MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Monday, February 13, 2023, 12:00 p.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Troy S. Bundy
Kenneth C. Crowley
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Drake Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Hon. Scott Shorr
Tina Stupasky
Stephen Voorhees
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Derek Larwick
Scott O'Donnell
Margurite Weeks

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7	ORCP 1	ORCP 57	Lawyer Civility	ORCP 7	ORCP 54/ORS 36.425
ORCP 35	ORCP 4	ORCP 58	Lis pendens	ORCP 39	
ORCP 39	ORCP 14	ORCP 60	One set of rules	ORCP 55	
ORCP 55	ORCP 15	ORCP 68	Probate/trust	ORCP 57	
ORCP 57	ORCP 16	ORCP 69	litigation	ORCP 58	
ORCP 58	ORCP 17	ORCP 71	Quick hearings	ORCP 69	
ORCP 69	ORCP 18	Abatement	Self-represented		
ORS 45.400	ORCP 21	Affidaviting judges	litigants		
ORS 46.415	ORCP 22	Arbitration/mediation	Standardized forms		
	ORCP 23	Collaborative practice	Statutory fees		
	ORCP 27	Expedited trial	Trial judges		
	ORCP 32	Family law rules	UTCR		
	ORCP 47	Federalized rules			
	ORCP 52	Interpreters			

I. Call to Order

Mr. Crowley called the meeting to order at 9:27 a.m.

II. Administrative Matters

A. Executive Assistant

Judge Peterson explained that it was unusual for the Council to have a special meeting to approve minutes, and that this was the first time it had happened during his tenure on the Council. He stated that, during this biennium, Ms. Nilsson had helped her mother relocate to New York, dealt with her mother's medical crisis, and then moved overseas with her family to Sweden.

Judge Peterson informed the Council that he has been in negotiations with the law school, which is in partnership with the Council and handles its funds and employment needs, to terminate Ms. Nilsson as an employee and make her an independent contractor so that she can be paid in Sweden. The pandemic has shown that remote work is quite possible. It would cost the Council a bit extra because of Swedish taxes; however, the Council has adequate funds to cover the increased costs, and Ms. Nilsson has skills and institutional knowledge that make her somewhat invaluable.

Mr. Crowley asked whether the Council would be asked to ratify or approve the independent contract at some point. Judge Peterson stated that approval was not necessarily needed, but that he wanted the Council to be aware, since it would have an impact on the budget. Mr. Crowley stated that, in his almost eight years on the Council, Ms. Nilsson has been one of the two amazing fixtures. He stated that he has been incredibly impressed with Ms. Nilsson's development of the website, which has become a very useful and user-friendly tool with all kinds of great information. He stated that he appreciates the work that Ms. Nilsson has done to keep the Council running. Judge Peterson stated that he cannot imagine finding somebody else with the skills and institutional knowledge that Ms. Nilsson has, and that he just wanted to inform the Council of his intention to keep Ms. Nilsson associated with the Council, but as an independent contractor.

B. Approval of Meeting Minutes

Mr. Crowley asked whether the Council would prefer to review each individual meeting individually, or whether it was preferable to make a motion to approve all minutes as a group. Mr. Goehler made a motion to approve the minutes for the May 14, 2022; June 11, 2022; August 27, 2022; September 17, 2022; and December 10, 2022, meetings as drafted. Mr. Bundy seconded the motion, which was approved unanimously with no abstentions.

III. New Business

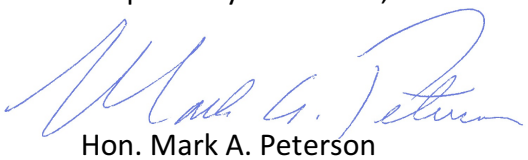
A. Council's Presentation to the House Judiciary Committee

Judge Peterson explained that the House Judiciary Committee had asked the Council to make a presentation. The Council's Legislative Advisory Committee members were not available on the short notice that was provided, so Mr. Andersen and Judge Peterson went to Salem and presented the work of the Council this biennium. Judge Peterson stated that, during his time on the Council, the Legislature had never asked for a presentation. He noted that he and Mr. Andersen had received positive feedback. At one point during the presentation, a legislator asked what a peremptory challenge was. Since most of the members of the Judiciary Committee are not lawyers, Judge Peterson's approach was to convince them that the Legislature had created a good body that does careful, deliberative, and transparent work that the Legislature never wants or needs to think about. He stated that he believes that he and Mr. Andersen accomplished that mission.

IV. Adjournment

Mr. Crowley adjourned the meeting at 12:11 p.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT 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

Members Absent:

Hon. Benjamin Bloom
Troy S. Bundy

Guests:

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

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 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		
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	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)]

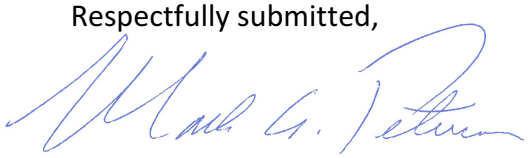
Judge Peterson explained that the Consumer Law Section was suggesting a modification to ORS 36.425(6) (Appendix G) to create a simple process for cases when an offer of

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, June 11, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Kelly L. Andersen
Hon. Benjamin Bloom
Kenneth C. Crowley
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Derek Larwick
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Scott O'Donnell
Hon. Scott Shorr
Jeffrey S. Young

Members Absent:

Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Nadia Dahab
Hon. Melvin Oden-Orr
Tina Stupasky
Stephen Voorhees
Margurite Weeks

Guests:

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

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 35 (Vexatious Litigants)	ORCP 1	ORCP 71	ORCP 7		ORCP 54/ORS 36.425
ORCP 39	ORCP 4	Abatement	ORCP 39		
ORCP 55	ORCP 14	Affidaviting judges	ORCP 55		
ORCP 57	ORCP 15	Arbitration/mediation	ORCP 58		
ORCP 58	ORCP 16	Collaborative practice	ORCP 69		
	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				

NOTE: The Council did not discuss items of business in the order presented on the agenda.

I. Call to Order

Mr. Crowley called the meeting to order at 9:30 a.m.

II. Approval of May 14, 2022, Minutes

Mr. Crowley explained that the May 14, 2022, minutes were not yet completed and that they would be approved at a later time.

III. Administrative Matters

A. Legislative Counsel's Proposed New Publication

Judge Peterson explained that, for the last few biennia, he had been encouraging the Office of Legislative Counsel (LC) to create a publication that contains the Oregon Rules of Civil Procedure (ORCP), similar to LC's family law, criminal law, and landlord tenant law publications. He noted that Thomson Reuters' publication uses small print so it is not very user friendly, it costs more than $300, and it contains additional rules that are not helpful to most practitioners. Judge Peterson stated that LC has now decided to create a publication containing the ORCP. He stated that his proposal was to include the ORCP, the Oregon Evidence Code, and the Uniform Trial Court Rules (UTCR), with permission from the Oregon Judicial Department (OJD). The benefits will be that it will be a thinner volume that will be easy to take to court, and that it will presumably be less expensive.

Judge Peterson stated that he had also proposed that staff comments be included in the volume, but noted that this may not be workable. Ms. Nilsson had asked whether an electronic version of the book would be available, and suggested that a link to the Council website for comments would then be possible. Judge Peterson stated that he has not received an answer as to whether there would be an electronic version, nor as to what exactly the book would contain. However, he hoped that it would be thinner and less expensive for practitioners, and believed that it will be a real service to the bar to have such a book that can go to counsel table with lawyers at trial.

Mr. Crowley stated that the book sounds like a great idea, and that making the rules more available is better for everyone, particularly if an electronic link is available. He also stated that he promotes the Council website at every opportunity, because there is so much useful information there that many people are not aware even exists. Judge Peterson noted that, before Ms. Nilsson joined Council staff, the website did not exist.

The website is a result of her hard work, and it is still a work in progress, but it is so much more useful than having bound volumes of the Council's work in seven law libraries all located along the Interstate 5 corridor. Mr. Crowley agreed.

B. Court of Appeals Vacancy

Judge Peterson reminded the Council that Judge Roger DeHoog had been appointed to the Oregon Supreme Court and had therefore resigned his position on the Council. Judge Scott Shorr was appointed to the Court of Appeals position on the Council and joined the Council for his first meeting. Judge Peterson welcomed Judge Shorr, who introduced himself and stated that he was pleased to join the Council.

IV. Old Business

A. Committee Reports

1. Rule 55 Committee

Judge Norby stated that, at the last Council meeting, the Council had asked her to add language to the proposed form to invite people who are using the form to explain what their efforts had been to contact the person who subpoenaed them. Ms. Nilsson explained that those changes were highlighted in blue on Appendix A, and that there were a few staff suggestions that were highlighted in green as well.

Judge Peterson stated that the intent of the new language is basically to reduce the number of motions that get filed frivolously by including what is essentially a UTCR 5.010 conferral obligation that states that, if a witness is going to file a motion to quash the subpoena, that witness must make a reasonable effort to contact the attorney issuing the subpoena. He explained that the language that Judge Norby had crafted requires the witness not only to say that they did confer, but to explain how, and also states that the motion will be denied if no reasonable effort was made. He stated that this is an excellent addition.

Judge Bloom suggested using the word "resolve" instead of "solve." Judge Norby explained that she thought that a non-lawyer might understand "solve" better than "resolve," but that she was not committed to that word. Judge Jon Hill noted that the Council had discussed the issue at length at the last meeting and that Judge Norby had come up with good language to resolve the issue. He made a motion to put the proposed amendment on the publication agenda in September, with the change of the word "solve" to "resolve." Judge Leith seconded the

motion.

Mr. Crowley asked Judge Peterson for clarification about what it means to vote to move the proposed amendment to the September publication docket. He asked whether it would be possible to make additional changes at the September meeting. Judge Peterson explained that changes can be made before publication in September. He strongly urged Council members to take a hard look at this draft amendment in the next month or so and, if they see anything of concern, to contact Council staff, who can put the issue before the entire Council to try to work out a solution. He stated that it is preferable not to engage in wordsmithery on the fly at the September meeting.

Judge Peterson also pointed out three minor staff changes, highlighted in green. One change was in subparagraph A(1)(a)(v) to include a missing reference. The second was to include the word "substantially" in supbaraph A(1)(a)(vi). The last was to change the word "upon" to "on" in paragraph B(1)(a).

Mr. Crowley called for a vote on Judge Jon Hill's motion, which was passed unanimously by voice vote.

2. Rule 57 Committee

Ms. Holley referred the Council to Appendix B, which contains 4 versions of draft amendments to Rule 57. Draft 2A uses only the word "unconscious" when referring to bias. Draft 2B uses the word "unconscious" and includes language that states that the totality of the circumstances may include, among other factors, whether the party challenged the same juror for cause. Draft 2C includes the words "unconscious," "implicit," and "institutional." Draft 2D includes the 3 words in Draft 2C as well as the language about totality of the circumstances referred to in draft 2B. Each version also includes changes by staff not intended to affect the operation of the rule.

Ms. Holley walked the Council through draft 2D, the draft with the most proposed changes up for debate. She noted that Council staff had moved the definitions to the top of subsection D(1). She stated that the only potential issue she saw with this change is that "unconscious" bias is only used in subsection D(4) of the current rule, which would become subsection D(5) in the proposed amendment. She did not necessarily see it as a big problem, and Ms. Nilsson had explained it in a way that makes sense to her, but she wanted to explain it for the Council. Ms. Holley pointed out that "implicit" bias is also defined to be a bias of which a

person may be aware, although the person may be unaware of its association with unlawful discrimination. She noted that, to her, that is the distinction between implicit and unconscious bias. She referred to the example of a person who is aware that they do not like people who do not speak English, but who is not aware that this dislike can be associated with race and nationality discrimination. Ms. Holley asked whether the Council wanted to vote on whether to only include unconscious bias in the rule, or to keep implicit and institutional bias there as well.

Judge Oden-Orr asked where the definition of implicit bias was derived from. Ms. Holley stated that she had crafted it herself, as she did not find one in any other rule that made the same kind of distinction. Judge Oden-Orr stated that there is case law that has found that implicit bias supported a claim for unlawful discrimination. He also stated that his reading has suggested that the words "implicit" and "unconscious" are used interchangeably. Ms. Holley agreed that they can be used interchangeably, and that creating this definition would be setting out a new distinction between the two terms. She stated that the reason she feels that the distinction is important is that, for example, a person may know that they have a bias against people who have been arrested, but they may not understand that police contacts are associated with race.

Judge Norm Hill pointed out that having two separate definitions effectively operationalizes them in a way that is actually substantively different. If this is not the intention, what is the reason for adding unconscious bias? Ms. Holley reiterated the example of the person who is prejudiced against non-English speakers, but claims that it is not based on race. She expressed concern that, without the two definitions, no clear link is made to unlawful bias. Judge Norm Hill asked whether that would be an actual bias. Ms Holley stated that it would not necessarily be actual bias. She stated that a person can be biased against people who have yellow shirts, which is not an unlawful bias. However, if everyone living in Multnomah County who is Latinx has been ordered by ordinance to wear yellow shirts, and a person states that they are biased against people with yellow shirts, they could still claim that it is not a bias against people who are Latinx.

Judge Norm Hill stated that his question is whether the proposed amendment would treat unconscious bias differently from implicit bias in the exercise of peremptory challenges. Ms. Holley stated that it is possible that it would not. She noted that the Washington, Connecticut, and California rules all say "unconscious, implicit, and institutional bias." She opined that it is like an overlapping Venn diagram where all three can be related, but not necessarily the same. She expressed concern that removing unconscious bias may give rise to arguments

that the Council is not intending to support. Judge Norm Hill stated that the question is what is being done with the definitions, not the definitions themselves. He stated that he did not know that he could divorce the definition from the operationalization of it. Ms. Holley stated that she did not know that they would need to be divorced. She stated that she thinks that the purpose is to cover all types of bias and not to have a question of whether something is not covered based on a kind of nuanced argument.

Mr. Crowley stated that he would need to see how the definitions are being used in the rest of the rule before voting to keep them in the rule or to take them out. Judge Jon Hill noted that, at a previous Council meeting, there was a good discussion regarding how each definition of bias could be thought about by the court. Ms. Holley stated that the idea of unconscious bias was a situation where a judge feels that exclusion of a juror would reduce confidence in the fairness of the system, and appear discriminatory whether or not that is the intent. Including unconscious bias in the rule would give the court the discretion to deny a peremptory challenge in order to promote justice and and fairness and confidence in the system. Ms. Holley pointed out that, in paragraph D(5)(e), in making the determination on whether to exclude the juror, 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. This also means that, even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding a juror would more likely than not 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 that harm.

Judge Norm Hill asked what standards the trial judge would use to make that determination, as opposed to simply imposing their own view of what will advance social justice within the jury system. Ms. Holley stated that, under paragraph D(5)(c), if there is an objection to the exercise of a peremptory challenge, the party exercising the peremptory challenge must articulate the reasons supporting it that are not pretextual or historically associated with discrimination. Then the objecting party may present evidence or argument that the stated reason for the objection is pretextual or is historically associated with discrimination, whether the discrimination is unconscious, implicit, or institutional. The judge would then listen to the argument, consider the totality of the circumstances, and explain their reasoning on the record. Judge Norm Hill stated that it is one thing to look at whether the reasoning given is real or pretextual. He stated that he understands that and is comfortable being able to

ascertain that. He expressed concern about being able to determine how that exercise of the peremptory challenge will be viewed by the community at large with respect to the fairness of the jury. Ms. Holley suggested that the judge would consider the totality of the circumstances. Judge Norm Hill stated that this phrase does not tell him what objective standards he should be looking at. Without such a list, he is left with his own subjective opinion as the trial judge, which is going to look different from courtroom to courtroom and jurisdiction to jurisdiction. He stated that this frightens him, because, if the rule is standardless, confidence in the system is lost.

Ms. Holley stated that she understood Judge Norm Hill's concern. However, the intent of the rule is that the objecting party would always have the burden to prove that the peremptory challenge is more likely than not historically associated with discrimination, and that granting it, regardless of whether or not the judge finds a bad motive on the part of counsel making the peremptory challenge, would contribute to lack of faith in the fairness of the justice syatem. Judge Peterson stated that he prefers this suggested approach to Washington's rule. For one thing, Washington's factors are very substantive. In addition, they may not work and the list may not be sufficiently expansive. He noted that it is the quality of the discussion of the reasons posited by the person making the challenge that will influence the judge's decision. The judge will listen to the arguments of counsel and decide based on who has made a better case.

Judge Jon Hill asked whether the Council should take a vote about keeping all three kinds of bias or just one. Judge Leith stated that he was in favor of including only unconscious bias. He stated that it seems to him that unconscious bias is what the Council is trying to get at, and that including the other definitions turns the rule into a little bit of a word soup, with the need to untangle what those other words mean. He stated that he understood from workgroup discussions that the desire to include institutional bias was to account for situations where, for example, removing the only African American from the jury would send a bad message or potentially harm the jury system. However, it seems to him that it will be a miscarriage of justice to disallow a valid peremptory challenge just because the juror happens to be African American. He stated that he was not certain that is the correct position for the Council to take. He observed that the Council should be trying to prevent parties from exercising peremptory challenges in ways that are actually biased, and he believes that goal is accomplished with just using the word "unconscious."

Judge Norm Hill asked whether "protected status" refers to First Amendment

issues, or is simply from an employment discrimination standpoint. Ms. Holley noted that the phrase "protected characteristic" is more accurate to Oregon's discrimination law. She stated that race, ethnicity, sex, and gender identity are characteristics of a person, but that status could potentially be read to include speech or whistleblower status.

Judge Norm Hill presented the hypothetical situation of a criminal case with a victim who is a person of color and a potential juror with a big confederate flag on his shirt. With the proposed language in the draft amendment, can the prosecutor exercise a peremptory challenge for that potential juror after asking whether they can be fair and getting an affirmative reply? The prosecutor would be basing their peremptory challenge on the conclusions drawn from the shirt. Ms. Holley stated that this speaks to the actual bias issue, because the shirt is potentially an expression of actual bias. However, a party may not exercise a peremptory challenge on the basis of any status protected by Oregon or federal discrimination law. Judge Norm Hill then gave the hypothetical situation of one African American on an otherwise all-white jury panel in a civil action based on police misconduct. A prosecutor might have a conversation with that juror about their interactions with and attitudes toward police, and their response may not rise to the level of a for-cause challenge, but enough to tell the prosecutor that the person's attitudes regarding the police are probably not going to make them a good juror for the state. Would the prosecutor be allowed to exclude that juror under the proposed amendment? Ms. Holley stated that the prosecutor would be able to make a peremptory challenge, the other side would be able to object, and the judge would need to articulate on the record whether the judge believes that exclusion would impact the system. The consideration would be whether exclusion would more likely than not contribute to implicit, institutional, or unconscious bias sufficient to harm a party or the excluded juror, and the reasons given in support of the challenge are insufficient to outweigh the risk of harm.

Judge Norm Hill stated that he was trying to drill down on how to make the determination of whether excluding the juror is going to harm that juror or the system. Ms. Holley stated that a judge would rely on the arguments of both parties. Judge Norm Hill pointed out that a judge would need to have a standard to weigh that against because, at the end of the day, it cannot just be what the judge thinks. Judges need to follow the law. Ms. Holley noted that the question is whether it is more likely than not that excluding the juror would contribute to implicit, institutional, or unconscious bias. She stated that there is case law, including *Batson v. Kentucky*, 476 U.S. 79 (1986), that the parties could use to argue for or against that point. She pointed out that the workgroup did not want

to outline any factors from that case law too explicitly, because case law does change sometimes. There was also concern about creating a path for someone to know the arguments not to make to perpetuate intentional discrimination in disguise.

Judge Oden-Orr asked whether the amendment was intending to capture issues other than race, ethnicity, and sex, more broadly than they already exist in the current rule. Ms. Holley stated that feedback from members of the workgroup indicated that the desire was to capture the characteristics listed in the public accommodation law, ORS 659A.403. As an alternative to referring to that statute in the draft amendment, the language in the amendment was chosen.

Justice Garrett asked about the language in paragraph D(5)(3) that states that judges should look at the totality of the circumstances from the perspective of an objective, reasonable person who is aware of unconscious bias. He stated that he was not certain that he fully understands what the phrase "aware of unconscious bias" means. "Unconscious bias" is earlier defined to mean bias that one is not aware of. But what is being expected of the trial judge in this situation in terms of what they are and are not expected to understand? Ms. Holley stated that this language was taken from the Washington rule, and that the Council might want to modify it, but that the basic idea is is acknowledging that these forms of bias exist. Justice Garrett clarified that it is meant to say "an objective reasonable person who understands that unconscious bias exists exists." Ms. Holley agreed.

Judge Jon Hill asked Ms. Nilsson to conduct a poll about whether just unconscious bias should be included in the rule, or whether implicit, institutional, and unconscious bias should be included. Council members voted 11-4 to only include unconscious bias in the rule.

Ms. Holley referred the Council to draft 2B, which includes only unconscious bias and also includes Judge Oden-Orr's language about considering for-cause challenges in the totality of the circumstances. She stated that the language in new paragraph D(2)(b) related to disability had been revised. She asked Aja Holland from the Oregon Judicial Department (OJD) to talk about some language that the OJD is suggesting to replace the language in the draft: "A court does not need to provide accommodation for the juror's impairment if that impairment would impose an undue hardship on the courts or the juror."

Ms. Holland explained that Title 1 of the federal Americans With Disabilities Act (ADA) deals generally with employers and employees. The standard that the OJD

applies in courts for jury service is from Title 2 of the ADA, which deals with programs and services of state and local governments, and that standard is a little bit different than the undue hardship standard. There are two parts to it. If the person is requesting a communication-related accommodation, the court has to provide the accommodation unless it would fundamentally alter the nature of the service or program or activity, or create an undue financial and administrative burden. If it is a non-communication related accommodation, the court would have to grant it unless it the modification would fundamentally alter the nature of the service. program, or activity. Ms. Holland stated that the OJD's concern is to ensure that the language in Rule 57 comports with current federal law, and the language as drafted may not do so.

