting judges			
ORCP 55	ORCP 15	Arbitration/mediation			
ORCP 57	ORCP 16	Collaborative practice			
ORCP 58	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 9:32 a.m.

II. Approval of March 12, 2022, Minutes

Mr. Crowley asked whether there were any corrections or concerns with the minutes from the last Council meeting. Hearing none, he asked for a motion to approve the March 12, 2022, minutes (Appendix A). Mr. Bundy made a motion and Mr. Andersen seconded. The motion carried unanimously by voice vote.

III. Administrative Matters

A. Vacancy in Council Membership

Judge Peterson reminded the Council that there is a vacancy in the Court of Appeals position due to former Court of Appeals Judge Roger De Hoog's appointment to the Supreme Court. He stated that he has reached out to the Chief Judge of the Court of Appeals, Judge Erin Lagesen, for a new appointment pursuant to the Oregon Revised Statutes so that the Council will soon be back to full strength.

B. Article on Council

Judge Norby reported that she had did not have further news to report on the article she had written about the Council. She stated that the Oregon Association of Defense Counsel (OADC) is willing to publish the article, but could not do so immediately. Also, the Oregon Trial Lawyers Association is considering sending the article in an e-mail blast or posting it on their listserv. These responses made her think that the wise course would be to wait for the OADC publication and then attribute the article when it was sent by email/listserv.

Mr. Crowley asked whether there is a timeline for the OADC publication. Judge Norby stated that she was not certain of the timeline, but that the article had just missed the deadline for the most current publication. She stated that it is her understanding that it is a quarterly publication, so it will probably be a few months until the article appears.

IV. Old Business

A. Committee Reports

1. Rule 55 Committee

Judge Norby stated that her understanding after the last Council meeting was that the language in the draft (Appendix B) was approved, and the only remaining issue

was whether or not a motion to quash form or requirement should be included in subpoenas. Judge Peterson had said that he was going to reach out to court staff and judges in the state of Utah to see if they had any encountered any problems when they had included a motion form on their subpoena, such as an overwhelming number of folks challenging subpoenas or not showing up at proceedings.

Judge Peterson explained that he had reached out to the presiding judge and to the trial court administrator in Salt Lake County, the largest county in Utah. His thinking was that any problems would be more likely to appear in a more populated county. He stated that had not heard back before the last Council meeting, but had since then spoken with Nathaniel Player, the director of the self-help center at the Utah State Law Library, who is involved in creating Utah's forms. Mr. Player referred him to some other people in the county who had information on the subject as well.

Judge Peterson reminded the Council that the form in Utah contains many pages, with checkboxes to choose the objection to appearing that the subpoenaed party is asserting. Mr. Player indicated that the only complaint he could recall during his eight years in charge of forms in the county was from the Sheriff's Association, which complained that the form was too long. Judge Peterson noted that Utah's form is also different from what the committee is proposing in that the Utah objection stays the requirement to appear. He stated that, in addition to Mr. Player, he had also spoken to two judges. District Court Judge Richard Mrazik did not understand what the problem was and stated that he has only had the an objection to a subpoena occur two or three times during his years of practice and just once in his four years of being a judge. Judge Su J. Chon also wondered what the issue was, because the problem had only occurred about 10 times during his judicial career. Judge Peterson stated that everyone he talked to in Utah agreed that, ideally, the party serving the witness should have already spoken to that witness, and that the first inkling of an issue should not become apparent when a process server serves the subpoena. Judge Peterson acknowledged, however, that lawyers are human and sometimes realize at the last minute that they need to call a witness. Judge Peterson stated that he also pointed out to the Utah judges that Oregon is different because of its somewhat unique trial rules. One of the judges was quite taken aback by the fact that Oregon does not have expert discovery, and they had quite an exchange regarding Rule 47 E.

Judge Peterson emphasized that Utah's form is quite different from the one being proposed by the committee. He stated that former Council chair Don Corson's comments regarding last biennium's published draft Rule 55 made it pretty clear that it is not a good idea to tell someone that they are being subpoenaed but that they do not have to show up. That would be a bad situation. Judge Peterson opined that the suggested method of saying that a witness must appear, unless

they get permission from a judge not to appear, works better. He stated that he would like to look at the form language again and perhaps suggest adding the requirement that the subpoenaed person must certify that they had conferred with the person who issued the subpoena before filing the motion. That would facilitate communication without the court's involvement if the attorney has not previously reached out to the witness.

Judge Peterson stated that he otherwise likes the form motion. He noted that Mr. Larwick had appreciated that the form was not just a bunch of checkboxes that makes it too easy but, rather, requires an explanation. He also noted that Judge Jon Hill had pointed out that, without the form or language in the rule, judges would potentially receive all sorts of free-form requests to be excused from appearing with no limit on how much they can write. If the form were to only be included on the court's website, the rule would kind of indicate that there is a way out, but not show exactly what it is, so his preference would be to include the form in the rule. Judge Norby asked Judge Peterson for clarification, as she understood at the last Council meeting that he had changed his mind about including the form in the rule. Judge Peterson explained that he did like having the motion to quash form on the back side of the subpoena. Judge Norby asked whether he thought that the rule should include the form language and specify that it should be on the back of a subpoena. Judge Peterson stated that the rule could simply state that the form used as a motion to quash must be provided substantially in the following form. This would give parties the option of printing it in the manner that they wish to, but it would at least give them the idea of boilerplate language that will work to satisfy the rule.

Judge Norby stated that her impression after the last Council meeting was that even those who had believed that they would like a form in the rule had changed their mind when they saw one, and that there was a pretty strong majority of people who wanted that part removed from the proposed changes. She wondered if it would be a good idea to have some discussion now that Judge Peterson had reported on Utah's experience, in case Council members had changed their minds and wanted to keep the form language. The Council agreed. Judge Norby stated that it was unfortunate that Judge Norm Hill was unable to attend the meeting, as he had previously stated articulately that he thought he would like having the form there; however, when he saw the form included as part of the rule, he realized that he did not think that it belonged there. She wondered whether there were any other Council members who felt that way, and whether Judge Peterson's discussions with judges and court staff in Utah had changed their minds.

Judge Peterson reiterated that Mr. Larwick had expressed approval of the form language at the last Council meeting, especially since it did not follow the lead of the Utah form and include checkboxes for every possible reason one would not

want to come to testify. Judge Peterson agreed that the checkbox format would not work well in Oregon and opined that, if a witness has a good reason for not attending, they should be able to articulate it in two or three lines. Ms. Stupasky stated that she was surprised that so few people in Utah challenge subpoenas, and stated that this makes her feel more in favor of the form and providing witnesses with that avenue to object to the subpoena.

Judge Jon Hill stated that it appears that either the Oregon Judicial Department's Law and Policy Group would need to create a form or that the Council would need to create a form, and his preference is that the Council do so. He opined that, in general, the draft form is good. Judge Peterson agreed that Judge Norby's form is superior, having taken the best out of the Utah form, but being much shorter and giving a person an opportunity to put down in a couple of lines why they should be excused or why the subpoena should be modified. It also has the advantage of allowing the objections to be received in a standardized form. Mr. Andersen agreed that he is in favor of a short form. He stated that it is a terrible thing when a witness gets a subpoena and just ignores it. He pointed out that this is happening on a national level right now. The form tells a person they either need to be there or fill out this form to request to be excused. Ms. Holley stated that she had previously expressed concern that the form would encourage people to frivolously object, but she does not have a strong concern with the current, non-checkbox form.

