MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, May 14, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

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

Guests:

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

Council Staff:

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

Members Absent:

Hon. Benjamin Bloom
Troy S. Bundy

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 35 (Vexatious Litigants)	ORCP 1	ORCP 71	ORCP 7		
ORCP 39	ORCP 4	Abatement	ORCP 39		
ORCP 54/ORS 36.425	ORCP 14	Affidaviting judges	ORCP 55		
ORCP 55	ORCP 15	Arbitration/mediation	ORCP 58		
ORCP 57	ORCP 16	Collaborative practice	ORCP 69		
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 April 9, 2022, Minutes

Mr. Crowley asked whether any Council members had changes to the draft April 9, 2022, minutes (Appendix A). Hearing none, he asked for a motion to approve the minutes. Judge Norby made a motion to approve the draft April 9, 2022, minutes. Judge Jon Hill seconded the motion, which was approved unanimously by voice vote.

III. Administrative Matters

A. Article about the Council in Oregon Association of Defense Counsel Publication

Mr. Crowley referred the Council to Appendix B, the article written by Judge Norby explaining the history of the Council on Court Procedures that the Oregon Association fo Defense Counsel (OADC) agreed to publish. He noted that the article was edited for space, but that the revised article is still incredibly good. Judge Norby noted that the space requirement was 1500 words, so quite a bit of the original article was slashed, but that she was still pretty happy with the outcome.

Mr. Crowley asked if Judge Norby knew the date of publication. She stated that she believed that the final version would go to publication that week, with the intention of ensuring that the publication reaches members before OADC's annual convention that begins on June 16, 2022. OADC kindly offered to send some extra copies to the Council. Mr. Goehler also pointed out that the publication is available online.

IV. Old Business

A. Committee Reports

1. Rule 55 Committee

Judge Norby reminded the Council that, at the last meeting, there was fairly strong majority agreement that a form motion should be included with the subpoena. Since then, Council staff put that form language into a new draft for possible approval for the publication agenda (Appendix C).

Judge Peterson stated that he raised an issue at the last meeting that did not get incorporated into the changes to the Rule 55 draft, and speculated that it may not have been heard. He stated that he wondered whether it would be worthwhile to include a certification by the declarant that the person who is signing the motion has conferred with the person that issued the subpoena, very much like a UTCR 5.010 certification. Judge Norby recalled that Judge Peterson had mentioned that

at the last meeting, but stated that she had forgotten to include it in the draft. Judge Peterson stated that it strikes him that a potential problem that will occur is that people will not talk beforehand, and that including this requirement could alleviate that problem.

Judge Norby recollected that the Utah judges with whom Judge Peterson spoke thought that attorneys were already, or at least should already, be talking to witnesses prior to the time that the witness gets the subpoena handed to them. She stated that, if a witness does get a subpoena without having been contacted by a lawyer, it would be best for that witness to reach out to the lawyer to try to resolve the issue before seeking court intervention. She suggested, however, that the requirement be a good faith effort to confer with the attorney, for cases where a witness is not able to get in touch with the attorney due to that attorney being in trial and unavailable, for example. Judge Peterson agreed with this friendly amendment, because an attorney may not necessarily be at the listed telephone number during a trial. Judge Norby asked whether Judge Peterson envisioned this provision as something that would be an addition to the motion form, or something that would be in the rule prior to the introduction of the form. Judge Peterson stated that his preference would be to include it in the form, perhaps just before the declaration.

Ms. Holley suggested yes and no check boxes for simplicity in the interest of self-represented litigants. Mr. Goehler stated that the options could be, "I have conferred, and we have not been able to resolve the issue," or, "I made a good faith effort and was unable to confer." Judge Norby noted that the idea was to move away from checkboxes, because it is too easy to justify checking something that someone has not actually done. She suggested a line to fill in a short sentence, with a prompt. Ms. Nilsson suggested, "I conferred or attempted to confer with the person who issued the subpoena in the following way." Ms. Stupasky agreed that having an explanation is a good idea, and stated that it should be included in both the rule and the form.

Mr. Crowley stated that he had looked at the minutes from the April meeting to refresh his recollection about where the Council is in terms of its approval of the draft language amending Rule 55. He stated that it appears that a poll was taken at the last meeting about including the form in the rule itself. Since that has been done, the question seems to be whether to approve this new language. Judge Jon Hill made a motion to approve the draft amendment to Rule 55 contained in Appendix C, with the addition of the language proposed by Ms. Nilsson to the motion form prior to the declaration. Judge Leith seconded the motion.

Judge Norby mentioned that Judge Peterson was planning to reach out to former Council chair Don Corson regarding the draft amendments to Rule 55, and wondered whether it was important for that to happen before the Council votes to move the draft amendment to the publication docket. Judge Peterson

reminded the Council that, after the publication of a draft amendment to Rule 55 last biennium, the Council received a letter from Mr. Corson pointing out that the proposed changes to Rule 55 were, regrettably, flawed. This was due to the fact that the rule was adjusted on the fly at the at the publication meeting, which is something that the Council does not want to repeat this biennium. The goal is to make the draft amendments as solid as possible by June. Since Mr. Corson had sent such a well written, and fairly devastating, comment about Rule 55 last biennium, Judge Peterson thought that it would be a good idea to go back to the source to have him review the new draft amendment this biennium. Mr. Corson is a smart lawyer who is happy to work with the Council. Judge Peterson stated that he thinks that it is fine to move the rule to the publication docket before having Mr. Corson review it.

Mr. Crowley asked whether there are examples of this type of language in other ORCP. Judge Peterson stated that Rule 7 includes similar language in two places, once with regard to the notice that is in every subpoena, and once with regard to the declaration or affidavit by the publisher if it is a published summons. He noted that there is a modified type of this language already in Rule 55 with regard to confidential health information.

The motion to approve the draft amendment to Rule 55, with the language proposed by Ms. Nilsson included, passed unanimously by voice vote.

2. Rule 57 Committee

Ms. Holley explained that she had written three separate memos that capture what the Council is asking the Legislature to change (Appendix D). The first regards changes to challenges for cause; the second regards changes to peremptory challenges; and the third regards changes to ORS chapter 10. Ms. Holley stated that she had received input from Erin Pettigrew at the Oregon Judicial Department (OJD), who stated that the OJD is putting together a more comprehensive analysis of ORS chapter 10 and how to effectively revamp it to address concerns such as juror pay, with the goal of more diverse jury pools and promoting more access to being able to serve on a jury. Consequently, Ms. Holley's memo regarding ORS chapter 10 mostly states that the Council supports the work of the OJD in this regard. The thought is that the OJD's analysis is much more in depth than what the workgroup has done, and the Council does not want to undermine the OJD's thoughtful work with a different proposal. The memo does include some suggestions regarding possible discrimination in jury service prohibitions and access to communication devices, but it is possible that the OJD will want to include its own proposals related to those issues, so those recommendations may come out in a later draft.

Ms. Holley noted that she represented that the Council's primary focus is what the Oregon Court of Appeals asked it to do, which is to look at peremptory challenges.

She stated that she is inclined to wrap up the workgroup work unless the Council thinks that additional input from the workgroup is still needed. At the last workgroup meeting, the important direction and focus was agreed on and any remaining issues were not "make or break" issues but, rather, what the Council was willing to put forward. Some of those issues are included in the memo, and Ms. Holley specifically wanted to give Judge Oden-Orr time to talk about his recommendation of carving out a specific designation for cases where someone attempts to exercise a peremptory challenge against a juror without having first raised a for-cause challenge against that juror. She noted that, unfortunately, Judge Oden-Orr's suggested language was not included in Appendix D, but it would appear in paragraph D(4)(d) and read as follows (the rest of the paragraph would remain the same):

> **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.**

Judge Oden-Orr pointed out that the proposed amendment asks the judge to analyze the totality of the circumstances after all of the questioning of a juror has been completed and all of the theories are on the table. He gave the example of a lawyer challenging an objection believed to be based on discrimination and the challenged lawyer stating something along the lines that the reason was that the juror had looked away during questioning. Judge Oden-Orr stated that his thought was that a consideration of whether or not that party had actually exercised a for-cause challenge at the time of questioning would be the best indication that the later peremptory challenge was not being exercised for a discriminatory purpose. He also stated that he had since been reminded that, if someone exercises a for-cause challenge against a juror that is denied by the court, the failure to subsequently use a peremptory challenge to strike that juror is essentially a waiver of the for-cause challenge to that juror. Looking at the way the court considers peremptory challenges in light of for-cause challenges, he came to the conclusion that it is appropriate to infer that the failure to challenge a juror for cause is a strong indicator that the party does not, in fact, have a real, non-discriminatory reason to remove that juror.

Judge Oden-Orr reiterated that his original language appeared in at the end of paragraph D(4)(b) and basically read that a failure to exercise a for-cause challenge against a juror protected by paragraph D(1)(a), creates a prima facie showing of a violation of paragraph D(1)(a). Judge Bailey noted that the standards are completely different for challenges for cause and peremptory challenges. He expressed concern that it would not be good to have attorneys making for-cause challenges that are not legally based. He gave the example of a theft case and an attorney using a peremptory challenge to remove a potential juror who rents a home. That would not be a valid basis for a challenge for cause, because the potential juror could be fair to both of the parties in the particular case. However,

there is a lot of literature that indicates that people who do not own property may not be the best jurors for this type of case. He stated that his fear is that, if Judge Oden-Orr's proposal were to be adopted, people would make for-cause challenges while knowing that there is no basis for them, which is unethical, yet they feel that they must in order to preserve the right to make a peremptory challenge later. It seems unworkable to him.

Judge Oden-Orr stated that, if a party believes that a person who is a renter might have a bias against their client, he does not believe that this is not a bias that could support a for-cause challenge. As a judge, he might decide that it is not a good enough reason and that he will not strike the juror; however, if the party then exercises a peremptory challenge on the same juror and states that they are doing it for the same reason, it will show that the challenge is not for a reason of bias. He stated that, hopefully, every other renter on the panel would also be stricken, which would support that the party really is trying to remove renters. Judge Bailey opined that this would put an attorney in a bad position because they would have challenged a whole bunch of jurors in front of the other jurors. He again stated that the standards are completely different: one is whether the juror can be fair and impartial to that individual; the other is whether research bears out that certain types of people just typically are not fair. A renter could still claim they will be fair, but the research suggests that they may not be.

Ms. Holley noted that, at the last Council meeting, some attorney members were concerned that they would have to challenge a lot of jurors and potentially create a negative relationship with jurors by accusing them or calling them out as being biased in front of other jurors in order to preserve the peremptory challenge. Judge Oden-Orr stated that, in his courtroom, he conducts voir dire in such a way that no juror is challenged in front of the entire panel. All of that happens outside of the presence of the jury. Ms. Holley stated that she has seen it done in this manner many times and that it seems like a good way to do it. Judge Norby acknowledged that it is late in the biennium, but she wondered whether there is a way to amend the rule to try to channel judges into doing what she and Judge Oden-Orr and many other judges already do, which is waiting until the jury is removed to handle for-cause challenges. Ms. Holley noted that this concern is somewhat addressed in the proposed change to Rule D(1)(g), although the assumption seems to be that the challenge would be made in the presence of the jury:

> **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.**

Mr. Andersen stated that his approach to for-cause challenges may be less adversarial. He asks enough questions to raise his concern that the juror may need

to be excused for cause, and then simply asks the juror, "Would you like me to ask the judge that you can be excused for cause?" That way, he is not confronting the juror in an adversarial sense, and very often, the juror will agree. He stated that he believes that the challenge has to be made while the jury is present, but that he also believes that the judge should wait until the end to make rulings on for-cause challenges, if the concern is that there will be jurors mimicking what other jurors have done to get out of jury service. Mr. Andersen also agreed with Judge Bailey that peremptory challenges and for-cause challenges are two entirely different concepts, and that it is a mistake to try to conflate the two. They should be separate because they serve two very different purposes.

Mr. Goehler stated that failing to make a for-cause challenge is one factor to consider in the totality. He pointed out that there are many other factors and stated that he would not favor calling one factor out, as that may give it more weight than other factors. However, he also opined that it would be a mistake to try to list all factors. He stated that the failure to previously use a for-cause challenge is something that should be considered, especially when the attorney purports that the peremptory challenge is unbiased and not for a prohibited purpose, but then tries to make a "for-cause" explanation. The fact that they did not actually make that challenge to begin with kind of shoots down the credibility of the later challenge. He agreed that it is something to consider, but emphasized that there are many other things to consider, and calling out the failure to exercise a for-cause challenge, or any other factor might give it more weight than other factors. However, a laundry list of everything that judge should consider would be a whole page or more. Certainly, if people are looking at this rule and its history, the discussion is here in the Council's minutes, and that would illuminate for them that not using a for-cause challenge is part of the totality of the circumstances.

Judge Oden-Orr thanked Mr. Goehler for his thoughts. He stated for the record and for full disclosure, however, that he believes that the fact that a for-cause challenge has not been made should be entitled to greater weight than other factors. Ms. Holley asked whether it was fair to summarize Judge Oden-Orr's concept as that a juror should be challenged for one of the reasons listed in the rule including actual bias and, if someone is just using a "I sort of have a bad feeling about this juror," as a reason, it has a high probability or danger or including an unlawful bias reason. Judge Oden-Orr agreed with that summation. He stated that the goal is to ensure that discrimination against protected persons is not being used against those jurors. The question is how to do that. He stated that the Council has been hearing that the *Batson* process does not accomplish it, or has issues, which means that there is a need for something different. He stated that he believes that his proposal is that "something different" that really gets to the heart of the issue.

Ms. Holley asked whether the Council would like to have more discussion or

whether a vote was in order about this particular issue. She stated that, if the Council would like to vote, she would frame the question as, "Should the language 'failure to make a for-cause challenge create a prima facie case that a peremptory challenge is a violation of the rule?' be included in the draft amendment to Rule 57?" Judge Oden-Orr agreed that this was a good statement of his suggestion.

Mr. Andersen asked whether the effect of such a change would be that one would have to challenge every juror for cause before exercising a peremptory challenge. Judge Oden-Orr stated that this heightened concern is really only raised in the case of protected parties. However, in reality, any person of any racial background could be challenged under *Batson*. Judge Bailey stated that he thinks that the answer to Mr. Andersen's question is yes, theoretically. He pointed out that a lawyer could end up in a position where, even though they have a non-biased reason for challenging a juror in one of those protected classes, they would have to make a for-cause challenge just in case. Judge Bailey also noted that a reason for making a challenge could also arise while the other party is conducting voir dire, in which case there would not have been a chance to raise a for-cause challenge. He observed that it could then, ironically, result in more biased juries rather than ameliorating the existing problem.

Judge Jon Hill stated that he liked Mr. Goehler's suggestion regarding using Judge Oden-Orr's suggestion as a more heavily weighted factor. He stated that this may assuage concerns about lawyers needing to make a for-cause challenge before every peremptory challenge. Mr. Andersen stated that this would not solve the problem, in his view. He stated that, in the average jury trial with 36 potential jurors, he might use two to four challenges for cause and will typically exercise all of his peremptory challenges. He opined that Judge Oden-Orr's suggestion would turn jury selection into a battle with every juror that an attorney has a bad feeling about for any number of reasons that are not "for-cause" reasons. If a lawyer has to lay out a for-cause challenge before each peremptory, jury selection time will be extended. Mr. Andersen posited that, even if an attempt is made to soften the suggestion, an adversarial relationship will be created between the attorneys and the jurors. He stated that he does not think it is wise to make any linkage between for-cause and peremptory challenges.

Ms. Holley asked Ms. Nilsson to take a poll of whether the Council would like to include Judge Oden-Orr's suggested language in the draft amendment. Ms. Nilsson conducted a poll in which Council members voted not to include that language. Judge Jon Hill asked whether a vote could be taken on Mr. Goehler's suggestion. Mr. Goehler reiterated that his thought was that the fact that a for-cause challenge had not been exercised before the peremptory challenge was made may be included as a factor to consider, but that it should not be given extra weight. He stated that, if it were to be called out as a factor, there should be a caveat or as many other factors as possible should also be listed.