Ms. Holley expressed concern that using language similar to that found in the ADA would limit the court beyond what she thinks the realistic limitations are. Rather than just undue hardship on the operation of the court, which seems to be the same as undue financial and administrative burdens, the modification would have to fundamentally alter the nature of jury service. She also pointed out that the draft language also allows for the possibility that it could be an undue hardship on the juror to try to accommodate them, and allows the juror to say that they do not wish to be accommodated. She stated that she believes that this is consistent with the spirit of the law. Ms. Holland stated that, since the standard is already in federal law, there may be a perceived conflict between the ORCP and the federal law, In that case, she believes that the courts would have to apply the federal law. Ms. Holley stated that she did not believe that there is a conflict, because the federal law is meant to protect people with disabilities. She suggested that the language "undue financial and administrative burden" could be used instead of "undue hardship."

Mr. Crowley stated that this conversation makes him uncomfortable as a lawyer for the Department of Justice (DOJ), because the DOJ would be representing the OJD if they were sued for discrimination based on language like this. He also expressed concern that the Council had not really dug into what the best approach is, and stated that it feels a bit awkward to be considering it at this point. Judge Norm Hill asked what the problem is with the existing language. Ms. Holley stated that she did not think there was a problem, and that she actually thinks that the suggestion from the OJD is problematic because it will invite the opportunity for additional issues. She stated that the draft language provides the protections that the federal law provides, and then does a little bit more to create flexibility for what is going to serve the parties and the juror. She did agree that there is case law around the precise language in Title 2. Ms. Holland explained

that part of OJD's concern is that other states look to that Title 2 wording, and there is a lot of case law that interprets that language. One of her concerns about retaining the undue hardship language in the draft would be that the courts could lose all of the case law that they look to when determining whether to grant an accommodation. Ms. Holley stated that she did not believe that the case law would be lost if the current language in the draft were retained. She stated that undue financial burden can fall within undue hardship.

Judge Norm Hill asked for clarification of OJD's position about why the current language in ORCP 57 would need to be changed. Ms. Holland explained that the OJD had not identified any issue with the existing language. The issue was more that, if the Council feels the need to include the standard for whether an accommodation has to be granted in the amendment, the OJD wanted to make sure that it reflects the federal law that applies. Judge Norm Hill stated that he did not understand the reason for the change to the language in the existing rule. Ms. Holley explained that the reason for the change is that "mental or physical defect" is outdated, offensive language and not appropriate to use. Since that language was being changed, her thought was to track the actual law as well. And now OJD is providing feedback on that change.

Mr. Andersen agreed that the language about mental or physical defects needs to be updated. He expressed concern that the rule seems to have become much longer and more complicated, with a short subsection having been expanded to become much longer, and suggested that it would be better to make amendments to the existing rule rather than making a complete overhaul. That way, the Council would really know what is being changed. Ms. Holley asked for clarification on which area Mr. Andersen was referencing. Mr. Andersen stated that he was referring to subsection D(4). Ms. Holley asked if the conversation about subsection D(1) could be completed before moving on to the rest of the rule. Mr. Andersen stated that his concern is that the Council is laboring with a lot of branches before deciding where the trunk really is.

Judge Norm Hill suggested that, if the problem is the inappropriate language about disability, the Council can just fix that language to be more appropriate to modern ears and do nothing more with it. That would solve OJD's issue. Ms. Holley stated that this is a potential solution, although she expressed concern that it might cause confusion in the way that it comports with the law. She suggested the language, "the existence of a mental or physical impairment, which satisfies the court that the challenged person is unable to perform the essential duties of a juror," which is more consistent with discrimination law. Judge Norm Hill stated

that he would be in favor of that. Judge Jon Hlll stated that he preferred the OJD's language. Ms. Holland stated that she actually preferred the suggestion that Judge Norm Hill and Ms. Holley had crafted.

Ms. Holley suggested examining the new paragraph D(5)(b), which deals with objections to peremptory challenges. She stated that Judge Norm Hill's suggestion about adding standards could be included here, such as, "totality of the circumstances may include argument or evidence from the parties," and just include other factors after that. Judge Jon Hill stated that he liked that idea, but he also liked the idea of considering whether or not the challenging party had requested a for-cause challenge as well. Ms. Holley reminded the Council that the workgroup did not want to set out many different specifics, but argument and evidence from the parties, existing case law, and perhaps two other suggestions work. She asked Judge Norm Hill if this would be acceptable. Judge Norm Hill stated that he thought that it would be better.

Judge Norm Hill asked about the standard in subparagraph D(5)(d)(ii), which states that, even when no subjective intent to exclude is perceived as motivation for the challenge, excluding the juror would more likely than not contribute to unconscious bias. He asked for an explanation of "contribute to unconscious bias." Ms. Holley stated that the complete phrase is, "contribute to unconscious bias harming a party or the excluded juror," and explained that it would be something like the example of a judge having the authority to say that a challenge is suspect because it challenges the only Black or Asian American juror. Judge Norm Hill stated that the phrase hits his ear wrong and he does not understand it. Judge Oden-Orr gave the example of a prosecutor, in response to a challenge, saying that a witness indicated that they had police contact, and that unconscious bias could be reflected in that comment. Judge Norm Hill stated that this is not contributing to bias but, rather, it is the product of unconscious bias on the part of the prosecutor. He stated that this is what he is getting hung up on. Ms. Holley stated that this is not the part that would fall under subparagraph D(5)(d)(i). She noted that subparagraph D(5)(d)(ii) is intended to cover a scenario where the judge says that, even though there is no intent to discriminate, sustaining the peremptory is going to reduce faith in the system and cause harm or deprive people of rights. Ms. Nilsson asked whether the word "unconscious" should be included, since the type of bias Ms. Holley was describing seemed to be more institutional. Ms. Holley stated that the point is that the bias is not intentional. The party does not have to say that the prosecutor is racist. The party can just say that, while the prosecutor is doing the best they can toward antiracism, they have concerns about whether the challenge will create a jury panel that maintains faith

in the system.

Judge Norm Hill stated that this might be the source of his confusion, because he thinks of unconscious bias as a mental process that goes into his decision making as an actor in the system, similar to what Judge Oden-Orr described, but he stated that he does not feel that this is what is being captured here. What is being captured here is a larger impact on the system. Ms. Holley agreed that it is more like institutional bias, which is why including all three words makes sense. Judge Norm Hill stated that this is why he said that it depends on how the language is used. He stated that, if the concept is that it does not necessarily have anything to with the parties or the juror but, rather, is an attempt to protect the system as a whole, the language should just state that.

Judge Jon Hill suggested that stating what can be considered in paragraph D(5)(e) would inform the paragraphs above it. He reiterated that the workgroup did not want to include an exhaustive list, but he opined that there should be some list there, because that will inform what the Council is trying to do. Ms. Holley suggested, "may include, among other factors, argument from the parties, case law, and whether the party challenged the same juror." Judge Jon Hill suggested that the list of guidelines to consider might need some time and consideration to craft.

Judge Norm Hill stated that he has a problem with the language in subparagraph D(5)(d)(ii) that talks about harm to a party, because of course removal of the potential juror is going to harm a party. That is the reason that the lawyer wants them out. Exercising a peremptory, presumably in every case, is harmful to the a party, because that is why the opposing side is exercising it. Ms. Holley opined that it is the opposite: that the peremptory is being exercised to protect against a bias that the lawyer believes exists. Judge Norm Hill stated that sometimes a lawyer is exercising a peremptory challenge simply because there is a better juror sitting in the next seat.

Judge Norm Hill thanked Ms. Holley for the incredible work that has been done on the draft amendment, which will move the ball so much further than its current position. However, he stated that he thinks that there is a fundamental question that has not been answered: does the Council think that it is appropriate for the court to take into consideration the extrajudicial societal effects that the exercise of peremptory challenges will have? Ms. Holley reiterated that the workgroup's answer to that question was a resounding yes, that the court should consider

these institutional impacts. Judge Norm Hill asked whether this is a consensus within the Council as well. Ms. Holley stated that, at the last Council meeting, there was no fundamental disagreement with the concept.

Judge Peterson stated that it was his understanding that the idea was to say that it would not contribute to the public's perception of fundamental fairness, rather than harm to the parties. Ms. Holley stated that the word “harming” was intended to refer to whether whether the peremptory challenge is discriminatory based on a protected class. Judge Norm Hill stated that it appears that there is an attempt to bring in a de facto discrimination concept into it, as in, “even though you did not intend it to be discriminatory, it had that effect.” He suggested that, if that is what the Council is trying to capture, perhaps it needs to be stated in a more direct way than the proposed language. Ms. Holley asked whether “more likely than not have discriminatory effect” would work. Judge Oden-Orr suggested, “Even when no subjective intent to exclude for a protected status motivated the peremptory challenge, excluding the juror would more likely than not harm a party or the excluded juror.”

Justice Garrett stated that he has some of the same questions that Judge Norm Hill does. He stated that, if the idea is to ask the trial judge to look past pretext and past the question of whether there was a subjective intent to discriminate, and to look more deeply into issues of unconscious bias, it might be sufficient to say, “if the court determines that unconscious bias was at work, the challenge should be rejected.” He noted that this would place the focus on what was going on as opposed to what the broader systemic effects might be. He pointed out that this is not because of a lack of concern about the systemic effects but, rather, if systemic effects are the focus, all of the questions that Judge Norm Hill raises arise. Ms. Holley stated that this is a fair point, because there does not necessarily have to be a party to accusing another party; it is more about what the impact would be. Judge Norm Hill reiterated that his primary concern is how to determine this in a principled way as a trial judge without simply substituting his own values for those of the lawyer making the challenge, because unconscious bias is necessarily subjective. Judge Oden-Orr stated that the Washington rule addresses that precise issue, with the statute doing the work for the judge. Ms. Holley pointed out that the list in Washington’s statute was derived from case law and that there is much case law to guide judges. Judge Norm Hill pointed out that the workgroup’s concern was that including such a list would lead to attorneys not making those arguments but, rather, coming up witih new pretextual arguments.

Ms. Nilsson conducted three polls as an attempt to guide the Council in further

drafting, although the meeting was coming to a close and there were no longer enough members to constitute a quorum. The first poll was whether to include factors to be considered along with the totality of the circumstances. Council members voted 6-3 to include factors. The second poll was whether one of those factors should be the previous exercise of a for-cause challenge. Council members voted 6-3 to include this as a factor. The third poll was whether to include argument from the parties and case law as factors. The Council voted 4-2 to include those factors.

Judge Norm Hill expressed concern that the draft amendment is going beyond *Batson* and that, the way it is set up, there may be no parameters. He stated that the thing that causes him the greatest concern is that a judge will need to make the determination as to whether or not the exercise of a peremptory in a case will have an injurious effect on the jury system or the community outside of the courtroom, and the only standard that judge will have is their own personal opinion. That makes him uncomfortable, and he thinks that is a dangerous place to be. Ms. Holley stated that, if that is the only standard that the judge has, the judge would sustain the challenge. Judge Norm Hill asked on what basis the challenge would be sustained. Ms. Holley stated that it would not have been proven more likely than not that there is harm. Judge Norm Hill asked what evidence a party would be able present to be able to carry that burden.

Judge Jon Hill suggested that the committee attempt to develop a list of more than one or two factors, perhaps not as detailed as Washington's statute, but more detailed than just a couple of things. He stated that bringing a new draft to the next Council meeting might help inform the discussion. Judge Norm Hill approved of that idea. He stated that he was having a hard time envisioning what evidence a party would present and how the judge would efficiently make a decision with a jury panel sitting in the other room ready to go. Ms. Holley opined that part of the evidence people would put on is all of the research about diverse jury pools making better and more fair decisions, as well as evidence about other discrimination cases and what has been found to be discriminatory. She did not think that the evidence would have to be super involved, and the burden would be on the party to show it to the judge.

Judge Peterson stated that, in *State v. Curry*, 298 Or App 377 (2019), the reasons that were provided for peremptory challenges to the jurors in question were not persuasive because they were factual observations that could also be said of other jurors, but these two jurors happened to be Black. Judge Norm Hill stated that this is a different question, a *Batson* question. Ms. Holley stated that it is not

necessarily a different question, just a different way to get at it. She stated that part of the reason for amending the rule is trying to bypass the problem that arose in that case, where one attorney was offended at being called racist. The amendment can bypass that in that an attorney does not have to call the opposing attorney consciously or unconsciously racist but, rather, just say that these two jurors are the same and that excluding this particular one runs the risk of the appearance of discrimination. Judge Norm Hill stated that the last piece is a significant change in what has been understood to be the rule. Judges would now be asked to consider not what is going on in their own courtrooms, but how their decisions will impact the community at large. He noted that he was not suggesting a debate on whether this is a good or bad thing, but it is different. In *Curry*, it was just a *Batson* question, and *Batson* does not tell the court to look at the community as a whole. Ms. Holley agreed.

Judge Norby noted that judges are always using their discretion, and that this discretion is often unguided. She stated that part of moving things forward is just teeing up the question. Judge Norm Hill pointed out that, ethically, judges make decisions in their courtrooms based on the facts and the law without regard to public opinion. One of the core functions of judges is not to be influenced. Ms. Holley stated that the rule does not say public opinion but, rather, harm to a party or juror.

Judge Jon Hill opined that, until a list of factors has been set out, there will be a lot of uncertainty. Judge Norby asked if the factors from Washington's statute could be borrowed. Ms. Holley stated that the workgroup had already recommended that Washington's list not be used. Judge Peterson stated that the list has issues, one of which is that it is incomplete. Ms. Holley noted that the list is also changeable, and that it is a different list from the one that is being discussed here. Washington's list is a list of presumptively invalid reasons, not factors for a judge to consider. Judge Norm Hill stated that they sort of plug the hole that *Batson* leaves open. Ms. Holley stated that her proposal for a list of factors would simply be, argument from the parties, case and statutory law, and whether the for-cause challenge was previously made. Judge Norby opined that those are not really factors in themselves, just how a person argues. She stated that this is an evolving area of understanding, with people's eyes being opened by the month to new and different ways of seeing, and that it is not simple to articulate. Ms. Holley stated that it boils down treating a person differently than how another person is treated in a way that creates harm, and the party making the objection to the challenge explaining how it creates harm. Judge Norby stated that developing factors that could be a guide to what creates harm would be helpful to judges.

Judge Norm Hlll stated that he was on board with the concept of the totality of the circumstances as the scope, but was still struggling with the target, or the goal line for the parties to get across. The concept of "harm to society" is very broad. Ms. Holley stated that it is not harm to society but, rather, a discriminatory component that will cause harm to a party or to a juror. Judge Norm Hill stated that, if someone intentionally discriminates against someone, that is harm by definition, and that is easy. The struggle is how to articulate the unintentional discrimination based on a perception that is inextricably linked to a person's race. Ms. Holley stated that it is similar to disparate impact. Judge Norm Hill stated that this was his point, that it has disparate impact. He understands and has no problem with the concept, but does not think that the rule includes something to show him when that threshold is met like one finds in disparate impact cases. Ms. Holley noted that disparate impact is a jury question, and it would similarly be a fact finding issue here. Judge Norm Hill agreed. He stated that another problem is that judges will have to be able to do this on the fly, to stop jury selection to have a separate factual determination as to whether or not the peremptory challenge is valid. That will not work in terms of court efficiency. It has to be a cleaner process, or it will collapse. Mr. Crowley asked the judges how often this issue arises, because he has not had it arise in the many jury trials in which he has been involved. Judge Jon Hill opined that it probably will not come up much but, when it does come up, it will be helpful for judges to have a roadmap, even if it is just a non-exclusive list of factors to consider.

Judge Norby pointed out that judges also have unconscious bias, and are being asked to recognize unconscious bias. She stated that, if people cannot always articulate their own unconscious bias, it will be difficult to articulate how to identify someone else's unconscious bias. Judge Norm Hill stated that this was the reason that the committee shifted away from trying to discern unconscious bias on behalf of the party exercising the peremptory and moved to looking at the impact instead.

Mr. Andersen stated that he would imagine that any judge conducting jury selection has to make some pretty quick decisions, and suggested that the rule should be easy to reference. He opined that fixing the language relating to disability, adding unconscious bias, adding protected status, and adding totality of the circumstances are the only changes necessary. Making these changes would retain the simplicity of the existing rule and make it easier for judges. Mr. Andersen stated that he appreciated the laudable and commendable efforts of the workgroup, but thinks that these changes are overkill. Judge Norm Hill stated that he would like to gently and respectfully push back a little bit. He stated that

his fear is that, if the Council does not act, the Legislature would act during the upcoming session to eliminate peremptory challenges as had happened in Arizona. And he believes that this would be a disservice to the justice system.

Ms. Holley agreed with Judge Norm Hill. She stated that she believes that the Council should work with the version that received support from the workgroup. One of the things that the Council tried to do was to include in the workgroup criminal lawyers and interest groups who experienced these disputed challenges more than civil lawyers do, and who may be more impacted. Ms. Nilsson pointed out that the rule is not actually much longer than the original rule, but the draft includes the deleted text from the current rule, which makes it look much longer. Judge Norm Hill stated that his primary motivation is to create a rule that, while it may not be perfect, does the very best to make improvements and preserve peremptory challenges as a general concept. Ms. Holley agreed. She stated that the current, workgroup-approved drafts have the best chance at addressing the majority of the concerns. There are still some disagreements, but the consenus is to move forward.

Ms. Holley suggested having Ms. Nilsson create a new draft incorporating the changes discussed today into draft 2B. Ms. Holley would then send that to the Council with a poll and an opportunity for comments. Judge Norm Hill suggested instead having a small group of no more than three or four people get together over the next month and work on crafting language to present to the Council at the August meeting. He stated that he would be happy to be a part of that group. Judge Jon Hill agreed. Judge Norm Hill suggested including Judge Oden-Orr in the group. Ms. Holley suggested including Judge Bronson James, because he had some good suggestions for language in past drafts of the rule.

Mr. Crowley and Judge Norby thanked Ms. Holley for her dedication and hard work.

3. Remote Hearings Committee

Mr. Andersen shared his screen and presented the latest draft amendment of Rule 39 (Appendix C). He explained that this draft reflected the changes discussed at the last Council meeting. Council members did not have any questions or comments. Ms. Holley made a motion to place the draft on the agenda for the September publication meeting. Mr. O'Donnell seconded the motion, which passed unanimously by voice vote.

Mr. Andersen then shared his screen and presented the latest draft amendment of Rule 58 (Appendix C) and asked if Council members had questions or comments. Judge Leith stated that he had no issues with the changes in regard to testimony by remote means part of the changes. However, he stated that he was troubled by the provision in subsection B(7) to preclude a judge from limiting argument unless it is at least two hours per party. He apologized if this change has been in previous drafts, but he just noticed it. Ms. Holley stated that this is not a change intended to affect the operation of the rule but, rather, a rewording of existing text. Judge Peterson agreed that the sentence was reworded to make it more clear. He stated that Judge Tom Ryan in Multnomah County had let the Council know last biennium that he had presided over a criminal trial where the defendant was self represented and had insisted on using the entire two hours to address the jury in closing argument. Judge Ryan felt that the time should be discretionary with the court. However, the Council felt fairly strongly that parties should be allowed the full two hours if they want them. He pointed out that most parties would be bright enough to start winding down when they see the jurors glaring at them. However, this biennium, Council staff saw that the existing language is unclear and written in the negative, and attempted to rewrite it so that it is easier to understand. Judge Leith stated that two hours would be unreasonable in a one-day trial, but he understood that this is not a change that affects the operation of the rule. Mr. Crowley stated that this may be a change that the Council would like to address at a later time.

Judge Norby stated that, based on what she has seen about the forthcoming Chief Justice Order (CJO) about expanding the need to provide remote opportunities, this change is really timely. She congratulated Mr. Andersen for promoting this change at the beginning of the biennium, because it looks like it will be even more important with the new CJO. Judge Bloom agreed. Judge Peterson also agreed and thanked Mr. Andersen.

Judge Norm Hill asked whether the minutes are clear that language in this amendment does not require a stipulation. He expressed concern that the amendment implies that remote testimony can only occur if there is a stipulation between the parties subject to the court's approval. However, there are times when one party wants remote testimony, the other party objects, and the court can still go through the factors and make that determination. He stated that he just wants it to be clear that the Council is not not changing that. He noted that it may be enough that minutes or the staff comments reflect that, but he thinks that it is important to point out that the intention is not to give a veto to one of the parties and to the court. Judge Leith suggested that a clarification might be “the

parties may stipulate or the court may order...” Ms. Holley stated that the words “the parties may stipulate” could be removed. Judge Peterson pointed out that ORS 45.400 gives the parties the right to move for remote testimony without a stipulation, so the ability of the parties to stipulate gives a little enhancement to their ability to get the judge to go along with it. Mr. Andersen asked whether, “subject to court approval, the parties may stipulate, or the court may order that testimony be taken by remote means” would solve the problem. Ms. Nilsson pointed out that the court’s order would not be subject to court approval. Ms. Holley agreed. She stated that it may make more sense to say, “subject to court approval, testimony may be taken by remote means.” Ms. Nilsson stated that this would leave it up to the court whether or not the parties stipulated to it.

Mr. Larwick stated that his understanding for including the language about stipulation in the first place was to encourage the court to honor the stipulations of the parties and to try to encourage the parties to work it out among themselves. So, even though it might not be a requirement, it encourages cooperation. Mr. Goehler suggested changing the language to read, “The court may order that testimony be taken by remote means. Additionally, subject to court approval, the parties may stipulate that testimony be taken by remote means.” Mr. Larwick suggested, “The court may order that testimony be taken by remote means or approve a stipulation by the parties that testimony be taken by remote means." Judge Norby suggested, “The court may consider whether the parties stipulated to remote testimony when deciding whether to allow it.” Ms. Holley suggested, “The court may order or approve a stipulation of the parties that testimony be taken by remote means.”

Mr. Andersen stated that the point is well taken, and that he could make one more run at the language. Judge Norm Hill stated that there may not be a need to change the language if the Council feels that a note in the staff comments saying that the change is not intended to modify the Court's authority to order and to resolve disputes about remote testimony is enough. Mr. Andersen stated that he could see a judge saying that they would love to allow the remote testimony but, according to this rule, both parties have to stipulate to it and they do not have an alternative. Ms. Holley stated that she liked Mr. Goehler’s language. Judge Jon Hill made a motion to approve the draft of Rule 59 with Mr. Goehler’s language change. Ms. Holley seconded the motion.