Mr. Crowley stated that he is not necessarily against the form; however, he has not seen a big problem with the issue. He stated that it seems to him that Oregon's subpoena process works pretty well. He did agree with Mr. Andersen that the abundance of objections to or ignorance of subpoenas on the national level right now could potentially lead to a bigger issue, but that he has not seen a ripple effect in Oregon yet. For that reason, he would rather keep subpoenas as simple as possible and not include a form.

Judg Peterson pointed out that including the form on the back of the subpoena gives the court some additional authority when someone does not appear. If someone duly served with a subpoena had an opportunity to object and did not take it but, rather, did not show up, the court has an easier time holding that person in contempt.

Judge Norby asked Ms. Nilsson to poll the Council to get an idea of the support for including the form. Ms. Nilsson created a poll asking members whether they wanted to include a requirement for form language in subpoenas in Rule 55 or not. The vote was 12 to 3 in favor of including the requirement and form language.

Judge Norby asked Ms. Nilsson to convert the committee's draft into Council format for the next meeting. Ms. Nilsson agreed.

2. Rule 57 Committee

Ms. Holley stated that the committee/workgroup had met again since the last Council meeting, and had draft language to propose to the Council (Appendix C). The draft amendments fall into four categories. One is the committee's actual charge, which is the amendment to Rule 57 D regarding peremptory challenges. The next is a proposed amendment to the language regarding challenges for cause. One of the components of that is to correct the disability language to track more with current law and to be less offensive, and the other is to simplify the language regarding actual bias in paragraph D(1)(g). The other two components are outside of the purview of the Council, so the suggestion is to propose to the Legislature that it amend ORS 10 to increase juror pay and also to correct some of language related to discrimination in that chapter. Ms. Holley stated that her next step would be to separate these components into separate proposals that the Council would ultimately decide whether to promulgate or suggest to the Legislature. She stated that she believes that the main proposals for the Council to consider are the amendment to challenges for cause and the amendment to the language regarding peremptory challenges.

Mr. Crowley asked about the second clause of that first sentence of the proposed new language in Rule 57 D(4)(d). He stated that it seems understandable to him that the court must evaluate the peremptory challenge by considering the totality of the circumstances, but that he does not understand why language related to whether the party failed to exercise a challenge for cause against the juror is included. Ms. Holley stated that she did not feel that this new language was a "make or break" and that it was added in the last committee/workgroup meeting in response to a concern voiced by Judge Oden-Orr. Judge Oden-Orr had proposed language that one could make a prima facie case of discrimination if the party had not previously made a challenge for cause as to that person. Rather than eliminating peremptory challenges, it would sort of create a reverse presumption to say that, if a challenge for cause had not been made, the challenge is presumptively discriminatory. In the committee/workgroup meeting, that proposed language was toned down to say that the court could consider whether the party failed to exercise a challenge for cause as one factor. She stated that she did not want to speak out of turn, but summarized Judge Oden-Orr's position as, if a lawyer has a problem with a juror, that lawyer should be able to voice it as a challenge for cause. She noted that Judge Oden-Orr feels that peremptory challenges are automatically suspect because of the research showing that they have contributed to bias.

Judge Jon Hill stated that part of the issue is that lawyers feel that peremptory challenges are part of them getting a fair trial for their clients, as well as a sort check on the bench. He wondered how that concern syncs with what the committee/workgroup is proposing. Mr. Bundy asked whether this language would mean that the judge would have the ability to basically automatically determine that a peremptory challenge cannot be used. Ms. Holley stated that the language is intended to say that one factor a judge may consider is that a party did not make a challenge for cause for that juror, among the totality of the circumstances.

Mr. Crowley stated that the language jumped out at him. First of all, there are slightly different considerations when it comes to challenges for cause as opposed to peremptory challenges, although he was not sure that he could articulate that. It also seemed odd to him that it was something that needed to be specially identified in the totality of the circumstances. Ms. Holley stated that she believes that the concept that Judge Oden-Orr was trying to express was that if a lawyer, in defense to a discrimination objection, responds that the juror was articulating bias against their client, but did not make a challenge for cause because of it, the challenge would be suspect.

Judge Bailey expressed grave concern. He pointed out that peremptory challenges and challenges for cause are very different. He stated that, when he was a lawyer working with child abuse cases, there were times when the science of jury selection indicated that certain jurors would not be good for his client, but the potential juror would say they were going to be fair and impartial. This was a case where he would use a peremptory challenge. Ms. Holley asked whether, in those scenarios, Judge Bailey would not have elicited a statement from the juror reflecting the bias that he was intuiting existed, and would just be making the challenge based on the potential juror's age and economic status? Judge Bailey pointed out that challenges for cause are only authorized because a juror cannot be fair and impartial. So, the potential juror can say that they can be fair and impartial, but the lawyer knows that, because of their age or socioeconomic status, they are really not the right juror for their client. He stated that he thinks that it would be unethical for an attorney to exercise a challenge for cause when they do not have a basis to do so. So, this potential change would put lawyers in a weird position where they have to exercise a challenge for cause, knowing that they really want to have the potential juror excused for a peremptory reason in the first place.

Ms. Holley stated that she believes that Judge Oden-Orr's point is that, in voir dire, lawyers should be eliciting whether the person is actually biased against the client, not making assumptions based on the potential juror's protected statuses. Judge Bailey stated that implicit bias is not just about gender, race, or color. He opined that it can be based on a whole lot of other things; for example, owning

property or not owning property is a huge one. In the jury forms that the attorneys receive, they already have a lot of information that they do not need to ask the jurors about, including age, work status, property ownership status, crime victim status, and whether they have been involved in a civil action. Attorneys who have studied the science of picking a jury know that there are tendencies and implicit biases among jurors, and a many other factors other than race, gender, or sexual orientation.

Judge Jon Hill asked for a practitioner point of view. If, in order to exercise a peremptory challenge, a lawyer must exercise a challenge for cause each time, what impact would that have on the ability to try a case? He recalled that practitioners had mentioned that they viewed peremptory challenges as a sort of check on the judge's power. Ms. Holley stated that the workgroup/committee's intention was to dial back the language and not to say that a lawyer must exercise a challenge for cause but, rather, have it be one factor that a judge could consider in the totality of the circumstances.

Mr. Larwick stated that it seemed a bit strange. He pointed out that the proposed language appears to encourage lawyers to seek a challenge for cause before exercising a peremptory challenge because they could otherwise potentially be accused of trying to strike a juror based on the attorney's bias or improper motive. Yet, if the lawyer later does use a peremptory challenge, that means the court has already ruled that the juror did not demonstrate bias, which to him suggests that there is now more evidence of an improper motive to strike that juror. He observed that it would be almost as though, if the lawyer does not move, that can be used against them to argue that they did something unfair. But, if the lawyer does move as a challenge for cause and loses that, it also seems like it would be evidence of striking a juror for an unfair reason.