Judge Oden-Orr reminded the Council that the workgroup had previously considered a solution that was more along the lines of what the state of Washington did with their Rule 37, that is, create a laundry list of factors. Ms. Holley agreed that this was an early thought but that group members had fairly consistently come to the conclusion that such a list of presumptively discriminatory factors could create a roadmap for people to specifically avoid something that looks like discrimination while trying nefariously to be discriminatory. Mr. Goehler clarified that he would not be opposed to including Judge Oden-Orr's language if it included a caveat that it could be considered with the totality of the circumstances. He stated that his only concern is giving that factor undue weight and potentially setting up a situation that Mr. Andersen posited where a challenge for cause would have to be exercised before every peremptory challenge. Mr. Goehler suggested an addition to the proposed language in paragraph D(4)(d): "The totality of the circumstances can include the failure to exercise a for-cause challenge, among many other factors." Judge Norby suggested: "The totality of the circumstances may include, among other factors, whether the party challenged the same juror for cause."

Judge Oden-Orr stated that he appreciated Mr. Goehler's suggestion because it softens his own suggestion a bit. By including his language as one factor among others, it would point it out as a factor to be considered and, even though the court would not be required to give it greater weight, most people would tend to think that it does have more weight simply by its presence in the rule. Mr. Andersen stated that Mr. Goehler's language seems to create a situation where one would be going in a circle: a party attempts to excuse a juror for cause for a prohibited reason and then exercises a peremptory challenge, which is obviously for that very reason if the challenge for cause was not allowed. He again stated that the two types of challenge should not be conflated at all, since they are so different.

Mr. Goehler stated that he does not believe that making a challenge for cause for a discriminatory reason would insulate someone who has a discriminatory reason for making a peremptory challenge. Because there will be so many other factors, the judge can look at the totality of the circumstances and say that, despite the fact that a challenge for cause was attempted, there are all these other factors that point to a discriminatory purpose. Judge Bailey pointed out that judges will ask why a challenge for cause was not given anyway. He worried that, by including Judge Oden-Orr's factor, people may feel the need to unethically make challenges where they ordinarily would not because they know there is not necessarily a bias that reaches the level of a challenge for cause.

Ms. Holley suggested including language in paragraph D(4)(c) to the effect of, "the objecting party may then present evidence or argument that the stated reason for the objection is pretextual or historically associated with discrimination, or that the challenging party stated no bias on the part of the juror in a for-cause

challenge." Mr. Crowley stated that this suggestion raises another point that he wanted to ask about: the way the proposed amendment has been written, it changes the burden of proof. Ms. Holley explained that this was intentional, and that it was one of the main issues the workgroup was trying to solve with the amendment.

Judge Peterson observed that the literature from the Pound Institute made it clear that better juries can be selected if more time is spent on voir dire, but he stated that this probably is not going to happen due to tight court schedules. In terms of establishing challenges for cause, the ability to really spend some time with people allows one to get a better sense of them. With the pressure to get trials moving, this does not often happen. He also observed that, in order to promulgate a rule, there is a need to find an amendment that will garner the support of 15 of the Council's voting members. Otherwise, nothing will have been accomplished. Regardless of how this one issue ends up, just the change of the burden and the presumption that a challenge is not discriminatory is a sea change and a huge improvement, so the Council should not lose sight of that.

Ms. Nilsson conducted a poll on whether to include the language "The totality of the circumstances may include, among other factors, whether the party challenged the same juror for cause" in paragraph D(4)(d). The Council voted yes by a one-vote margin. Judge Peterson suggested including the language in the next version of the rule in June, to be considered for the September publication agenda. He again pointed out that, without a 15-vote super majority, the amendment could not be promulgated. Ms. Holley stated that, with this close vote, it did not seem that the amendment could get that super majority. Judge Peterson stated that this is not necessarily the case, as there were members absent at the meeting.

Ms. Holley agreed to keep this version as a potential option to discuss at the publication meeting. She did note that the agreement that the workgroup made was to move the rule forward and that, if any controversial issues like this came up, they could potentially be compromised on in order to move the most essential parts of the rule forward. Judge Peterson explained that there has, at times, been two versions of a rule presented at the publication meeting, each with slightly different language in it. This allowed the Council to determine which version would garner the most support and be moved forward to the promulgation meeting.

Ms. Holley stated that the next issue for discussion was whether to include the language, "implicit, institutional, or unconscious." She explained that Judge Leith and Judge Oden-Orr wondered whether simply using "unconscious" would suffice. She stated that she and attorney Arunah Masih from the workgroup, being discrimination lawyers, felt that all three words should be included in case there was a situation that may not be covered under "unconscious" on its own. She

noted that Washington, California, and Connecticut use all three words and, as case law gets developed, she and Ms. Masih felt that it would be more useful to include all three words in the Oregon rule as well. There was concern, however, that using all three words may be redundant. However, she noted that there may be scenarios where implicit bias may not necessarily be unconscious. Ms. Holley gave the example of an insurance adjuster who had said that they would not pay a plaintiff until that plaintiff learned to speak English. She stated that this may fall under explicit bias, but that it could fall under an implicit bias area that is not necessarily unconscious.

Judge Oden-Orr stated that he felt that "implicit" and "unconscious" were two ways of saying the same thing, but he wondered how a judge would take into consideration something like institutional bias, which is not exercised by a person but, rather, is a culture that is reflective of biases that people who are involved in the system may not actually consciously use. He stated that he does not think that institutional bias is something a judge could look at in the context of jury selection. Ms. Holley stated that she was not certain exactly how it would come up. However, she stated that one example of institutional bias would be one of the presumptively unlawful reasons in the Washington rule: contacts with law enforcement.

Judge Bailey stated that he believes that the reason for *Batson* challenges in the first place is because of abuse and unwarranted challenges in the past, and that concern is already addressed in these suggested rule changes. He opined that sometimes language is just thrown out there to make people feel good, and that it is unnecessary in this case, because clearly this whole rule amendment is designed to do exactly what is right and make sure people get a jury of peers to the best degree possible. His opinion is that the best way to solve the issue is to pay jurors more to get a better cross-section of jurors to start with. As for judges, when lawyers are asking questions on a *Batson* challenge, judges will realize whether the challenge is happening for the right or wrong reason. It is important to remember that the reason for the rule in the first place is to make sure people are not challenging jurors for improper purposes.

Judge Jon Hill asked what the idea was in including these three terms and how using them in court might work. Judge Oden-Orr used Ms. Holley's previous example of an insurance adjuster who had stated that they would not pay a person because that person could not even speak English. That is not explicit bias, but it would reflect that the person has in their mind that a person not speaking English is bad. So it is implicit in that statement that they believe the person is not worthy. Ms. Holley stated that it is not necessarily unconscious, but the relationship between race and speaking English is implicit. Judge Oden-Orr agreed, and stated that this is opposed to someone saying explicitly, straight-out, "those people should not have..." A judge can divine an implicit bias from that statement, but how can a judge divine institutional bias from anything that a person would

say? Judge Oden-Orr stated that he understands wanting to include "institutional," but feels that it may be superfluous.

Ms. Holley stated that, during a workgroup meeting, Judge Oden-Orr had given an example of a judge seeing a challenge happen and being concerned that it would impact the jury's confidence in the justice system. To her, that is how the judge might get to institutional bias. Judge Oden-Orr recounted for the Council that a colleague had stated that, in his years on the bench, he had only had one *Batson* challenge. Judge Oden-Orr replied that he had not had any, but pointed out that it is rare that he has a number of diverse people on his jury panels. Judge Oden-Orr's colleague told him about an occasion where one of the parties moved to strike the only black person on the panel with a peremptory challenge, and the judge just felt like it sent a bad message and denied the challenge. Judge Oden-Orr stated that this was the closest he could come to a situation where the judge could be looking at the sort of societal impact of that decision to remove that one person. However, that was fairly unique.

Ms. Holley recalled that Judge Leith had pointed out that "implicit" and "unconscious" are very similar words, and that all three words could potentially be covered by the word "unconscious." She stated that she does not necessarily feel that is true, but noted that she is steeped in the nuances of discrimination law. She and Ms. Masih felt that it was better to not differ from this part of what the Washington, California, and Connecticut rules did because a situation may develop that the Council is not seeing yet. However, if it is necessary to just reduce to the one word to move the rule forward, she and Ms. Masih were willing to accept that compromise. Judge Oden-Orr pointed out that Oregon case law already talks about the role of judges to look at both actual and unconscious bias in jury selection, and unconscious bias is already included in the uniform jury instructions as well. Judge Jon Hill asked what the downside to including all three words would be. Ms. Holley stated that there did not seem to be a substantive downside but, rather, the change would be an effort to tighten up the language.

Ms. Nilsson conducted a poll asking whether all three words should be included in the rule. The "nays" won the poll by a one-vote margin. Ms. Holley again expressed concern that, with close calls on these votes, the rule itself may not have enough votes to pass. Mr. Goehler and Judge Norby disagreed. Mr. Goehler stated that he liked Judge Peterson's idea of having two versions of rules where there may be close calls, and publishing the rule that gets the most votes.

Mr. Crowley asked Ms. Holley to review all of the significant changes to the rule for the Council. Ms. Holley stated that subsection D(1) includes language stating that an individual juror does not have a right to sit on any particular jury and that jurors have the right to be free from discrimination in jury service as provided by law. It also states that any juror may be excused for cause, including for a juror's actual bias. This is to reflect the case law that says discrimination against jurors is

a consideration.

Ms. Holley explained that the changes to paragraph D(1)(b) include the explicit reasons that a that a juror could be excluded for cause. She stated that new language was inserted primarily to be consistent with discrimination law related to disability. The existing language uses existence of a mental or physical defect, but the new language states, "the inability of a juror to perform essential functions of jury service with or without accommodation because of mental or physical impairment." Impairment is the word that is used in disability discrimination law. The change also reflects the undue hardship exception for the courts or for the juror. Judge Norby noted that reasonable accommodations typically have to be requested in advance, in writing. She asked whether the amendment envisions that a person who receives a jury summons and who needs accommodation could request that accommodation in advance so that the courts could try to accommodate them, or whether that potential juror would just show up and ask the court to make the accommodation on the fly. Ms. Holley pointed out that the law requires an interactive process to accommodate a person, including a member of a public, in a public accommodation. She stated that she thought that most people would tell the court ahead of time but, as a matter of law, there could be an obligation to try to accommodate a person who did not provide notice in writing ahead of time. Judge Norby observed that, if it came down to it and the judge had to keep the trial going, it could become an undue hardship without advance notice. Ms. Holley agreed that such a situation could potentially arise, but that it would be a good idea to try to work with the court administration to make a good faith effort to accommodate such a potential juror.

Judge Bailey pointed out that the state does not currently have the ability to pay for interpreters for jurors. However, he noted that the language in paragraph D(1)(b) would seem to suggest that the only thing that can be challenged is the juror's inability to serve because of a mental or physical impairment. He stated that he does not believe that language ability is either a mental or physical impairment, and wondered about including it. Judge Jon Hill stated that some counties actually are providing interpreters for jurors, although he is not sure how they are paying for it. He suggested that Ms. Holley talk to Erin Pettigrew with the Oregon Judicial Department (OJD), because the OJD is considering that issue. Ms. Holley pointed out that the language in paragraph D(1)(b) was meant to track with disability discrimination law, and that the intent was not to build in a right to include or to exclude a juror because of language barriers. Judge Bailey stated that his concern is making sure that the amendment is not building in a right *not* to exclude for language barriers. He wanted to be sure that excluding a juror because of a language barrier would still be something that would be allowed, because Washington County cannot find enough interpreters for parties, let alone for jurors. Ms. Holley stated that the workgroup's proposal regarding changes to chapter 10 of the ORS would say that it is discrimination to not allow a juror to serve because of a language barrier. She noted that most of the proposal

regarding chapter 10 of the ORS is just to support the OJD's recommendations, and OJD's plan would include securing funding and logistics for a solution to that problem.

Judge Bailey stated that his next question would be how the courts can ensure that the interpreter has correctly interpreted what the witnesses have said. Ms. Holley asked whether that is the obligation of the court. Judge Bailey opined that it is the court's record, so it is the court's obligation. If a juror is getting different information than what the witnesses actually said, that juror is getting incorrect information because of the interpreter. Judge Bailey gave the example of a recent case with an Arabic interpreter who was so poor that both Arabic-speaking parties had to make corrections during the trial. With a juror, as the case was proceeding, the court would not know because there would be nobody else to question whether or not that interpretation was wrong, and there would be no recording. Judge Bailey expressed hope that this problem would be solved if changes were made to chapter 10 of the ORS.

Council Guest Aja Holland from the OJD noted that current Uniform Trial Court Rule (UTCR) 7.06 requires four judicial days' notice for an Americans with Disabilities Act (ADA) accommodation, but that there is a provision that allows the waiver of those four days' notice for good cause, so she does not believe that there is any conflict with the Council's language. Judge Norby asked whether UTCR 7.06 applies to jurors, or just to parties and the court. Ms. Holland stated that it would apply to anyone who requests an ADA accommodation. Right now, the UTCR requires the request to be made by a party for the witness or other person who needs the accommodation, but considerations are being made for some amendments so that anyone who needs the accommodation can make the request on their own, because that is more reflective of what is actually happening in courts.

Ms. Holley noted that a juror with diabetes might not know that they could not have food in the courtroom and might ask "on the fly" for an accommodation to have nuts in their pocket during the trial in case of an emergency. She stated that she did not necessarily think that this would create a administrative barrier. Judge Bailey agreed that sometimes a juror will have a back pain issue, or diabetes, or some other problem where they need to let the court know that they need an accommodation that might prove distracting, like the occasional need to stand up. He agreed that the courts are usually pretty accommodating. Ms. Holley stated that the ADA is meant to address things in a flexible way that allows people to have access.

Mr. Crowley expressed concern that, while the language is consistent with the law as he understands it, it could present a difficulty for OJD because of the wide variety of physical and mental impairments that may need to be addressed. That is not always easy to do, especially on the fly. Ms. Holley stated that this scenario

really regards just challenges for cause, and she believes that the law exists whether or not the language in the rule reflects it. However, she stated that she would be happy to run the language by anyone Mr. Crowley thinks should consider it. Ms. Holland stated that she is not the attorney at OJD who specializes in ADA accommodation issues, but that she would be happy to forward this on to Laurie De Paulus. Ms. Nilsson stated that she would send Ms. Holland the draft for forwarding to Ms. De Paulus.

Ms. Holley explained that the workgroup had tried to make paragraph D(1)(g) a little clearer. The language, "satisfies the court, in the exercise of sound discretion" is removed because it seems like an unclear standard. Some appellate judges have opined that it does not really have a lot of meaning. The language now states that actual bias is a state of mind on the part of the juror that the juror cannot try the issue impartially and that actual bias may be in reference to the action; to either party to the action, or to the protected status or perception of a protected status of the party, the party's attorney, a victim, or a witness. 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 voir dire is complete.

Judge Bailey stated that he does not have a problem with the language, but expressed concern that the language emphasizes the issues that he and Mr. Andersen raised previously about including the for-cause challenge as a totality of the circumstances issue. He stated that the language in paragraph D(1)(g) states that the person has to have an actual bias against that party, which he agrees with. So the only way, ethically, that a party should be making a for-cause challenge is if the party believes that potential juror has an actual bias against their client. So that party should *not* ethically be making a for-cause challenge when social science studies suggest that this type of a person who has these characteristics, which are not related to any protected characteristics, will rule against their client. That is the scenario that peremptory challenges are for in the first place. Judge Bailey opined that the Council should not encourage an attorney to unethically make a for-cause challenge in order to preserve the right to make a peremptory challenge. Ms. Holley pointed out that the idea of including this language is that the studies that Judge Bailey references indicate that the "other reasons" are inherently suspect and that they contribute to bias.