Mr. Andersen stated that the second sentence seemed a bit redundant. Judge Bloom agreed, although he liked the concept. Mr. O’Donnell stated that he would rather have some redundancy than to have a judge be in the position of not being

able to feel they had the discretion to allow remote testimony. He also stated that he was not certain how many judges or litigants would be eager to go through the Council's minutes to find the intent behind the rule. Mr. Hood stated that he liked Mr. Goehler's first sentence, but he was not certain that the second sentence was necessary. Judge Bloom agreed. Ms. Holley agreed with Mr. Larwick that it encourages people to stipulate if it is suggested in the rule. Mr. O'Donnell stated that this may be true; however, if the tenor from the Chief Justice is going to encourage remote access, he does not envision a scenario where a judge is going to deny it. And, if the judge wants to deny it, the judge can deny it anyway.

Judge Peterson noted that this is the kind of discussion that should be taking place at this point in the biennium. He agreed that the language is a bit redundant, and suggested keeping the first sentence and inserting a sentence encouraging the parties to stipulate if that is the desire. Judge Norm Hill stated that he does not feel that it is the proper role of the rules to encourage the parties to do anything. Judge Bloom agreed, and stated that the Council is making rules, not telling people how to act. Mr. Young pointed out that the rule references ORS 45.400, which requires filing a motion 30 days beforehand if agreement cannot be reached. He believes that the reference to the statute encourages that kind of discussion and possibly stipulation. He stated the rule should just authorize the ability to order testimony by remote means.

Judge Jon Hill asked what the Council's thoughts were about Mr. Larwick's suggested language. Ms. Holley stated that her only issue with that language is what an approval looks like versus an order, and whether it will cause logistical confusion with the courts. Judge Norby pointed out that it is logistically messy already. She explained that, on a daily basis, there are some cases in which she is told that there has been an order signed to allow remote appearances, there are other cases in which no one asked but everyone is expecting it and the court allows it, and there are other cases where nobody asked but somebody expected them to ask. She opined that any guidance would be helpful, and that it will necessarily be a sort of fluid guidance as the process is worked out in the courts. Ms. Holley stated that Mr. Larwick's language solves the redundancy problem. Judge Leith agreed.

Mr. Andersen suggested going back to, "Subject to court approval, testimony may be taken by remote means." Mr. Crowley agreed. Judge Norby agreed. Judge Norm Hill stated that this language is most elegant and operationally accomplishes the goal, but it does not include the stipulation language that was desired. Mr. Crowley pointed out that lawyers probably know that they are more likely to get

court approval if they get a stipulation from the other side. Mr. Andersen stated that he thinks that it is implied that parties can file a motion or stipulate, and he thinks that the role of an attorney would require conferring before filing a motion. Judge Peterson stated that the statute gives factors the court needs to consider, so a lawyer filing a motion for remote testimony would want to take those factors into consideration and attempt to avoid any pushback from the other side. This encourages people to check with the other side and work it out.

Judge Leith suggested, "Subject to court approval under ORS 45.400(2), testimony may be taken by remote means." Mr. Andersen stated that he liked this language. Mr. O'Donnell stated that he liked this language better, because it directs people who are not familiar with ORS 45.400 to it right away, rather than just relying on the reference at the end of the new language that people may not think means anything. Mr. O'Donnell pointed out that, in this day and age, everyone knows that the person who objects to remote testimony would be well advised to have a bag over their head when they come into the courtroom.

Mr. Hood wondered why there should be a rule at all if it just references the statute. He stated that he liked the idea of being more up front and saying that testimony will be allowed by remote means subject to court approval if that is what the goal is. If the rule is going to simply say that remote testimony may be taken pursuant to the statute, he is not sure what amending the rule is going to do that the statute does not already do. Keeping the reference to the statute might also cause issues if there is any future conflict with the statute. He suggested removing the reference to the statute. Strengthening the ability of the court and the parties to be able to present remote testimony might just require a simple statement to that effect. Ms. Holley agreed that, if the intent is to say generally that it is at the court's discretion whether testimony is taken by remote means, the reference to the statute is not needed. She expressed concern that it may unintentionally impose some sort of limitation.

Mr. Andersen noted that ORS 45.400 is not as accessible in the minds of attorneys getting ready for trial as is ORCP 58. Having this information front and center in trial preparation and for judges to make rulings on remote testimony rather than having to go find what is in that statute is very valuable. Mr. Crowley noted that the Council will also be discussing a proposed modification to the statute that will make the time frame a little more flexible.

Judge Norm Hill asked about the timing of the rule. He stated that the Chief Justice of the Supreme Court was going to issue a CJO and he expressed concern

that the Council might do something that would not make sense depending on that order. He feared that the Council was spending a lot of time grappling in the dark, and wondered whether taking the best, most simple language now and moving it to the September agenda was the best idea, knowing that the issue might need to be addressed again after the issuance of the CJO. He stated that he would hate to see the Council spend time and energy coming up with something that becomes obsolete or is contradicted by what the Chief Justice is instructing judges to do in the courtroom.

Erin Pettigrew from the OJD stated that the Chief Justice is taking feedback now for a new CJO, in light of authority that was given by the Legislature to allow her to direct or permit any appearance to be by remote means notwithstanding any other statute. She stated that she was not in a position to say what the contents of that CJO will be. However, if there is a circumstance in which there are case types that are presumptively available to be remote, under the current statute the decision to override that is delegated to the presiding judge, who could in turn delegate that power to the judge of record for that case. Nevertheless, Ms. Pettigrew agreed with Judge Norm Hill that it is important to make sure that the Council and the Chief Justice are in alignment as the Council thinks about this rule. She stated that the need for clarity for litigants is important, and the Chief Justice shares that goal. Making sure that this rule clearly states that there is the availability of remote testimony is helpful.

Mr. Larwick stated that ORS 45.500 does not seem to suggest that stipulation of the parties alone is sufficient to allow the court to grant a motion for remote testimony. It has a number of factors listed that would constitute good cause. He stated that this is why he is reluctant to take out Mr. Andersen's original proposed language about stipulation of the parties. Otherwise, he worries that a court would look only to the factors in the statute and could potentially say that a motion was not made 30 days before trial and that it does not have the ability to allow the case to go forward. Alternatively, a court might only consider the factors of good cause that are shown in the statute and not give any weight at all to the stipulation between the parties. Since that is not particularly enumerated in the statute, perhaps it should be included in the proposed rule language.

Judge Peterson stated that he preferred Mr. Larwick's language because it does something more than the statute; it tells the parties that a stipulation is a good thing, and it allows the courts to consent with the stipulation. Mr. Goehler stated that he likes the idea of pushing forward simple language at this meeting, with the goal of maximum flexibility and maximum discretion with the court. He stated

that, if he is reading ORS 45.400 correctly, he is thinking of it narrowly as not limiting other ways that remote testimony can come in, but only addressing the motion component of it. What he thinks the Council should be clear about is that the ORCP are not a roadblock. If the ORCP say that the court has the authority to do this, and there are no restrictions, his view is that the statute only applies to motion situations.

Justice Garrett suggested a slight modification of Mr. Larwick's language: "The court may order, or approve a stipulation, that testimony be taken by remote means." Judge Jon Hill made a motion to strike the current first sentence in subsection F(1) of the draft amendment and substitute Justice Garrett's language, and to move the amended draft rule to the September publication agenda. Ms. Holley seconded the motion, which carried unanimously by voice vote.

Mr. Crowley asked the about the committee's recommendation to the Legislature to amend ORS 45.400. Judge Peterson explained that the suggestion is to change the 30-day notice requirement to, sufficiently in advance of the trial or hearing at which the remote testimony will be offered, allow the non-movant to challenge those factors specified in 3(b) and to advance those factors specified 3(c). He explained that this will give the court maximum discretion to let the other side be heard and to focus on the factors that are in the statute. Judge Peterson noted that a change in existing language in 3(c)(E) is proposed in light of a very robust discussion within the Council. The change is to lay out a little more clearly that the facilities and technology must cover the court, counsel, parties, and the witness. Based on the Council's discussion about bandwidth and other technological issues, the goal is to be sure that everyone can participate.

Judge Leith made a motion to approve recommending the change to ORS 45.400 to the Legislature. Judge Norby seconded the motion, which was approved unanimously by voice vote.

4. Vexatious Litigants Committee

Judge Jon Hill thanked Judge Norby, who has been the drafter of the proposed Rule 35. He stated that Aja Holland and Erin Pettigrew from the OJD had expressed some concerns about the statute of limitations and relation back and with regard to the proposed rule, and that he wanted to give them the opportunity to discuss those concerns.

Ms. Holland explained that the OJD's concern about the statute of limitations is

that, if a litigant has to request leave to file from the presiding judge and they are close to the statute of limitations when they file that motion, there could be a circumstance where that person misses the statute of limitations. She stated that Judge Norby had graciously accepted suggestions from the OJD in this new draft to make it clear that, if the presiding judge accepts the motion and allows the litigant to file, the date of filing relates back to the date that the original motion was filed, and makes clear that the litigant will not miss the statute of limitations in that case. She noted that this change is in section C. She also explained that there was a change in new section F from the last draft, in which a clerk would reject a filing from a vexatious litigant if they had not sought leave to file from the presiding judge. The new draft removes the rejection by the clerk, because there were concerns about potential unintended consequences in civil case filings. For example, the only way that the court can identify who is filing a case is by their name, so it would be possible that a litigant could be misidentified as vexatious if they have the same name as a vexatious litigant. In the current draft, the person would still be allowed to file the case, and either the court or another party who identified the person as a vexatious litigant would send a notice and serve it on everyone else in the case, with a 10 day window for the judge to dismiss the case. This would eliminate potential unintended consequences as well as save support staff time. Ms. Holland explained that there was also a language change so that, if the case has already been filed, the motion would be called a motion for leave to proceed instead of a motion for leave to file, to avoid confusion about two filing dates.

Judge Norby thanked Ms. Holland for the OJD's insights. She stated that these changes improved the draft and likely precluded the Council's need to address a lot of concerns after the bar weighs in. She stated that there was one issue remaining from the last meeting, which was the need to change the definition of "finally decided" and how that is expressed. She stated that the language had been moved and some numbering had been changed in an effort to keep definitions together, and that she had attempted to write a better definition of "finally decided." The definition now reads, "For purposes of this rule, an action is deemed to be 'finally decided' or to have reached a 'final decision' after all appeals conclude, or after the time to appeal has elapsed if no appeal is filed."

Judge Peterson stated that he was present at the meeting with Ms. Holland, Ms. Pettigrew, Judge Jon Hill, and Judge Norby regarding the statute of limitations and that meeting was very helpful. He explained that he was initially worried that problems with relation back would not be able to be resolved. He recalled that, when the Council amended Rule 27 regarding guardians ad litem, there were

some real concerns among the plaintiffs' bar about statutes of limitations that also needed to be resolved. He stated that he believes that the OJD's suggestions solve the problem in this instance. Judge Peterson also pointed out that a change was made to solve the issue of a court moving very quickly on the vexatious litigant issue and suddenly the the non-vexatious opposing party would have to respond within 10 days, but they should get a full 30 days. He stated that language from Rule 15 has now been used so that the non-vexatious party has 10 days or the amount of time that was left to respond to the previously-thought-to-be-vexatious-litigation complaint, whichever is longer.

Mr. Crowley stated that section C(3) seems to cover the same issue as paragraph C(1)(b), and wondered whether paragraph C(1)(b) is redundant. Judge Norby stated that paragraph C(1)(b) pertains to factors that the presiding judge can consider, so that is helping the judge decide the motion and telling the judge what needs to be shown in order to get that relief. Section C(3) is separate from that, and happens after a judge has issued an order. She stated that paragraph C(1)(b) was her suggestion and section C(3) was OJD's suggestion, and opined that both are necessary. She agreed that section C(3) might be redundant if the judge had just issued an order; however, if the order had been issued in the past in a different scenario, there would be no current challenge and no new order and section C(3) would be needed to cover that situation. Mr. Crowley stated that he was reading it differently, and that the relation back language in section C(3) removes the need for paragraph C(1)(b). Judge Norby recalled that she had written paragraph C(1)(b) before the OJD had proposed section C(3), and that it might be possible that both are not necessary.

Judge Peterson stated that he was not necessarily defending retaining the language, but it seems to him that it the court has two ways of looking at it. Looking to see whether a claim is frivolous might be a little more involved, and it could be less involved to say that one is bumping up against the statute of limitations or ultimate repose. It would give the court the opportunity to allow the filing and either require security or say that someone will be filing a motion on this case to get it stopped. It seems like it could be a shortcut for busy courts. Ms. Holley stated that, to her, paragraph C(1)(b) runs the risk of implying that the statute does not toll during the motion. Section C(3) implies that the statute does toll. Mr. Crowley agreed. Judge Norby posed a hypothetical situation where she is a presiding judge and a litigant is designated vexatious or is about to become so in a hearing. One of the things that would be important to know and might change her analysis is whether a statute of limitations would be missed. If leave to file is granted, the litigant may have just missed the statute anyway, because of the

need to appear before her, so section C(3) may be needed to relate it back even just for a few days during the time that she was making the decision. Ms. Holley asked whether Judge Norby meant that section C(3) relates to granting and paragraph C(1)(b) relates to denial. Judge Norby explained that section C(3) makes the relation back happen. Paragraph C(1)(b) is for those rare cases where time is so much of the essence that a judge should probably lean in favor of allowing a case to proceed even though the litigant is vexatious because, if they do not, the litigant could miss the statute of limitations and lose their claim.

Judge Norm Hill stated that subsection C(3) only has a relation back effect if the order is granted. He asked what would happen if a vexatious litigant were to be denied the right to file the case and sought a review or mandamus and, during that time, the statute of limitations had expired. He asked what the implication would be if the language were that simply filing the request tolls the statute of limitations on all of them, granted or not granted. Ms. Holley stated that the litigant would still have the same amount of time and it would not put the pressure on the judge to feel like they could not deny the filing of the case. Judge Norm Hill stated that, if the filing tolls the statute of limitations, then that factor is irrelevant. Judge Norby asked Judge Peterson his opinion on whether that is something that the Council can do. She recalled that, when she was concerned about relation back, Judge Peterson stated that, because the Council cannot affect the substantive rights of any party, it is almost obligated to do that. She wondered whether that argument also applies to making a statement about tolling the statute of limitations. Judge Peterson stated that the Council did that in Rule 23. He noted that he had a concern from the start with this proposed rule about how to document when the filing reached the court because, if the judge refuses to allow the filing, the filing will be dismissed with prejudice. If it is dismissed with prejudice, he assumes that is an appealable result from the court. Judge Norby stated that it is not appealable but that one could seek a writ of mandamus. She noted that there is law that says that a designation of vexatious litigant is not appealable, and that one can probably not even seek a writ of mandamus, but one could seek a writ of mandamus about an order saying a case cannot be filed. Judge Peterson stated that the effort here gets awfully close to preserving the statute limitations, and he could see the Council getting pushback otherwise.

Judge Norm Hill asked whether the definition of commencing an action is statutory or just in the rules. Judge Peterson stated that Rule 3 states that an action is commenced by filing a complaint. Judge Norm Hill stated that, since that rule defines commencement as the filing of a complaint, once the case is commenced, tolling is not really a thing. Judge Peterson pointed out that the

vexatious litigant cannot file the complaint but, consistent with Rule 71, they have to attach the proposed complaint as an exhibit to the petition that they are trying to file.

Mr. Crowley wondered whether, if the judge's decision to not allow the vexatious litigant to go forward is mandamused and overturned, the relation back privilege would apply. Judge Norm Hill stated that he believed it would. Mr. Crowley thought that it would as well. Judge Norm Hill stated that, for a person who has already been designated a vexatious litigant and who must therefore file a petition with a copy of the proposed filing, the date that the petition is received would be the equivalent of commencement. He stated that he believes that judges already have the authority to designate somebody vexatious under case law, and all this rule is doing is to create some concrete, predictable procedures in order to exercise that authority. Judge Norby stated that the memo that the committee had previously sent to the Council included a reference to *Heritage Properties LLC v. Wells Fargo Bank*, 318 Or App 470 (2022), which discusses what the Council's authority is and what is substantive versus procedural.

Judge Peterson stated that, if someone is precluded from filing a complaint because they have been designated vexatious litigant, they can file a petition that has attached to it a copy of the complaint that they would like to file. He proposed that the language in the rule could say that, in addition to Rule 3, an action is commenced for the purposes of the statute of limitations when the petition is filed attaching the complaint that the vexatious litigant would like to file.

Ms. Holley opined that the proposed rule seems substantive to her. She expressed concern that the rule could have unintended consequences. For example, there are instances where a party would need to file multiple motions in order to preserve an issue for appeal, and she feared that could lead to a designation of vexatious litigant. The rule also feels to her like it would have a tendency to impact vulnerable people and put an additional burden on the court. Judge Norby stated that it would not be a burden on the court. She pointed out that courts statewide are hoping for a standardized practice to deal with this problem, as opposed to trying to figure it out case by case as is happening now. She predicted that the Council would receive pushback from people who mistrust the courts to not use the rule well, and people who are fearful that they may be interpreted as vexatious when they are not. Judge Norby expressed faith in the courts to not do anything that impedes good people who are doing the right thing from proceeding.

Judge Peterson summarized that there are two kinds of vexatious litigant issues. One is where someone who is previously an unknown vexatious litigant files a case and then gets called out on that by either the court or by one of the parties. In this case, a case has been filed and the action has been commenced. The other is where someone is known as a vexatious litigant and would like to file a case, but does not want to be found in contempt of court so they they have to file a petition. He stated that it seems to him that, for the latter category, the case can be commenced by the filing of the petition with a copy of the complaint attached as an exhibit to protect the statute of limitations in that instance. That was his hope with the most recent changes to the draft rule. Mr. Crowley stated that this makes sense to him.

Judge Norm Hill asked whether there had been a consensus on whether to retain or eliminate paragraph C(1)(b). Judge Norby stated that she was fine with leaving it but would defer to the Council's wishes. Ms. Holland opined that both paragraph C(1)(b) and section C(3) may not be needed. Section C(3) accomplishes relation back and paragraph C(1)(b) is something for the presiding judge to consider. Judge Norby stated that she hoped that Ms. Holland might weigh in on the question of whether, instead of having a relation back provision, the rule should create an equivalency to commencement of an action. Ms. Holland stated that she thought that at least one of the relation back provisions are needed. She stated that this is similar to a situation that the OJD has dealt with in the UTCR where there is a motion for fee waiver or deferral. The motion for fee waiver or deferral is not counted as satisfying the statute of limitations, and there is a relation back provision that is very similar to this. She stated that something else beyond just the motion filing date is needed to satisfy the statute of limitations.

Judge Norm Hill stated that he agreed with Ms. Holland based on the language of Rule 3. However, if Rule 3 were changed, or it was made clear that the filing of this motion is essentially the functional equivalent of commencement of an action for the purposes of the statute of limitations, he did not think a relation back was needed. The effect would be not letting the case be filed yet, but having it be presented and file-stamped for the limited purpose of the statute of limitations. He stated that a presiding judge would no longer need to be concerned about the statute of limitations as a factor because it has already been complied with. Judge Norm Hill stated that he feels that Judge Peterson's suggestion makes the process much easier and that the relation back issue just makes things muddy.

Judge Norby stated that relation back is what people are used to, and part of the idea behind the rule is to proactively address what attorneys are going to be

concerned about. She stated that one of the things she likes about the relation back is that it is familiar, whereas the rest of this rule is not. She opined that trying to solve a problem that lawyers are going to be particularly concerned about and doing it in a way that only judges can fully appreciate may not be the best solution.

Ms. Holley asked what would happen if the motion was denied. Would the action still be commenced and would the person have 30 days to refile? Judge Norm Hill stated that the case would be dismissed and the litigant would appeal. However, the statute of limitations as to that filing would still be preserved, just as if the person had filed the case. The vexatious litigant got to their process without the need to involve the other side. That is the purpose of the rule, not bothering other people with vexatious claims that are not going to get through. Judge Norm Hill stated that just changing the definition of commencement would preserve all rights to appeal and preserve the statute of limitations. He stated that he understands and respects Judge Norby's concern about making people comfortable; however, his concern is about not creating something that has a redundancy that leads to an ambiguity. Because if a case is commenced, there is nothing to relate back, and it will not make any sense.

Judge Norby stated that she appreciated this solution; however, it does involve a few additional steps and would involve working on another rule late in the biennium to define commencement. She suggested doing the simpler thing and getting the rule adtoped this biennium and adjusting it later if that seems appropriate. Judge Norm Hill stated that his only comment on that is that the relation back can only relate to those motions that are approved, but he suggested that it has to be broader than that, because otherwise the statute of limitations could expire while the review process was going on. He stated that there has to be some level of review or there is a risk of a due process problem. Judge Norby stated that she believed that relation back would still apply if someone was either denied or granted mandamus. Judge Norm Hill stated that, based on the language in the draft rule, there is an open question, because the relation back language only applies if the judge, after review, grants it. He suggested tweaking that language.

Judge Peterson suggested language in Rule 35 that would avoid the need to amend Rule 3: "The filing of a petition as provided in subsection C(1) of this rule shall be deemed a commencement as provided in Rule 3." He stated that, whether it is denied or granted, a petition has been filed that must include a copy of the complaint or other case-initiating document attached as an exhibit, and there

would therefore be a court document that shows the date it was filed. Judge Norby stated that she liked this idea, and asked whether both paragraph C(1)(b) and the language in subsection C(3) could be eliminated if this language were to be added. Judge Peterson agreed. After some wordsmithery, it was agreed to retain the lead line "Relation back" in subsection C(3) and the following language: "The filing of a petition as provided in subsection C(1) of this rule will be deemed the commencement of an action under Rule 3." Paragraph C(1)(a) would also be eliminated.