Mr. Goehler agreed with Judge Bailey that there are totally different reasons for a peremptory challenge versus a challenge for cause. He stated that, if a judge is looking at the totality of the circumstances, calling out this one factor seems to give it undue weight. Of course, it is part of the totality of the circumstances and the judge would consider it, but are there other things that are more important to consider? He stated that he did not think that the Council would want to include a laundry list of everything that could be considered. He stated that he would be in favor of just dropping the reference to an absence of a challenge for cause and just saying, "totality of the circumstances," period.

Judge Peterson observed that, in voir dire, a lawyer is trying to curry favor with the jurors, or at least not alienate them. He agreed that challenges for cause are completely different than peremptory challenges, and opined that requiring someone to make a challenge for cause interferes with their ability to pick the juror and jury in a way that does not make a lot of sense. Mr. Bundy agreed with

Judge Peterson. He stated that trial lawyers have to be very careful, because they have to assume that they may offend a juror by making a challenge for cause. They also have to assume that challenges for cause often will not be granted. Lawyers reserve peremptory challenges for those jurors. He stated that he does not want to be put in a position of feeling like he has to exercise a challenge for cause every time, with the risk of upsetting a juror who will end up being on the jury. He agreed with keeping it a consideration that can be discussed and considered by the court, but he did not think it should be called out in the rule.

Judge Bailey stated that there are many occasions where an attorney knows a person's bias and does not want to ask any questions for fear of tainting the rest of the pool. He agreed with Mr. Bundy that a lawyer can poison the entire pool by making that challenge for cause, and also run the risk of having to ask more questions. He stated that there are many strategic reasons why a lawyer just does not ask. They may not ask questions for a challenge for cause because they know they have enough peremptory challenges to excuse that juror.

Ms. Holley asked Ms. Nilsson to create a poll to determine Council members' thoughts on the issue. Ms. Nilsson polled the Council on whether specific language regarding challenges for cause should be included (i.e., given special status) in paragraph D(4)(d). The vote was 14 to 1 against including the language. Ms. Holley stated that she would let Judge Oden-Orr know the Council's position so that he would be able to make a case for his position at the next Council meeting, if he so desired.

Mr. Andersen pointed out that the third sentence in paragraph D(4)(d) is about 85 words long, and he suggested breaking it into several sentences to make it more clear. Judge Peterson agreed and stated that he thought that it might actually have gotten turned around to say the wrong thing. Ms. Holley stated that her thought would be to take out the "more likely than not" standard from the two different sentences and include that in a separate sentence saying that this shall be considered under the totality of the circumstances. The other language in the sentence starting with "additionally" is the objective, reasonable person standard that was discussed in the committee/workgroup. The suggestion was that "objective, reasonable person" is standard language in the law, and it is already used in, for example, discrimination law. She stated that she would try to improve that language overall.

Justice Garrett asked whether there is a need to define the terms that come later in the clause about "implicit, institutional, or unconscious bias." He also expressed concern that the term "would contribute to" is a bit vague, and that there might be a question about whether it refers to contributing to that kind of bias throughout the system or contributing to bias among the jury. Ms. Holley stated that she believes that is a function of the sentence being too long. She explained

that it is intended to state that it would contribute to bias harming one or more of the parties or the excluded Juror. She suggested that the language could be changed to "would harm" instead of "contribute to harming." Judge Jon Hill agreed with Justice Garrett's point and stated that it is important to define terms to make things clear. Justice Garrett noted that "implicit, institutional, or unconscious bias" is a term that lawyers and judges use a lot and are familiar with, but that does not mean that it always means the same thing to every reader. Ms. Holley asked whether Justice Garrett was suggesting defining that term. Justice Garrett stated that he was asking whether that term should be defined. He stated that he believes that there is a danger with this discussion, because lawyers and judges take for granted that this term has a common meeting, but it may not mean the same thing to everyone who is going to be interpreting the rule. Ms. Holley explained that paragraph D(4)(c) puts it on the party to articulate the discrimination and make that showing to the court.

Justice Garrett asked a question of the people practicing and making decisions in trial courts, which he has not done for a long time. He wondered whether the phrase, "articulate reasons supporting the peremptory challenge that are not pretextual or historically associated with discrimination" signals to the person making the peremptory challenge what it is that they need to say. Ms. Holley stated that her understanding from the committee/workgroup's discussion is that they did not want to create magic words that a lawyer could say to overcome an objection, and that they wanted to treat it as a nuanced issue that the parties could address early on through their argument. She stated that the group had considered going in the direction of Washington state, which does lay out specific reasons that are invalid, but had decided not to go that route because there have been criticisms that it sort of lays out a pathway to say magic words to justify a discriminatory challenge and overcome the objection. Judge Norby opined that someone will come up with magic words, no matter what, and those will have to be evaluated.

Judge Peterson stated that he certainly understands that there is a fairly strong minority that wants to get rid of peremptory challenges altogether, but he stated that it seems clear that this effort will not succeed. He stated that unconscious bias is very possible, but this proposed change puts everybody on notice that, if a lawyer makes a challenge that happens to zero in on someone who has a protected status, that lawyer can expect to be required to explain if an objection is raised. He believes that this would be a huge improvement to the existing rule.

Judge Jon Hill followed up on Justice Garrett's concern. He wondered whether it would be better to have a more explicit definition rather than a nuanced one. This could be helpful when someone has been accused of an improper challenge and the case goes up on appeal. He understood the concern with "magic words," but thought that there might be a need for better guardrails as far as what is

permissible or impermissible. Judge Bailey asked whether the matter should be brought back to the fundamental reason for an objection to a challenge: that the challenge is a violation of the party's constitutional right to have a jury of their peers, and the constitutional right not to have a juror removed for all of the reasons that have been discussed. There would be no need to worry about Justice Garrett's concern about defining terms. Judge Bailey expressed concern that, by starting to define terms, the Council might end up getting too far into the weeds, particularly because people have different ideas of what some of the words surrounding bias mean. In fact, some would argue whether the concept expressed by those words even exists. He opined that this is not the goal of the rule change; the real goal is to truly get back to making sure that a party has a proper jury of their peers and that there are no issues regarding *Batson* challenges.

Ms. Holley stated that other states have used similar language and stated something along the lines that an objective observer is aware that implicit, institutional, or unconscious bias exists. She stated that she believes that the intent of including that language is that an attorney would not have to accuse another attorney of being intentionally racist. It is a way of avoiding the interpersonal dynamics that distract from the real issue. She opined that implicit, institutional, or unconscious bias should not be defined but, rather, should be left to the parties to articulate to the judge so that the judge may consider it on a case-by-case basis. She pointed out that bias might look different in different cases.

Judge Bailey suggested having some boilerplate language somewhere else in the rule that makes clear that the reason for the changes are because of past issues with bias and the desire to move forward and provide parties with a more diverse jury pool and a greater opportunity for a true jury of peers. This language would obviate the need for definitions later in the rule. He opined that, no matter what, when such a challenge is made the party making the challenge will automatically be on guard about the potential need to defend against a charge of racism, as that is inherent in the challenge. Ms. Holley thanked the Council for this discussion, which would inform her in making further modifications to the language in this part of the draft amendment.