Mr. Crowley agreed with Judge Bailey, and stated that his thoughts about for-cause challenges is that they should be quite narrow. A for-cause challenge cannot be made unless it is absolutely obvious, and even then it is going to be a tough sell in most cases, whereas peremptory challenges are more based on discretion and not-so-obvious things. Ms. Holley noted that one could say that they are based on ideas that are inherently suspect.

Judge Oden-Orr pointed out that the current rule actually reads that actual bias may be in reference to the action, a party, a witness, a victim, or the lawyer, so it is more expansive than just a party. He wondered if it was intentional that this new language reduces it to just a party. Ms. Holley stated that it was unintentional and that the language should read, "If a juror expresses actual bias, the court must excuse that juror without further inquiry." Judge Oden-Orr stated that he has excused potential jurors because they have had an experience that may have impacted whether or not they can serve. He stated that a classic example would be someone who has been sexually assaulted on a jury panel for a sex abuse case. While the juror did not have anything to do with the party, because of the juror's experience, they may not be a good juror. Another example would be someone who previously served on a murder trial who was not happy with that verdict being on a jury panel for another murder case. There is no bias about these parties, but that could make for a good argument for why that person might have an actual state of mind that is going to impact their ability to be fair and impartial, which is ultimately the standard: is there something going on with this person that raises the question about whether they can be fair and impartial? Judge Oden-Orr opined that, if a case is one where a potential juror being a renter raises an issue about whether they can be fair and impartial, the lawyer should raise that issue. Ms. Holley agreed. She stated that, historically, a lot of non-articulated reasons for peremptory challenges have been considered, like "senses" about things, but much of the current research shows that this is inherently suspect. So that would be the reason to consider the actual challenge for cause.

Judge Oden-Orr reminded the Council that, when he had initially suggested removing peremptory challenges altogether, he had also suggested removing the rehabilitation role of the judge. He wondered whether the language in paragraph D(1)(g) was a holdover that was intended to remove that role. He stated that, if peremptory challenges are not being eliminated, it is not a good idea to remove the court's ability to ask jurors if they feel they can be fair and impartial. Ms. Holley stated that she does not believe that the language is intended to totally eliminate a judge's ability to explore whether the potential juror can be rehabilitated. She stated that juror rehabilitation is something that most attorneys that she has talked to have asked her about when she has told them that the Council is considering challenges in Rule 57. However, the language is not meant to say that the court cannot ask the juror questions but, rather, that the other jurors need to be excused in the case of disagreement before there is inquiry into the bias so that the other jurors are not impacted by potentially biased statements. She stated that she believes that this allows further inquiry and rehabilitation without the other jurors being infected with biased statements.

Judge Jon Hill stated that the language seemed a bit unclear, and that he was not reading it to say exactly what Ms. Holley was explaining. Ms. Holley noted that it is stated in the negative, so if the parties *disagree* as to whether the juror has expressed actual bias, further inquiry and argument must be held on the record

outside of the presence of the other jurors. It is implied that if everyone agrees that there is actual bias, no further inquiry is needed. Ms. Nilsson pointed out that the prior sentence states "if a juror expresses actual bias," but it does not specify according to whom. She opined that this language is a little ambiguous. Ms. Holley and Ms. Nilsson collaborated on a possible change: "If the parties agree that a juror has expressed actual bias, the court must excuse that juror without further inquiry." Judge Oden-Orr stated that the way this plays out in his courtroom is that one attorney will say, "Your Honor, we move to excuse juror number four for cause." He then asks the other party whether there is any objection. If the answer is no, they just keep on moving.

Ms. Holley noted that, as emphasized in the explanatory memorandum to the Legislature, the priority in the amendment to Rule 57 is the changes with regard to peremptory challenges. All other changes can be considered separately, and she does not feel that all of them must move forward in order for one of them to move forward. She stated that she did not feel that it was necessary for the workgroup to meet again in May, because the next question is really what can move forward through the Council after the brainstorming input from the workgroup.

Ms. Nilsson stated that, once Ms. Holley gets the language fine tuned, she and Ms. Holley should talk about the possibility of putting together different versions of the amendment for the Council to consider. She pointed out that the entire rule needs to be included in those versions, not just the specific areas that are being amended. Ms. Holley stated that she wanted to be flexible about what can be moved forward and that she would be happy to talk to Ms. Nilsson about what that would look like. Judge Peterson noted that Council staff might have some suggestions and tweaks to Ms. Holley's language, and that they would try to get those back to her promptly. Ms. Holley stated that she is also open to one-on-one feedback from other Council members, as well as other attorneys known to Council members who might be interested in weighing in on the final language. Judge Peterson encouraged Ms. Holley to send the language to Council staff as early as possible so that it could be shared with the Council well in advance of the June meeting. That way, any potential issues could be pointed out prior to the publication vote.

3. Remote Hearings

Mr. Andersen referred the Council to the most recent versions of draft amendments to Rule 39 and Rule 58, as well as a suggestion to the Legislature for an amendment to ORS 45.400 (Appendix E). He stated that these versions incorporate the suggestions from the last Council meeting, and asked whether the Council had any further input.

Ms. Nilsson pointed out that the green highlighted areas in the draft amendments

are staff recommendations for changes to bring the rule in line with current Council drafting standards. Some examples would be eliminating the word "shall" in favor of more concrete verbs and fixing paragraph numbering. She asked the Council to look carefully at those changes to ensure that they did not unintentionally change the operation of the rule.

Judge Peterson asked the Council about language that exists in the current rule in subsection C(2) and indicates that a person can be subpoenaed more quickly if they are "bound on a voyage to sea." He stated that he does not believe that there are any seas within the state of Oregon or adjoining the coastline, and that someone going on a sailing trip on a lake probably should not qualify under the rule. He wondered whether that phrase could be removed, but he was not certain where it came from. Ms. Holley asked whether it means that someone is subject to the laws of another state or maritime law. Judge Peterson pointed out that, if they are at sea, they are out of the state of Oregon. Ms. Holley stated that she likes the phrase and wants to keep it. Mr. Goehler agreed. Ms. Nilsson suggested that "bound on a voyage" may mean that someone is about to take a voyage. Mr. Crowley stated that it is a nod to our ancient past. Judge Jon Hill pointed out that Oregon fishermen may travel to Alaska to fish and that may be a reason for the language.

Ms. Nilsson asked the Council to pay particular attention to part of a sentence in subsection B(7) that staff had re-drafted to try to make it read better. She stated that the original language, "the whole time occupied on behalf of either shall not be limited to less than two hours," was written in the negative and was very difficult to follow. Staff rewrote it to read, "Plaintiff and defendant shall each be afforded a minimum of two hours to address the jury, irrespective of how that time is allocated among that side's counsel."

Judge Peterson recalled that, last biennium, he had shared Judge Tom Ryan's concern about this part of the rule. The judge had an experience with an unrepresented litigant who had insisted on filling those allowed two hours, with the result being that the judge was unhappy, the jury was unhappy, and the loquacious party lost their case. Judge Peterson observed that a smart lawyer or litigant would wrap up a closing argument in a much shorter period of time; however, last biennium's Council had decided that the rule states what it states, and he hoped that the rewritten language made what it states more readable. Ms. Dahab agreed that the rewording correctly reflects the current rule, but in a more clear way. Mr. Crowley agreed. Judge Oden-Orr pointed out that Ms. Nilsson had included the word "shall" in the new language. She sheepishly stated that she would correct that in the next version of the rule.

Mr. Crowley stated that he appreciated Mr. Andersen and the committee's work on these amendments. He noted that he was ambivalent at first about the need for these rule changes, because the courts have been living through so many

changes these last two years and he was not sure whether that experiment was completed yet. However, the language that Mr. Andersen and the committee had crafted very much captures the best of how it should work, and it is very useful and timely.

Mr. Andersen shared his screen to briefly review the amendments to Rule 39. Judge Peterson again pointed out that the green highlighted portions were staff suggestions. Judge McHill made a motion to approve moving the draft amendment to Rule 39, with staff suggestions, to the September publication agenda. Ms. Holley seconded the motion, which was approved unanimously by voice vote.

Mr. Andersen shared his screen to briefly review the amendments to Rule 58. He explained that, once again, the green highlighted portions were staff suggestions. Judge Norby made a motion to approve moving the draft amendment to Rule 58, with staff suggestions, to the September publication agenda. Mr. Goehler seconded the motion, which was approved unanimously by voice vote.

Mr. Andersen shared his screen to briefly review the suggestion to the Legislature to amend to ORS 45.400 to eliminate the 30-day requirement. Ms. Holley made a motion to approve moving the recommendation to the September publication agenda. Judge McHill seconded the motion. Mr. Crowley asked whether there was any discussion about this recommendation to the Legislature, and noted that the Council cannot make this substantive change itself. Judge Peterson opined that a change to the language in the statute would be procedural, and that the language in question really should not be in the statutes in the first place; however, the fact remains that it is there and that changes to the statute are in the purview of the Legislature. He noted that the Council had made a suggestion for a change to a statute last biennium, that it had gone through the Office of Legislative Counsel, and that it was approved by the Legislature. The Council voted on the motion, which carried unanimously by voice vote.

4. Vexatious Litigants

Judge Jon Hill asked Judge Norby to explain the latest changes to proposed Rule 35 (Appendix F). Judge Norby noted that the committee made changes that were highlighted by Justice Garrett's comments at the last meeting. She stated that the concept was not wanting to focus on whether an action is meritorious as a criterion to determine that a litigant is vexatious. The changes put the focus on whether an action is frivolous and intended to harass or likely to harass. Ms. Nilsson pointed out that the changes suggested at the last Council meeting are highlighted in blue, and staff changes are highlighted in green.

Mr. Crowley also referred the Council to the memorandum of authority that he had prepared, included with the committee material in Appendix F, and stated

that this would serve as a history of some of the authority that led to the rule's creation, should it be promulgated.

Judge Peterson stated that he had a few more questions and potential suggestions for changes to the proposed rule. He asked whether there should be a semicolon at the end of subparagraph A(1)(a)(ii), as the list of who is considered a vexatious litigant continues in paragraphs A(1)(b) and A(1)(c). Judge Norby explained that this was an oversight resulting from some language that had previously been moved. Ms. Nilsson noted that it is a problem of having a clause within a clause in a long sentence. She was not certain that adding a semicolon was the solution, but she suggested the possibility of contacting Martha Anderson at Legislative Counsel, because she would know how to solve the problem. Judge Norby agreed with this suggestion. Judge Peterson stated that his main concern was to establish that there are three separate ways of having a litigant determined to be vexatious.

Ms. Holley asked whether the language in subparagraph A(1)(a)(i) might mean that a person who files an appeal or a motion for reconsideration could be considered a vexatious litigant. She stated that she could imagine that a person who has a case on appeal, and then files seven other cases related to the same matter while the appeal is pending, would be vexatious, but stated that this language seems unclear. Judge Norby stated that she believes that there needs to be at least one case that has been finally decided because, until it is finally decided, there is no objective evidence that it was flawed or vexatious. She stated that a trial-level decision that a case should not have been brought could still be altered by the Court of Appeals or the Supreme Court if it is on appeal. She noted that the original number of cases was more than two and that the committee had lowered it to one, and stated that it would be impossible to say that a case that has not yet been decided can be the foundation of a vexatious litigant finding. Judge Jon Hill asked whether that means that a case is on appeal but the litigant keeps filing cases. Ms. Holley noted that the principle that she is talking about is that an appeal is, as a matter of law, not vexatious. She stated that it would be a separate matter if a person were filing many related cases while a case is on appeal.

Judge Norby stated that she did not believe that a litigant should be able to be found to be vexatious until there has been one case that has made it all the way through to completion, whether that be on appeal or whether it is not appealed, that demonstrated the litigant's vexatious tendency. She stated that, unfortunately, if a litigant were to file 20 cases at once and had never filed one before, one of those cases would have to be concluded to its fullest extent before there would be a foundation for a finding of being vexatious. That was the intention of the sentence. Judge Oden-Orr stated that a person with a case that Is pending on appeal who files another case on the same issue against the same parties sounds vexatious to him. Judge Jon Hill stated that he was not sure

whether the committee had discussed a litigant who filed essentially the same issue several times in the same court while the appeal was pending. Judge Norby stated that, if it is literally the same people and the same cause of action, there are other ways to deal with it besides having a person designated vexatious. Judge Peterson mentioned Rule 21.

Judge Norby stated that it has been very pleasantly surprising to her how much the Council has embraced the concept of having a rule like this, because she is concerned that the Council will receive pushback if the rule is published since the rule brings it down to its lowest level where one prior case could be enough. She stated that, in other jurisdictions where vexatious litigation is subject to a rule or a law, a higher standard is required. Judge Peterson noted that, without the final determination requirement, the rule might verge on being substantive because it could preclude parties from attempting to solve their issue in court. He reiterated that there are other methods to use, such as a Rule 21 motion that there is another action pending.

Judge Bailey stated that a lot of these questions can be solved if vexatious litigation is determined by motions to show cause. In other words, asking the litigant to show cause why the court should not consider them vexatious. He noted that a litigant coming in and explaining to the judge at that specific hearing what it is they believe are the merits will help the judge make the determination. He stated that part of the reason for creating a vexatious litigant designation is to avoid the need for other parties to file Rule 21 motions time and time again and wasting resources.

Judge Peterson asked whether paragraph A(1)(b) should be in the past tense, because the behavior would have occurred either well into a case or at the conclusion of the first case. Judge Norby stated that, if a judge or party is seeking a pre-filing order, the behavior could still be occurring at that time. She opined that past or present tense is not all that important, because the expectation is that the vexatious litigant would continue to do what they've done in the past.

Judge Peterson stated that this discussion had helped clarify his concern about the semicolon, which he no longer felt was necessary. He summarized that there are three separate criteria for being labeled vexatious: that a litigant is filing repetitiously; that a litigant behaves badly in a lawsuit; or that a litigant has already been determined to be vexatious. Judge Norby agreed with this summary

Mr. Andersen stated that the last sentence in subparagraph A(1)(a)(ii) is clunky, and suggested perhaps putting it in parentheses. He noted that, in rule construction, there usually is a balance between both sub parts. However, that balance is lost by adding this clunky sentence. Judge Norby noted that the sentence did not seem as clunky until the sections were rearranged. She stated that she was uncertain how to fix the problem, other than reaching out to

Legislative Counsel as Ms. Nilsson had suggested. Judge Norby stated that it sounds like no one has a real concern about the substance of the language but, rather, the concern is about the the beauty of the flow. Mr. Goehler suggested moving the sentence out of subparagraph A(1)(a)(ii) and adding it as a separate definition in a new subsection A(4).

Ms. Holley expressed concern about the language in paragraph A(1)(b), and asked if it could be clarified with regard to discovery. She stated that plaintiffs do not necessarily know what exists, and defense counsel sometimes has massive amounts of electronic discovery, so a request may be made without the intent to cause any kind of delay, but that seems too broad and needs to be narrowed. She stated that she did not think that should be considered vexatious, and that the word "unnecessary" could be interpreted to pertain to such a situation. Ms. Dahab agreed, and stated that the parties can legitimately and reasonably disagree on what's necessary and what's unnecessary. Mr. Goehler suggested the language, "conducts discovery beyond the scope of ORCP 36." Ms. Holley expressed concern that, with that language, a client could be labeled a vexatious litigant if she filed a motion to compel and the court denied it because it is outside the scope of ORCP 36.