Judge Leith expressed concern about relying on the Council's authority to amend ORCP 3 with respect to commencement of actions, because when an action is deemed begun is also statutory under ORS 12.020. So, if a statute defines when an action is deemed begun, the Council might be doing something substantive purporting to change that statute. Judge Peterson pointed out that Rule 3 is the Council's purview, and his concern all along has been not to expand or diminish a potential right in any way. He sees this draft rule as not abridging the rights of a potential litigant. Judge Leith pointed out that the statute does not say that an action is commenced by filing a notice of request to be allowed to file a complaint. Judge Peterson noted that the complaint would be filed as part of the petition. Judge Norm Hill pointed out that filing and service are required by the statute, and service will not happen under this rule. He stated that he had now come full circle and believes that Judge Peterson's suggestion would represent a substantive change because it functionally would amend ORS 12.020. Judge Norby asked whether that would put the original language back on the table. Judge Norm Hill stated that the original language has the same problem, because the action would still not be commenced for the purpose of the statute of limitations under ORS 12.020. He stated that, by relating it back, it would effectively be expanding the statute of limitations for people who were deemed vexatious litigants.

Ms. Holley stated that there is also the problem of creating an entirely new process for commencing an action. Judge Norm Hill stated that he is fine with the new process, because it is consistent with the case law that states that judges have the authority to deal with vexatious litigants now. This rule is just building a process to do that. He stated that his issue is with the process effectively expanding the statute of limitations in contravention to a statute. That would exceed the Council's authority. Judge Norby asked whether tolling the same thing is expanding, because the intent is to toll. Judge Norm Hill stated that he believes that it is the same thing.

Ms. Holland mentioned a provision in the UTCR that allows relation back in the

case of a rejection of an electronic filing. She stated that there was a relevant Supreme Court case, *Otnes v. PCC Structurals, Inc.*, 367 Or 787, 799-800 (2021), that allowed relation back, but that dealt with a motion for new trial rather than a case-initiating document, so it may not be helpful in this instance. She noted that section C and section G are very similar, but section G deals with a situation where the litigant files without leave of the presiding judge, and creates sort of a procedure on the back end where all the parties are notified that a vexatious litigant filed the proceeding. She wondered whether taking out section C and using the procedure in section G would eliminate the relation back problem, as the complaint would be designated as filed on the day it was filed. Judge Norby stated that the point of having a vexatious litigant designated as such is to prevent them from filing without permission, so eliminating the section on how to get permission would make the rule not work very well. She noted that this situation is virtually never going to come up, partly because vexatious litigants rarely wait until the last minute to file litigation. She stated that it is good that these issues are coming up now and being well discussed, and that she shares the concerns about the statute of limitations.

Judge Norm Hill asked whether this is something the Council should consider taking a left turn on and shifting to a legislative recommendation. Judge Jon Hill stated that this was where the committee had started its discussions but, after research, it had discovered that the courts have inherent authority to designate litigants vexatious under case law. The only issue seems to be relation back. Judge Norby stated that perhaps the Council should pass the rule without the relation back piece and ask the Legislature to deal with that issue. Judge Norm Hill stated that he had thought about that; however, removing that piece makes the rule not as good. He thought that having the Legislature pass the entire rule would be better than breaking it in half, because the rule as it stands is helpful in not letting vexatious litigants file and bother people and waste court time. It also does a good job in protecting people's rights.

Mr. Crowley stated that the DOJ deals with this issue frequently, in federal court as much as in state court. He stated that the federal courts have a process where the initial filing is allowed, and the court jumps in immediately and deals with it. He wondered whether the Council might want to mirror the way the federal court handles it to avoid this issue. Judge Peterson stated that he does not think that the Council can necessarily count on the Legislature to pass this rule. He expressed concern that the pursuit of the perfect is getting in the way of pursuing the good. He stated that Judge Norby had determined that there is a way to flag the case in the court's electronic filing system as being filed by a vexatious litigant so, if the

vexatious plaintiff wants to serve documents, they would be served along with the order from the judge saying that a response is not needed because, at this time, the case is stayed. He noted that it is not a perfect solution, because it does not keep the vexatious litigant from filing things, but it does allow them to create a little less havoc for for the defendants that they are suing.

Mr. Andersen noted that the proposed rule requires that the petition be accompanied by a proposed complaint. He stated that both documents would be file stamped by the court, which would indicate the filing date. He opined that a relation back would not be necessary. Judge Norby suggested a requirement that that the petition with the complaint be served, as a complaint would otherwise have to be served. Ms. Holley agreed with Mr. Crowley that the complaint should still have to be filed and treated normally, and then there would be a process after that in order for the rule not to affect substantive rights. She also expressed concern that mandamus would be required in order to get an appellate review of the order, because only final judgments can be appealed, not orders. Judge Norby agreed that an order denying the ability to file a case would require mandamus. Ms. Holley opined that this has some substantive implications.

Judge Norm Hill stated that one solution, although not perfect, might be to treat the situation like a SLAPP case, where it would be filed but with the ability to very quickly get in front of the court, and the court can dismiss it with prejudice and then move on from there. He agreed that this was not what was envisioned, but that it may be what is truly needed to fit within the court's authority and to preserve everyone's rights. Judge Norby pointed out that this can already be done with Rule 21 motions, so there is not really a need for a rule to create an opportunity to move early to try to get a case dismissed. She stated that Rule 35 is intended to deal with perpetually vexatious litigants.

Judge Peterson stated that it seems to him that it would be necessary for the Council to reconvene and try to work out the issue, as it is not just a matter of slight wordsmithery. Judge Leith agreed that the work product is good and should not be abandoned. He stated that the solution may be to just incorporate filing and service as part of the rule. Mr. Crowley stated that he really likes the rule and feels that the problem can be addressed. Judge Jon Hill stated that the committee would meet again, but asked about the process for getting the rule back before the Council before the September meeting, since no other Council meetings were scheduled prior to that meeting. Judge Peterson stated that, while it is the custom of the Council to not meet in July or August, there is no rule stating that it cannot do so. He asked the committee to meet as soon as possible and circulate its work

product to the entire Council for review. He reminded the Council that two weeks' public notice is required for each Council meeting, and that it would be important to have a quorum to discuss the new rule draft and vote whether to pass it on to the September publication agenda. Ms. Nilsson stated that the date for a July or August meeting would likely be the second Saturday of either month, and that she would be in touch with members to set up the meeting depending on when the committee completed its work.

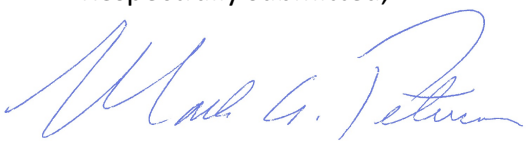
5. Proposed Bill by Consumer Law Section [ORCP 54 / ORS 36.425(6)]

The Council decided to move this agenda item to the next biennium.

V. Adjournment

Mr. Crowley adjourned the meeting at 12:50 p.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, August 27, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin Bloom
Troy S. Bundy
Kenneth C. Crowley
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Drake Hood
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Melvin Oden-Orr
Margurite Weeks
Jeffrey S. Young

Members Absent:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Derek Larwick
Scott O'Donnell
Hon. Scott Shorr
Tina Stupasky
Stephen Voorhees

Guests:

Aja Holland, Oregon Judicial Department

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 35 (Vexatious Litigants) ORCP 57	ORCP 1 ORCP 4 ORCP 14 ORCP 15 ORCP 16 ORCP 17 ORCP 18 ORCP 21 ORCP 22 ORCP 23 ORCP 27 ORCP 32 ORCP 47 ORCP 52 ORCP 55 ORCP 57 ORCP 58 ORCP 60 ORCP 68 ORCP 69	ORCP 71 Abatement Affidaviting judges Arbitration/mediation Collaborative practice Expedited trial Family law rules Federalized rules Interpreters Lawyer Civility Lis pendens One set of rules Probate/trust litigation Quick hearings Self-represented litigants Standardized forms Statutory fees Trial judges UTCR	ORCP 7 ORCP 35 ORCP 39 ORCP 55 ORCP 57 ORCP 58 ORCP 69		ORCP 54/ORS 36.425

I. Call to Order

Mr. Crowley called the meeting to order at 9:33 a.m.

II. Administrative Matters

A. Setting September and December Meeting Dates

Ms. Nilsson reported that she had conducted polls regarding member availability on the second and third Saturdays of September and December. Three members had not yet responded to the polls. Fifteen members were committed to attending a meeting on September 17. Nineteen members were committed to attending a meeting on December 10. Judge Peterson reminded the Council that a quorum (twelve members) must be present at the publication meeting in September, with a simple majority needed to publish a rule, but that it is better to have as many Council members present as possible for the publication votes. A quorum plus a super majority vote (fifteen or more *votes*) is necessary, however, to promulgate a rule in December. The Council agreed to wait for the final responses to the poll before determining the final meeting dates. Ms. Nilsson stated that she would communicate the meeting date information by e-mail.

B. Article on Council in *The Verdict*

Judge Norby referred the Council to the copy of the article that she had written that appeared in the Oregon Association of Defense Counsel's (OADC) publication *The Verdict* (Appendix A). Ms. Holley stated that she would also be posting the article on the Oregon Trial Lawyers Association's listserv with attribution to the OADC's publication. Mr. Crowley and the Council thanked Judge Norby for her excellent contribution to making more people aware of the Council's work.

III. Old Business

A. Committee Reports

1. Rule 57 Committee

Ms. Holley referred to the committee's latest draft amendment of Rule 57 (Appendix B) and noted that the committee would like to make a last-minute change to the language in paragraph D(4)(c) that was not reflected in that draft. The language in the draft reads as follows:

> If there is an 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 discriminatory. An objection to a peremptory challenge must be sustained if the court finds that it is more likely than not that a

protected status under ORS 659A.403 was a factor in invoking the peremptory challenge.

The committee's proposal was to change the paragraph to read:

> If there is an 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 discriminatory. The objecting party may then provide argument and evidence that the given reason is discriminatory or a pretext for discrimination. An objection to a peremptory challenge must be sustained if the court finds that it is more likely than not that a protected status under ORS 659A.403 was a factor in invoking the peremptory challenge.

Ms. Holley explained that the language in the draft intimated that the person making the challenge had to prove ahead of time that their reason for making the challenge was not pretextual, instead of saying that they needed to articulate a non-discriminatory reason. The new language helps to clarify that intent.

Ms. Holley began to summarize the changes between the draft before the Council and the draft that was discussed at the June Council meeting. She explained that the definitions of bias that were included in section D of the previous draft had been removed. In paragraph D(4)(b), Ms. Holley changed the language that previously stated that an objection could be sustained if it was based on a protected status under Oregon or federal discrimination law to cite Oregon's public accommodation statute that lists Oregon's protected characteristics. She stated that this was a change she had made on her own, feeling that it would make things more clear based on conversations that the Council had, but that she was open to changing it back if the Council felt strongly about it. There is also language that states that an objection to a peremptory challenge must be sustained if the court finds it more likely than not that a protected status was a factor in invoking the peremptory challenge. Instead of separating out the types of bias and going into detail about them, the current draft simplifies it into a factor that still allows flexibility.

Ms. Holley stated that she, Judge Norm Hill, and Judge Oden-Orr had spent a lot of time working on adding factors to paragraph D(4)(d) that the court can consider in evaluating the totality of the circumstances. These include the nature of the questions, whether the non-discriminatory reason could arguably be a proxy for a protected status or could be disproportionately associated with a protected status, and whether the party had challenged the same juror for cause. The factors give some guidance but also leave it open. The important thing is to eliminate the presumption of non discrimination, which is the key problem with the existing rule.

Judge Norm Hill reiterated that the primary objection to the existing rule that started this discussion was, as Ms. Holley mentioned, the requirement under *Batson v. Kentucky*, 476 U.S. 79 (1986), that one start with the presumption of non discrimination. He stated that *Batson* also requires a "but for" connection between a discriminatory motive and the challenge. The workgroup had wrestled with how to encompass and address unconscious bias and do it in a way that allows for meaningful review. Judge Norm Hill explained that one of his concerns was that the language that came out of the workgroup appeared to establish a standard but, when he tried to imagine it in practice, it became apparent to him that there was no standard. His fear was that whichever judge heard the case and reviewed it would apply their own view. He stated that, when the committee reviewed the latest draft, he had tried to strip out everything that was not essential and just tried to get to the heart of what was trying to be accomplished.

Judge Norm Hill opined that the new language does three things that are critical. Number one, it says that any time someone objects to a peremptory challenge on the basis that it is discriminatory, the party exercising the peremptory is going to immediately be required to come up with a justification that addresses it. He stated that this is the best way to address the problem of unconscious bias. While there is no rule the Council can create that will account for overtly discriminatory, intentional, racist, cynical attempts to get people off of a jury, it can create a structure that forces people to confront their own biases and to actually ask questions as part of their decision-making process on the ground. Creating a structure where, if someone tries to strike a juror that is in a protected class, they have an expectation that they may have to address it, forces that person to have an internal dialogue and confront their own potential implicit biases. And it gives the court an opportunity to do something about it if those biases indeed exist. Judge Norm Hill stated that he feels that the amendment strikes the right balance in that regard. He opined that the second thing that the new language does is to get judges out of the posture of trying to decide whether or not the exercise of the challenge would be harmful to the community at large, because that takes the rule outside of the scope of the private litigation between the parties. The third thing that the new language does is to remove the "but for" concept and to allow the question to simply be whether discrimination was a factor, and give the court the ability to determine that and sustain the challenge. The new language is simpler and gets to the heart of what the folks that wrote the law review article were looking for, and it raises the profile of the issue that the Council is trying to address.

Ms. Holley thanked Judge Norm Hill for the excellent summary. She asked Mr. Hood if he had a chance to look over the final modifications that had been made to the draft based on their conversation the previous day. Mr. Hood stated that he had and that the changes were acceptable to him. Judge Jon Hill opined that changing the language in paragraph D(4)(d) from paragraph form to list form makes it easier to read. Mr. Goehler suggested that the language in subparagraph

D(4)(d)(iv) could be changed to read "other factors, information, or circumstances considered by the court" to make it read more clearly. Ms. Holley stated that the intent was just to say that the judge is not limited, and that she was not wedded to the current language in that subparagraph.

Judge Leith thanked the committee for its excellent work. He stated he has only two concerns. The first is that he is not a big fan of incorporating substantive discrimination liability statutes into the ORCP. He also expressed concern about whether all of those factors under paragraph D(4)(d) were necessary, and suggested going through them all and ensuring that the Council wanted to include each one. He stated that, if the Council does like all of them, they could be lifted out into a definition, and that definition could be used each time the protected statuses were referred to. He stated that he was not sure that it was bad to consider a prospective juror's age, which is a protected status under the statute. Sometimes a good lawyer will be looking either for a person with a lot or a little life experience, depending on the perspective they are looking for in the case. Marital status may also not be an invidious thing to consider when a party is posing a peremptory challenge. His preference would be to list the statuses that the Council wants to list, and not refer to the statute.

Ms. Holley stated that, arguably, the statute does apply, although perhaps not in the same way that is being discussed at the beginning of the rule, that a juror does not have a right to be on a particular jury. However, because the statute is a public accommodation statute, she believes that it applies to the court system, and she wondered whether it invites a problem to particularly carve out certain protections.

Judge Oden-Orr asked whether OJD's general counsel had weighed in on this issue at some point. Ms. Holland stated that some of the workgroup's previous drafts used the undue hardship standard, which is from part of the Americans with Disabilities Act (ADA), but the ADA does not apply to those systems, so the preference was to use another standard. Ms. Holley stated that the language in the previous draft was "Oregon or federal discrimination law," which is quite broad. She pointed out that disability is addressed in other areas. She also stated that ORS 659A.403 does not include disability protections around medical leave and workers compensation claims, which arguably could be within the catch-all of discrimination law; however, she believes that issue was resolved earlier in the rule.

Mr. Bundy stated that he does not like the idea that the other attorney does not have to voice some sort of reasonable basis to make the objection in the first place, especially since one or more of the statuses cited in the statute apply to literally every juror that is sitting on the panel: race, color, religion, sex, sexual orientation, national origin, and marital status. Ms. Holley pointed out that all of them apply to every juror. Mr. Bundy stated that, if the other side does not have

to form a reasonable basis for objecting to the opposing side's exercise of a peremptory challenge, there is really no barrier to someone trying to ascertain his thought process as to each and every juror on the panel. Judge Norby stated that the objector would have to identify on the basis of which protected status they are objecting. Mr. Bundy stated that he would like them to have to provide some reason, not just "I am challenging you because I think you are a racist or a misogynist," or whatever sort of broad, sweeping accusation that people seem to be making these days. He did not want someone to be able to say, "I object and I cite subsection D(4)."

Judge Norm Hill stated that he would like to help address Mr. Bundy's concern. He first agreed with Judge Leith that the language of the existing rule addresses race and sex, and all that the Council is trying to do is to make the rule more broad. He did not believe that anyone was disagreeing with that goal. Ms. Holley pointed out that this was the most consistent request from the participants in the workgroup. Judge Norm Hill stated that the only controversy seems to be how to express that broadening of categories. To Mr. Bundy's point, as a practical matter, the person making the objection to the peremptory challenge is not just going to be able to say "I object to the exercise of the peremptory challenge," and then just sit there. They will have to explain the ways in which they believe the peremptory challenge is discriminatory. What is different is, in the existing rule, the court could say that the attorney making the peremptory challenge did not even have to respond until a certain threshold was reached. The change in the draft amendment is to take away that threshold so that, if an objection is raised, the attorney who made the peremptory challenge will need to be ready to respond. The goal is to get people to start thinking about that ahead of time. Judge Norm Hill stated that Mr. Bundy's concern is taken care of in the rule, as that part of the rule has not changed. The difference is that the attorney making the peremptory challenge has to also be ready to make a response.

Ms. Holley wondered whether Mr. Bundy's concern arose from paragraph D(4)(b), which reads, "Any objection must be made by simple citation to this rule." She suggested language along the lines of, "Any objection must be made by simple citation to this rule and an articulated reason for the objection." Judge Oden-Orr suggested the language, "Any objection must be made by simple citation to the rule and by citing the objectionable basis." Ms. Holley asked if that would resolve the issue for Mr. Bundy. Mr. Bundy stated that it might. He noted that he has not done research to determine whether or not the public accommodation laws under ORS 659A.403 apply to a peremptory challenge issue. He stated that he has a problem with the breadth and the fact that anyone can essentially call a lawyer out for being discriminatory without an adequate basis. He stated that addressing those issues would help but, the way the draft is written, it eliminates the burden of establishing some sort of reasonable belief that opposing counsel would have to suggest that a lawyer is exercising a peremptory challenge for something other than a legitimate basis.

Judge Norm Hill stated that this is a policy change from the existing rule to the proposed rule, and that it is by design. Mr. Bundy stated that it might be the case that he just does not like the proposed rule, and that he may be an outlier. He noted that it may not be that much of a change if a reason must be articulated. Judge Norm Hill stated that the way the existing rule is worded was designed to create a space where the party objecting to a challenge must reach a threshold. He stated that the reason he likes the proposed change is that it accomplishes some of what article by Justice Paul DeMuniz and the other literature suggested. He noted that he got over his initial concerns, which were similar to those that Mr. Bundy is expressing because, in practicality, the burden shift is very small and the mechanics of it are not a big deal. He likes the suggested amendment because it puts all parties on notice to be thinking about peremptory challenges, and creates a mechanism for trial lawyers to have that quiet internal dialogue about unconscious bias before even making a peremptory challenge. The risk of having to articulate it at any time forces that thought process.

Judge Peterson stated that he was not sure that changing the language in paragraph D(4)(b) was necessary, although he did not object to it. He pointed out that, under the *Batson* process, one must show a pattern, so he did not believe that one could simply make an objection and cite the rule. He stated that the language in that paragraph simply refers to the need to make the argument outside of the presence of the jurors. He stated that there will definitely be a discussion, and *State v. McWoods*, 320 Or App 728 (2022), makes it pretty clear that there will have to be consideration and a record so that the Court of Appeals and the Supreme Court can evaluate exactly what happened. He agreed that the amendment would be a huge burden shift and that both sides would be on a more level playing field than they have been in the past. If a party cannot defend their challenge, they may have a problem getting a judge to sustain it.

Mr. Crowley agreed with Judge Peterson that there is a significant burden shift, which changes the landscape. However, he also wondered whether ORS 659A.403 was the direction the Council wanted to take, because it is quite broad and could be applied to just about every juror on the panel. Judge Peterson stated that he and Ms. Holley had a discussion about citing to the statute. As to whether it is a good idea to cite to statutes in the ORCP, Judge Peterson stated that he is not generally in favor of citing to statutes, Uniform Trial Court Rules (UTCR), or other laws because, if they change, the ORCP must be updated. However, to quote, Justice Thurgood Marshall in *Batson*, these decisions are sort of "seat of the pants," so it seems like it might be helpful to have some sort of a standard that is understood in the rule so that people are not arguing that left-handed people ought to be a protected class because they found a case that kind of said that maybe they are.

Ms. Holley stated that her concern with not citing to the statute and pulling out the categories individually is that, to her, it is more likely that there will be added

protected classes to the statute that the Council will then have to consider individually whether to include every time there is an update to the statute. She stated that she feels that there is more of a danger of having the Council considering every biennium whether a new characteristic should be considered than whether there is a numbering problem in the rule. Judge Norm Hill stated that he had the exact opposite view. He felt that this is exactly what the Council should be doing. The mere fact that the Legislature has added a new category to the accommodation statute does not necessarily mean that it makes sense in the context of the ORCP. He stated that he is much more in favor using the statute as a template for the Council to arrive at a common understanding of which categories should be included, and then just list those categories.

Mr. Bundy stated that, in his opinion, it devalues the significance of the rule to include every single category. He opined that the purpose of subsection D(4) was always to protect race, ethnicity, and sex. Ms. Holley pointed out that this still includes every juror, because everyone has the characteristics of race, ethnicity, and sex. Mr. Bundy agreed, but stated that he believes that there are certain understandings about how those laws are applied. He stated that it would be difficult for him to claim that he was discriminated against because he is a white male. He believes that it devalues the significance of this special rule, which was designed for a particular purpose, to include every category. He also stated that one of the objectives of the Council has been to allow a layperson to read the rules and be able to understand them, and citing to a statute may not be as easily understandable and available the layperson.