Ms. Holley then shifted the discussion to the larger changes to the language in paragraph D(1)(g), which deals with actual bias on the part of a juror and challenges for cause. She stated that the current standard is whether the court is satisfied that there is actual bias on the part of the juror, and explained that the draft language removes this language because it is an unclear standard. Based on Mr. Andersen's suggestion, language is included that allows a judge to defer a ruling on challenges for cause until the end of voir dire. The draft also creates a standard for further inquiry being held outside of the presence of other jurors so that, in the case of an inquiry as to whether actual bias exists, this will not poison

the rest of the pool. Judge Norby stated that she appreciated Mr. Andersen's suggestion, and that she has already been using this procedure in her court. She stated that it has been really helpful for the attorneys and protective of the other jurors. It is a great way to approach the problem that attorneys have experienced where judges do not allow for cause challenges. The language is clear, and it is a sort of mandate to judges to not be so squishy on challenges for cause.

Ms. Holley asked the Council to review paragraph D(1)(b), which has been changed to track more with the language used in discrimination law. The current language is problematic on several levels, so it has been changed to, "The juror is not able to perform the essential functions of jury service without impacting the substantial rights of the parties or the juror because of a physical or mental impairment, or accommodation for the juror's impairment would impose an undue hardship on the operation of the courts or the juror." She admitted that this sentence might be confusing, but stated that it lays out the standards that are currently being used.

Judge Norby asked what the difference between the old and new language is, apart from changing the offensive language. Ms. Holley explained that "essential function" is language used in employment law. If a person is unable to perform the essential functions of a job, and their disability cannot be accommodated, they are not entitled to maintain that job. Similarly, this new language states that, if someone cannot perform the essential functions of jury service, they would not be eligible to serve. Judge Norby suggested that the word "duties" could be changed to "essential functions" and the word "defect" could be changed to "impairment," rather than completely rewriting the existing language.

Judge Bailey stated that he appreciated that the new language goes further than just mental or physical disabilities, because there are many times that jurors are excluded due to language barriers and the fact that the court does not have money to provide interpreters for those jurors. He stated that by just emphasizing the idea that a juror cannot perform the essential function, which would obviously include understanding the evidence, the proposed language tells the court that an attorney can ask the judge to dismiss the juror if there appears to be a language barrier and the court is unable to provide an interpreter. Ms. Holley noted that the issue to which Judge Bailey refers is more addressed in the suggested changes to ORS chapter 10, whereas the draft amendment to paragraph D(1)(b) would apply in the instance where a juror has a disability such as a back issue that would not allow them to sit in court for eight hours a day and might be able to be dismissed for cause. Judge Bailey stated that, the way he reads the suggested language, it also seems to suggest that it applies to the situation he posited. Ms. Holley stated that the suggested changes to ORS chapter 10 would require the court to provide interpretation assistance to jurors. Judge Bailey opined that this suggestion would not be adopted by the Legislature, because the budget does not

allow for that expense. Ms. Holley acknowledged Judge Bailey's language regarding a party's constitutional rights, but pointed out that there are also rights under statutory public accommodation law that apply in a trial situation.

Judge Norby expressed concern that, in discussions about providing interpretation in trials, one issue that often is overlooked is that it can double the time of the trial. Interpretation does not happen simultaneously but, rather, consecutively. When talking about funding and burdens on the courts, it becomes a real issue if a two-day trial is now going to take four days. Judge Norby acknowledged that it is a real issue to want to accommodate jurors; however, it is a huge burden on the courts with many layers of complication. Judge Bailey stated that the Legislature would have to agree to pay for it. He also noted that he did not know that the court interpreter system would be able to provide enough interpreters for jurors in addition to parties, let alone whether the court could afford the extra time that it would add to trials.

Mr. Shields asked, under the language in paragraph D(1)(g), whether a juror's statement that they believe they are biased would constitute an expression of actual bias such that the judge must excuse them, even if the judge doubted whether they were, in fact, biased. Ms. Holley explained that the idea of the process would be that the juror's statement would raise the issue. Then, if everyone agreed that the juror was actually biased, there would not necessarily be further inquiry. If further inquiry was needed, the rest of the jurors would be excused so that there could be further questions about whether actual bias exists. Judge Jon Hill stated that, if a juror expresses a bias, he takes it at face value. Otherwise, he must assume that the juror is lying to him, in which case he would want to excuse them anyway. Judge Bailey pointed out that there are times when a juror might think they are biased but, when the judge explains the law to them, they realize that they are not biased. However, he stated that part of the research that the committee/workgroup looked at also suggests that judges tend not to excuse potential jurors who tell them that they have biases because they do not have enough jurors in their jury pools. Ms. Holley agreed that the lack of potential jurors in jury pools seems to be the biggest problem. However, she opined that it will be helpful for the rest of the jury pool to be able to be protected from being infected by a biased juror continuing to reiterate their bias.

Ms. Holley thanked the Council for all of the helpful feedback. She stated that she would break apart all of the different proposals and create a more developed version of each to bring back to the Council in May.

3. Remote Hearings

Mr. Andersen referred Council members to a new draft of ORCP 58 (Appendix D). He stated that he had made revisions to the former draft based on comments from Council members at the last meeting. Mr. Crowley thanked Mr. Andersen for all of the work that he and the committee had done on this matter to bring the rules into a place that is very practical for our times. He did express concern that the 30 days that is required for advising the court and the opposing party seems like it might be more time than necessary. Mr. Andersen stated that the rule does not mention the 30 days but, rather, states that the request for remote location testimony must be made within the time allowed by ORS 45.400(2). The thought is that the Council does not have the authority to change the time in a statute, but can suggest that the Legislature do so.

Judge Norby stated that Mr. Andersen's language was very well written and includes everything necessary and nothing that is not necessary. She wondered, however, whether adding a reference to "or as otherwise required by the court due to necessity" might be helpful, or whether that would be overkill given a judge's inherent authority to shorten timelines. Mr. Andersen expressed concern that such language would create a rule that contradicts what the Legislature has said, and he believes that the ORCP must yield to the legislative enactment.

Judge Peterson stated that he actually liked Mr. Andersen's earlier draft, with just a few things taken out of it. He noted that the current version says "subject to court approval." However, the parties may stipulate to remote testimony or the court may require it, and it seems unnecessary to state that testimony required by the court is subject to court approval. Judge Peterson stated that he preferred the previous draft's phrasing regarding recording and preserving the record. He suggested that the reference to ORS 45.400 may not be necessary in paragraph (a) of the current draft since it is included in paragraph (d). He also referred to ORS 8.430(4), which states that all court proceedings have to be recorded if the judge so desires or if any party requests it. He stated that this likely covers the recording of testimony, so perhaps that language is unnecessary.

With regard to the reference to the FTR recording system, Mr. Goehler pointed out that the system may change in the future, so it seems unwise to refer to it by name. Mr. Andersen asked whether Judge Peterson would suggest referencing the statute in this rule. Judge Peterson stated that he was not sure that was necessary. Judge Jon Hill pointed out that statute numbers can change, so a reference may not be wise. He suggested simply removing the reference to the court's FTR recording system.