Judge Norby stated that she did not believe that the courts would be eager to use this rule, and posited that it would most likely be used rarely. She also doubted that the court would jump to the conclusion that a litigant qualifies as vexatious every time someone asks for a pre-order or hearing. She stated that the rule certainly is not intended to create an opportunity to label half of the litigants in the state as vexatious if they ever make a mistake. The idea behind the rule is to try to manage court dockets when someone is truly vexatious, not to punish people for a poor decision. She did state that she understood the concern, however, and felt that language could be crafted to better reassure that the rule is not intended to be commonly or lightly used. Judge Jon Hill stated that he had not read the rule in the same way as Ms. Holley or Ms. Dahab, nor did he think about the potential for it to be weaponized.

Judge Bailey stated that there may not be a whole lot of faith in the judiciary right now, but judges have a pretty clear picture of when a litigant is doing something that is vexatious as opposed to when two parties have merit in their cases and are doing things to move their cases forward. He opined that the courts would never even think about declaring someone vexatious in the latter circumstance. However, the rule would be a useful tool for judges who see litigants whose issues do not have merit but who continue to file discovery requests or new cases. He stated that, even then, he feels that the process should include a show cause hearing so that the litigant can be heard.

Judge Peterson stated that he appreciated Ms. Holley's concern, but observed that involving Rule 36 would take the rule into an area that the Council did not

want to go: proportionality and discovery. He suggested striking the word "unnecessary." After some wordsmithery on the part of various Council members, the following language was suggested: "A person who files frivolous motions, pleadings, or other documents, or engages in discovery or other tactics that are intended to cause unnecessary expense or delay."

Judge Peterson asked whether the language "leave of the presiding judge" in section B should be changed to "leave of the presiding judge or designee." He stated that he suspects that, in some circuits, the presiding judge may appoint another judge to hear vexatious litigant cases. Judge Norby stated that, in Clackamas County, whenever the presiding judge is gone or otherwise needs someone to take on a duty, they do designate a judge as presiding during the time that they are gone. Judge Bailey agreed with Judge Peterson's suggestion. He noted that domestic relations cases in his county do not involve the presiding judge at all, so it would be the chief family law judge making that kind of decision. Judge Norby argued that there are many rules that say that the presiding judge has to decide certain motions, but that designees of the presiding judge make these decisions anyway. She did not feel it was necessary to add the language. Judge McHill pointed out that the statutes allow the presiding judge to designate some responsibilities.

Judge Bailey expressed concern that a litigant could object to a designee making the decision if that is not explicitly stated in the rule. Judge Norby stated that she felt that it usually would be the presiding judge making the decision in these cases, because the times that her county has dealt with vexatious litigants, the presiding judge was very involved and looking for a rule like this for authority. Judge Jon Hill noted that adding the language suggested by Judge Peterson would avoid any instances like the one Judge Bailey pointed out. Judge Peterson then asked whether the use of "presiding judge" in section F should also be changed. Judge Norby explained that, in this instance, the presiding judge would have to be the one to issue a presiding judge order, since a designee cannot do so.

Judge Peterson stated that the phrase "petition/motion" in section C was probably a holdover from an older draft and suggested that it should be changed to just "motion." Judge Norby agreed. Judge Peterson then asked whether the language in paragraph C(1)(d) should be changed to read "unnecessary expense or delay" to mirror the language in paragraph A(1)(b). Judge Jon Hill noted that the factors laid out in section C were taken from *Safir v. United States Lines, Inc.*, 792 F.2d 19, 24 (2d Cir. 1986). He stated that the idea was to put that case's factors into the rule as a guideline. Judge Norby pointed out that paragraph C(1)(f) allows for other considerations, which could include expense. Mr. Andersen stated that he agreed with Judge Peterson's suggestion, because expense and delay are two different things. He noted that there are times when the expense is minimal, but the delay is significant. Judge Norby agreed that the change could be helpful.

Judge Peterson pointed out that section C(2) talks about the court determining the litigant to be vexatious and not reasonably likely to prevail on the merits. He noted that the word "merits" had been removed earlier in the rule after discussion at the last Council meeting, and stated that he wanted to ensure that this use of the word was different. Judge Norby stated that the other place where the word "merits" was used was when it appeared as a part of the definition of being vexatious. She stated that, in this section, it is a secondary consideration for the posting of security. She stated that this is an important distinction, because someone could be vexatious and yet be meritorious. Judge Peterson thanked her for the clarification.

Judge Peterson stated that Council staff would make the changes discussed by the Council and bring a new draft to the Council at the next meeting for voting on whether to publish at the September meeting.

Judge Peterson then referred the Council to the proposed changes to ORS 46.415 that might be sent to the Legislature in the event that Rule 35 is promulgated. He stated that the ORCP do not apply in the small claims department, and that the change to the statute would make the provisions of Rule 35 apply in such cases. He noted that the same kind of mischief can happen, and probably does happen, as frequently in the small claims department as in the circuit courts. Judge Peterson pointed out that Rule 1 A states that the ORCP do not apply in the small claims department, unless there is a statute that says they do.

Ms. Nilsson wondered what would happen if Rule 35 were promulgated, but the Legislature did not act on the Council's suggestion to change ORS 46.415 to specify that the rule applies to small claims cases. She stated that a situation like this had not arisen during her time on the Council. She asked whether the Legislature might possibly amend Rule 35 to take out the clause stating that it does apply to small claims cases, and wondered whether it might be prudent for the Council to take out the clause to err on the side of caution. Judge Norby stated that, if the rule were to be approved by the Legislature, it would become a statute. If ORS 46.415 were not to be amended, there would be a rule with a specific provision applying something to small claims cases versus a general rule that the ORCP do not apply there. She pointed out that statutory interpretation requires that something specific would prevail over something generic. The Council agreed to move the suggestion to modify ORS 46.415 to the publication docket at the September Council meeting.

V. New Business

A. Proposed Bill by Consumer Law Section [ORCP 54 / ORS 36.425(6)]

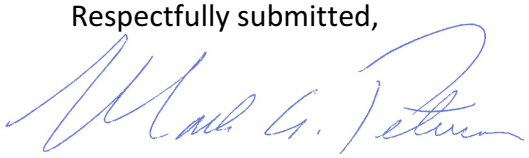
Judge Peterson explained that the Consumer Law Section was suggesting a modification to ORS 36.425(6) (Appendix G) to create a simple process for cases when an offer of

judgment may affect the attorney fees and costs after an arbitration and the case is not appealed to trial de novo. He pointed out first that the Council has no power to modify statutes. He asked the Council to take a look at the proposal and at Rule 54, and stated that he believes that there may be a workaround that would not require a rule change or a statutory change, but he may be wrong. Mr. Crowley suggested that the issue could be discussed more at the next meeting.

VI. Adjournment

Mr. Crowley adjourned the meeting at 12:30 p.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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.

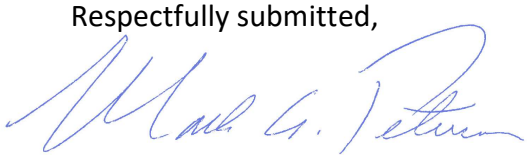
V. New Business

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

GHOSTBUSTERS MEETS GUARDIANS OF THE GALAXY

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

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

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

As early as the mid-1920s, Oregon's bench and bar resolved to exorcise that ghost and create a better civil procedure blueprint. But finding a ghostbuster squad to liquify the Deady Code was not easy. Legislators sidestepped the daunting rule renovation venture. A 1939 OSB Committee considered empowering the Supreme Court to enact new trial court rules, but bar members voted against it, wanting litigators and trial judges to influence rule reform. A 1962 proposal for a new state constitution again tried to shift rulemaking to the Supreme Court but failed.[ii] The Deady Code remained undead.

"Who You Gonna McCall?"

Finally, in 1975, Governor McCall's visionary Commission on Judicial Reform, the Oregon State Bar, and the state's judiciary cooperatively deduced that an ideal ghostbuster squad must extend beyond the legislature and the Supreme Court to include trial judges and lawyers with broad perspectives. They jointly created the Council on Court Procedures with 23 volunteers: one Supreme Court Justice, one Court of Appeals Judge, eight trial court judges, six plaintiff litigation attorneys, six defense litigation attorneys, and one public member.[iii] In 1977 these ghostbusters liquified the Deady Code with rule-reforming plasma guns and modernized Oregon's civil procedure. By 1979, the Council had created Rules 1-64 to guide civil procedure through trial completion. After publication, public comment and acceptance by the legislature, those rules were enacted, and buried the laws of yesteryear. By 1981, Rules 65 – 85 completed Oregon's new Code of Civil Procedure. The Deady *coda* came to life.

Interface - The Final Frontier

After the original ghostbuster Council vanquished the Deady Code and created a more evolved civil procedure process, it resolved that the new rules must not only live but thrive. So, the Ghostbuster Council members mutated into "Guardians of the Galaxy (of Civil Procedure Rules)." Their new mission: to continually study Oregon civil procedure laws, reexamine existing rules and seek out new ideas and viewpoints.

As egalitarian as the Council members are, even broader inclusion of trial lawyer ideas is key to its mission. Each biennium, the Council distributes surveys inviting Oregon attorneys to suggest ideas for rule improvement. Responses land on the desk of the Council's own Miss Moneypenny – an Executive Assistant with epic skills. Dozens of ideas are sent by lawyers, judges, and organizations that interact with civil courts. They are compiled into a chart for Council members to review and decide which to focus on in that biennium. Once choices are made, committees are formed, sleeves are rolled up, and debates and re-writing begin.

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We Ain't Afraid of No Consensus!

Oregon's Council on Court Procedures is anomalously democratic compared to other courts' civil procedure rulemaking overlords. Most federal and state rulemaking power is held exclusively by the highest-ranking judges. Even states with rulemaking committees typically invite only judges to join. Oregon is different. By statute, there are more attorneys on the Council than judges. A quorum requires approval by plaintiff litigators, defense litigators, *and* judges.

Since today's civil procedure code is comparatively young, each new proposal for change is cautiously considered. The Council's Saturday morning monthly meetings last several hours, with some members zealously defending existing rule language while others champion the proposed change. Sometimes a single rule change debate spans many meetings, yet never reaches a point of consensus that advances it for publication to the bar and submission to the legislature. No Council member is immune to the consequences of rule changes, because Council members are not only volunteer Guardians of the Galaxy (of Civil Procedure Rules) but also inhabitants of the worlds affected by rule changes, who must live with Council decisions in their own professional lives.

Time-Space Continuum.

Just as a superhero film takes years to produce, so does a rule change take two years to complete. The Council's own Steven Spielberg, Executive Director Mark Peterson, has harnessed enthusiasm and harmonized discord of ardent Council members for 17 years.

The first step in the rule change process is action-packed. Its arc begins in August of odd-numbered years when committees are formed to configure and consider new projects. To approve a rule change proposal, a majority vote during a full Council meeting attended by a quorum of members must deem it worthy. Once a proposal is approved, which takes several months, Moneypenny converts it into final form for publication to all Oregon bar members to critique. The Council reviews every comment, then votes on whether to deliver final amendment proposals to the state legislature.

When the next long legislative session begins, neither the Senate nor the House vote on the Council's proposals. The law requires that they be published with the Oregon Revised Statutes the following January. The legislature retains the option to enact other rules, modify a change, or reject a recommendation, and remains the entity that rulemaking power would revert to if the Council is disbanded. But for 45 years, the legislature has welcomed nearly all Council creations. The Guardians of the (Civil Procedure Rules) Galaxy continue to find favor with lawmakers the Council was created to help.

Rulemaking Kryptonite

Though the Council's superpowers may seem limitless, there are two forms of kryptonite that unfailingly repel a rule amendment proposal. The first arises from ORS 1.735(1), which authorizes the Council to make rules "governing pleading, practice and procedure, … in all courts of the state **which shall not abridge, enlarge, or modify the substantive rights of any litigant**." When a rule change proposal may affect a litigant's substantive rights, the Council is powerless to approve it. Many biennial survey comments lament the Council's inaction on substantive issues, urging it to be bolder. Alas, only the legislature has the superpower to alter substantive law.

The second form of kryptonite arises from ORCP 1B, which requires: "These rules shall be construed **to secure the just, speedy, and inexpensive determination of every action**." Other biennial survey comments question whether the Council purposely alters rules to make litigants' lives more difficult. It does not. On the contrary, whenever a proposal threatens the just, speedy and inexpensive determination of any action, it is in jeopardy. The Council members retreat unless there is no other way to craft a necessary rule improvement.

Edge of Tomorrow

The Council on Court Procedures busted the ghosts of the past, guards civil procedure in the present, and shapes Oregon's court processes for the future, a mission of galactic proportions. There were only four Ghostbusters, and only five Guardians of the Galaxy. Even if Agent 007 and Superman vote too, the Council would not reach a quorum. A dozen more volunteers comprise our 23-member Civil Justice League. Council member identities shift continuously; each is appointed for four years and must pass their cape to a new crusader after eight years. Leadership power is balanced by rotating plaintiffs' attorneys and defense attorneys into leadership as Chair in each new biennium.

Every Council on Court Procedures volunteer knows that Oregon's Rules of Civil Procedure are imperfect. It is a perpetual challenge to protect, revise, and harmonize rules while modernizing parts that no longer function well, and balancing interests of all who work for civil justice. Serving on the Council is a privilege and a unifying pursuit, akin to jury service. Unlikely collaborators unite – people from divergent legal standpoints and dissimilar communities. These protectors, critics, and visionaries clash and collaborate over the rules in a cacophony of voices, rising and falling for hours as members passionately debate whether rule changes would bring clarity or calamity. Then, at meeting's end, dissonance resolves into conviviality, as combatants retreat into friendships forged in the verbal fire.

Oregon civil procedure has come a long way since the exorcism of the Deady Code 45 years ago. Council on Court Procedure volunteers are not cinematic action heroes unifying to protect people from mythic threats. But they are steadfast allies bound by a shared mission to protect Oregon's procedural code from the threat of obsolescence. No one need buy a ticket to see the Council or pay money to read stories of the Council's adventures. Council meetings are open to the public and meeting minutes are posted on its website.[iv] You don't need a superpower to be a potential future Council member either -- just litigation experience, a collaborative nature, and a love of law. For Council on Court Procedure members, a sense of duty is mandatory, but capes and intergalactic ancestry are, surprisingly, optional.

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[i] **NOTE ABOUT THE AUTHOR**: Hon. Susie L. Norby has served as a trial judge in Clackamas County since 2006, and on the Council on Court Procedures since 2017. She spearheaded the Council's recent overhaul of ORCP 55, in response to a survey comment that simply read: "ORCP 55 is a mess. Can you do something about that?" Other biennial survey notes sometimes criticize the Council based on misconceptions about why the Council exists, how it works, and who is on it. This article is an explanatory response, unanimously approved by all Council members. The Council thanks OADC for its support of the Council and enthusiastic willingness to publish this to its members.

[ii] For a more in-depth account of the history leading up to the creation of the Council on Court Procedures, *see* Frederic R. Merrill, *The Oregon Rules of Civil Procedure – History and Background, Basic Application, and The "Merger" of Law and Equity*, 65 Or L Rev 527 (1986).

[iii] ORS 1.730

[iv] https://counciloncourtprocedures.org.

SUBPOENA

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[.]**;** **and**

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

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

MOTION

The subpoenaed witness whose signature appears below respectfully asks this court to issue an order quashing the subpoena 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.

_____

A(2) Originating court. A subpoena must issue from the court where the action is pending. If the action arises under Rule 38 C, a subpoena may be issued by the court in the county in which the witness is to be examined.

A(3) Who may issue.

A(3)(a) Attorney of record. An attorney of record for a party to the action may issue a subpoena requiring a witness to appear on behalf of that party.

A(3)(b) Clerk of court. The clerk of the court in which the action is pending may issue a subpoena to a party on request. Blank subpoenas must be completed by the requesting party before being served. Subpoenas to attend a deposition may be issued by the clerk only if the requesting party has served a notice of deposition as provided in Rule 39 C or Rule 40 A; has served a notice of subpoena for production of books, documents, electronically stored information, or tangible things; or certifies that such a notice will be served contemporaneously with service of the subpoena.