Judge Leith agreed with Judge Norm Hill that it makes more sense to consciously pick and choose what is appropriate subject matter for a *Batson* challenge, rather than just adopting a statute that might change, resulting in the rule suddenly protecting things it was not protecting before without the Council having made that decision. He also opined that the factors in the statute may be overly broad. For example, if a lawyer were to argue that they were looking for jurors with a lot of life experience, he might be inclined to accept that as a non-invidious explanation for a peremptory challenge. He stated that he has not done the research on whether the public accommodation discrimination laws apply to jury service, but stated that it sounds like a an unnatural fit to him. He stated that, having now heard that it is actually a legal theory that could be presented and that someone might advocate for, it makes him feel even more strongly that the Council ought not to be implying in its rules that those statutes do apply. He stated that, if a bar member or the courts were to be sued for allegedly violating the public accommodation statutes in the way that they exercised or were allowed to exercise a peremptory challenge, the OJD would probably want to look into whether it wanted to argue that the statute does not apply, and it would be awkward in that circumstance to have the ORCP take a side on whether the statute is applicable.

Justice Garrett echoed Judge Leith's last point, and also agreed with Council members who stated that it would be better to list the factors rather than incorporate any statute by reference. With regard to Mr. Bundy's point about the burden shifting, his understanding is that the purpose is deliberately not to hold the person making the objection to a prima facie case standard. That is the language that is being removed from the existing rule. He agreed with that policy choice to not hold the objector to a certain burden of production. He wondered, however, if it would help Mr. Bundy to make it more clear that there is no preclusion of some initial explanation of what the objection is. He stated that he could not recall whether the language about objection being made by simple citation to the rule is a recent addition, but the phrase "simple citation" implies that the objector really is not expected to do anything other than say, "I object, your honor, based on this rule." He stated that he did not believe that it would frustrate the purpose of the rule change to elicit a little more information from the objector about why the objection is being made, and that goal is not assisted by the simple citation language.

Ms. Holley referred back to Judge Oden-Orr's suggested language and asked whether it would solve the problem. Justice Garrett suggested just referencing making an objection. He stated that he assumed that the trial judge would then try to elicit the problem. Ms. Holley stated that the reason for the simple citation to the rule is that the trial judge is then supposed to then take out the jury. The reason for the objection is not supposed to be articulated in front of the jury to avoid poisoning the jury. Justice Garrett stated that this makes sense; however, he reads that sentence to suggest discouraging the objector from having to say anything more, even after the jury is gone, about why the objection is being made. He stated that he did not feel that the citation to the rule was necessary. Ms. Holley suggested removing the language about simple citation to the rule and adding a sentence at the end of the paragraph that states something along the lines of, "outside of the presence of the jury, the objecting party must state the basis for the objection."

Mr. Bundy pointed out that the issue is complicated by the fact that so many judges have their own process for jury selection. He noted that, many times, he makes his peremptory challenges in chambers. Sometimes attorneys write their challenges on slips of paper and give them to the bailiff. Mr. Bundy suggested modifying the first sentence of paragraph D(4)(b) to read, "If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph D(4)(a) of this rule, that party may object to the exercise of the challenge, citing reasonable grounds, outside the presence of the jury." Mr. Goehler stated that he was not sure that he would agree with citing reasonable grounds. He stated that the trigger for the challenge ought to be identifying the protected status. In some cases it will be obvious if someone says they are objecting to this peremptory challenge based on the rule, but in some cases it may be less obvious. In the less obvious cases, he would think that, if the judge does

not know what the protected status is, the jury would be sent out and the judge would inquire further. Mr. Goehler reiterated that it is not a matter of a reasonable basis but, rather, it is identifying what the trigger is for the rule.

Ms. Holley suggested the phrase, "citing the basis for the objection." Mr. Goehler stated that he did not know that this language was needed. He suggested, "identifying the protected class, if necessary." Judge Norm Hill suggested "...that party may object to the exercise of the challenge. The basis for the objection must be made outside of the presence of the jury. The objecting party must articulate the protected status that forms the basis of the objection." After some wordsmithery, the Council agreed on, "If a party believes that the adverse party is exercising a peremptory challenge on a basis prohibited under paragraph D(4)(a) of this rule, that party may object to the exercise of the challenge by citation to this rule. The basis for the objection must be stated outside of the presence of the jury and must identify the protected status that forms the basis of the objection. The court may also raise this objection on its own. 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."

Mr. Bundy asked where the language about new information being discovered came from. Ms. Holley stated that it came from the Washington rule. Judge Norm Hill asked how this language would be practically applied. He posed the hypothetical situation of a juror having been excused after a peremptory challenge and, two hours later, someone discovering some new information and suddenly wanting to raise the issue again. He asked what, exactly, this language would do. Ms. Holley guessed that it would result in a mistrial. Judge Norm Hill agreed that this would be the likely outcome, and stated that it would perhaps be the desired outcome. He stated that, the more he thought about it, without that language, it may be too late if you discover something later that was a problem – the objection was not made beforehand, so now it has been waived.

Mr. Goehler asked again about the statutory list of statuses. He reiterated that he did not think it was a good idea to cite the statute, and suggested deliberately listing the protected statuses that the Council wants to have listed. His suggestion would be to include race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, and age. He pointed out that he does not think that age discrimination in jury selection is a good thing. While he may believe that an older jury panel may be perhaps more conservative and more favorable to his case, if he is striking a young juror, he ought to be able to have a reason for it that is not just their age. He stated that he believes that having a broader range of categories is good and makes lawyers think the way they ought to be thinking when exercising peremptory challenges.

Ms. Weeks asked, if the Council chooses to list out all of the protected statuses that are in the statute, and the statute is amended at a time when the Council is

not going to be amending the ORCP, whether that would potentially cause a problem. Ms. Holley agreed that the ORCP would not automatically change, but stated that some Council members seemed to favor the Council individually considering each potential new protected characteristic as it gets added to the statute. Ms. Weeks asked whether it does make sense to refer to the statute, since the Council is starting out with every characteristic being protected. She noted that it seems likely that the rule will continue to support every protected characteristic. Judge Norby wondered, along that same line, if the Council might be acting a bit too self important in wanting to have its own say about what is protected and what is not. She pointed out that the Council does not really have that say anyway, since the Council's work gets sent to the Legislature. By saying that the Council as a body is going to decide which pieces that the Legislature has enacted should apply to the rules may be overstepping the Council's bounds. Judge Norm Hill stated that he sees it as the opposite – that the Council's task is to take these questions as they relate to civil litigation (and, in this context, criminal litigation) and make sure that the rule makes sense for what goes on in courtrooms. Just because the Legislature changes a statute does not automatically mean that it was done in a context that makes sense for the courtroom. For that reason, Judge Norm Hill stated that he likes Mr. Goehler's list.

Mr. Crowley noted that people with disabilities were missing from the list of protected statuses. Ms. Holley stated that one of the reasons that she originally cited to the statute is that disability is handled by statute. She stated that she thought that there could be some reason to intentionally limit the rule to what is being protected under public accommodation laws, and handle disability under chapter 10 of the ORS. Mr. Crowley asked about the cases decided under *Batson* and how far they go. Ms. Holley stated that her understanding is that they only go as far as sex and race. She stated that disability can be handled in for-cause challenges, but it is also protected under chapter 10 of the ORS, so there might be a conflict.

Ms. Nilsson conducted a poll to see whether Council members preferred to cite the statute, use Mr. Goehler's list of statuses, or use Mr. Goehler's list without including marital status and age as Judge Leith proposed. Using the list without marital status and age prevailed with 8 out of fifteen votes. Judge Norm Hill made a motion to approve that language. Mr. Goehler seconded the motion, which passed unanimously by voice vote.

Ms. Holley reminded the Council that the last draft of the amendment had modified the language in subsection D(1) to state that an individual juror does not have a right to sit on any particular jury, that jurors have the right to be free from discrimination in jury services as provided by law, and that any juror may be excused for cause including a juror's inability to try the issue impartially. Judge Jon Hill stated that he thought that this language had been improved last time after discussion by the Council. Ms. Nilsson pointed out that the last draft had talked

about actual bias, but that language had been changed to the inability to try the issue impartially.

Ms. Holley directed the Council's attention to paragraph D(1)(g), which addresses the issue of excessive attempts by the court to rehabilitate jurors. She stated that the new language here is an attempt to remedy that problem, but pointed out that the definition of "actual bias" is also removed, along with the definition of "unconscious bias." She stated that she realized that defining actual bias was not really useful, and that "inability to try the issue impartially" was simpler than trying to parse bias into real and false. Another change is to remove the discretionary requirement that the court must be satisfied from all the circumstances, because it did not seem like a real standard. It is replaced by new language. Mr. Crowley stated that he did not believe that he has ever had a situation where both sides were in agreement that a juror should be removed for cause. Ms. Holley stated that she could envision it occurring in a situation she had been in where a judge had forced a juror over and over again to say that she thought that an attorney was a liar. In that case, both parties became uncomfortable with the juror.

Judge Norm Hill observed that the change being made in this paragraph deals with very small category of cases, and he was not sure that it truly gets at the issue that the Council is concerned with, which is the judge who is overly aggressive in attempts to rehabilitate a juror. He stated that his worry is that, by trying to make a change of this substance here, there is a risk of incurring more pushback on the rule change as a whole, including the important work on peremptory challenges. He suggested perhaps omitting this language, at least for this biennium. Ms. Holley stated that she was fine with that suggestion, but that she was trying to be responsive to the bar members who have raised the issue of excessive juror rehabilitation every time she has discussed amending Rule 57. She stated, however, that she did not want the juror rehabilitation issue to detract from the other issues. Judge Norm Hill stated that he would make a commitment, and asked the other trial judges on the Council to make a commitment, to asking OJD to work on judicial education to address that issue, because that is really where the problem lies. Mr. Bundy agreed that including this change could be distracting to the other important changes in the rule, and suggested that it might not be worth the battle that might result from leaving it in.

Judge Peterson stated that the Council has sometimes put two versions of a rule on the agenda for the publication meeting, giving Council members more time to think. He stated that it was even possible to publish two versions to determine whether pushback would be confined to one issue and to not risk losing the work of an entire biennium just because of one unpopular feature. Judge Jon Hill urged the Council to give judicial education a chance to address the problem of juror rehabilitation and, if that does not work, to take up the issue again at a later time. Mr. Crowley agreed and stated that including this secondary issue or publishing

two versions of the rule might unnecessarily complicate things. Judge Norm Hill suggested not making any changes to the existing language in paragraph D(1)(g). Judge Norby and Ms. Holley agreed.

Judge Jon Hill made a motion to approve the changes to section D(1) discussed by the Council, including not modifying the existing language in paragraph D(1)(g). Mr. Goehler seconded the motion, which was approved unanimously by voice vote.

Ms. Holland asked the status of the Council's recommendation to the Legislature for a change to ORS 10.030. Ms. Holley stated that the Council was no longer making such a recommendation but, rather, was supporting the OJD's proposed changes to ORS chapter 10.

Ms. Nilsson pointed out the few staff changes to punctuation and word choice throughout the draft. Mr. Crowley noted that the Council had only voted to approve changes to two sections of the draft and asked for a motion to approve the entire draft for the September publication agenda. Judge Jon Hill made a motion to approve the entire draft with the changes that the Council voted on. Judge Norby seconded the motion, which was approved unanimously by voice vote.

2. Vexatious Litigants Committee

Judge Norby reminded the Council that, at the June meeting, the significant issue of the need for the right to notice and an opportunity to be heard was raised, regardless of whether the vexatious litigant process is being initiated administratively outside of the presence of a case or whether it is brought up within the context of a case that has already been filed. She stated that she believes that the draft before the Council (Appendix C) solves that problem. The only exception to that would be if the vexatious litigant had already had notice and an opportunity to be heard because they had already been designated a vexatious litigant by another jurisdiction.

Judge Norby explained that a number of other changes had been made as well that are also outlined in a memo included with the draft. Many of these changes were made with collaboration with Ms. Holland and the OJD and were process driven. One such example is to make clear that there should not be a filing fee for an application for leave to file by a vexatious litigant. If leave is granted, there is a requirement for prompt filing of the case accompanied by a filing fee. There is also a clarification that there is no requirement for service under Rule 7, which the committee initially contemplated in order to ensure that relation back was covered. However, the committee feels confident now that service under Rule 7 is not necessary in order to accomplish relation back, since the language in the rule itself takes care of the problem. She noted that the committee was nervous that

including Rule 7 would create an expectation of 30 days to appear that would not fit into the streamlined application process, and might also cause confusion with parties who would want involvement in the administrative process after being served.

Judge Norby explained that another change was to require that applications for leave to file a new case by vexatious litigants need to be filed conventionally at ex parte. This was due to the challenge in trying to figure out how such an application could be filed electronically in the Odyssey system, and the conclusion was that, because there are already a few exceptions with matters that must be filed on paper in person, the easiest solution was to choose the same method. This would involve adding applications under this rule into the list of conventional filings allowed under UTCR 21.070(3), which she understands to be a simple matter. Judge Norby explained that section F of the rule was made to refer back to subsection B(1) of the rule to ensure that the business processes for both are the same. There were some other minor changes, such as that the presiding judge decision granting or denying leave to file does not have to be in the form of a decision letter as long as it is in writing and signed by the presiding judge so that it can be mandamused or appealed in whatever form someone thinks is appropriate.

Judge Leith asked whether the Council is adding this rule as a regular promulgation, or just as a suggestion to the Legislature. Judge Norby stated that it would be a regular promulgation. Judge Leith noted that his assumption would be that it would be a suggestion, since relation back seems to him like a substantive change to the statute of limitations. Ms. Holland stated that there are rules in the UTCR that say that, if a fee waiver is applied for and then granted, the statute of limitations date relates back to the date that the fee waiver was requested, even though the actual case was not filed on that date. She noted that the Supreme Court case, *Otnes v. PCC Structurals, Inc.*, 367 Or 787, 799-800 (2021), approved that relation back through the UTCR. She stated that there had been extensive discussion in the committee and that she thought that everyone had agreed that, based on that case and the fact that relation back has been done through a UCTR, that it is acceptable to do it in the ORCP. She stated that ORCP 23 also contains relation back for some other issues.

Judge Jon Hill reminded the Council that the committee had discussed at length the idea of submitting a recommendation to the Legislature. However, the committee had decided to try to draft a rule and, through that process, the committee found case law to support the rule. The factors in that case law are included in ORCP 35 as drafted by Judge Norby. He opined that it would be better to go forward with a rule. He stated that there had been legislation proposed in 2013, but this rule proposal is more detailed in his opinion.

Judge Norby stated that Judge Peterson had also found a Court of Appeals case

that addressed pretty concisely what is deemed to be substantive for the Council and what is not. Judge Peterson stated that the case is *Heritage Properties LLC v. Wells Fargo Bank*, 318 Or App 470 (2022). Judge Norby noted that the case supported that an administrative process like this would be something that the Council can pass and that it is not prohibited by an argument that there may be substance that was intended to be outside the Council's realm. Judge Peterson pointed out that the case is a bit different, in that it addresses the fact that some thought that the Council's dealing with extrinsic and intrinsic fraud in Rule 71 might be a bit of an overreach, and the Court of Appeals said that it was not. However, it seems to him that this is a little bit like a mini summary judgment. He stated that the Council is not taking away anyone's rights but, rather, giving them a better, faster process. If someone thinks that a litigant's case is without any merit whatsoever or is frivolous, that can be adjudicated rather quickly. If the vexatious litigant is not happy with the adjudication, they can have an appeal. If the vexatious litigant wins an adjudication, it does not impact the case – the case just goes forward. He opined that it does not seem like the Council is taking away anyone's rights, especially now that there is relation back language included, so much as giving people a streamlined process.

Ms. Holley asked for clarification about "conventional filing" of the application to file a case. She stated that a litigant having to go to the courthouse and appear in person could have a lot of impact. She opined that the draft rule is too broad. She expressed concern that filing a res judicata issue could cause someone to be deemed a vexatious litigant. She stated that she might be more supportive of the rule if it was a bit more concisely targeted at any litigant who engages in litigation tactics to harass people. She stated that the rule as drafted seems to specifically target plaintiffs, and its broadness could lead it to be easily weaponized if someone were so inclined. Judge Bloom expressed concerns with the rule as well, although he appreciated all of the work that the committee had done on it. He stated that it goes against fundamentally how he believes that courts should act, and also crosses into substantive changes. He opined that there are already tools to deal with situations like this, there are already ways to fast track cases such as anti-SLAPP statutes and res judicata. He expressed concern that the net is too broad here and that it will have a chilling effect.

Judge Jon Hill mentioned a Malheur County case, *Woodroffe v. State of Oregon*, 15CV1047, that basically stated that presiding judges already have the authority to declare a litigant vexatious. He stated that the committee used the criteria that the judge used in that case when drafting the rule. He explained that the intent was not only to formalize the existing authority, but to also put a little more structure to that inherent authority. Judge Jon Hill stated that he believed that Judge Peterson had already addressed the issue of whether the change was substantive. He asked Judge Bloom how he thought that the rule should be limited, or whether he thought that the idea inherently was substantive. Judge Bloom stated that the idea in its whole is substantive. He explained that he fully

understands that the court already has this power. He stated that his court has used it in family law cases where someone files a motion to modify every other week. However, he could only think of one case in 12 years in which it had been used. Judge Jon Hill pointed out that there are some places, like Clackamas County, where people are trying to re-litigate the same issue over and over again, or where groups of people keep bringing the same type of action against every governmental body they can, and where vexatious litigants are a bigger problem.

Mr. Crowley opined that the process envisioned under Rule 35 is probably not going to be used a lot. Obvious examples would be litigation used as harassment and unrepresented adults in state custody who file cases over and over again. He stated that the Department of Justice sees many of the latter cases, and they are expensive and time consuming to deal with. He pointed out that the federal courts have a well-defined process for dealing with repeat filers. However, there is not a uniform process across Oregon counties to deal with it in state courts.

Judge Norby stated that, if the rule is published, she suspects that the issues that Ms. Holley and Judge Bloom are articulating will be the type of comments that the Council will receive. She stated that there may be no way to really respond to those concerns, because it is a question of perspective. She stated that the concern may arise on the part of good plaintiffs' attorneys who file good cases and who have a hard time believing that there are people out there that are doing this kind of thing, or that judges would be very discriminating in their use of the proposed rule. She stated that she does not have that perspective, but that she could appreciate it. However, she is not sure how to respond to it. She stated that she did not think that those concerns would ever come to fruition if the rule were promulgated, but she could not say that it is an impossibility.

Ms. Holley stated that she understands that this is not the purpose of the rule but, conversely, there are vexatious defendants who want to bring every motion that is possible to bring. To her, the language in the draft limits the vexatious litigant designation to any re-litigation and seems to invites an additional opportunity for vexatious motions on the defense side, which is not covered as something prohibited by the rule. Judge Peterson stated that the rule was redrafted specifically not to be directed to plaintiffs. It is directed to litigants because it was understood early on that there are there are respondents and defendants who are also misbehaving. Judge Norby stated that the rule was redrafted to cover counterclaims or responsive pleadings that contain claims, but that Ms. Holley is talking about defendants who are being vexatious in ways that are not included in this rule. Ms. Holley stated that this is a fair summary of her position. She also stated that the language seems too broad for the intent of what the rule is meant to cover.

Judge Jon Hill stated that the goal is to assist a presiding judge in something that happens perhaps every couple of years, maybe yearly in larger counties. He asked

Ms. Holley if her concern is that someone could file a motion to designate someone to be a vexatious litigant to get back at the other side. Ms. Holley stated that she could see that happening. She also stated that she is currently representing a client who is still working for a public body and is experiencing harassment and discrimination. Ms. Holley sent a tort claims notice, as required while the client is still working. If the client gets fired, she will have to send a second tort claims notice about the same issue. She could envision that as potentially falling within the scope of this rule, but not being vexatious behavior. Judge Peterson stated that he could not imagine a judge buying that argument. He recalled that, when the Council made changes to Rule 27 because people were behaving badly by appointing guardians ad litem for nefarious purposes, the Council had to make the plaintiffs' side feel comfortable while giving a safety valve to give some protection from people who are abusing the process. Judge Peterson pointed out that the draft rule would confirm that the court has this authority and give a uniform process to deal with the very small number of people that create a lot of grief and take up a lot of the court's time and cost other parties a lot of money. Judge Peterson noted that most of the rules the Council creates are geared toward lawyers and their needs, but this rule is really geared toward judges and court staff to try to be able to manage things in a way that can be predictable and give relief to staff who are dealing with untenable situations.

Ms. Holley stated that she wanted to be respectful of that desire and of all of the work that had gone into drafting the rule. She stated that she does not disagree with that limited purpose, but feels that the language in the rule is broader than that. She asked about the federal process. Mr. Crowley stated that the federal process was outlined in the memo he had previously sent to the Council. Ms. Holley stated that she could not recall the exact process, but that her colleague who works in the federal court had stated that the process works well. Judge Norby stated that the federal situation is one in which the judges just do it, and people do not have notice of how or why they are going to do it or what rules apply. She noted that the Council tried to use the rules identified in case law in drafting Rule 35.

Mr. Hood suggested that Ms. Holley's concerns may be covered by Rule 17. Judge Peterson stated that he believes that they are. He opined that a vexatious litigant is a little bit like pornography – judges will know it when they see it. Judge Jon Hill reiterated that the criteria for judges to look at come from the *Woodroffe* case, and the draft rule is not a change from what the courts can already do now. Mr. Crowley stated that he believes that the draft rule would give a predictable framework for the different circuits to be able to handle the issues in the same way. Judge Norby stated that perhaps part of Ms. Holley's concern is that, by articulating the process in a rule, it is almost inviting people to avail themselves of the rule. She stated that she does not expect the draft rule to be universally embraced, but hopes that it will be sufficiently embraced that it will pass and courts will be able to start using it sometime soon. Judge Jon Hill stated that it

would be a real help to presiding judges to have a uniform framework across the state.