Judge Bailey stated that he had looked at ORS 8.430 and it appeared to refer to court reporters and not the court's recording system. He agreed that it should not

be referenced in the rule for this reason and also because the recording system could change at any time. Judge Peterson suggested that Mr. Andersen still look at the statute. It does reference court reporters, but that is only because the statute was written at a time when court reporters were the norm instead of digital recording systems. Subsection (4) still seems to apply in that the court must ensure that a proceeding is recorded.

Judge Peterson also noted that he had also submitted a draft suggestion to the Legislature to amend ORS 45.400(2) (Appendix D), because 30 days is unduly long. The new language would be "sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow for the non-movant to challenge those factors. . ." This would give the court much more authority to require advance notice in the appropriate amount of time, as opposed to an arbitrary 30 days.

Mr. Andersen stated that he had made some small changes to the ORCP 39 draft as well: adding "real time" in section B and changing the word "permits" to "allows."

Judge Peterson suggested that Mr. Andersen take the suggestions from the Council, incorporate them into a new draft, and get the draft to Ms. Nilsson so that she can put it into Council format for May's meeting. Mr. Andersen stated that he would do so.

4. Vexatious Litigants

Judge Norby explained that she had drafted a new version of Rule 35 (Appendix E) based on the feedback she received at the last Council meeting. She noted that one concern raised by the Council, and further discussed by the committee in April, was how many repetitions would have to occur before a litigant could be deemed vexatious. In the prior draft, multiple instances were required. That language is now removed and only one repetition is required. She stated that filing the exact same matter twice could qualify as being vexatious but, of course, the matter would have to be reviewed by the court and all of the factors would have to be considered in order for that to happen. Judge Norby stated that she also addressed the concern that it may not always be a plaintiff who is vexatious by removing references to the plaintiff so that any party could potentially be labeled vexatious.

Judge Peterson reminded the Council that the ORCP apply in the trial courts, but not in the small claims department. He explained that he had drafted a suggestion to the Legislature to make a change to ORS 46.415 (Appendix E) to simply say that the provisions of ORCP 35 apply to cases filed in the small claims department. He stated that he suspects that there are many vexatious litigants lurking in the small

claims department. He did not expect that the Legislature would find this to be a bad idea.

Ms. Nilsson pointed out that she had highlighted the word “shall” where it appears in the proposed new rule, because of the Council’s desire to replace the imprecise “shall” with words like “must,” “may,” or “will.” Judge Peterson noted that it is Professor Bryan Garner who argues against the use of the word “shall” in statutes and rules due to the impreciseness of the word. The Council has begun to use more precise language and to replace “shall” when drafting amendments to the rules.

Judge Peterson asked whether the word “petition” in section B should actually be “motion.” He noted that judges do not respond to petitions but, rather, read motions and make orders. Judge Norby explained that the process of labeling someone as a vexatious litigant can occur outside of a case, and the way a person requests a presiding judge's order is through a petition. She stated that it is not the sort of petition that one would imagine in a litigation context. It may be requested before a case is even filed, in which case it would be an independent presiding judge's order that is not filed under a case number. Judge Peterson stated that this may answer his question, and the use of the word “petition” in section F may have the same explanation. However, he did point out that the word “notice” is used a number of times where the word “motion” might be more appropriate. Judge Norby stated that a motion is a request for relief that ends with a prayer, whereas a notice is an alert. She stated that she was not thinking in terms of motions; the person either does or does not have a pre-filing order. If they do have a pre-filing order, she did not know what relief a motion would be requesting. She stated that there has to be some way to notify both the court that the filing mistake was made and to notify the other parties. She explained that she is thinking of things from a court administrative point of view, as opposed to from a party point of view, because she sees this as a court administrative process.

Judge Peterson stated that Judge Norby may have won him over with the petition in section B. However, regarding section F, if a case gets filed in error because the clerk did not notice the presiding judge order, that may be the time that a party who has been bothered again by the vexatious litigant needs to make a motion for relief, because a case has been filed. Judge Norby stated that one would not so much be asking for relief as a party but, rather asking the court to correct its inaction. She opined that motions are directed at other parties. The vexatious litigant finding and order are administratively apart from the goings on of any case, even though such an order will impact some cases. She stated that she feels that, if a motion is filed within the case, the message would not get properly delivered within the court administrative system but, rather, just to the parties. Part of the goal is to make sure that court staff is paying attention to this and getting notifications. Judge Norby also pointed out that the rules require a

response time for motions. If a motion asks the court to act on something it should have already done, it is not desirable to have to wait three weeks for a response to the motion and another week for a reply.

Judge Peterson stated that he wanted to think about the matter a bit more. He stated that, if a vexatious litigant files a case they should not have filed, he suspects that the motion to ask the judge to say, "stop it," will probably get to the court staff too, because the judge probably thinks that the vexatious litigant is causing an undue use of everyone's resources. Judge Norby pointed out that the motion would be in the court file, but that it would not have the administrative file number. Mr. Crowley stated that his understanding of the proposed rule is that, once a person has been found to be a vexatious litigant, in some form or another they are flagged as such. If they were to file something new, that should be reflected within the e-court system so that the other parties are aware that this person has been identified as a vexatious litigant. Judge Norby confirmed that the other parties and the court should know that the case filing was made in error, and that it should be documented in the administrative file that there was another example of the vexatious litigant filing an action and that there is therefore a need for a "pre-filing hearing." Mr. Crowley stated that the language in the proposed draft makes sense to him.

Judge Peterson stated that he wanted to be sure that, if a vexatious litigant files a new claim, they have a right to respond to the notice and to be heard and allowed to argue that this case is not one that should be precluded. Judge Norby stated that, under section F, the filing of the notice triggers the motion for leave to file the action, which the vexatious litigant should have filed in the first place, and that would trigger a hearing. Judge Peterson stated that he would like to think about it a little more, but that this may be satisfactory.

Judge Peterson also mentioned that there has been some concern whether the Council can make a rule like this. There was a recent Court of Appeals case, *Heritage Properties v. Wells Fargo Bank*, that has some very good language about the Council and its rulemaking, and it seems to support the fact that this is something that the Council can do.

Justice Garrett raised a question about the use of the words "meritorious" and "non meritorious" in the draft. He expressed concern that these words could be read to mean that a party is going to be restricted from filing claims or making arguments that are better than frivolous, but may not be winners, which is not the intention of the Council. However, it could be read that way. He asked whether the Council is trying to reach beyond the standard that already exists in ORCP 17 about what frivolous means and be more restrictive than that. If not, the Council may want to avoid words like "meritorious" and stick with the existing language in places like Rule 17 that govern frivolousness.

As an example, Justice Garrett pointed out the proposed language near the end of Section B, “A vexatious litigant's request to commence a new action or claim may be made by a petition accompanied by a declaration and will only be granted on a showing that the proposed action or claim is meritorious and is not for the purpose of delay or harassment.” He worried that this could be read to mean that this person has to show that they are likely to prevail on the case. If a person brings what might be a losing claim under current law, but they have a good faith argument that the law should change, or they just want to preserve something for appeal, he expressed concern that the proposed language could be read to say the person could not do that because the case is not meritorious in terms of the likelihood to prevail at the trial court level.