A(3)(c) Clerk of court for foreign depositions. A subpoena to appear and testify in a foreign deposition may be issued as specified in Rule 38 C(2) by the clerk of the court in the county in which the witness is to be examined.

A(3)(d) Judge, justice, or other authorized officer.

A(3)(d)(i) When there is no clerk of the court, a judge or justice of the court may issue a subpoena.

A(3)(d)(ii) A judge, a justice, or an authorized officer presiding over an administrative or out-of-court proceeding may issue a subpoena to appear and testify in that proceeding.

A(4) Who may serve. A subpoena may be served by a party, the party's attorney, or any other person who is 18 years of age or older.

A(5) Proof of service. Proving service of a subpoena is done in the same way as provided in Rule 7 F(2)(a) for proving service of a summons, except that the server need not disavow being a party in the action; an attorney for a party; or an officer, director, or employee of a party.

A(6) Recipient obligations.

A(6)(a) Length of witness attendance. A command in a subpoena to appear and testify requires that the witness remain for as many hours or days as are necessary to conclude the testimony, unless the witness is sooner discharged.

A(6)(b) Witness appearance contingent on fee payment. Unless a witness expressly declines payment of fees and mileage, the witness's obligation to appear is contingent on payment of fees and mileage when the subpoena is served. At the end of each day's attendance, a witness may demand payment of legal witness fees and mileage for the next day. If the fees and mileage are not paid on demand, the witness is not obligated to return.

A(6)(c) Deposition subpoena; place where witness can be required to attend or to produce things.

A(6)(c)(i) Oregon residents. A resident of this state who is not a party to the action is required to attend a deposition or to produce things only in the county where the person resides, is employed, or transacts business in person, or at another convenient place as ordered by the court.

A(6)(c)(ii) Nonresidents. A nonresident of this state who is not a party to the action is

required to attend a deposition or to produce things only in the county where the person is served with the subpoena, or at another convenient place as ordered by the court.

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

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

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

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

A(7)(a)(ii) Objection suspends obligation to produce. Serving a written objection suspends the time to produce the documents or things sought to be inspected and copied. However, the party who served the subpoena may move for a court order to compel production at any time. A copy of the motion to compel must be served on the objecting person.

A(7)(b) Motion to quash or to modify. A motion to quash or to modify the command for production must be served and filed with the court no later than the deadline set for production. The court may quash or modify the subpoena if the subpoena is unreasonable and oppressive or may require that the party who served the subpoena pay the reasonable costs of

production.

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

B Subpoenas requiring appearance and testimony by individuals, organizations, law enforcement agencies or officers, prisoners, and parties.

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

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

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

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

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

B(2)(a) Service on an individual 14 years of age or older. If the witness is 14 years of age or older, the subpoena must be personally delivered to the witness, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(b) Service on an individual under 14 years of age. If the witness is under 14 years of age, the subpoena must be personally delivered to the witness's parent, guardian, or guardian

ad litem, along with fees for one day's attendance and the mileage allowed by law unless the witness expressly declines payment, whether personal attendance is required or not.

B(2)(c) Service on individuals waiving personal service. If the witness waives personal service, the subpoena may be mailed to the witness, but mail service is valid only if all of the following circumstances exist:

B(2)(c)(i) Witness agreement. Contemporaneous with the return of service, the party's attorney or attorney's agent certifies that the witness agreed to appear and testify if subpoenaed;

B(2)(c)(ii) Fee arrangements. The party's attorney or attorney's agent made satisfactory arrangements with the witness to ensure the payment of fees and mileage, or the witness expressly declined payment; and

B(2)(c)(iii) Signed mail receipt. The subpoena was mailed more than 10 days before the date to appear and testify in a manner that provided a signed receipt on delivery, and the witness or, if applicable, the witness's parent, guardian, or guardian ad litem, signed the receipt more than 3 days before the date to appear and testify.

B(2)(d) Service of a deposition subpoena on a nonparty organization pursuant to Rule 39 C(6). A subpoena naming a nonparty organization as a deponent must be delivered, along with fees for one day’s attendance and mileage, in the same manner as provided for service of summons in Rule 7 D(3)(b)(i), Rule 7 D(3)(c)(i), Rule 7 D(3)(d)(i), Rule 7 D(3)(e), Rule 7 D(3)(f), or Rule 7 D(3)(h).

B(3) Service of a subpoena requiring appearance of a peace officer in a professional capacity.

B(3)(a) Personal service on a peace officer. A subpoena directed to a peace officer in a professional capacity may be served by personal service of a copy, along with fees for one day’s attendance and mileage as allowed by law, unless the peace officer expressly declines payment.

B(3)(b) Substitute service on a law enforcement agency. A subpoena directed to a peace officer in a professional capacity may be served by substitute service of a copy, along with fees for one day's attendance and mileage as allowed by law, on an individual designated by the law enforcement agency that employs the peace officer or, if a designated individual is not available, then on the person in charge at least 10 days before the date the peace officer is required to attend, provided that the peace officer is currently employed by the law enforcement agency and is present in this state at the time the agency is served.

B(3)(b)(i) "Law enforcement agency" defined. For purposes of this subsection, a law enforcement agency means the Oregon State Police, a county sheriff's department, a city police department, or a municipal police department.

B(3)(b)(ii) Law enforcement agency obligations.

B(3)(b)(ii)(A) Designating representative. All law enforcement agencies must designate one or more individuals to be available during normal business hours to receive service of subpoenas.

B(3)(b)(ii)(B) Ensuring actual notice or reporting otherwise. When a peace officer is subpoenaed by substitute service under paragraph B(3)(b) of this rule, the agency must make a good faith effort to give the peace officer actual notice of the time, date, and location specified in the subpoena for the appearance. If the law enforcement agency is unable to notify the peace officer, then the agency must promptly report this inability to the court. The court may postpone the matter to allow the peace officer to be personally served.

B(4) Service of subpoena requiring the appearance and testimony of prisoner. All of the following are required to secure a prisoner's appearance and testimony:

B(4)(a) Court preauthorization. Leave of the court must be obtained before serving a subpoena on a prisoner, and the court may prescribe terms and conditions when compelling a prisoner's attendance;

B(4)(b) Court determines location. The court may order temporary removal and

production of the prisoner to a requested location, or may require that testimony be taken by deposition at, or by remote location testimony from, the place of confinement; and

B(4)(c) Whom to serve. The subpoena and court order must be served on the custodian of the prisoner.

B(5) Service of subpoenas requiring the appearance or testimony of individuals who are parties to the case or party organizations. A subpoena directed to a party who has appeared in the case, including an officer, director, or member of a party organization, may be served as provided in Rule 9 B, without any payment of fees and mileage otherwise required by this rule.

C Subpoenas requiring production of documents or things other than confidential health information as defined in subsection D(1) of this rule.

C(1) Combining subpoena for production with subpoena to appear and testify. A subpoena for production may be joined with a subpoena to appear and testify or may be issued separately.

C(2) When mail service allowed. A copy of a subpoena for production that does not contain a command to appear and testify may be served by mail.

C(3) Subpoenas to command inspection prior to deposition, hearing, or trial. A copy of a subpoena issued solely to command production or inspection prior to a deposition, hearing, or trial must comply with the following:

C(3)(a) Advance notice to parties. The subpoena must be served on all parties to the action who are not in default at least 7 days before service of the subpoena on the person or organization's representative who is commanded to produce and permit inspection, unless the court orders less time;

C(3)(b) Time for production. The subpoena must allow at least 14 days for production of the required documents or things, unless the court orders less time; and

C(3)(c) Originals or true copies. The subpoena must specify whether originals or true

copies will satisfy the subpoena.

D Subpoenas for documents and things containing confidential health information ("CHI").

D(1) Application of this section; "confidential health information" defined. This section creates protections for production of CHI, which includes both individually identifiable health information as defined in ORS 192.556 (8) and protected health information as defined in ORS 192.556 (11)(a). For purposes of this section, CHI means information collected from a person by a health care provider, health care facility, state health plan, health care clearinghouse, health insurer, employer, or school or university that identifies the person or could be used to identify the person and that includes records that:

D(1)(a) relate to the person's physical or mental health or condition; or

D(1)(b) relate to the cost or description of any health care services provided to the person.

D(2) Qualified protective orders. A qualified protective order means a court order that prohibits the parties from using or disclosing CHI for any purpose other than the litigation for which the information is produced, and that, at the end of the litigation, requires the return of all CHI to the original custodian, including all copies made, or the destruction of all CHI.

D(3) Compliance with state and federal law. A subpoena to command production of CHI must comply with the requirements of this section, as well as with all other restrictions or limitations imposed by state or federal law. If a subpoena does not comply, then the protected CHI may not be disclosed in response to the subpoena until the requesting party has complied with the appropriate law.

D(4) Conditions on service of subpoena.

D(4)(a) Qualified protective order; declaration or affidavit; contents. The party serving a subpoena for CHI must serve the custodian or other record keeper with either a qualified protective order or a declaration or affidavit together with supporting documentation that

demonstrates:

D(4)(a)(i) Written notice. The party made a good faith attempt to provide the person whose CHI is sought, or the person's attorney, written notice that allowed 14 days after the date of the notice to object;

D(4)(a)(ii) Sufficiency. The written notice included the subpoena and sufficient information about the litigation underlying the subpoena to enable the person or the person's attorney to meaningfully object;

D(4)(a)(iii) Information regarding objections. The party must certify that either no written objection was made within 14 days, or objections made were resolved and the command in the subpoena is consistent with that resolution; and

D(4)(a)(iv) Inspection requests. The party must certify that the person or the person's representative was or will be permitted, promptly on request, to inspect and copy any CHI received.

D(4)(b) Objections. Within 14 days from the date of a notice requesting CHI, the person whose CHI is being sought, or the person's attorney objecting to the subpoena, must respond in writing to the party issuing the notice, and state the reasons for each objection.

D(4)(c) Statement to secure personal attendance and production. The personal attendance of a custodian of records and the production of original CHI is required if the subpoena contains the following statement:

_____

This subpoena requires a custodian of confidential health information to personally attend and produce original records. Lesser compliance otherwise allowed by Oregon Rule of Civil Procedure 55 D(8) is insufficient for this subpoena.

_____

D(5) Mandatory privacy procedures for all records produced.

D(5)(a) Enclosure in a sealed inner envelope; labeling. The copy of the records must be

separately enclosed in a sealed envelope or wrapper on which the name of the court, case name and number of the action, name of the witness, and date of the subpoena are clearly inscribed.

D(5)(b) Enclosure in a sealed outer envelope; properly addressed. The sealed envelope or wrapper must be enclosed in an outer envelope or wrapper and sealed. The outer envelope or wrapper must be addressed as follows:

D(5)(b)(i) Court. If the subpoena directs attendance in court, to the clerk of the court, or to a judge;

D(5)(b)(ii) Deposition or similar hearing. If the subpoena directs attendance at a deposition or similar hearing, to the officer administering the oath for the deposition at the place designated in the subpoena for the taking of the deposition or at the officer's place of business;

D(5)(b)(iii) Other hearings or miscellaneous proceedings. If the subpoena directs attendance at another hearing or another miscellaneous proceeding, to the officer or body conducting the hearing or proceeding at the officer's or body's official place of business; or

D(5)(b)(iv) If no hearing is scheduled. If no hearing is scheduled, to the attorney or party issuing the subpoena.

D(6) Additional responsibilities of attorney or party receiving delivery of CHI.

D(6)(a) Service of a copy of subpoena on patient and all parties to the litigation. If the subpoena directs delivery of CHI to the attorney or party who issued the subpoena, then a copy of the subpoena must be served on the person whose CHI is sought, and on all other parties to the litigation who are not in default, not less than 14 days prior to service of the subpoena on the custodian or keeper of the records.

D(6)(b) Parties' right to inspect or obtain a copy of the CHI at own expense. Any party to the proceeding may inspect the CHI provided and may request a complete copy of the information. On request, the CHI must be promptly provided by the party who served the

subpoena at the expense of the party who requested the copies.

D(7) Inspection of CHI delivered to court or other proceeding. After filing and after giving reasonable notice in writing to all parties who have appeared of the time and place of inspection, the copy of the CHI may be inspected by any party or by the attorney of record of a party in the presence of the custodian of the court files, but otherwise the copy must remain sealed and must be opened only at the time of trial, deposition, or other hearing at the direction of the judge, officer, or body conducting the proceeding. The CHI must be opened in the presence of all parties who have appeared in person or by counsel at the trial, deposition, or hearing. CHI that is not introduced in evidence or required as part of the record must be returned to the custodian who produced it.

D(8) Compliance by delivery only when no personal attendance is required.

D(8)(a) Mail or delivery by a nonparty, along with declaration. A custodian of CHI who is not a party to the litigation connected to the subpoena, and who is not required to attend and testify, may comply by mailing or otherwise delivering a true and correct copy of all CHI subpoenaed within five days after the subpoena is received, along with a declaration that complies with paragraph D(8)(b) of this rule.

D(8)(b) Declaration of custodian of records when CHI produced. CHI that is produced when personal attendance of the custodian is not required must be accompanied by a declaration of the custodian that certifies all of the following:

D(8)(b)(i) Authority of declarant. The declarant is a duly authorized custodian of the records and has authority to certify records;

D(8)(b)(ii) True and complete copy. The copy produced is a true copy of all of the CHI responsive to the subpoena; and

D(8)(b)(iii) Proper preparation practices. Preparation of the copy of the CHI being produced was done:

D(8)(b)(iii)(A) by the declarant, or by qualified personnel acting under the control of the

entity subpoenaed or the declarant;

D(8)(b)(iii)(B) in the ordinary course of the entity's or the person's business; and

D(8)(b)(iii)(C) at or near the time of the act, condition, or event described or referred to in the CHI.

D(8)(c) Declaration of custodian of records when not all CHI produced. When the custodian of records produces no CHI, or less information than requested, the custodian of records must specify this in the declaration. The custodian may only send CHI within the custodian's custody.

D(8)(d) Multiple declarations allowed when necessary. When more than one person has knowledge of the facts required to be stated in the declaration, more than one declaration may be used.

D(9) Designation of responsible party when multiple parties subpoena CHI. If more than one party subpoenas a custodian of records to personally attend under paragraph D(4)(c) of this rule, the custodian of records will be deemed to be the witness of the party who first served such a subpoena.

D(10) Tender and payment of fees. Nothing in this section requires the tender or payment of more than one witness fee and mileage for one day unless there has been agreement to the contrary.

DRAFT
OREGON COUNCIL ON COURT PROCEDURES
RECOMMENDATION REGARDING ORCP 57D(1) – FOR CAUSE CHALLENGES

Background. In 2019, the Oregon Court of Appeals asked the Council on Court Procedures to consider updating Oregon's rules regarding bias in jury selection, which largely fall under Oregon Rule of Civil Procedure 57D(4) regarding peremptory challenges. In the course of considering those changes, the Council became aware that ORCP 57D(1) needs to be updated for clarity and to correct some language regarding disability discrimination. If the legislature adopts these recommendations, they will apply to both civil and criminal cases. ORS 136.210.

The Council offers this Recommendation regarding ORCP 57D(1)'s rule regarding "for cause" challenges. This Recommendation is offered concurrently with other recommendations, but the legislature does not need to adopt the other recommendations in order to adopt this one. The Council's priority is this recommendation to amend ORCP 57D(4).

In the 2019-2020 biennium, the Council on Court Procedures initiated the process of considering amendments to ORCP 57D. The Council's enabling statute, ORS 1.735(1) makes it clear the it is not within the purview of the Council to make any amendments that would "abridge, enlarge or modify the substantive rights of any litigant." The Council believes that discrimination in jury selection inherently implicates substantive rights of both litigants and jurors, and that it is the role of the legislature to determine whether any amendment is appropriate. However, this recommendations regarding ORCP 57D(1) fall more safely in the class of procedural recommendations and language clarity.