Judge Norby stated that she appreciated the collaboration with the OJD and their assistance with standardizing the process and establishing a way of recording it in the Odyssey system so that it is available for everyone to see. Ms. Holland stated that she viewed her role as facilitating the committee's vision for the rule and making sure that, if it is promulgated, it will work for OJD. She stated that Erin Pettigrew at the OJD could not attend today's meeting, but that Ms. Pettigrew had asked Ms. Holland to make it clear that OJD intentionally refrained from weighing in on any policy decisions, and is not taking a position on the policy at this point.

Ms. Holley stated that she had less problem with the language in subsection D(1) than she had with the definitions in section A, which she does not feel reflect her idea of a vexatious litigant as harassing, duplicative, and excessive. Judge Norby recalled the situation that caused her to be so invested in the creation of this draft rule in the first place. She stated that, in Clackamas County, there was a litigant who had filed about 16 cases against the same person over three years. Among other cases, there were two restraining orders in Clackamas County; one restraining order in another county claiming that the events had taken place there when they had, in fact, taken place in Clackamas County; two eviction cases; and one probate case. All of the cases involved the same foundational texts and the same basis, and all related to the same piece of property, with one party living on the upper floor and the other on the lower floor and the owner having passed away and left the property to someone else. There were allegations of elder abuse, attempts to evict, allegations of probate error, family law cases because the parties were distant relations, and basically anything the one party could think of to try to attack the other party. There were also multiple appeals on all of those cases. She stated that she feels that the rule must have some flexibility or it cannot encompass the creativity that people demonstrate when they are harassing each other in the courts. Ms. Holley stated that the important part is the word harassment, because Judge Norby's example is clearly harassment.

Ms. Dahab agreed with Ms. Holley. She stated that she is as concerned as Judge Norby about vexatious litigants, but the definitions in the draft rule are more broad than any sort of harassing litigation tactics that Judge Norby has described. She stated that it was not clear to her why it was so broad, and wondered why a rule could not be created that was a bit narrower. Judge Norby stated that the definitions came from an amalgamation of the definitions in other rules in other states and federal law. She asked whether someone was proposing a different definition, or if the rule was going to be allowed to rise and fall on the current definitions. Judge Jon Hill asked what the proposed change would be, because there are other reasons people bring frivolous suits besides harassment. Sometimes people will bring a suit and really believe that what they are doing is

correct, but they either may not understand or may not be capable of proceeding. He stated that this is why the definition needs to be a bit more broad. Ms. Holley asked whether it was possible to be more specific about the "other tactics" mentioned in paragraph A(1)(b). She stated that she would be open to another phrase, such as "excessively duplicative." Judge Norby suggested "For purposes of this rule, 'vexatious litigant' may include" instead of "includes" in subsection A(1).

Judge Norm Hill stated that there is a philosophical decision to be made – whether the Council publishes or does not publish this draft rule – because there has been a great deal of wordsmithery done already. He stated that he would suggest a poll to see where the Council is now, because there is no point in excessive discussion if the rule will not pass to the September publication agenda.

Justice Garrett noted that the concerns that have been expressed seem to relate to paragraph A(1)(a) and its subparagraphs, which focus on repeated filings or filing to re-litigate facts and claims. He stated that he has not heard much objection to the other parts of the definition that focus on frivolous filings. He wondered how important paragraph A(1)(a) is to the committee, and whether most of what is intended to be captured is captured with paragraphs A(1)(b) and A(1)(c). Mr. Bundy suggested that paragraph A(1)(a) could specifically refer to subsection D(1) by saying something like, "Subject to the factors enumerated in subsection D(1), for purposes of this rule, vexatious litigant includes situations..."

Ms. Nilsson suggested eliminating the language in paragraph A(1)(a) altogether, and moving up paragraph A(1)(b) with the language modified to read "A person who files frivolous or harassing cases, appeals, motions, pleadings or other documents." She stated, however, that this might not address Judge Jon Hill's concern about people who just do not know what they are doing. Justice Garrett stated that there could be a good faith disagreement about whether the first or second successive filing is really issue preclusion. However, if a person repeatedly files, would that not be captured by paragraph A(1)(b) because those filings have become frivolous after it has been established that these are res judicata? He again wondered how independently significant paragraph A(1)(a) is, or whether most of the people who are repeat filers would be swept up by paragraph A(1)(b). Judge Norby stated that paragraph A(1)(a) came from other states' definitions, and that she did not mind losing it, but that she was not sure that this change would convince Ms. Holley or Judge Bloom to support the rule. She stated that she is reluctant to make a change unless it gains support for the rule.

Mr. Hood thanked Judge Norby and the committee for all of their work on the rule. He stated that he appreciated her frustration with the current discussion. He stated that the information in section A is very important, and mentioned a divorce case he handled where the now ex husband on the other side is self represented and has continued to sue all of the lawyers who have represented him or his ex wife, as well as suing his wife in his daughter's name in a tort case

and at least one municipality and its police force. Mr. Hood stated that all of these cases have, essentially, the same facts at their core, but this litigant is very smart and modifies the complaints just enough that a judge would not say that res judicata applies and that the case must be at least decided on a motion for summary judgment. Judge Norby thanked Mr. Hood for his support. She stated that it is frustrating to know that these things are happening and the courts do not have an easy tool to deal with them. Mr. Hood again suggested that Rule 17 covers the motion issues, and that frivolous discovery is contained in paragraph A(1)(b) so that might address Ms. Holley's concerns about litigants filing cases and taking actions in the context of ongoing court processes.

Mr. Goehler made a motion to approve the draft of Rule 35 for inclusion on the September publication agenda. Judge Jon Hill seconded the motion. Ms. Holley stated for the record that she would probably be opposed to the rule, but that she did not necessarily mind if it went to publication. Judge Bloom stated that he is not comfortable with the rule philosophically. Ms. Dahab agreed. The motion passed by voice vote with three no votes.

IV. New Business

A. September Meeting Procedures

Judge Peterson reminded the Council that there are now seven rules on the agenda for the September publication meeting. He stated that his experience is that making on-the-fly modifications to the language in the rules during the September meeting is usually not a good idea, and the quality of the published rule may suffer as a consequence. He stated that Ms. Nilsson would send a copy of the rules on the agenda well in advance of the meeting, and asked every Council member to read them carefully and e-mail the entire Council with any concerns so that a discussion can take place prior to the publication meeting.

V. Adjournment

Mr. Crowley adjourned the meeting at 12:04 p.m.

Respectfully submitted,

Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, September 17, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

Hon. Benjamin Bloom
Kenneth C. Crowley
Nadia Dahab
Hon. Christopher Garrett
Barry J. Goehler
Hon. Jonathan Hill
Hon. Norman R. Hill
Meredith Holley
Derek Larwick
Hon. David E. Leith
Hon. Thomas A. McHill
Hon. Susie L. Norby
Hon. Scott Shorr
Tina Stupasky
Stephen Voorhees
Margurite Weeks

Members Absent:

Kelly L. Andersen
Hon. D. Charles Bailey, Jr.
Troy S. Bundy
Drake Hood
Scott O'Donnell
Hon. Melvin Oden-Orr
Jeffrey S. Young

Guests:

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

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium		ORCP Amendments on Publication Docket	ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7	ORCP 1	ORCP 71	ORCP 7		ORCP 54/ORS 36.425
ORCP 35	ORCP 4	Abatement	ORCP 35		
ORCP 39	ORCP 14	Affidaviting judges	ORCP 39		
ORCP 55	ORCP 15	Arbitration/mediation	ORCP 55		
ORCP 57	ORCP 16	Collaborative practice	ORCP 57		
ORCP 58	ORCP 17	Expedited trial	ORCP 58		
ORCP 69	ORCP 18	Family law rules	ORCP 69		
ORS 45.400	ORCP 21	Federalized rules			
ORS 46.415	ORCP 22	Interpreters			
	ORCP 23	Lawyer Civility			
	ORCP 27	Lis pendens			
	ORCP 32	One set of rules			
	ORCP 47	Probate/trust litigation			
	ORCP 52	Quick hearings			
	ORCP 55	Self-represented litigants			
	ORCP 57	Standardized forms			
	ORCP 58	Statutory fees			
	ORCP 60	Trial judges			
	ORCP 68	UTCR			
	ORCP 69				

I. Call to Order

Mr. Crowley called the meeting to order at 9:35 a.m.

II. Administrative Matters

Mr. Crowley asked Judge Peterson and Ms. Nilsson to explain the process for today's meeting, since there are some newer Council members who have never been present for a publication meeting before.

Judge Peterson stated that the publication and promulgation meetings tend to be more like coronations than the usual, deliberative Council meetings. He noted that, at the end of the last Council meeting, he asked members to please take a look at the rules up for consideration today to look for either typographical errors or any concerns about amending the wording to make something more clear. He stated that he is very reluctant to make on-the-fly amendments during this publication meeting, simply because that would result in a product that is not the Council's best, most deliberative work. He hoped that Council members are satisfied with the rules up for publication today. He stated that this will be a simple majority vote, and that the draft amendments that get that majority vote will published to the bench and bar and subject to comment. He stated that Ms. Nilsson will receive those comments and organize and disseminate them to the Council. Any rules that are published will be put on the agenda for the December promulgation meeting, and those amendments require a super majority vote of fifteen to promulgate.

Judge Norby stated that she has been thinking a lot about this meeting. She stated that, in her experience on the Council, this meeting can be characterized as simply a vote about whether to collect comments; a vote to see whether the Council wants to hear what the bar has to say about its work. Judge Peterson agreed with that characterization. He stated that the Council has previously published some draft amendments that were controversial to take the temperature of the bar. In at least two cases, a flood of comments came in, none of which were positive, and those particular amendments were not promulgated. This is an opportunity to run amendments up the flagpole and see how they are received.

Ms. Nilsson agreed that there have been times where a proposed amendment has been unpopular on one side or the other of the bar, and the Council has received comments to that effect. But it has also been the case that the Council has received comments about an unintended consequence that the Council had not considered, and the Council was able to address that concern the following biennium and craft a better rule that was, in fact, promulgated.

Judge Peterson stated that it has been the practice of the Council that, once the rule is published, the Council does not make substantial changes between publication and promulgation. If there is something that has been overlooked that is simply wrong, like a word that was omitted, of course that can be fixed. However, if the rule needs to be substantially retooled, it is probably better to rethink it in the following biennium.

Judge Norby summarized a yes vote as a vote to find out what the rest of the bar thinks, and a no vote as a vote not to let the rest of the bar weigh in on it. Mr. Larwick stated that a no vote could also be re-framed as a vote to rework the language until the Council feels that it is at a place where members can weigh in on it more intelligently. Mr. Crowley stated that, if it is the opinion of a Council member that the rule just is not ready to be published yet and that it needs more work, a no vote would reflect that. As a practical matter, that would mean that the draft would have to be carried over to the next biennium.

Mr. Crowley thanked all Council members for their work over the biennium, and for their presence at the meeting. He stated that there had been a lot of debate throughout the biennium, and that there is a lot of work on the table today as a result.

III. Old Business

A. Discussion of Draft Amendments

1. ORCP 7 (Appendix A)

Mr. Goehler reminded the Council that the Rule 7 committee looked at several suggestions that came from the greater bar, talked through them, and decided that the one issue that warranted further review was the relevance of whether county location was part of business entity service. The committee looked particularly at subsection D(3) and the different business entities there, then retooled the subsection to remove different rules based on whether the business entity was served in the same county where the action was filed. Mr. Goehler explained that this was the main change that was made, and that other changes were made by Council staff and did not affect the meaning or operation of the rule, such as taking out the word upon and replacing it with on.

Judge Peterson stated that Council staff had also added the phrase “if any” in part D(3)(c)(ii)(C) relating to limited liability companies to make it consistent with part D(3)(b)(ii)(C) relating to corporations. Mr. Goehler agreed that this was a good change to make the language parallel and consistent.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 7

Ms. Holley made a motion to publish the draft amendment to Rule 7. Judge Jon Hill seconded the motion, which was passed unanimously by roll call vote.

2. ORCP 39 (Appendix B)

Judge McHill stated that committee was formed, in large part due to Mr. Andersen's efforts, to create a way to handle situations where there is now better technology to either take depositions by remote means or take testimony at trial by remote means. The committee spent a lot of time talking about whether depositions would require a stipulation or an order of the court. Judge McHill stated that the intent of the committee was to liberally allow remote testimony, either at deposition or at trial, depending on the circumstances. As far as taking remote testimony, Judge McHill made special note that the Council had voted to retain the language in paragraph C(2)(a) that pertains to people who are bound on a voyage to sea.

Mr. Crowley stated that he appreciated the suggested changes to Rule 39. He pointed out that remote testimony is something that is currently happening on a regular basis and has been throughout the pandemic, and it has proven to be very useful. Judge Peterson stated that the amendment replaces telephone testimony, and brings the rule into modern, post COVID-19 practice.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 39

Judge Jon Hill made a motion to publish the draft amendment of ORCP 39. Ms. Holley seconded the motion, which passed unanimously by roll call vote.

3. ORCP 58 (Appendix C)

Judge McHill stated that the major change to Rule 58 is section F, which allows for testimony by remote means with respect to trial. The committee also recognizes that there is a statute, ORS 45.400, that talks about time limits with respect to requesting remote testimony in a trial situation, and the suggestion of the Council with regard to modifying that statute will be discussed later in the meeting.

Judge Peterson noted that staff had made many changes throughout the rule that were not intended to change its meaning or operation. One of those changes was in subsection B(7) to make the sentence regarding the two hour minimum for closing argument more clear. Another change was in subsection B(9) to clarify that the objection to the jurors' questions should be made outside of the presence of the jury.

Judge Norm Hill noted that the Chief Justice of the Supreme Court and the State Court Administrator are looking at creating a more comprehensive default position on what testimony will be allowed to be remote. He stated that he does not have a problem publishing this amendment, but that he would feel very

uncomfortable with the Council getting ahead of the Chief Justice's effort, because there is a lot more at play than just the civil side of this. It is also an issue in criminal trials, and juvenile delinquency and dependency cases add a new level of complexity to it. Based on the timing, this may be a case where the Council needs to take a step back and let the OJD go first.

Judge McHill stated that the committee had discussed this issue early on, and the intent was to adopt what was at least then the definition of "remote means" because the rule was inconsistent with the present reality, with the realization that there may be other work happening on the issue. Judge Norm Hill stated that he and Judge Bloom were on a conference call the previous day where the OJD's plan of action regarding remote appearances was a major topic of conversation, so he wanted to bring it to the Council's attention that there is a substantial push from the Chief Justice to create some uniformity. He stated that he would hate to have the Council's promulgation make that process more difficult. Having said that, given the nature of this meeting, he believes that the Council should absolutely publish the rule to remain part of that conversation. He cautioned that there may be a need to take a step back before finally adopting the amendment.

Judge Peterson asked whether the OJD's effort would result in a statute or a Chief Justice's Order (CJO). Judge Norm Hill stated that it may take the form of a CJO or it may be changes to the Uniform Trial Court Rules; they are both being looked at. One of the issues right now is whether these things should be looked at on a very granular, hearing-by-hearing basis, like many states have done. Another option would be to have groupings of categories of hearings to decide whether some will be held remotely as a default. Judge Norm Hill stated that he was not saying that the OJD's work would be inconsistent with the Council's work, because that remains to be seen.

Mr. Crowley asked whether Judge Norm Hill was aware of whether the Chief Justice knows that the Council is considering this change to the ORCP. Erin Pettigrew from the OJD stated that the Chief Justice and the Office of the State Court Administrator are carefully, critically looking at how they can help the courts have greater consistency and clarity around where remote proceedings will be encouraged. She stated that she had sent the Council's draft amendments of Rule 39 and Rule 58 to the Chief Justice and her staff, and they have reviewed them. Preliminarily, there are no concerns, and it looks like the Rule 58 proposal might be quite helpful in terms of helping create clarity. Of course, there are many unknown factors, and it is not certain where the process will lead, but for now there are no concerns about conflicts. Ms. Pettigrew agreed with Judge Norm Hill that these amendments are part of a larger process that is just taking flight, but the OJD is aware of and appreciates the Council's work because it does matter for people to have clarity around remote proceedings.

Judge Norm Hill stated that, in terms of the process, as the Chief Justice is developing her position, she has a process that starts with a small group of trial court administrators and regional presiding judge representatives that deliberate, and then her goal will be to rely on input from all of the presiding judges, and that has not happened yet. He pointed out that the Chief Justice is at the beginning of that process and is not yet in a position to know how the Council's work will play into it. Ms. Pettigrew agreed that this is a fair summation of the situation.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 58

Judge Jon Hill made a motion to approve the draft amendment of Rule 58. Judge Norby seconded the motion, which was approved unanimously by roll call vote.

4. ORCP 55 (Appendix D)

Judge Norby reminded the Council that this is an amendment that has pretty limited applicability. The amendment arose from a request from Multnomah County Judge Marilyn Litzenberger, who asked for a process for moving to quash a subpoena for occurrence witnesses. That process was placed in subparagraph A(1)(a)(vi), and a basic form was added to the rule that would be required to be included with a subpoena to allow people who receive subpoenas to move to quash them by providing essential information that would be necessary for that decision.

Judge Peterson stated that Judge Litzenberger had noted that it does not occur very frequently that occurrence witnesses ask to be excused from complying with a subpoena but, every time it does come up, no one feels comfortable about how to handle it. What this amendment is trying to avoid is the occurrence witness ignoring the subpoena, which is not desired by anyone. The amendment provides a procedure that also tells the recipient that, if they do not appear, there can be adverse consequences. It states in the proposed motion and declaration that the witness must basically perform the equivalent of UTCR 5.010 conferral and talk to the attorney that issued the subpoena, as well as stating the reasons for being unable to appear and why the subpoena request should be modified or quashed. Judge Peterson reminded the Council that an attempt was made to modify Rule 55 last biennium, and it was pulled back after publication. He stated that the committee had done a lot of research and come up with a blend of three different jurisdictions' methods. He reached out to the courts in Utah, which has a much more troublesome form, and discovered that their form does not seem to be causing mischief there. Judge Peterson stated that this is the committee's best effort at this concept.

Ms. Stupasky stated that she has been hearing that there will be a lot of pushback from some very well-respected plaintiffs' attorneys about this draft amendment if it is published. She anticipated many comments that the change is not necessary given the fact that the ability to move to quash a subpoena already exists. She stated that many people are troubled about providing the form with the subpoena and inviting witnesses that are already difficult to get to come to trial to fight the process. Ms. Stupasky stated that she has also heard that some people feel like the form is giving legal advice, but she did not know the specifics of that. Ms. Holley stated that she had heard that the pushback is in regard to the form, and not to the language added to the rule itself. Ms. Stupasky agreed. Ms. Holley stated that she thought it was a good form, but heard that there will be objection to it.

Judge Peterson noted that one of the judges he spoke to in Utah had suggested that service of the subpoena should not be the first communication a lawyer has with a witness. Of course, occasionally, things come up unexpectedly, but there typically should be some kind of communication beforehand. He stated that he likes the fact that the form states what existing subpoenas do not – that, if you do not comply, you might be in big trouble and receive a fine or jail time. He noted that this may make it easier to enforce contempt.

Mr. Goehler stated that he appreciated Judge Peterson's comments about the warning. He likes the language and feels that it is good to include it. The Washington form is very ominous and threatening, stating, "Disobey at your peril." He appreciated the neutrality of the language here.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 55

Judge Jon Hill made a motion to publish the draft amendment of Rule 55. Judge Bloom seconded the motion, which was approved by roll call vote with twelve affirmative votes and two negative votes.

5. ORCP 57 (Appendix E)

Ms. Holley stated that the Council had made a number of changes at the last meeting that simplified the overall amendment. Some of those changes were in subsection D(1), the for-cause challenge area. The previous change to paragraph D(1)(g) was removed. Paragraph D(1)(b) was changed to use the language "impairment" instead of "defect" and "essential functions" instead of "duties" to comport with general disability law terms. There is language in subsection D(1) that says that an individual juror does not have the right to sit on a particular jury, but they do have the right to be free from discrimination in jury service, and that is to reflect case law.

Ms. Holley reminded the Council that the main changes start in subsection D(4). At the last Council meeting there was a vote to expand the protected characteristics from race, ethnicity, or sex to comply with Oregon's public accommodation statute, ORS 659A.403. Those characteristics now include race, color, religion, sex, sexual orientation, gender identity, and national origin. The Council chose not to include age and marital status. The biggest change removes the presumption of non discrimination and allows the adverse party to make an objection regarding bias in jury selection. The person exercising the peremptory challenge must state a non-discriminatory reason, then an objecting party must provide argument and evidence that the reason is discriminatory or is a pretext for discrimination. The objection to the peremptory challenge must be sustained if the court finds more likely than not that a protected characteristic was a factor in invoking the challenge. The amendment also adds factors for the court to consider, including whether the juror was questioned and the nature of the questions, the extent to which the non-discriminatory reason could arguably be a proxy for a protected status, whether the party challenged the same juror for cause, and any other factors. The explanation is to be made on the record. Ms. Holley stated that she feels that the draft before the Council is the best so far, and that the changes made at the last meeting simplified the rule in a way that judges will be able to more practically implement. She also stated that she believes that this amendment is probably the best option for preventing elimination of peremptory challenges through the Legislature.

Judge Shorr suggested changing "a juror does not have a right to sit on any particular jury..." to "a juror does not have a right to sit on a particular jury..." to avoid ambiguity. Ms. Holley stated that she agreed with this suggestion. Judge Peterson stated that this is the type of change that is appropriate at the publication meeting.

Mr. Crowley asked whether the intent is to also publish the memo from the committee that is attached to the draft (Appendix F). He stated that he feels that there is an advantage to publishing the memo with the rule, because it shows the amount of work that was done to arrive at the final amendment, as well as contains a link to all of the materials that the workgroup reviewed. Ms. Holley stated that she is open to suggestions for changes to the memo as well.