Judge Norby stated that she hoped that the definitions at the very beginning, which require that there have already been an action on the same issue with the same parties before even moving on to use the rule, would create a context for the word meritorious. Justice Garrett stated that “vexatious litigant” is defined to mean someone who has previous litigation against the same party, or anyone who has engaged in this type of behavior that is not tied to the same parties. He noted that this could have a pretty broad sweep. Judge Norby stated that she understood Justice Garrett’s concern. Judge Jon Hill stated that the intent was for the meaning to be akin to “frivolous.” He wondered if the committee should meet again and refine some of the definitions. Judge Bailey agreed with Justice Garrett, but stated that he thought it was an easy fix. He stated that the language was a bit more broad than was intended in paragraph A(1)(b), but using the term “frivolous” instead of “non meritorious” and removing the second use of the word “frivolous” later in that sentence could work. Judge Norby agreed. Judge Peterson noted that “frivolous” is defined and used in Rule 21 E and Rule 17, and it is a term that lawyers know when they see it.

Judge Norby asked Ms. Nilsson to change the language in paragraph A(1)(b) to read: “A person who files frivolous motions, pleadings, or other documents, conducts unnecessary discovery, or engages in other tactics that are intended to cause unnecessary delay. . . . “ Ms. Nilsson asked whether a change was also necessary in the language in section B. Judge Norby stated that she did not believe so. Ms. Nilsson pointed out that the language states that the vexatious litigant would have to show that the proposed action or claim is meritorious, which goes to Justice Garrett's concern that they would have to show it was a winning claim. Judge Bailey suggested “the proposed action or claim is not frivolous and is not for the purpose of delay or harassment.” Judge Jon Hill agreed and stated that this is where the committee was trying to go. Judge Norby stated that this would be fine, but that she would also try to come up with a better phrase than “not frivolous.”

Justice Garrett also stated that the "not reasonably likely to prevail on the merits against the moving party" standard included in subsection C(2) of the draft language may present the same issue, because a claim can be non frivolous and the plaintiff can still be not likely to prevail. Judge Peterson pointed out that if the vexatious litigant says that, despite their status as a vexatious litigant, this particular case has some merit, it should be allowed to proceed. Judge Norby agreed and noted that, in this subsection, the judge is not necessarily barring the case but, rather, just ordering the posting of security. Judge Jon Hill stated that he believes that the committee took that analysis from *Robert Woodruff v. State of Oregon*. Judge Bailey agreed with Judge Peterson. He stated that this subsection seems to say that, in addition to determining that the litigant is vexatious, the judge also needs to determine whether this new claim also does not seem to have merit. It is a twofold process.

Justice Garrett asked about another issue in section B. He stated that, the way the text reads, a person who becomes aware that someone has filed a bunch of cases against people like them in other courts would not be able to preemptively use this rule, because they have not been a defendant. He wondered whether that is the intent, or whether non defendants should be allowed to use the process as well. Judge Norby stated that the question brought before the Council assumed that litigation would be between the same parties. The committee expanded it after the last Council meeting to include the concept that it would not always be between the same two parties. She stated that it may not have been broadened enough in the draft. Judge Jon Hill stated that this was a good point and asked what language change Justice Garrett would suggest. Justice Garrett stated that changing the language to "on its own motion or under petition of any person" would suffice, and then that person would have to make a show about why it is warranted. Judge Norby suggested "interested person" rather than just "any person." Justice Garrett agreed.

Judge Norby wondered whether the Council would like the committee to look at these changes one last time before presenting them at the next Council meeting. Ms. Nilsson suggested that she could make the changes and send the new draft to committee members for their review. Judge Peterson stated that staff would change instances of "shall" and run those changes by Judge Norby as well.

Ms. Stupasky stated that, looking at the draft through the lens of a vexatious litigant, she was concerned about the first paragraph of section C, which states that the court shall consider any evidence. She stated that it makes her think that the evidence code maybe does not apply and that there is no hearsay exception. Judge Norby pointed out that this is an administrative hearing, so it is not subject to the rules of evidence. Part of the reason for that is so that courts may consider cases from other courts without bringing in presiding judges from around the state. Ms. Stupasky asked what the limitations are on what evidence can be

presented by the vexatious litigant. Judge Norby asked why there would be any. Judge Jon Hill stated that the *Woodruff* case set out what may be considered under subsection C(1) through C(6), and that gives presiding judges the guidelines of what to consider. He stated that this provides some guardrails.

Judge Peterson asked whether the committee could provide the Council with the benefit of its hard work and provide a very short written report that includes the cases that were explored as the draft rule was being written. Judge Norby agreed. She stated that the committee would try to meet before the next Council meeting as well.

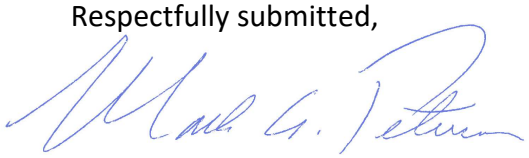
V. New Business

No new business was raised.

VI. Adjournment

Mr. Crowley adjourned the meeting at 11:40 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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.

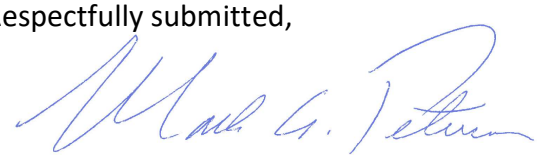
V. New Business

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

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.

JURORS
RULE 57

A Challenging compliance with selection procedures.

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

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

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

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

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

D Challenges.

D(1) **Challenges for cause; grounds. An individual juror does not have a right to sit on any particular jury. Jurors have the right to be free from discrimination in jury service as provided by law. Any juror may be excused for cause, including for a juror's actual bias as provided herein.** Challenges for cause may be taken on any one or more of the following grounds:

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

D(1)(b) [*The existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing the duties of a juror in the particular action without prejudice to the substantial rights of the challenging party.*] **The juror is not able to perform the essential functions of jury service without impacting the substantial rights of the parties or the juror because of a physical or mental impairment, or accommodation for the juror's impairment would impose an undue hardship on the operation of the courts or the juror.**

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

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

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

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

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

Commented [MH1]: Alternative language: "Jurors have the right to not be excluded from service on account of race or sex." I was concerned "not be excluded" was a double negative.

Jury service is a form of civic participation, which gives jurors certain rights under the law.

Commented [MH2]: D(1)(g) Actual bias on the part of a juror. Actual bias is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. Actual bias may be in referencewith regard to: (i) the action; (ii) either party to the action; (iii) the sex of the party, the party's attorney, a victim, or a witness; or (iv) a racial or ethnic group of which the party, the party's attorney, a victim, or a witness is a member, or is perceived to be a member. A challenge for actual bias may be taken for the cause mentioned in this paragraph, but on the trial of such challenge, although if it should appears that the juror challenged has formed or expressed an opinion upon the merits of the cause based on from what the juror may have heard or read, such opinion shall not of itself be sufficie

state of mind on the part of a juror that the juror cannot try the issue impartially. Actual bias may be in reference to the action; either party to the action; or a protected status of the party, the party's attorney, a victim, or a witness, or a perception of a protected status. If a juror expresses actual bias against a party, the court must excuse that juror without further inquiry. If the parties disagree as to whether a juror has expressed actual bias, further inquiry and argument must be held on the record, outside of the presence of the other jurors. A judge may defer ruling on a for cause challenge until the end of voir dire.