The Council is made up of both plaintiffs' and defense lawyers, as well as judges from around the state and both courts of appeals. This recommendation is also made with the assistance of the following lawyers from the criminal bar as well as other interest groups:

Oregon Supreme Court	Justice Christopher Garrett (Council Member)
Oregon Supreme Court Council on Inclusion and Fairness	Justice Adrienne Nelson (Workgroup Contributor) (Justice Lynn Nakamoto substantively contributed to the Council's considerations in the 2019-2020 biennium.)
Oregon Court of Appeals	Judge Bronson James (Workgroup Contributor) (Judge Douglas Tookey substantively contributed to the Council's considerations in the 2019-2020 biennium.)
Multnomah County Circuit Court	Judge Melvin Oden-Orr (Council Member)

	Judge Mark Peterson, *pro tem* (Council Staff) (Judge Adrian Brown substantively contributed in the 2021-2022 biennium)
Clackamas County Circuit Court	Judge Susie Norby (Council Member)
Washington County Circuit Court	Judge Charles Bailey (Council Member)
Polk County Circuit Court	Judge Norm Hill (Council Member)
Tillamook County Circuit Court	Judge Jon Hill (Council Member)
Marion County Circuit Court	Judge David Leith (Council Member)
Wasco County Circuit Court	(Judge John Wolf substantively contributed in the 2019-2020 biennium)
Linn County Circuit Court	Judge Thomas McHill (Council Member)
Oregon State Bar	Matt Shields, Oregon State Bar Public Affairs Staff Attorney (Council Member)
Oregon District Attorneys Association	Kevin Barton, Washington County District Attorney (Workgroup Contributor) Marie Atwood, Washington County Deputy District Attorney (Workgroup Contributor)
Oregon Public Defender Services	Ernest Lannet, Appellate Section Chief Defender (Workgroup Contributor) Joshua Crowther, Appellate Section Chief Deputy Defender (Workgroup Contributor) Zachary Mazar, Appellate Section Senior Deputy Defender (Workgroup Contributor) Brook Reinhard, Public Defender Services of Lane County Executive Director (Workgroup Contributor) Taya Brown, Multnomah Public Defenders Attorney (Workgroup Contributor)
Oregon Department of Justice	Kenneth Crowley, Sr. Assistant Attorney General (Council Member)
Oregon Trial Lawyers Association	Meredith Holley, Employment Discrimination Attorney (Committee Chair) Kelly Anderson, Personal Injury Attorney (Council Member)

	Nadia Dahab, Civil Rights Appellate Attorney (Council Member) Michelle Burrows, Civil Rights Attorney (Workgroup Contributor) J. Ashlee Albies, Civil Rights Attorney (Workgroup Contributor) Juan Chavez, Civil Rights Attorney (Workgroup Contributor) Paul Bovarnick, Personal Injury Attorney (Workgroup Contributor)
Oregon Association of Defense Counsel	Drake Hood, Civil Defense Attorney (Council Member) Iván Resendiz Gutierrez, Civil Defense Attorney (Workgroup Contributor)
Oregon State Bar Advisory Committee on Diversity and Inclusion	Aruna Masih, Employment Discrimination Attorney (Workgroup Contributor)
Willamette University College of Law	Brian Gallini, Law School Dean Taylor Hurwitz, Trademark Attorney (Workgroup Contributor)
American Civil Liberties Union	(Eliza Dozono substantively contributed in the 2019-2020 biennium.)
Oregon Hispanic Bar Association	(Stanton Gallegos substantively contributed in the 2019-2020 biennium.)
Oregon State Bar Diversity Section	(Lorelai Craig substantively contributed in the 2019-2020 biennium.)

In addition, in the 2019-2020 biennium, the Council sought comment from the Oregon Justice Resource Center, the Oregon Asian Pacific American Bar Association, the Oregon Chinese Lawyers Association, the Oregon Chapter of the National Bar Association, the Oregon Filipino American Lawyers Association, OGALLA – The LGBT Bar Association of Oregon, the Oregon Minority Lawyers Association, Oregon Women Lawyers, the South Asian Bar Association Oregon Chapter, the Oregon State Bar Disability Law Section, the Oregon State Bar Indian Law Section, and the Northwest Indian Bar Association.

The workgroup's meetings, as well as the primary materials they considered, are available here: https://www.dropbox.com/sh/iwpf4frhincz64i/AAC06s9FF2twfx2z-amL24vYa?dl=0

Excluding Jurors. Under Oregon law, a party may exclude a juror from jury service on a particular jury panel through "for cause" or "peremptory" challenges. The opportunity to exclude a juror under a "for cause" challenge is limited under ORCP 57(1), and this recommendation relates to that type of exclusion. This recommendation recognizes the right of jurors to be free from discrimination under public accommodation and constitutional law, corrects outdated language regarding disability discrimination, and simplifies language regarding actual bias of a juror.

The Council recommends amendment of ORCP 57D(1) as follows:

JURORS
RULE 57

…

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 inability of a juror to perform the essential functions of jury service, with or without accommodation, because of a mental or physical impairment. A court does not need to provide accommodation for the juror's impairment if it 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 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.**

DRAFT
OREGON COUNCIL ON COURT PROCEDURES
RECOMMENDATION REGARDING ORCP 57D(4) – PEREMPTORY CHALLENGES

Background. In 2019, the Oregon Court of Appeals asked the Council on Court Procedures to consider updating Oregon's rules regarding bias in jury selection, which largely fall under Oregon Rule of Civil Procedure 57D(4). These rules apply to both civil and criminal cases. ORS 136.230(4).

The Council offers this Recommendation regarding ORCP 57D(4)'s rule regarding objections to peremptory challenges because of bias. This Recommendation is offered concurrently with other recommendations, but the legislature does not need to adopt the other recommendations in order to adopt this one. The Council's priority is this recommendation to amend ORCP 57D(4).

In the 2019-2020 biennium, the Council on Court Procedures initiated the process of considering amendments to ORCP 57D. The Council's enabling statute, ORS 1.735(1) makes it clear the it is not within the purview of the Council to make any amendments that would "abridge, enlarge or modify the substantive rights of any litigant." The Council believes that discrimination in jury selection inherently implicates substantive rights of both litigants and jurors, and that it is the role of the legislature to determine whether any amendment is appropriate.

However, because the Council is made up of both plaintiffs' and defense lawyers, as well as judges from around the state and both courts of appeals, the Council makes these recommendations to assist the legislature. The Council does not include attorneys who practice criminal law, though, and there are strong implications for criminal litigants, as well as other interest groups, in any amendment to ORCP 57D(4). With that in mind, in the 2021-2022 biennium, the Council put together a workgroup comprised of the representatives listed below, including members of the criminal defense bar and other stakeholder groups:

Oregon Supreme Court	Justice Christopher Garrett (Council Member)
Oregon Supreme Court Council on Inclusion and Fairness	Justice Adrienne Nelson (Workgroup Contributor) (Justice Lynn Nakamoto substantively contributed to the Council's considerations in the 2019-2020 biennium.)
Oregon Court of Appeals	Judge Bronson James (Workgroup Contributor) (Judge Douglas Tookey substantively contributed to the Council's considerations in the 2019-2020 biennium.)

Multnomah County Circuit Court	Judge Melvin Oden-Orr (Council Member) Judge Mark Peterson, *pro tem* (Council Staff) (Judge Adrian Brown substantively contributed in the 2021-2022 biennium)
Clackamas County Circuit Court	Judge Susie Norby (Council Member)
Washington County Circuit Court	Judge Charles Bailey (Council Member)
Polk County Circuit Court	Judge Norm Hill (Council Member)
Tillamook County Circuit Court	Judge Jon Hill (Council Member)
Marion County Circuit Court	Judge David Leith (Council Member)
Wasco County Circuit Court	(Judge John Wolf substantively contributed in the 2019-2020 biennium)
Linn County Circuit Court	Judge Thomas McHill (Council Member)
Oregon State Bar	Matt Shields, Oregon State Bar Public Affairs Staff Attorney (Council Member)
Oregon District Attorneys Association	Kevin Barton, Washington County District Attorney (Workgroup Contributor) Marie Atwood, Washington County Deputy District Attorney (Workgroup Contributor)
Oregon Public Defender Services	Ernest Lannet, Appellate Section Chief Defender (Workgroup Contributor) Joshua Crowther, Appellate Section Chief Deputy Defender (Workgroup Contributor) Zachary Mazar, Appellate Section Senior Deputy Defender (Workgroup Contributor) Brook Reinhard, Public Defender Services of Lane County Executive Director (Workgroup Contributor) Taya Brown, Multnomah Public Defenders Attorney (Workgroup Contributor)
Oregon Department of Justice	Kenneth Crowley, Sr. Assistant Attorney General (Council Member)
Oregon Trial Lawyers Association	Meredith Holley, Employment Discrimination Attorney (Committee Chair) Kelly Anderson, Personal Injury Attorney (Council Member)

	Nadia Dahab, Civil Rights Appellate Attorney (Council Member) Michelle Burrows, Civil Rights Attorney (Workgroup Contributor) J. Ashlee Albies, Civil Rights Attorney (Workgroup Contributor) Juan Chavez, Civil Rights Attorney (Workgroup Contributor) Paul Bovarnick, Personal Injury Attorney (Workgroup Contributor)
Oregon Association of Defense Counsel	Drake Hood, Civil Defense Attorney (Council Member) Iván Resendiz Gutierrez, Civil Defense Attorney (Workgroup Contributor)
Oregon State Bar Advisory Committee on Diversity and Inclusion	Aruna Masih, Employment Discrimination Attorney (Workgroup Contributor)
Willamette University College of Law	Brian Gallini, Law School Dean Taylor Hurwitz, Trademark Attorney (Workgroup Contributor)
American Civil Liberties Union	(Eliza Dozono substantively contributed in the 2019-2020 biennium.)
Oregon Hispanic Bar Association	(Stanton Gallegos substantively contributed in the 2019-2020 biennium.)
Oregon State Bar Diversity Section	(Lorelai Craig substantively contributed in the 2019-2020 biennium.)

In addition, in the 2019-2020 biennium, the Council sought comment from the Oregon Justice Resource Center, the Oregon Asian Pacific American Bar Association, the Oregon Chinese Lawyers Association, the Oregon Chapter of the National Bar Association, the Oregon Filipino American Lawyers Association, OGALLA – The LGBT Bar Association of Oregon, the Oregon Minority Lawyers Association, Oregon Women Lawyers, the South Asian Bar Association Oregon Chapter, the Oregon State Bar Disability Law Section, the Oregon State Bar Indian Law Section, and the Northwest Indian Bar Association.

This recommendation relates to "peremptory challenges," which are decisions parties can make for almost any reason, or no reason, to exclude particular jurors from participation on a jury panel. Basically, in any civil or criminal case, each party gets a designated number of "peremptory challenges," allowing them to exclude a jury from participation for any reason.

The parties usually pass slips of paper to the judge with a juror's number on the paper, and then that juror is excluded with no further questions asked. The one exception is that, consistent with Supreme Court decisions, under Oregon's current ORCP 57D(4), a party may not exclude a juror because of race or sex. T

Court of Appeals Request. The Oregon Court of Appeals asked the Council on Court Procedures to revisit ORCP57D(4) through the case *State v. Curry*, 298 Or App 377 (2019). In that case, the Court of Appeals reversed a trial court for allowing a party to exclude a juror through a peremptory challenge. The appeals court determined that the trial court had improperly evaluated what is called a *Batson*[1] objection, referring to an objection that the party was excluding the juror for discriminatory reasons.

Specifically, the Oregon Court of Appeals has asked the Council to consider Washington State's amendment to its rule regarding bias in jury selection, Rule 37. During the Council's consideration, California, Connecticut, and Arizona also amended their rules. The Council and its workgroup considered each of these amendments.

In addition, the Council considered research offered by the Willamette University College of Law Racial Justice Task Force, research from Connecticut's Jury Selection Task Force, and research from the Pound Civil Justice Institute regarding jury selection and fairness in jury trials.

The research concludes that diversity of representation on jury panels contributes to the fairness of a jury's verdict.[2] The Council strongly recommends that the legislature adopt the proposed amendments in order to promote diversity and provide protection against bias.

The workgroup's meetings, as well as the primary materials they covered are available here: https://www.dropbox.com/sh/iwpf4frhincz64i/AAC06s9FF2twfx2z-amL24vYa?dl=0

Excluding Jurors. Under Oregon law, a party may exclude a juror from jury service on a particular jury panel through "for cause" or "peremptory" challenges. The opportunity to exclude a juror under a "for cause" challenge is limited under ORCP 57, and recommendations regarding amendments to that portion of ORCP 57 are offered separately. The legislature does not need to adopt changes to "for cause" challenges in order to adopt the recommendations regarding "peremptory" challenges. In trial, each party receives three or six "peremptory" challenges (depending on the size of the jury) and the party may use a "peremptory" challenge to exclude a juror for any reason that is not prohibited.

One of the purposes of allowing parties or the court to exclude jurors from service is to prevent litigants from being harmed by a juror's unfair bias. Current research shows, however, that bias on the part of the parties or the court may perpetuate unlawful discrimination

[1] Objections to excluding jurors for discriminatory reasons are commonly called *Batson* objections. This refers to the Supreme Court case *Batson v. Kentucky*, 476 US 79 (1986), ruling it unconstitutional to exclude a juror on the basis of race.

[2] Valerie P. Hans, *Challenges to Achieving Fairness in Civil Jury Selection*, POUND CIVIL JUSTICE INSTITUTE 2021 FORUM FOR STATE APPELLATE COURT JUDGES.

through the process of jury selection, even where the person perpetuating the bias may be unaware of the bias themself.

Because of the dangers of implicit, institutional, and unconscious bias impacting litigants and jurors without any of the parties being aware of the bias, the Council received strong recommendations to eliminate peremptory challenges entirely. The United Kingdom, Canada, and Arizona have eliminated peremptory challenges. Some experienced trial attorneys were reluctant to do this, however, because peremptory challenges allow attorneys to exclude a juror they fear will be unfavorable to a client without embarrassing that juror or confronting that juror regarding potential bias. Peremptory challenges offer some control to the parties that is otherwise not available through the jury trial process. Ultimately, the Council concluded that amendments may be made to ORCP 57D(4) to promote fairness without eliminating peremptory challenges.

Priorities. The Council's priorities in amending this rule were to change the burden shifting issue that put a very high burden on the person making the objection and to recognize implicit, institutional, and unconscious bias. Within those priorities, it became important to create a clear standard for judges in evaluating an objection. The recommendation also reflects that jurors have protections based on protected statuses under Oregon and federal law that go beyond race and sex.

The Council recommends amendment of ORCP 57D(4) as follows:

JURORS
RULE 57

…

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

D(4)(a) A party may not exercise a peremptory challenge on the basis of [*race, ethnicity, or sex.*] **<u>status protected by Oregon or federal discrimination law.</u>** [*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.*] **<u>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.</u>**

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.*] **An objection to a peremptory challenge must be sustained if the court finds (i) A protected status under Oregon or federal discrimination law was a factor in the subjective intent of the person invoking the peremptory challenge; or (ii) Even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding the juror would contribute to implicit, institutional, or unconscious bias sufficient to harm a party or the excluded juror, and the reasons given to support the challenge are insufficient to outweigh the risk of harm. In making the determination under (ii), the court must consider the totality of the circumstances from the perspective of an objective reasonable person, who is aware of implicit, institutional, and unconscious bias. The court must explain the reasons for its ruling on the record. For purposes of this rule, implicit and unconscious bias are biases of which a person is unaware. For purposes of this rule, institutional bias is a bias that favors one group over another within a system, whether or not a person intends to discriminate.**

DRAFT
OREGON COUNCIL ON COURT PROCEDURES
RECOMMENDATION REGARDING ORS 10

Background. In 2019, the Oregon Court of Appeals asked the Council on Court Procedures to consider updating Oregon's rules regarding bias in jury selection, which largely fall under Oregon Rule of Civil Procedure 57D(4). These rules apply to both civil and criminal cases. ORS 136.230(4). In order to consider recommendations regarding this rule, the Council convened a workgroup comprised of lawyers from the judiciary, both the civil and criminal bars, as well as representatives of interest group stakeholders (listed more fully below).