Judge Norm Hill stated that he would like to raise a few issues with the memo. The first is an error when referring to the makeup of the Council; it refers to the two courts of appeal where it should say the two appellate courts, or the Court of Appeals and the Supreme Court. Another issue is that the memo is a communication to the Legislature, and he would like to have the Council take a firm position about how the Legislature should be addressing the problem of the disparate impact of the jury system on people of color by improving jury composition through improving jury compensation. Because of low jury pay, the only people who can participate are on the high end of the economic spectrum,

not people who cannot afford a day off of work. If the system is truly going to be fair, giving people a jury of their peers, there must be a way to bring more, and more diverse, people into the system. Ms. Holley noted that there was some language in the last draft of the memo that supported the OJD's changes to ORS chapter 10 regarding juror compensation. She removed that language in this version because the Council had discussed just focusing on the crucial changes to Rule 57 so as not to distract from them. Judge Norm Hill stated that he believes that the message cannot be overstated because it is so important.

Judge Norm Hill stated that some judges and members of the bar had expressed concern to him about the burden shift making jury selection much more difficult for prosecutors, almost putting a target on them. He stated that he had sold the change to these people by pointing out that the burden is not that high to begin with. He noted that the memo seems to say that the burden is very high. He pointed out that the burden really is not high, but that the rule change has simply changed the conversation. He asked that this language in the memo be changed to reflect this reality. He also stated that he thought that it is important to state that the Council wants to address the issue of implicit bias by having everyone who is engaged in jury selection consciously challenge themselves as a matter of course about whether the choices they are making are based on implicit bias. The amendment simply creates an environment where that can happen automatically. Judge Norm Hill suggested emphasizing that a bit more in the memo. Ms. Holley stated that she could make these changes and let Judge Norm Hill review them before the publication meeting. Judge Peterson suggested allowing Ms. Pettigrew and Ms. Holland with the OJD to review the language as well.

Mr. Crowley asked Ms. Holley to remove the reference to him as a representative of the Department of Justice (DOJ) in the report, as he was not representing the DOJ in that capacity. Ms. Holley stated that she would refer to him as a Council member. Judge Peterson stated that Mr. Shields was erroneously listed as a Council member, when he should be listed as the Council's liaison from the Oregon State Bar.

Mr. Larwick stated that he could understand publishing proposed rule changes, but that he was not sure that understood the mechanism by which it is publishing commentary (i.e., the memo). Ms. Holley stated that the reason the Council is publishing the memo is that the Council voted last biennium that this may be a substantive change, and she believes that this is outside of the Council's purview as a rule. She stated that Judge Peterson disagrees with her, but the reason to publish the memo is to say that the Council recognizes that it has been asked to make this change, but it may have serious, substantive implications. Typically, when the Council makes a recommendation to the Legislature, Judge Peterson sends a letter with the recommendation attached. Because there is a little bit of a disagreement as to whether this change is substantive or procedural, this is sort of the middle ground.

Judge Peterson noted that the third paragraph of the memo states rather strongly that jury selection inherently implicates the substantive rights of both litigants and jurors. Ms. Holley stated that this is because the Council voted last biennium that it does. Judge Peterson pointed out that last biennium's discussion was about what questions were on the "naughty and nice" list, and that has been changed, so the proposed amendment before the Council now is much more procedural. He simply suggested toning down that language to "may implicate." Ms. Holley agreed. Judge Peterson did agree that it is a concern, if the change is determined to be substantive, that the Council should flag that for the Legislature. If the Legislature wants to hold hearings on it, they certainly can, and should. However, Judge Peterson did not want to cede the Council's procedural territory to the Legislature. Judge Norm Hill echoed Judge Peterson's belief that, given the current state of the proposed changes in the draft amendment, this is squarely a procedural question that is within the Council's purview.

Judge Peterson reminded the Council that the memo will not become a part of the rule; rather, it is intended to be an attachment to show the Legislature the amount of work that was involved in crafting the rule. He noted that Council staff does write legislative comments to the rules, but that this is a separate process and that these comments will not be as detailed as the memo.

Ms. Pettigrew updated the Council on the OJD's juror compensation bill. This standalone bill will be introduced by the Chief Justice in the next legislative session and would do two things. First, it would tie the rate of compensation for mileage to the federal rate, as opposed to the current statutory rate of 20 cents per mile. Second, and more importantly, it would raise the per diem rates of jury service from $10 a day to $50, and from $25 per day to $60 on the third and subsequent days. Ms. Pettigrew stated that the OJD would appreciate all support that could be brought to the ears of legislators, as it is a $21 million proposal. She thanked Judge Hill for raising the issue of juror pay today, and Ms. Holley for working this access to justice issue through the workgroup.

Judge Norm Hill specifically acknowledged Ms. Holley. He stated that, during his time on the Council, he did not believe that there had been a more impactful and difficult issue, and that Ms. Holley had been incredibly gracious and patient with Council members as they worked through it. He stated that the Council would not be at this point without her hard work, and the Council owes her a debt of gratitude.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 57

Judge Jon Hill made a motion to publish the draft amendment of Rule 57, along with the committee memo, amended pursuant to today's discussion.

Judge Norby seconded the motion, which passed unanimously by roll call vote.

6. ORCP 35 (Appendix G)

Judge Jon Hill reminded the Council that the committee had first discussed recommending legislation about vexatious litigants based on a Senate bill from 2013 but, after further discussion, had decided to see whether an ORCP could work. Through case law research, the committee discovered that presiding judges have this authority now. In subsections D(3) and D(4) of the draft amendment, criteria from that case law is listed. He stated that he believes that the most recent draft of the rule addresses all of the relation back issues. The rule gives structure to what presiding judges can already do now.

Judge Norby stated that, after the last Council meeting, she looked at the definitions in section A. She believes that the three categories there that this rule would apply to are: 1) litigants who refuse to accept their past losses and try to re-litigate them; 2) litigants who file frivolous or harassing claims; and 3) litigants who have already been designated vexatious by another jurisdiction. That is who this rule is aimed at. As Judge Jon Hill said, there are criteria that need to be applied in order to take any further action on a member of those three groups.

Judge Norm Hill stated that he is aware that the draft rule is going to generate controversy and that, even on the Council, there is some question about whether this rule is a good idea. He opined, however, that the rule should be published exactly for that reason. He stated that the members of the committee and the Council have wordsmithed the rule to where it is the best expression of the concept, and he did not believe any further discussion was going to significantly improve it. The real question is whether it is a good or bad idea, and that is exactly the kind of thing that the Council should publish to the bar. He urged all Council members to vote to publish the draft rule so that a conversation can be had at the publication meeting about whether it is ultimately a good or bad idea.

Judge Bloom appreciated Judge Norm Hill's comments, the work of the committee, and the reason behind the creation of the rule. However, he opined that it is a profound overreach on the part of the Council. For that reason, he respectfully disagreed with its publication. He stated that, when he was a lawyer on the Council and there was a suggestion to put forward two versions and see what bar members thought, he did not think that was appropriate. He stated that the Council is a quasi-deliberative body set up to for rulemaking recommendations to the Legislature, and it is the Council's job to come up with rules. He stated that, whether work has been put in on a rule or not, if it is not a good idea, it should not be published. Judge Bloom stated that his concerns are on several grounds: 1) the draft rule is legislative; 2) it sends a wrong signal to people; and 3) it invites unnecessary litigation for power that the courts already

have. He recognized that the federal courts are designating litigants as vexatious, but asked Mr. Crowley whether there is actually a federal rule. Mr. Crowley stated that there is no rule in the Federal Rules of Civil Procedure; it is more or less a local process that is somewhat easier for the federal court to apply consistently because there is only a handful of federal judges. Nevertheless, Mr. Crowley stated that the process that the committee has come up with is intended to provide consistency within state courts for the same reasons.

Ms. Dahab expressed appreciation for the work of the committee, but shared the same concerns that Judge Bloom articulated. She stated that she belives that the rule turned out to be more substantive than procedural. Her bigger concern is the access to justice concerns that she reads the rule to have. The first category of people to whom the rule potentially applies, those who may be unwilling to accept the result from a prior lawsuit, may capture more people than the Council is intending to capture. The Council may not appreciate how aggressive litigants can be in many contexts. Ms. Dahab stated that she does a lot of consumer protection work, and that this strikes her as something that could come up quite frequently for debt collectors against debtors. In addition, the security requirement poses access to justice concerns. The idea that a litigant must apply for leave to file a lawsuit that is not exactly the same, but may be similar or substantially related, may have remedy clause problems or policy-based access to justice concerns. She worried that there might be unintentional blocking of access to the courts. She would therefore vote not to publish the rule.

Ms. Stupasky agreed with Judge Bloom and Ms. Dahab for the reasons they stated. She also expressed concern about including persons who have previously been declared to be a vexatious litigant by any state or federal court of record. That language is very broad and, if a judge in another state got carried away and found someone to be vexatious who was not, having Oregon rely on that ruling could be problematic. While she appreciated the work of the committee, she would also vote against publication.

Mr. Larwick stated that he was unable to attend the last Council meeting, and apologized if he had missed some discussion. He stated that he is mostly concerned about the second category, which is a person who files frivolous motions, pleadings, or other documents, or engages in discovery or other tactics that are intended to cause unnecessary, expensive delay. He stated that this language seems so broad that it could almost apply in pretty much all of the cases where the defendants file affirmative defenses with no basis in law or fact. For example, he has a few uninsured motorist cases against the same insurance company. In each case, there is an attempt to change existing law. In one case, the plaintiff lost in summary judgment; in the other case the defendant lost in summary judgment, because the case law was against the position each was taking. He expressed concern that, during the summary judgment hearing, a party might file a motion asking for the other party to be deemed vexatious and a trial

court might buy into it. In that situation, how would a carrier who is a repeat litigant that gets branded with a scarlet letter of being a vexatious litigant get that scarlet letter taken away? The rule does not address how someone who is tagged a vexatious litigant can get that designation removed, because it looks like, each time they file something with the court, they have to go through the process of an ex parte motion. Mr. Larwick wondered how the rule can be constitutional.

Judge Peterson pointed out that the creation of this rule was a suggestion from the poll of bench and bar. He noted that there are some bad suggestions, and that this does not automatically mean that the Council should follow all suggestions it receives. But that suggestion, and the experience of some of the judges on the Council, shows that the problem is occurring throughout the state, without any procedure whatsoever and any remedy being imposed, by the whim of individual judges. These cases take an incredible amount of time from court staff, and inflict pain on people. In terms of whether it is substantive or not, this is really very much like Rule 47 – we are putting a party in the express lane. Rather than simply not being allowed to litigate, the party simply has to show that there is some basis for the litigation, or that it is somehow a little different from the last one. He opined that these cases are kind of like what the late Justice Potter Stewart said about pornography – you know them when you see them. They are rare, but fairly obvious. Judge Peterson stated that it seems to him that having some uniformity is not a bad idea. He did not think that the rule is substantive, but publishing it would allow the Council to find out what the bench and bar think. Mr. Crowley stated that he thinks that it is fair to say that most lawyers do not see these cases, but they still have a real impact on justice across the board because they clog the courts.

Judge Jon Hill reminded the Council that the discussion thus far has not included the list of factors that the presiding judge may consider in determining whether a litigant is vexatious. These factors are taken from case law and are found in subsection D(1). This is what presiding judges should already be doing now, but this formalizes the process.

Ms. Holley stated that she has trouble voting yes to publish if she ultimately knows that she will vote no on promulgation. She stated that she wanted to be up front about that. She understood Judge Jon Hill's point about the factors, but the definitions in subsection A(1) are so different that she does not quite understand how they are supposed to interact with one another.

Ms. Nilsson stated that it is possible that publishing the draft rule could potentially give good feedback, even if the rule is not ultimately promulgated, for the matter to be potentially revisited and the work product improved the following biennium.

a. ACTION ITEM: Vote on Whether to Publish Draft ORCP 35

Mr. Goehler made a motion to publish the draft ORCP 35. Judge Norm Hill seconded the motion, which was approved by roll call vote with eight votes in favor and seven in opposition.

7. ORCP 69 (Appendix H)

Judge Peterson reminded the Council that the citation to the Servicemembers Civil Relief Act, found in the United States Code, had been changed by Congress. There is a citation to that Act in ORCP 69 that must be correspondingly updated. This is the main change to ORCP 69. Ms. Nilsson noted that there are also a few grammatical changes by staff that are not intended to affect the operation of the rule.

a. ACTION ITEM: Vote on Whether to Publish Draft Amendment of ORCP 69

Ms. Holley made a motion to publish the draft amendment to Rule 69. Judge Jon Hill seconded the motion, which was passed unanimously by roll call vote.

B. Review of Recommendations to Legislature

1. ORS 45.400 (Appendix I)

Judge Peterson stated that, if the draft amendment to Rule 58 is ultimately promulgated, the Council would likely make a recommendation to the Legislature for amendment of ORS 45.400. In section 2, the statute currently requires 30 days' written notice of remote testimony before trial, and that just does not happen any more. Judge Peterson stated that the significant change is in section 2, and it simply says that there must be notice sufficiently in advance of the trial or hearing at which the remote location testimony will be offered to allow the non movant to challenge those favorable factors specified in the statute, or to advance those unfavorable factors that are also in the statute. It boils down to basically giving the other side a reasonable opportunity to object.

Judge Peterson stated that there is also a suggested change to 3(c)(E) based on the Council's rather rich discussion about the logistics of remote testimony. He stated that the change is an improvement because it makes clear that the attorney, the court, the parties, and the witnesses must have functioning technology to make remote testimony work. Judge Peterson stated that he believes that the amended language reflects the Council's discussion. Finally, in section 6, there is a suggestion for a correction of a typographical error in the existing statute.

2. ORS 46.415 (Appendix J)

Judge Peterson stated that, if the draft of Rule 35 is ultimately promulgated, the Council would likely make a recommendation to the Legislature for amendment of ORS 46.415 to add a new section 3 to make it explicit that Rule 35 will apply to cases in the small claims department. This is because Rule 1 states that the ORCP do not apply in the small claims department unless otherwise stated. Since many vexatious litigants file small claims cases, the committee feels that it is important that Rule 35 should apply there.

IV. New Business

A. Internal Reference to ORCP 55 in ORS 136.600 (Appendix K)

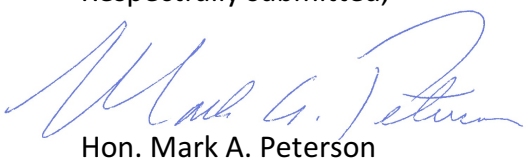
Judge Peterson explained that, for some reason, ORS 136.600 has several references to sections in Rule 55 that no longer exist after the reorganization of Rule 55 two biennia ago. It was his understanding that Legislative Counsel was going to take care of this in a reviser's bill; however, he has now been informed that any correction may get sent to the Ways and Means Committee and languish there. He stated that he has contacted Legislative Counsel and asked whether they would like the Council to suggest an amendment to the statute, and Council staff has prepared one in case the answer is yes. In that case, the suggested amendment will be on the December agenda.

Ms. Pettigrew stated that the Chief Justice had offered to include this suggestion in OJD's omnibus bill, but that bill will have fiscal impacts so will also go to the Ways and Means Committee. If the Council would like to include this amendment in the OJD's bill, the edits are due on Wednesday, September 21. Judge Peterson stated that he would be in contact with Legislative Counsel and get back to Ms. Pettigrew if there was a desire to include the suggested fix in the OJD's bill.

V. Adjournment

Mr. Crowley adjourned the meeting at 11:02 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director

DRAFT MINUTES OF MEETING
COUNCIL ON COURT PROCEDURES
Saturday, December 10, 2022, 9:30 a.m.
Zoom Meeting Platform

ATTENDANCE

Members Present:

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

Members Absent:

Hon. Benjamin Bloom
Troy S. Bundy
Hon. Melvin Oden-Orr

Guests:

Leland Baxter-Neal, Or. Consumer Justice
Kathryn Clarke
Brian Dretke, Dretke Law Firm
Aja Holland, Oregon Judicial Department
Matt Shields, Oregon State Bar
Blair Townsend, Wise & Townsend

Council Staff:

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

ORCP/Topics Discussed this Meeting	ORCP/Topics Discussed & Not Acted On this Biennium			ORCP Amendments Promulgated this Biennium	ORCP/Topics to be Reexamined Next Biennium
ORCP 7	ORCP 1	ORCP 57	Lawyer Civility	ORCP 7	ORCP 54/ORS 36.425
ORCP 35	ORCP 4	ORCP 58	Lis pendens	ORCP 39	
ORCP 39	ORCP 14	ORCP 60	One set of rules	ORCP 55	
ORCP 55	ORCP 15	ORCP 68	Probate/trust	ORCP 57	
ORCP 57	ORCP 16	ORCP 69	litigation	ORCP 58	
ORCP 58	ORCP 17	ORCP 71	Quick hearings	ORCP 69	
ORCP 69	ORCP 18	Abatement	Self-represented		
ORS 45.400	ORCP 21	Affidaviting judges	litigants		
ORS 46.415	ORCP 22	Arbitration/mediation	Standardized forms		
	ORCP 23	Collaborative practice	Statutory fees		
	ORCP 27	Expedited trial	Trial judges		
	ORCP 32	Family law rules	UTCR		
	ORCP 47	Federalized rules			
	ORCP 52	Interpreters			

I. Call to Order

Mr. Crowley called the meeting to order at 9:33 a.m.

Judge Peterson thanked the Council for an interesting biennium. He stated that some of the rule issues that have been addressed may not be noticed by many lawyers if they are promulgated, but the Council has also taken on some big, important ideas. It has also received pushback on some of them. He opined that it is useful for the Council to put some big ideas out there and see whether it is brave enough to promulgate them.

Mr. Crowley stated that he appreciated Council members' patience during the Council's first-ever completely virtual biennium and its adaptation to video conferencing. While it has not always been smooth, the Council has gotten better at it with time, as has the entire bar.

II. Administrative Matters

A. Meeting Minutes

Mr. Crowley explained that the Council has some meeting minutes that still need to be finalized, so he asked to schedule a short follow-up meeting for that purpose. He asked Ms. Nilsson when those drafts might be ready for the Council's review. She stated that late January or early February seemed appropriate. Mr. Crowley suggested a lunch hour meeting.

Judge Norby asked whether the vote could be accomplished by e-mail. Ms. Nilsson stated that, unfortunately, as a public body, the Council is subject to state public meeting laws and is not allowed to vote by e-mail.

The Council agreed to meet on Monday, February 13, 2023, at noon to approve the meeting minutes from May, June, August, September, and December of 2022.

B. Election of Legislative Advisory Committee

Judge Peterson stated that, by statute, the Council is required to elect a Legislative Advisory Committee consisting of five members of the Council. The purpose of this committee is to answer any questions posed by a committee chair of the Oregon Legislature about a promulgation or any legislation that might bear on the Oregon Rules of Civil Procedure (ORCP). Typically, the committee consists of two lawyers, two judge members, and the public member. Judge Peterson asked for volunteers.

1. ACTION ITEM: Nominate and Vote on LAC

Mr. Goehler, Judge Norm Hill, Ms. Holley, Judge Norby, and Ms. Weeks volunteered to serve on the committee. Judge Jon Hill made a motion to approve that slate of volunteers. Mr. Andersen seconded the motion, which passed

unanimously by roll call vote. Mr. Crowley stated that he would be willing to be an unofficial member of the committee and that he could be called on if needed, in his capacity as a Council member only, not as a representative of the Department of Justice.

C. Set First Council Meeting for September of 2023

Judge Peterson stated that he had checked the calendar for September of 2023 to avoid religious holidays that fall on weekends. He also checked the second Saturdays of each month for the rest of the biennium, which is typically a schedule that the Council follows, and that those dates look relatively clear with the exception of Veterans' Day weekend, the second day of Hanukkah, and Mother's Day weekend.

Mr. Crowley suggested that the Council set its first meeting on September 9, 2023, and allow the new Council to set the remainder of the schedule for the biennium. Mr. Shields asked whether the Council was considering returning to in-person meetings. Mr. Andersen stated that he preferred virtual meetings, since it is far for him to travel from Medford to the Oregon State Bar. Judge Jon Hill agreed that it is much easier for members from throughout the state to participate if the meetings are held virtually. Judge Norby suggested perhaps holding one or two in-person meetings per year and the rest virtually. She stated that she did miss being in the presence of other Council members, and that it is easier to get to know people when you are face to face with them. Judge Bailey asked whether it was possible to conduct hybrid meetings, with some members appearing in person and some appearing virtually. Ms. Nilsson stated that this may be possible if the Bar has the technology that would allow it to happen. Judge Norm Hill noted that it is difficult for those who are not in the room to be part of the conversation. Judge Peterson mentioned that the Council's authorizing statute states that it should endeavor to meet in each of the congressional districts, and that may be something for the Council to consider next biennium. Judge Norm Hill agreed with Judge Norby's suggestion about holding one or two in-person meetings per year, not necessarily in the Portland metro area. Mr. Shields stated that he would reserve a meeting room for the Council for September 9, 2023, just in case it is needed.

III. Old Business

A. Discussion/Voting on Draft Amendments Published September 17, 2022

1. ORCP 69

Judge Peterson reminded the Council that the federal government had changed the citation to the Servicemembers Civil Relief Act. There is a citation to that Act in paragraph C(1)(e) of ORCP 69 that must be correspondingly updated. Council staff also made a few grammatical amendments to the rule that are not intended to change the operation of the rule.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 69. Hearing none, he asked for a motion to promulgate the amendment.

a. ACTION ITEM: Vote on Whether to Promulgate Draft Amendment of ORCP 69

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 69. Ms. Holley seconded the motion, which was approved unanimously (20-0) by roll call vote.

2. ORCP 7

Mr. Goehler reminded the Council that the operative changes to ORCP 7 are located in subsection D(3). These changes make the service method consistent whether it is a corporation, a limited liability company, or partnership that is served. He explained that there were also a few staff changes for cleanup that were not intended to affect the operation of the rule.

Mr. Crowley thanked Mr. Goehler and the committee for their work. He asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 7. Hearing none, he asked for a motion to promulgate the amendment.

a. ACTION ITEM: Vote on Whether to Promulgate Draft Amendment of ORCP 7

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 7. Ms. Holley seconded the motion, which was approved unanimously (20-0) by roll call vote.