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

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

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

Commented [MH3]: I tried to change throughout to say "status." Alternative words are "characteristic" or "class."

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

D(4)(b) If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph (a) of this subsection, the party may object to the exercise

of the challenge. [*The objection must be made before the court excuses the juror. The objection must be made outside of the presence of the jurors. The party making the objection has the burden of establishing a prima facie case that the adverse party challenged the juror on the basis of race, ethnicity, or sex.*] **The court may also raise this objection on its own. Objection should be made by simple citation to this rule. The objection must be made before the court excuses the juror, unless new information is discovered that could not have been reasonably known before the jury was empaneled. Discussion of the objection must be made outside of the presence of the jurors.**

D(4)(c) [*If the court finds that the party making the objection has established a prima facie case that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the burden shifts to the adverse party to show that the peremptory challenge was not exercised on the basis of race, ethnicity, or sex. If the adverse party fails to meet the burden of justification as to the questioned challenge, the presumption that the challenge does not violate paragraph (a) of this subsection is rebutted.*] **Upon objection to the exercise of a peremptory challenge under this rule, the party exercising the peremptory challenge must articulate reasons supporting the peremptory challenge that are not pretextual or historically associated with discrimination. The objecting party may then present evidence or argument that the stated reason for the objection is pretextual or historically associated with discrimination, whether that discrimination is intentional, implicit, institutional, or unconscious.**

D(4)(d) [*If the court finds that the adverse party challenged a prospective juror on the basis of race, ethnicity, or sex, the court shall disallow the peremptory challenge.*] **The court must evaluate the peremptory challenge by considering the totality of the circumstances, including whether the party failed to exercise a for cause challenge against the juror. If the court determines more likely than not a protected status under Oregon or federal discrimination law was a factor in invoking the peremptory challenge, then the objection must be sustained. Additionally, if the court finds more likely than not that an objective reasonable person would determine that sustaining the challenge would contribute to implicit, institutional, or unconscious bias, based on protected status, harming one or more of the parties or an excluded juror, and that the reasons given to support the challenge are insufficient to outweigh the risk of harm, then the objection must be sustained. The court must explain the reasons for its ruling on the record.**

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

F Alternate jurors.

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

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

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

F(4) **Duties and responsibilities.** Alternate jurors shall be drawn in the same manner; shall have the same qualifications; shall be subject to the same examination and challenge rules; shall take the same oath; and shall have the same functions, powers, facilities, and privileges as the jurors throughout the trial, until the case is submitted for deliberations. An alternate juror who does not replace a juror shall not attend or otherwise participate in deliberations.

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

ORS 10 Fees

10.061 Fees payable to jurors; required waiver. (1) The fee of jurors [*in courts other than circuit courts*] is $[*1*]**4**0 for each day that a juror is required to attend.

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

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

(3) Unless otherwise provided by the terms of an employment agreement, a juror must waive the juror's fee provided for in subsection (1), (2) or (4) of this section if the juror is paid a wage or salary by the juror's employer for the days that the juror is required to attend a court,

including a municipal or justice court. The provisions of this subsection do not affect any claim a juror may have for mileage reimbursement under ORS 10.065.

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

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

[*(2) In addition to the fees prescribed in ORS 10.061, a juror who is required to travel from the juror's usual place of abode in order to execute or perform service as a juror in a circuit court shall be paid mileage at the rate of 20 cents a mile for travel in going to and returning from the place where the service is performed.*] Mileage paid to a juror shall be based on the shortest practicable route between the juror's residence and the place where court is held.

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

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

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

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

ORS 10 DISCRIMINATION

10.030 Eligibility for jury service; discrimination prohibited.

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

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

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

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

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

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

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

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

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

(C) Is less than 18 years of age;

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

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

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

(b) As used in this subsection:

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

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

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

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

(5) A person is ineligible to act as a juror in any circuit court of this state within 24 months after being discharged from jury service in a federal court in this state or circuit court of this state unless that person's service as a juror is required because of a need for additional

jurors. [Amended by 1971 c.630 §1; 1975 c.781 §4; 1977 c.262 §1; 1985 c.703 §2; 1989 c.224 §3; 1997 c.313 §8; 1997 c.736 §1; 2007 c.70 §4; 2007 c.100 §13; 2009 c.484 §13; 2021 c.367 §2]

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

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

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

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

(2) The court to which a juror [*with a disability*]is summoned, upon [*written*] request by the juror and upon a finding by the court that the juror requires the services of a qualified interpreter or the use of an assistive communication device in examination of the juror as to the juror's qualifications to act as a juror or in performance by the juror of the functions of a juror, shall appoint a qualified interpreter for the juror and shall fix the compensation and expenses of the interpreter and shall provide an appropriate assistive communication device if needed. The compensation and expenses of an interpreter so appointed and the cost of any assistive communication device shall be paid by the public authority required to pay the fees due to the juror.

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

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

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

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.

Proposed ORCP 58

F. Testimony by Remote Means

a. Subject to Court approval and ORS 45.400 (2), the parties may stipulate or the court may require that testimony be by "remote means." 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 real-time electronic communication that permits all participants to hear and speak with each other simultaneously. .

c. Remote testimony must be recorded using the court's official FTR recording system, if suitable equipment is available; otherwise, remote testimony must be recorded at the expense and by the party requesting the remote testimony. Any alterntive 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 real-time electronic communication that permits all participants to hear and speak with each other and allows official court reporting when requested.

45.400 Remote location testimony; when authorized; notice; payment of costs. (1) A party to any civil proceeding or any proceeding under ORS chapter 419B may move that the party or any witness for the moving party may give remote location testimony.

(2) A party filing a motion under this section must give written notice to all other parties to the proceeding [*at least 30 days before the trial or hearing at which the remote location testimony will be offered.*] **sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow for the non-movant to challenge those factors specified in (3)(a) and to advance those factors specified in (3)(b).** [*The court may allow written notice less than 30 days before the trial or hearing for good cause shown.*]

(3)(a) Except as provided under subsection (5) of this section, the court may allow remote location testimony under this section upon a showing of good cause by the moving party, unless the court determines that the use of remote location testimony would result in prejudice to the nonmoving party and that prejudice outweighs the good cause for allowing the remote location testimony.

(b) Factors that a court may consider that would support a finding of good cause for the purpose of a motion under this subsection include:

(A) Whether the witness or party might be unavailable because of age, infirmity or mental or physical illness.

(B) Whether the party filing the motion seeks to take the remote location testimony of a witness whose attendance the party has been unable to secure by process or other reasonable means.

(C) Whether a personal appearance by the witness or party would be an undue hardship on the witness or party.

(D) Whether a perpetuation deposition under ORCP 39 I, or another alternative, provides a more practical means of presenting the testimony.