In considering recommendations and research regarding discrimination in jury selection, many members of the Council and the workgroup raised concerns regarding early barriers to jury service, including juror pay. The Council understands that the Oregon Judicial Department is conducting research regarding these barriers and the Council supports changes including the following:

- Amendment to ORS 10.065 allowing jurors to be reimbursed for child and elder care expenses. Inability to afford care for children and elders creates a significant barrier to jury service to caregiving citizens.
- Amendment to ORS 10.061 and 10.075 increasing pay for jurors. In 2022, the minimum wage in Oregon pays workers between $96 and $108 per day. By contrast, jurors receive $10 per day for jury service. This makes jury service prohibitively expensive for Oregon's most impoverished and marginalized citizens.

Additionally, ORS 10.030 and 10.115 should be updated to comply with public accommodation law and to correct outdated language regarding disability protections.

However, the Council's priority is its recommended amendment to ORCP 57D(4) regarding peremptory challenges. We believe the recommendations below are consistent with the recommendations regarding ORCP 57D(4), but the changes to ORS 10 are not required in order to enact the changes to ORCP 57D.

While the Council is made up of members of the judiciary and civil bar, in the 2021-2022 biennium, the Council put together a workgroup comprised of the representatives listed below, including members of the criminal defense bar and other stakeholder groups. The recommendations regarding ORS 10 are made considering the input of that workgroup.

Oregon Supreme Court	Justice Christopher Garrett (Council Member)
Oregon Supreme Court Council on Inclusion and Fairness	Justice Adrienne Nelson (Workgroup Contributor) (Justice Lynn Nakamoto substantively contributed to the Council's considerations in the 2019-2020 biennium.)

Oregon Court of Appeals	Judge Bronson James (Workgroup Contributor) (Judge Douglas Tookey substantively contributed to the Council's considerations in the 2019-2020 biennium.)
Multnomah County Circuit Court	Judge Melvin Oden-Orr (Council Member) Judge Mark Peterson, *pro tem* (Council Staff) (Judge Adrian Brown substantively contributed in the 2021-2022 biennium)
Clackamas County Circuit Court	Judge Susie Norby (Council Member)
Washington County Circuit Court	Judge Charles Bailey (Council Member)
Polk County Circuit Court	Judge Norm Hill (Council Member)
Tillamook County Circuit Court	Judge Jon Hill (Council Member)
Marion County Circuit Court	Judge David Leith (Council Member)
Wasco County Circuit Court	(Judge John Wolf substantively contributed in the 2019-2020 biennium)
Linn County Circuit Court	Judge Thomas McHill (Council Member)
Oregon State Bar	Matt Shields, Oregon State Bar Public Affairs Staff Attorney (Council Member)
Oregon District Attorneys Association	Kevin Barton, Washington County District Attorney (Workgroup Contributor) Marie Atwood, Washington County Deputy District Attorney (Workgroup Contributor)
Oregon Public Defender Services	Ernest Lannet, Appellate Section Chief Defender (Workgroup Contributor) Joshua Crowther, Appellate Section Chief Deputy Defender (Workgroup Contributor) Zachary Mazar, Appellate Section Senior Deputy Defender (Workgroup Contributor) Brook Reinhard, Public Defender Services of Lane County Executive Director (Workgroup Contributor) Taya Brown, Multnomah Public Defenders Attorney (Workgroup Contributor)

Oregon Department of Justice	Kenneth Crowley, Sr. Assistant Attorney General (Council Member)
Oregon Trial Lawyers Association	Meredith Holley, Employment Discrimination Attorney (Committee Chair) Kelly Anderson, Personal Injury Attorney (Council Member) Nadia Dahab, Civil Rights Appellate Attorney (Council Member) Michelle Burrows, Civil Rights Attorney (Workgroup Contributor) J. Ashlee Albies, Civil Rights Attorney (Workgroup Contributor) Juan Chavez, Civil Rights Attorney (Workgroup Contributor) Paul Bovarnick, Personal Injury Attorney (Workgroup Contributor)
Oregon Association of Defense Counsel	Drake Hood, Civil Defense Attorney (Council Member) Iván Resendiz Gutierrez, Civil Defense Attorney (Workgroup Contributor)
Oregon State Bar Advisory Committee on Diversity and Inclusion	Aruna Masih, Employment Discrimination Attorney (Workgroup Contributor)
Willamette University College of Law	Brian Gallini, Law School Dean Taylor Hurwitz, Trademark Attorney (Workgroup Contributor)
American Civil Liberties Union	(Eliza Dozono substantively contributed in the 2019-2020 biennium.)
Oregon Hispanic Bar Association	(Stanton Gallegos substantively contributed in the 2019-2020 biennium.)
Oregon State Bar Diversity Section	(Lorelai Craig substantively contributed in the 2019-2020 biennium.)

In addition, in the 2019-2020 biennium, the Council sought comment from the Oregon Justice Resource Center, the Oregon Asian Pacific American Bar Association, the Oregon Chinese Lawyers Association, the Oregon Chapter of the National Bar Association, the Oregon Filipino American Lawyers Association, OGALLA – The LGBT Bar Association of Oregon, the

Oregon Minority Lawyers Association, Oregon Women Lawyers, the South Asian Bar Association Oregon Chapter, the Oregon State Bar Disability Law Section, the Oregon State Bar Indian Law Section, and the Northwest Indian Bar Association.

The workgroup's recorded meetings, as well as the primary materials they considered are available here: https://www.dropbox.com/sh/iwpf4frhincz64i/AAC06s9FF2twfx2z-amL24vYa?dl=0

ORS 10

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]

DEPOSITIONS [*UPON*] ON ORAL EXAMINATION

RULE 39

A When deposition may be taken. After the service of summons or the appearance of the defendant in any action, or in a special proceeding at any time after a question of fact has arisen, any party may take the testimony of any person, including a party, by deposition [*upon*] **on** oral examination. **The attendance of a witness may be compelled by subpoena as provided in Rule 55.** Leave of court, with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, except that leave is not required**:** [*(1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) a special notice is given as provided in subsection C(2) of this Rule. The attendance of a witness may be compelled by subpoena as provided in Rule 55.]*

A(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

A(2) a special notice is given as provided in subsection C(2) of this rule.

B Order for deposition or production of prisoner. The deposition of a person confined in a prison or jail may only be taken by leave of court. The deposition [*shall*] **will** be taken on such terms as the court prescribes, and the court may order that the deposition be taken at the place of confinement or, when the prisoner is confined in this state, may order temporary removal and production of the prisoner for purposes of the deposition.

C Notice of examination.

C(1) **General requirements.** A party desiring to take the deposition of any person [*upon*] **on** oral examination [*shall*] **must** give reasonable notice in writing to every other party to the action. The notice [*shall*] **must** state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify such person or the particular class or group to which such

person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena [*shall*] **must** be attached to or included in the notice.

C(2) **Special notice.** Leave of court is not required for the taking of a deposition by plaintiff if the notice**:** [*(a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant, and (b) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.*]

C(2)(a) states that the person to be examined is about to go out of the state, or is bound on a voyage to sea, and will be unavailable for examination unless the deposition is taken before the expiration of the period of time specified in Rule 7 to appear and answer after service of summons on any defendant; and

C(2)(b) sets forth facts to support the statement.

C(2)(c) The plaintiff's attorney must sign the notice, and such signature constitutes a certification by the attorney that to the best of such attorney's knowledge, information, and belief the statement and supporting facts are true.

C(2)(d) If a party shows that**,** when served with notice under [*this subsection,*] **subsection C(2) of this rule,** the party was unable through the exercise of diligence to obtain counsel to represent such party at the taking of the deposition, the deposition may not be used against such party.

C(3) **Shorter or longer time.** The court may for cause shown enlarge or shorten the time for taking the deposition.

C(4) **Non-stenographic recording.** The notice of deposition required under [*subsection*

(1) of this section] **subsection C(1) of this rule** may provide that the testimony will be recorded by other than stenographic means, in which event the notice [*shall*] **must** designate the manner of recording and preserving the deposition. A court may require that the deposition be taken by stenographic means if necessary to assure that the recording be accurate.

C(5) **Production of documents and things.** The notice to a party deponent may be accompanied by a request made in compliance with Rule 43 for the production of documents and tangible things at the taking of the deposition. The procedures of Rule 43 [*shall*] apply to the request.

C(6) **Deposition of organization.** A party may in the notice and in a subpoena name as the deponent a public or private corporation**,** [*or a partnership or association or governmental agency*] **or a partnership, association, or governmental agency,** and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named [*shall*] **must** provide notice of no fewer than three (3) days before the scheduled deposition, absent good cause or agreement of the parties and the deponent, designating the name(s) of one or more officers, directors, managing agents, or other persons who consent to testify on its behalf and setting forth, for each person designated, the matters on which such person will testify. A subpoena [*shall*] **must** advise a nonparty organization of its duty to make such a designation. The persons so designated [*shall*] **will** testify as to matters known or reasonably available to the organization. This subsection does not preclude taking a deposition by any other procedure authorized in these rules.

[*C(7)* ***Deposition by telephone.*** *Parties may agree by stipulation or the court may order that testimony at a deposition be taken by telephone. If testimony at a deposition is taken by telephone pursuant to court order, the order shall designate the conditions of taking testimony, the manner of recording the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If testimony at a deposition is taken by telephone other than pursuant to court order or stipulation made a part of the record, then*

objections as to the taking of testimony by telephone, the manner of giving the oath or affirmation, and the manner of recording the deposition are waived unless seasonable objection thereto is made at the taking of the deposition. The oath or affirmation may be administered to the deponent, either in the presence of the person administering the oath or over the telephone, at the election of the party taking the deposition.]

C(7) Deposition by remote means.

C(7)(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 must designate the conditions of taking and the manner of recording the testimony and may include other provisions to ensure that the testimony will be accurately recorded and preserved. If testimony at a deposition is taken by remote means other than pursuant to a court order or a stipulation that is 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.

C(7)(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 and allows official court reporting when requested.

D Examination; record; oath; objections.

D(1) **Examination; cross-examination; oath.** Examination and cross-examination of deponents may proceed as permitted at trial. The person described in Rule 38 [*shall*] **will** put the deponent on oath.

D(2) **Record of examination.** The testimony of the deponent [*shall*] **must** be recorded either stenographically or as provided in subsection C(4) of this rule. If testimony is recorded

pursuant to subsection C(4) of this rule, the party taking the deposition [*shall*] **must** retain the original recording without alteration, unless the recording is filed with the court pursuant to subsection G(2) of this rule, until final disposition of the action. [*Upon*] **On** request of a party or deponent and payment of the reasonable charges therefor, the testimony [*shall*] **will** be transcribed.

D(3) **Objections.** All objections made at the time of the examination [*shall*] **must** be noted on the record. A party or deponent [*shall*] **must** state objections concisely and in a non-argumentative and non-suggestive manner. Evidence [*shall*] **will** be taken subject to the objection, except that a party may instruct a deponent not to answer a question, and a deponent may decline to answer a question, only:

[*(a)*] **D(3)(a)** when necessary to present or preserve a motion under section E of this rule;

[*(b)*] **D(3)(b)** to enforce a limitation on examination ordered by the court; or

[*(c)*] **D(3)(c)** to preserve a privilege or constitutional or statutory right.

D(4) **Written questions as alternative.** In lieu of participating in an oral examination, parties may serve written questions on the party taking the deposition who [*shall*] **will** propound them to the deponent on the record.

E Motion for court assistance; expenses.

E(1) **Motion for court assistance.** At any time during the taking of a deposition, [*upon*] **on** motion and a showing by a party or a deponent that the deposition is being conducted or hindered in bad faith, or in a manner not consistent with these rules, or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or any party, the court may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope or manner of the taking of the deposition as provided in section C of Rule 36. The motion [*shall*] **must** be presented to the court in which the action is pending, except that non-party deponents may present the motion to the court in which the action is pending or the court at the place of examination. If the order terminates the examination, it [*shall*] **will** be

resumed thereafter only on order of the court in which the action is pending. [*Upon*] **On** demand of the moving party or deponent, the parties [*shall*] **will** suspend the taking of the deposition for the time necessary to make a motion under this subsection.

E(2) **Allowance of expenses.** Subsection A(4) of Rule 46 [*shall apply*] **applies** to the award of expenses incurred in relation to a motion under this section.

F Submission to witness; changes; statement.

F(1) **Necessity of submission to witness for examination.** When the testimony is taken by stenographic means, or is recorded by other than stenographic means as provided in subsection C(4) of this rule, and if any party or the witness so requests at the time the deposition is taken, the recording or transcription [*shall*] **will** be submitted to the witness for examination, changes, if any, and statement of correctness. With leave of court such request may be made by a party or witness at any time before trial.

F(2) **Procedure after examination.** Any changes [*which*] **that** the witness desires to make [*shall*] **will** be entered [*upon*] **on** the transcription or stated in a writing to accompany the recording by the party taking the deposition, together with a statement of the reasons given by the witness for making them. Notice of such changes and reasons [*shall*] **must** promptly be served [*upon*] **on** all parties by the party taking the deposition. The witness [*shall*] **must** then state in writing that the transcription or recording is correct subject to the changes, if any, made by the witness, unless the parties waive the statement or the witness is physically unable to make such statement or cannot be found. If the statement is not made by the witness within 30 days, or within a lesser time [*upon court order*] **if so ordered by the court**, after the deposition is submitted to the witness, the party taking the deposition [*shall*] **must** state on the transcription or in a writing to accompany the recording the fact of waiver, or the physical incapacity or absence of the witness, or the fact of refusal of the witness to make the statement, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though the statement had been made unless, on a motion to suppress under

Rule 41 D, the court finds that the reasons given for the refusal to make the statement require rejection of the deposition in whole or in part.

F(3) **No request for examination.** If no examination by the witness is requested, no statement by the witness as to the correctness of the transcription or recording is required.

G Certification; filing; exhibits; copies.

G(1) **Certification.** When a deposition is stenographically taken, the stenographic reporter [*shall*] **must** certify, under oath, on the transcript that the witness was duly sworn and that the transcript is a true record of the testimony given by the witness. When a deposition is recorded by other than stenographic means as provided in subsection C(4) of this rule, and thereafter transcribed, the person transcribing it [*shall*] **must** certify, under oath, on the transcript that such person heard the witness sworn on the recording and that the transcript is a correct transcription of the recording. When a recording or a non-stenographic deposition or a transcription of such recording or non-stenographic deposition is to be used at any proceeding in the action or is filed with the court, the party taking the deposition, or such party's attorney, [*shall*] **must** certify under oath that the recording, either filed or furnished to the person making the transcription, is a true, complete, and accurate recording of the deposition of the witness and that the recording has not been altered.

G(2) **Filing.** If requested by any party, the transcript or the recording of the deposition [*shall*] **must** be filed with the court where the action is pending. When a deposition is stenographically taken, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition [*shall*] **must** enclose it in a sealed envelope, directed to the clerk of the court or the justice of the peace before whom the action is pending or such other person as may by writing be agreed [*upon*] **on**, and deliver or forward it accordingly by mail or other usual channel of conveyance. If a recording of a deposition has been filed with the court, it may be transcribed [*upon*] **on** request of any party under such terms and conditions as the court may direct.

G(3) **Exhibits.** Documents and things produced for inspection during the examination of the witness [*shall*] **will**, [*upon*] **on** the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party. Whenever the person producing materials desires to retain the originals, such person may substitute copies of the originals, or afford each party an opportunity to make copies thereof. In the event the original materials are retained by the person producing them, they [*shall*] **will** be marked for identification and the person producing them [*shall*] **must** afford each party the subsequent opportunity to compare any copy with the original. The person producing the materials [*shall*] **will** also be required to retain the original materials for subsequent use in any proceeding in the same action. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

G(4) **Copies.** [*Upon*] **On** payment of reasonable charges therefor, the stenographic reporter or, in the case of a deposition taken pursuant to subsection C(4) of this rule, the party taking the deposition [*shall*] **must** furnish a copy of the deposition to any party or to the deponent.

H Payment of expenses [*upon*] on failure to appear.

H(1) **Failure of party to attend.** If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court in which the action is pending may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable [*attorney's*] **attorney** fees.

H(2) **Failure of witness to attend.** If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena [*upon*] **on** the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because the attending party expects the deposition of that witness to be taken, the court may

order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by such other party and the attorney for such other party in so attending, including reasonable [*attorney's*] **attorney** fees.

I Perpetuation of testimony after commencement of action.

I(1) After commencement of any action, any party wishing to perpetuate the testimony of a witness for the purpose of trial or hearing may do so by serving a perpetuation deposition notice.

I(2) The notice is subject to [*subsections C(1) through (7)*] **subsection C(1) through subsection C(7)** of this rule and [*shall*] **must** additionally state:

I(2)(a) A brief description of the subject areas of testimony of the witness; and

I(2)(b) The manner of recording the deposition.

I(3) Prior to the time set for the deposition, any other party may object to the perpetuation deposition. [*Such*] **Any** objection [*shall*] **will** be governed by the standards of Rule 36 C. **If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code.** At any hearing on such an objection, the burden [*shall*] **will** be on the party seeking perpetuation to show that: [*(a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (e) or 45.250 (2)(a) through (c); or (b) it would be an undue hardship on the witness to appear at the trial or hearing; or (c) other good cause exists for allowing the perpetuation. If no objection is filed, or if perpetuation is allowed, the testimony taken shall be admissible at any subsequent trial or hearing in the action, subject to the Oregon Evidence Code.*]

I(3)(a) the witness may be unavailable as defined in ORS 40.465 (1)(d) or (1)(e) or ORS 45.250 (2)(a) through (2)(c);

I(3)(b) it would be an undue hardship on the witness to appear at the trial or hearing; or

I(3)(c) other good cause exists for allowing the perpetuation.

I(4) Any perpetuation deposition [*shall*] **must** be taken not less than seven **(7)** days before the trial or hearing on not less than 14 days' notice. However, the court in which the action is pending may allow a shorter period for a perpetuation deposition before or during trial [*upon*] **on** a showing of good cause.

I(5) To the extent that a discovery deposition is allowed by law, any party may conduct a discovery deposition of the witness prior to the perpetuation deposition.

I(6) The perpetuation examination [*shall*] **will** proceed as set forth in section D of this rule. All objections to any testimony or evidence taken at the deposition [*shall*] **must** be made at the time and noted [*upon*] **on** the record. The court before which the testimony is offered [*shall*] **will** rule on any objections before the testimony is offered. Any objections not made at the deposition [*shall*] **will** be deemed waived.

TRIAL PROCEDURE

RULE 58

A Manner of proceedings on trial by the court. Trial by the court shall proceed in the manner prescribed in [*subsections (3) through (6) of section B*] **subsection B(3) through subsection B(6)** of this rule, unless the court, for good cause stated in the record, otherwise directs.

B Manner of proceedings on jury trial. Trial by a jury shall proceed in the following manner unless the court, for good cause stated in the record, otherwise directs:

B(1) The jury [*shall*] **must** be selected and sworn. Prior to voir dire, each party may, with the court's consent, present a short statement of the facts to the entire jury panel.

B(2) After the jury is sworn, the court [*shall*] **will** instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions to witnesses if permitted, and the legal principles that will govern the proceedings.

B(3) The plaintiff [*shall*] **may** concisely state plaintiff's case and the issues to be tried; the defendant then, in like manner, [*shall*] **may** state defendant's case based upon any defense or counterclaim or both.

B(4) The plaintiff [*shall*] **will** introduce the evidence on plaintiff's case in chief, and when plaintiff has concluded, the defendant [*shall*] **may** do likewise.

B(5) The parties respectively may introduce rebutting evidence only[,] unless the court**,** in furtherance of justice**,** permits them to introduce evidence [*upon*] **on** the original cause of action, defense, or counterclaim.

B(6) When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, the plaintiff [*shall*] **may** commence and conclude the argument to the jury. The plaintiff may **initially** waive [*the opening*] argument[,] and**,** if the defendant then argues the case to the jury, the plaintiff [*shall*] **will** have the right to reply to the argument of the defendant, but not otherwise.

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B(7) Not more than two counsel [*shall*] **may** address the jury on behalf of the plaintiff or defendant[*; the whole time occupied on behalf of either shall not be limited to less than two hours.*] **Plaintiff and defendant shall each be afforded a minimum of two hours to address the jury, irrespective of how that time is allocated among that side's counsel.**

B(8) After the evidence is concluded, the court [*shall*] **will** instruct the jury. The court may instruct the jury before or after the closing arguments.

B(9) With the court's consent, jurors [*shall*] **may** be permitted to submit to the court written questions directed to witnesses or to the court. [*The court shall afford the parties an opportunity to object to such questions outside the presence of the jury.*] **The court must afford the parties an opportunity, outside of the presence of the jury, to object to questions submitted by jurors.**

C Separation of jury before submission of cause; admonition. The jurors may be kept together in charge of a proper officer, or may, in the discretion of the court, at any time before the submission of the cause to them, be permitted to separate; in either case, [*they*] **the jurors** may be admonished by the court that it is their duty not to converse with any other person, or among themselves, on any subject connected with the trial, or to express any opinion thereon, until the case is finally submitted to them.

D Proceedings if juror becomes sick. If, after the formation of the jury, and before verdict, a juror becomes sick, so as to be unable to perform the duty of a juror, the court may order such juror to be discharged. In that case, unless an alternate juror, seated under Rule 57 F, is available to replace the discharged juror or unless the parties agree to proceed with the remaining jurors, a new juror may be sworn, and the trial **may** begin anew; or the jury may be discharged, and a new jury then or afterwards formed.

E Failure to appear for trial. When a party who has filed an appearance fails to appear for trial, the court may, in its discretion, proceed to trial and judgment without further notice to the non-appearing party.

F Testimony by Remote Means

F(1) Subject to court approval, the parties may stipulate that testimony be taken 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.

F(2) "Remote means" is defined as any form of real-time electronic communication that permits all participants to hear and speak with each other simultaneously.

F(3) Testimony by remote means must be recorded using the court's official recording system, if suitable equipment is available; otherwise, such testimony must be recorded at the expense of and by the party requesting the testimony. Any alternative method and manner of recording is subject to the approval of the court.

F(4) A request for testimony by remote means must be made within the time allowed by ORS 45.400(2).

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)(b) and to advance those factors specified in (3)(c).** [*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

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" includes:

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 frivolous motions, pleadings, or other documents, conducts unnecessary discovery, or engages in other tactics that are 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 interested person, enter a pre-filing order prohibiting a vexatious litigant from commencing any new action or claim in the courts of that circuit without first obtaining

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leave of the presiding judge. On entry, a copy of the pre-filing order will 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 as a contempt of court. A vexatious litigant's request to commence a new action or claim may be made by a petition accompanied by an affidavit or a declaration and will only be granted on a showing that the proposed action or claim is not frivolous 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 to require posting of security. At the hearing on the motion, the court may consider any evidence, written or oral, by witness or affidavit or declaration, or through judicial notice, that may be relevant to the petition/motion.

C(1) **Determining whether a litigant is vexatious.** To determine whether a litigant is vexatious, the court may consider:

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

C(1)(b) the litigant's motive in pursuing the litigation;

C(1)(c) whether the litigant is represented by counsel;

C(1)(d) whether the litigant has caused unnecessary expense to opposing parties or placed a needless burden on the courts;

C(1)(e) whether other sanctions would be adequate to protect the courts and other parties; and

C(1)(f) any other considerations that are relevant to the circumstances of the litigation.

C(2) If, after considering all of 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 must 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 is not 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 section C of this rule, the court will promptly 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 to 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 must 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 must 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 been served or who have appeared in the action or claim. The filing of such a notice stays the litigation against all opposing parties. The presiding judge must 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 must plead or otherwise respond to the action or claim within ten (10) days after the date of service of the presiding

judge order.

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)*] **(5)** 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)*] **(6)** 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)*] **(7)** Assigned claims may be prosecuted by an assignee in **the** small claims department to the same extent they may be prosecuted in any other state court.

[(*7)*] **(8)** 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.

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VEXATIOUS LITIGATION AUTHORITY NOTES

Molski v. Evergreen Dynasty Corp., 500 F.3d 1047 (9th Circuit 2007).
The Ninth Circuit federal appeals court endorsed the use of a Pre-filing Order by a trial court to restrict future filings from a person declared to be a vexatious litigant. The Pre-filing Order was entered after notice and an opportunity to be heard, in which the factors included in **ORCP 35C(1) – (5)** guided the analysis for the decision. Those five factors were adopted from a decision in the Second Circuit in Safir v. United States Lines, Inc., 792 F.2d 19, 24 (2d Cir. 1986).

The factors applied by the trial court were: (1) the litigant's history of litigation and in particular whether it entailed vexatious, harassing, or duplicative suits; (2) the litigant's motive in pursuing the litigation, for example, whether the litigant had a good faith expectation of prevailing; (3) whether the litigant is represented by counsel; (4) whether the litigant has caused unnecessary expense to the parties or placed a needless burden on the courts; and (5) whether other sanctions would be adequate to protect the courts and other parties.

The Molski appeals court also concluded that a Pre-filing Order declaring a person to be a vexatious litigant is not appealable:

> As we see it, pre-filing orders entered against vexatious litigants are not conclusive and can be reviewed and corrected (if necessary) after final judgment. Though during the pendency of an appeal, the order might delay or prohibit a litigant from filing claims without leave of court, we have the authority to vacate the order entirely if we conclude the order was unjustified on the merits. Johnny Pflocks, 634 F.2d at 1216. Moreover, allowing immediate appeals of pre-filing orders would permit piecemeal appeals and result in a costly succession of appeals from the district court's rulings before entry of final judgment. Firestone Tire Rubber Co. v. Risjord, 449 U.S. 368, 374, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). We see no good reason to part ways from our case law holding that sanctions orders entered against a party are not immediately appealable, and we hold that pre-filing orders entered against vexatious litigants are also not immediately appealable.

* * *

In Malheur County in 2015, a Pre-filing Vexatious Litigant Order was entered in Woodroffe v. State of Oregon, 15CV1047. That Order ruled: "From this date forward, Plaintiff Robert Woodroffe is prohibited from filing any civil action in the Circuit Court for the State of Oregon without first obtaining leave of the court." Judge Baxter appears to have considered factors similar to those set forth in ORCP 35C(1) - (5), based on the arguments made in the Motion filed to request the Order. His Order was not appealed.

In a federal case in Oregon's District Court, Gonzalez-Aquilera v. Sgt. Francisco Benitez et. al., Case No. 2:17 – cv 02063 – MC, the court entered an Order declaring a self-represented litigant to be vexatious, because he had filed three prior similar lawsuits that were all dismissed either for being frivolous or for failure to state a claim.

* * *

In Heritage Properties, LLC v. Wells Fargo Bank, N.A., 318 Or App 470, 484-5, (2022), the Court of Appeals denied a challenge to a CCP amendment to ORCP 71B(1)(c) based on an argument that the 2010 amendment "modified the substantive rights of litigants contrary to ORS 1.735(1):

> The above authorities inform our conclusion that, in prohibiting the Council from promulgating rules of civil procedure that "abridge, enlarge or modify the substantive rights of any litigant," the legislature intended to prohibit the Council from promulgating rules that altered the rights, duties, or remedies available under the substantive law or from adopting procedural rules that effectively limit a party's substantive rights to maintain or defend an action. In that way, the legislature intended to limit the Council's rule-making purview to those procedural mechanisms and processes that litigants may utilize to enforce substantive rights. In other words, the Council may determine the procedural steps that a litigant must follow to enforce their rights but may not change the underlying rights themselves.

Among other things, the analysis emphasized the CCP's motivation to remove impediments to promote efficiencies and reduce expenses caused by frivolous litigation when creating that amendment.

* * *

Other states have enacted rules that create methods for limiting vexatious litigation. These include California's Civil Procedure Rule §391(b)(1-4), Florida's Code §69.093 and Georgia's Code §9-15-14.

<u>SITUATION</u>: Conflict between Court Rules and Arbitration Statute

The purpose of court-annexed arbitration is to promote speedy resolution of disputes and reduce the burdens on court by deciding smaller civil disputes where only money through arbitration with reduced court involvement. But a conflict exists between the arbitration statute and the court rules for certain cases heard in arbitration and are not appealed to trial de novo.

In *Mendoza v Xtreme Truck Sales LLC*, 314 Or App 87 (2021), the Court of Appeals held that, based on the language of ORCP 54(E), when a dispute over entitlement to attorney fees or costs arises from an offer of judgment, the arbitrator's final award—including the attorney fees and costs award, which the arbitrator now makes without knowing about the offer of judgment—must become a final judgment before the offer of judgment is disclosed and the effect of the offer of judgment on the attorney fees and costs award is determined.

This creates a conflict with ORS 36.425(3), which states that "If a written notice is not filed under subsection (2)(a) of this section within the 20 days prescribed, the court shall cause to be prepared and entered a judgment based on the arbitration decision and award. A judgment entered under this subsection may not be appealed."

So the statute on arbitrations dictates that final judgments are not subject to appeal, but the *Mendoza* holding directs litigants to wait until the judgment (including the award of attorney fees and costs) becomes final before disclosing the offer of judgment to the court so it can decide the effect on the attorney fees and costs. And there is no procedure in statute or rule for raising this issue, so each trial court who encounters it must create an ad-hoc procedure to consider the issue.

<u>TARGET</u>: A simple, clear procedure for litigants to follow during arbitration when an ORCP 54 offer of judgment might affect fees and costs.

Litigants, arbitrators, and courts should have a simple process for cases when an offer of judgment may affect the attorney fees and costs after an arbitration and the case is not appealed to trial de novo.

<u>PROPOSAL</u>: Revise ORS 36.425(6) to have the arbitrator consider and determine the effect of any ORCP 54 offers of judgments on the attorney fees and costs after submitting the arbitration award to the court.

ORS 36.425
Filing of decision and award

(6) Within seven days after the filing of a decision and award under subsection (1) of this section, a party may file with the court and serve on the other parties to the arbitration written exceptions directed solely to the award or denial of attorney fees or costs. Exceptions under this subsection may be directed to the legal grounds for an award or denial of attorney fees or costs, or to the amount of the award. **Any claim or defense pursuant to ORCP 54E offer to allow judgment must be filed as exceptions under this subsection.** Any party opposing the exceptions must file a written response with the court and serve a copy of the response on the party filing the exceptions. Filing and service of the response must be made within seven days after the service of the exceptions on the responding party. A judge of the court shall decide the issue and enter a decision on the award of attorney fees and costs. [*If the judge fails to enter a decision on the award within 20 days after the filing of the exceptions, the award of attorney fees and costs shall be considered affirmed.*] The filing of exceptions under this subsection does not constitute an appeal under subsection (2) of this section and does not affect the finality of the award in any way other than as specifically provided in this subsection.