(E) Any other circumstances that constitute good cause.

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(c) Factors that a court may consider that would support a finding of prejudice under this subsection include:

(A) Whether the ability to evaluate the credibility and demeanor of a witness or party in person is critical to the outcome of the proceeding.

(B) Whether the nonmoving party demonstrates that face-to-face cross-examination is necessary because the issue or issues the witness or party will testify about may be determinative of the outcome.

(C) Whether the exhibits or documents the witness or party will testify about are too voluminous to make remote location testimony practical.

(D) The nature of the proceeding, with due consideration for a person's liberty or parental interests.

(E) [*Whether facilities that would permit the taking of remote location testimony are readily available.*] **Whether reliable facilities and technology that would permit the taking of remote location testimony are readily available to the court, counsel, parties, and the witness.**

(F) Whether the nonmoving party demonstrates that other circumstances exist that require the personal appearance of a witness or party.

(4) In exercising its discretion to allow remote location testimony under this section, a court may authorize telephone or other nonvisual transmission only upon finding that video transmission is not readily available.

(5) The court may not allow use of remote location testimony in a jury trial unless good cause is shown and there is a compelling need for the use of remote location testimony.

(6) A party filing a motion for remote location testimony under this section must pay all costs of the remote location testimony, including the costs of alternative procedures or technologies used for the taking of remote location testimony. No part of those costs may be recovered by the party filing the [*motions*] **motion** as costs and disbursements in the

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proceeding.

(7) This section does not apply to a workers' compensation hearing or to any other administrative proceeding.

(8) As used in this section:

(a) "Remote location testimony" means live testimony given by a witness or party from a physical location outside of the courtroom of record via simultaneous electronic transmission.

(b) "Simultaneous electronic transmission" means television, telephone or any other form of electronic communication transmission if the form of transmission allows:

(A) The court, the attorneys and the person testifying from a remote location to communicate with each other during the proceeding;

(B) A witness or party who is represented by counsel at the hearing to be able to consult privately with counsel during the proceeding; and

(C) The public to hear and, if the transmission includes a visual image, to see the witness or party if the public would otherwise have the right to hear and see the witness or party testifying in the courtroom of record.

VEXATIOUS LITIGANTS

RULE 35

A Definitions.

A(1) For purposes of this rule, "vexatious litigant" shall include:

A(1)(a) A person who is a party to a civil action or proceeding who, after the litigation has been finally decided against the person, relitigates, or attempts to relitigate, either:

A(1)(a)(i) The validity of the decision against the same party or parties who prevailed in the litigation; or

A(1)(a)(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 party or parties who prevailed in the litigation. An action is not deemed to be "finally decided" if an appeal is still pending.

A(1)(b) A person who files non-meritorious motions, pleadings, or other documents, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay; or

A(1)(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 on the same or substantially similar facts, transaction, or occurrence.

A(2) For purposes of this rule, "pre-filing 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.

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

B Issuance of pre-filing 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 pre-filing order prohibiting a vexatious litigant from commencing any new

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action or claim in the courts of that circuit without first obtaining leave of the presiding judge. On entry, a copy of the pre-filing 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 opposing parties, if any. Disobedience of such an order may be punished by contempt of court. A vexatious litigant's request to commence a new action or claim may be made by a petition accompanied by a declaration and shall only be granted on a showing that the proposed action or claim is meritorious and is not for the purpose of delay or harassment. The presiding judge may condition the filing of the proposed action or claim on a deposit of security as provided in this rule.

C Designation and security hearing. In any case pending in any court of this state, including small claims cases, a litigant may move the court for an order to recognize an opposing party as a vexatious litigant and require posting of 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 litigant is vexatious, the court may consider:

C(1) the litigant's history of litigation and whether it entailed vexatious, harassing, or duplicative suits;

C(2) the litigant's motive in pursuing the litigation;

C(3) whether the litigant is represented by counsel;

C(4) whether the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts;

C(5) whether other sanctions would be adequate to protect the courts and other parties; and

C(6) any other considerations that are relevant to the circumstances of the litigation. If, after considering all the evidence, the court determines that the litigant is vexatious and not reasonably likely to prevail on the merits against the moving party, then the court shall order

the vexatious litigant 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 or claim, nor deemed to be a decision on any issue in the action or claim.

D Failure to deposit security; judgment of dismissal. If the vexatious litigant 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 or claim with prejudice as to the party for whose benefit the security was ordered.

E Motion for hearing stays pleading or response deadline. If a motion for an order to designate a vexatious litigant and deposit security is filed in an action, then the moving party need not plead or otherwise respond until ten (10) days after service of the order that rules on the motion, unless the order directs otherwise. If the motion is granted, the moving party shall plead or respond not later than ten (10) days after the required security has been deposited.

F Cases filed in error after a pre-filing order is entered. The clerk of the court shall reject for filing any new action or claim by a vexatious litigant unless the vexatious litigant has obtained an order from the presiding judge allowing the action or claim to be filed. If the clerk of the court mistakenly permits a vexatious litigant to file an action or claim after a pre-filing order has been entered, then any party to the action or claim mistakenly filed may file a notice stating that the vexatious litigant is subject to a pre-filing order. The notice must be served on all parties who have appeared or been served in the action or claim. The filing of such a notice shall stay the litigation against all opposing parties. The presiding judge shall dismiss the action or claim with prejudice within ten (10) days after the filing of such a notice unless the vexatious litigant files a motion for leave to file the action. If the presiding judge issues an order allowing the action to be filed, then the vexatious litigant must serve a copy of the order granting leave to file the action on all other parties. Each party shall have ten (10) days after the date of service of the presiding judge order to plead or otherwise respond to the action or claim.

46.415 Circuit judges to sit in department; procedure. (1) The judges of a circuit court shall sit as judges of the small claims department.

(2) No formal pleadings other than the claim shall be necessary.

(3) The provisions of ORCP 35 apply to cases filed in the small claims department.

[*(3)*] **(4)** The hearing and disposition of all cases shall be informal, the sole object being to dispense justice promptly and economically between the litigants. The parties shall have the privilege of offering evidence and testimony of witnesses at the hearing. The judge may informally consult witnesses or otherwise investigate the controversy and give judgment or make such orders as the judge deems to be right, just and equitable for the disposition of the controversy.

(4) No attorney at law or person other than the plaintiff and defendant and their witnesses shall appear on behalf of any party in litigation in the small claims department without the consent of the judge of the court.

(5) Notwithstanding the provisions of ORS 9.320, a party that is not a natural person, the state or any city, county, district or other political subdivision or public corporation in this state, without appearance by attorney, may appear as a party to any action in the small claims department and in any supplementary proceeding in aid of execution after entry of a small claims judgment.

(6) Assigned claims may be prosecuted by an assignee in small claims department to the same extent they may be prosecuted in any other state court.

(7) When spouses are both parties to a case, one spouse may appear on behalf of both spouses in mediation or litigation in the small claims department:

(a) With the written consent of the other spouse; or

(b) If the appearing spouse declares under penalty of perjury that the other spouse consents.

Council on Court Procedures
April 9, 2022, Meeting
Appendix E-4