3. ORCP 39

Mr. Andersen stated that the amendments to Rule 39 essentially specify the conditions under which testimony may be taken in depositions by remote means, formerly telephone depositions. He stated that the draft has been through a number of iterations and was approved by the Council for publication.

Mr. Crowley thanked Mr. Andersen and the committee for their work. He asked if there were any guests or Council members who wanted to comment on the proposed amendments to Rule 39. Hearing none, he asked for a motion to promulgate the amendment.

a. ACTION ITEM: Vote on Whether to Promulgate Draft Amendment of ORCP 39

Mr. Goehler made a motion to promulgate the draft amendment of Rule 39. Judge Jon Hill seconded the motion, which was approved unanimously (20-0) by roll call vote.

4. ORCP 58

Mr. Andersen stated that the amendment to Rule 58, to permit remote testimony in trials, pretty much tracks the changes to Rule 39, and also refers to ORS 45.400(2), which basically wraps around depositions as well as trial testimony. He stated that, again, the amendment has been through multiple iterations, and that he believes that the published language is just right.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 58. For the purposes of the minutes and to ensure his correct understanding, Judge Norm Hill asked Mr. Andersen whether ORCP 58 F simply validates he fact that the parties can stipulate to do things by remote means, but that it is not intended to remove the ability of the judiciary to dictate whether or not a matter is going to be held remotely or in person. Mr. Andersen stated that Judge Norm Hill's understanding is correct, and pointed out that the opening clause of section F states, "subject to court approval."

a. ACTION ITEM: Vote on Whether to Promulgate Draft Amendment of ORCP 58

Judge McHill made a motion to promulgate the draft amendment of Rule 58. Judge Norby seconded the motion, which was approved unanimously (20-0) by roll call vote.

5. ORCP 55

Judge Peterson reminded the Council that Judge Norby had authored a reorganization of Rule 55 a few biennia ago and made it a much more usable rule. At that time, the decision was made not to make any changes to the operation of the rule but, rather, to wait and make sure that the reorganization did not have any unintended consequences. Last biennium, the rule was examined again and modified to add the requirement that the subpoena should indicate that a witness does not need to appear if they are not offered the witness fee and mileage reimbursement. That was because there was a judge who was encountering a problem with inmates who were serving multiple subpoenas without those fees, and the witnesses did not know what to do. Judge Peterson stated that, this biennium, the Council had received a request from Multnomah County Judge

Marilyn Litzenberger, now retired, who had occasionally encountered the problem of witnesses who were unable to appear because of scheduling conflicts and who were uncertain of how to handle the problem. The amendment to Rule 55 before the Council today is the Council's best effort to try to solve that problem.

Judge Peterson explained that the committee had looked at rules in several jurisdictions, and had taken language for the amendment primarily from the state of Utah, with some significant changes. He stated that he had checked with several judges and the trial court administrator in the largest county in Utah. The judges said that they have had just a handful of requests over the years from people who wanted a hearing about whether they had to appear. The trial court administrator stated that it did not seem to be an issue there, despite the fact that Utah's form lays out a checklist of just about every possible reason under the sun why the witness might not have to appear. Judge Peterson stated that the committee decided that was not a good idea, and chose to require that the witness must instead write succinctly the reason that they should not have to appear. The amendment to Rule 55 also includes a duty to confer or attempt to confer, akin to that in UTCR 5.010, or the motion to have the subpoena quashed will be denied. Judge Peterson pointed out that one of the judges in Utah suggested to him that, as a general rule, the first time that a lawyer has contact with a witness should not be when the subpoena is is served on the witness.

Judge Peterson stated that the committee and the Council have spent a fair amount of time crafting this amendment to give a procedure for those rare times when someone who is going to be seriously inconvenienced by having to appear on a certain date does not know what to do. Judge Peterson noted that a few of the comments the Council received from the bar suggest that the amendment provides legal advice. He stated that this is not true; the rule is a rule that provides information on its face and does not provide legal advice, nor would any subpoena that was issued with the new motion to quash. Judge Peterson pointed out lawyers are already having conversations with witnesses about subpoenas now, and that is not legal advice.

Mr. Crowley thanked the committee for its work. He asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 55.

Brian Dretke from Dretke Law Firm introduced himself. He stated that he had submitted one of the comments in opposition to the amendment to Rule 55. He stated that, for the reasons contained in his comments, he believes that the amendment is a solution in search of a problem. Mr. Dretke noted that his experience has been that this is not something that occurs very commonly. In fact, it has never occurred personally for him as a lawyer or when he was on the bench. He stated that, the way the amendment is structured, it just provides a motion to quash and it is not very well defined in terms of the burden. He opined that the

amendment would lead to more problems than it would solve.

Blair Townsend introduced herself and thanked the Council for doing the brain trust work that benefits her practice all of the time. She stated that she has a law firm in Lake Oswego but that she was appearing today in her position as President of the Oregon Trial Lawyers Association (OTLA). She stated that several OTLA members had submitted comments on Rule 55 as well as on Rule 35, and she asked to submit comments on both rules, as she had another commitment at 10:30 a.m. She stated that she would not pretend to speak for every OTLA member, but that many members are having huge issues with the proposed amendments to both rules. As Mr. Dretke mentioned, there are a lot of thoughts that these are solutions in search of problems and that there will be unintended consequences to plaintiffs. OTLA, as an organization, asked the Council to vote no on the amendments to Rule 55 and Rule 35.

Judge Norby pointed out that a theme of the Council's work in the last few biennia has been trying to consider how many fewer people have access to lawyers and the higher number of self-represented litigants or, in this case, witnesses. She stated that the Council has been trying to find ways to strike a balance between keeping a set of rules that originally contemplated only lawyers ever reading and implementing them with a world that has evolved into a place where the general public is required more and more to navigate the court system on its own. Judge Norby stated that she thinks that one of the things that both Judge Litzenberger and Judge Peterson were concerned about in contemplating a change to this rule is trying to strike that balance, which she believes that the Council has done as well as it can be done. She stated that she does appreciate the objections, and that she has considered them herself, but that she still thinks that a balance needs to be struck. Judge Norby pointed out that she has said all along that she has just been a scrivener and that she does not really have a position on the amendment to Rule 55, but that she has come to a point where she is now leaning in favor of it because of the need for that balance.

Mr. Andersen stated that he was initially mildly in favor of the change because he did not want people ignoring subpoenas. He noted that the committee's deliberations occurred at about the time that Steve Bannon had just thumbed his nose at a congressional subpoena. He stated, however, that he has carefully read the comments, and the fact that there were none in favor has been telling. As to Judge Peterson's comment about talking to the Utah judges, Mr. Andersen stated that he is not sure that judges are on the front line of this issue, because they see the result, not what happens behind the scenes. Mr. Andersen expressed concern that creating an easy exit for witnesses will result in too many taking that easy exit, leading to uncertainty in trials and more delay. He opined that the power of the subpoena needs to be strong and immediate, sometimes even the same day that it is issued. He stated that his position is now a resounding no.

Mr. Goehler echoed Judge Norby's thoughts. He stated that the Council's discussion all along has been the issue of access to justice. As a counterpoint to Mr. Andersen, Mr. Goehler suggested that the amendment does not allow for an easy exit. It just provides information to the subpoenaed witness. Currently, the options for a subpoenaed witness who has a problem with the subpoena are to either ignore the subpoena or to hire a lawyer. The proposed process does not require a neutral witness to hire a lawyer when they may or may not be able to afford to. Mr. Goehler stated that he did not think that this is a substantive change that will wreak havoc on on trial practice but, rather, a more fair process for the general public.

Judge Jon Hill asked whether the change could be framed as for the public interest benefit of the witness rather than for the benefit of the party subpoenaing the witness. Judge Peterson stated that this is a good summation. He stated that witnesses had either contacted Judge Litzenberger to ask her what to do if they could not attend, or had just not appeared at all. Judge Jon Hill stated that the idea is not only to inform the witness what the subpoena is and why they need to appear, but also to essentially serve the public's interest in law. Judge Peterson agreed. He stated that it is to put people who have no interest in litigation on some kind of a footing so that they have a path. He also pointed out that the one thing that was not mentioned in any of the five comments is that the language in the amendment also beefs up the subpoena to make it clear that, if a witness does not comply with a subpoena, they could face the significant adverse consequences of fines or jail time. He noted that the current subpoena form simply states that a witness is ordered to come to court.

Ms. Stupasky stated that she did not believe that this amendment would change anything about whether a witness who had decided not to obey a subpoena would come to court or not. She stated that she was against the language instructing a witness on how to fight a subpoena and did not feel that it was necessary. She noted that she has not had an issue with this in 35 years of practice. She referred to the example that lawyer Bill Gaylord used in his comment to the Council, and stated that she had watched that trial. She opined that Mr. Gaylord would have never been able to get the rebuttal witness on whom the case turned to appear at the last minute if he had to rely on a subpoena that included the language proposed in the amendment to Rule 55. Ms. Stupasky stated that what is really in the public interest is that clients in the state of Oregon are allowed to put on their cases and get justice. That means that lawyers need to have witnesses appearing at trial, immediately in some cases. If those witnesses want to move to quash, there is already a process for that. Delivering a subpoena with an invitation to essentially make a motion to the judge not to have to appear is just inviting a problem. Ms. Stupasky stated that she is not opposed to keeping the language in the amendment with regard to the consequences for not complying with a subpoena.

Judge Bailey noted that, similarly to the vexatious litigation issue, his confusion to folks' objections to this amendment comes in part because of the fact that the court has the inherent authority to do these things. He stated that the amendments would just codify this inherent power. With regard to subpoenas, he stated that he has heard frequent complaints about witnesses not showing up, and a witness can already file a motion to quash and the court can already grant it. Judge Bailey stated that he did not understand how the amendment to Rule 55 would in any way, shape, or form impact a party's ability to get a witness in front of the court. To him, all it seems to do is to make sure that the witness gets notified and understands the process, and that there are consequences for not complying. He pointed out that he understands that attorneys sometimes, like dogs, want to mark their territory, but that this amendment would give folks on the outside an opportunity to understand that there is a process that they can follow versus not showing up at all and having a warrant issued. He thanked the committee for good work on a good amendment.

Mr. Andersen agreed with Ms. Stupasky that providing a ready-made motion almost invites the subpoenaed witness to take an exit. He stated that he was also concerned that the use of the words "the right not to testify," also seem to almost encourage a subpoenaed witness to believe that they have a right not to show up. Judge Bailey stated that his understanding of how the amendment would work is that the witness would need to show up, unless the court tells them otherwise. This is already how subpoenas work. The amendment then says that, if the witness thinks they have a legal basis not to show up, they can fill out the form, but they still have to wait for the court to give them approval. The only difference is the form, but the motion to quash procedure is still the same as in the current rule. The witness is still subject to the court's jurisdiction until the court says otherwise. Judge Bailey stated that the amendment is essentially telling folks that, if they had a lawyer, their lawyer could file a motion to quash for them. However, since the Council wants people to have access to the courts without having to afford expensive attorneys, it is providing the paperwork to allow them to do it on their own. He stated that he understands that there are people who are worried, but that it seems to him that this just explains for people who are not attorneys the rights that they already have.

Mr. Larwick stated that his concern about the amendment is embedding a whole motion inside of the rule. He stated that the ostensible reason is to help witnesses who are not even part of the proceeding not to have to find lawyers to help them understand the rules. However, it seems to him that this line of thinking could extend to pretty much all of the rules. There are self-represented litigants who are responding many of the other discovery rules, and the Council is not embedding motions to help them avoid their discovery obligations in those contexts. Mr. Larwick stated that he could see singling out Rule 55 for this purpose if it was a widespread problem, but he has not seen evidence that it is widespread problem. He noted that he has had witnesses who could not appear at trial, but those

witnesses have called him to discuss the problem and he has tried to work around their scheduling issues.

In response to Judge Bailey's comments, Mr. Andersen stated that he feels that, by providing a motion, the average witness will think that the filling out of the motion will allow them to avoid coming to court until the judge says that they have to. He stated that the impression will be that they have complied just by filling out the motion. Judge Bailey asked whether the Council thinks that it is more fair to hide the ball from folks and make them have to get an attorney to know what their rights are. He stated that this is the impression that he is getting. His feeling is that the amendment is crystal clear: a witness must show up, unless and until the court tells them otherwise. Judge Bailey stated that the Council must have faith that people are reading and following instructions to some degree. He stated that his sense from some of these comments is that, because a witness does not know what their real legal obligations are, or what the legal outcome could be for them to say that they cannot be there, it is better to hide the ball because it is a better outcome for lawyers when witnesses just show up. Judge Bailey stated that he believes that the amendment is a good compromise. He pointed out that access to justice is something that the Oregon Judicial Department (OJD) has been stressing for a long, long time, and has done yeoman's work trying to achieve. He thinks that this amendment helps move the rules closer to that goal. Ms. Stupasky stated that it could not be further from the truth that she wants to hide the ball. Her motivation for voting against this amendment is for the citizens of the state of Oregon to get the justice that they deserve. She stated that witnesses who are subpoenaed can already move to quash if they want to move to quash.

Judge Norby responded to Mr. Larwick's concern about embedding a form in Rule 55. She pointed out that there are many rules and statutes that are designed for lawyers that contain forms, because even lawyers struggle sometimes to know what to put in a form or how to be concise. She opined that including a basic form is not the same thing as "embedding a motion," and noted that the form, as with forms designed for lawyers, is intended as a guide and does not dictate that people should use it. Judge Norby also noted that one of the comments mentioned a concern that a witness would not understand the language in a subpoena. She stated that she is disappointed when she hears comments like this, as the assumption seems to be that the people who are being subpoenaed are either under educated, functionally illiterate, or careless in their reactions to things that come from the courts. She stated that, based largely on the conversations that she is lucky enough to have with jurors, this is the opposite of true. Her experience is that people are smart and do read and try to follow communications from the courts. She stated that it would be pretty difficult to write a rule based on the assumption that some people will ignore or not read it carefully. She stated that she is not sure that evaluating a rule based on the exceptions is a good idea.

Judge Peterson noted that it appears that the amendment may not receive a super majority vote. With regard to Ms. Stupasky's remark that she likes the language in the amendment about consequences for failure to comply with the subpoena, it appears that this might be a compromise position that the Council is willing to take. However, he is reluctant to substantially modify the language of the published rule at the promulgation meeting. This may be a matter for the Council in the next biennium. However, Judge Peterson pointed out that there are also two minor fixes: one in subparagraph A(1)(a)(v) to include a missing citation; and one in paragraph B(1)(a) to change the word "upon" to "on." He stated that he would like to see the Council adopt these changes, even if the overall amendment is unsuccessful.

a. ACTION ITEM: Vote on Whether to Promulgate Draft Amendment of ORCP 55

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 55, because it is in the benefit of the public at large, and because witnesses are different than parties. Mr. O'Donnell seconded the motion. The motion had twelve votes in favor and 8 votes against, but did not carry a super majority. The rule was not promulgated.

Mr. Crowley asked whether the Council would be willing to entertain Judge Peterson's suggestion to promulgate an amendment to Rule 55 that contains only the two changes that do not affect the operation of the rule. Judge Jon Hill made a motion to do so. Judge Norby seconded the motion, which passed 19-1 by roll call vote.

6. ORCP 57

Ms. Holley reminded the Council that the substantial changes to the rule are in section D. There are also some housekeeping changes throughout the rule, including changing the word "shall" to "must" or "may." The main change in subsection D(1) is to recognize that jurors do not have the right to sit on a particular jury, but that they do have the right to be free from discrimination. In paragraph D(1)(b), "physical defect" is changed to "impairment" and "duties" to "essential functions" to track more consistently with disability law. The amendment does not completely mirror the protections in ORS 659A.403, as the Council voted to have a more narrow set of protections for jurors. The amendment also sets a process for peremptory challenges under *Batson v. Kentucky*, 476 US 79 (1986), which changes the rule from the previous presumption that challenges were non discriminatory and allows a more balanced process and asks the courts to consider the totality of the circumstances.

Ms. Holley explained that paragraph D(4)(c) requires the court to sustain an objection to a peremptory challenge if the court finds that it is more likely than

not that a protected status was a factor in invoking that peremptory challenge. Paragraph D(4)(d) includes factors for the court to consider. The peremptory challenge process is preserved, but the mechanism by which a challenge that might be based on discrimination can be made is changed.

Mr. Crowley thanked the committee for its work. He asked if there were any guests or Council members who wanted to comment on the proposed amendment to Rule 57.

Judge Norby thanked Ms. Holley for her magnificent work in assembling the workgroup and guiding the Council through the many conversations on this topic throughout the biennium. Judge Jon Hill stated that the committee and the Council had worked hard to hone the language in the amendment so that it is both effective and not controversial. He noted that the comment the Council had received in support of the amendment also encouraged further modification of the rule, but he asked that the Council promulgate the amendment as written. He congratulated Ms. Holley again on her great work.

Mr. Hood asked about the draft recommendation memo that accompanied the published rule and how it relates to the actual rule change. He asked if the memo is intended to be included with the promulgation. Ms. Holley stated that it is intended to go to the Legislature with the rule, if it is promulgated. She pointed out to Ms. Nilsson that the memo would need to be updated to no longer be called "draft" and to remove the reference to paragraph D(1), since the entire rule is being amended. Ms. Holley explained that the memo is meant to inform what the Legislature sees, partly because the Council voted last biennium that changes to Rule 57 may be substantive in nature. The memo contains a more thorough description of the process that was used. Judge Peterson stated that the goal was for attorneys, the public, and the Legislature to have a little bit more context for where the rule change came from. He stated that his intention would be for the memo to accompany the Council's transmittal letter to the Legislature. While Ms. Holley is convinced that the amendment is a substantive change to Rule 57, Judge Peterson and Judge Norm Hill believe that it is purely procedural. However, if the Legislature disagrees and decides to hold hearings on whether to make a change by statute, this memo will make very clear the context of the changes and the fact that a change to jury procedures would also affect criminal trials by statute.

Judge Norm Hill stated that the Council should keep the following in mind when it is dealing with any of the rules. The Council can write a rule that is perfect but if he, as a trial judge, cannot actually apply it to individual cases with any predictability, it does more harm than good. He stated that he is really impressed with the language in the published amendment of Rule 57, particularly with its predictability. It makes a significant improvement on the existing rule, it is useful, and it is simple and elegant enough that a trial judge can make a meaningful determination with some intellectual integrity, as opposed to just relying on

whatever they personally feel.

Judge Norm Hill stated that he would also like to suggest including in the transmittal letter to the Legislature a recommendation that it significantly increase juror pay. The OJD will be introducing a bill asking for increased juror compensation, and Judge Norm Hill stated that he thought it would be very powerful to have the Council on Court Procedures strongly support that. Although amendments to Rule 57 will be an improvement, nothing will make as much of a difference as making sure that jurors actually reflect Oregon's diversity, and the key to that is making sure that everyone has the ability to serve, regardless of their financial wherewithal. Ms. Holley noted that the memo does support OJD's proposals to increase juror pay. Judge Norm Hill stated that this is good, but that it is more likely to be noticed if the support is coming from the Council directly on the same level as the promulgated rules. Judge Peterson agreed and stated that he would run proposed language to include in the promulgation letter past the OJD.

a. ACTION ITEM: Vote on Whether to Promulgate Draft Amendment of ORCP 57

Judge Jon Hill made a motion to promulgate the draft amendment of Rule 57. Mr. Andersen seconded the motion, which was approved unanimously (20-0) by roll call vote.

Judge Jon Hill made a motion to include language in support of OJD's efforts to increase juror pay in the Council's' transmittal letter to the Legislature. Judge Norm Hill seconded the motion, which passed unanimously by voice vote.

7. ORCP 35

Judge Jon Hill stated that the committee had used case law to draft a rule that gives a coherent structure to the inherent powers of the court. He explained that Judge Norby had authored the rule and that she and the committee had done a huge amount of work on the various revisions. The committee had started out by looking at potential legislative fixes, but had ultimately decided to try to write a rule. He acknowledged the comments that the Council had received about the rule itself but stressed that, as was discussed at the September publication meeting, the process laid out in the rule is set out in case law already.

Judge Norby stated that she had read the comments carefully and that she wanted to take the opportunity to go over the history of what the committee had done and the reasons behind it. She stated that the committee was formed to address a request that was received in response to the Council's biennial survey of bench and bar. That request had raised concern about the disproportionate

burden that small numbers of vexatious litigants place on court staff and judges and the justice system at large.

Judge Norby explained that the committee looked at vexatious litigant processes in state systems and the federal system, including reviewing the limited Oregon case law in which actions were successfully taken to address vexatious litigants. The committee concluded that, although the problem is limited, the burden on the courts is disproportionate, primarily because there is no clear process available to the courts to relieve this burden, particularly when it is created by self-represented litigants who are motivated by malice. This can sometimes occur in domestic relations proceedings and neighbor disputes, for example, where nothing is really sought from the courts except for the opportunity to unendingly bring misery to another person. Judge Norby opined that not very many attorneys, who are not judges or who have not previously been court staff, see the extent of the havoc this causes with the system. It is occasional, but the people who do it, do it repeatedly.

Judge Norby stated that ORCP 35 was purposely designed to collate and integrate processes that have been successfully used by the courts. The process is relatively easy for a self-represented litigant who is deemed vexatious to navigate. It is accessible to judges who are trying to figure out how to manage the problem. And again, it is for those rare occasions in which personal vendettas or manipulation is just crying out for restraint. Judge Norby stated that the concerns expressed by the comments and by Council members appear to be rooted in a fear that the creation of a rule implies that the process can and will be weaponized against litigants who are not at all vexatious, and that it will create barriers to access to legitimate justice that do not already exist. She stated that it is difficult to meaningfully respond to that fear, because it is a fear that apparently arises from factual past experiences with courts that acted cavalierly when they should not have. Judge Norby stated that one particular comment claimed that judges have the ability to simply toss out motions that they do not approve of and throw litigants out of courtrooms if they find them to be objectionable people, that this had happened in a case that the commenter had tried, and that this was the reason given that this rule is not needed – that the courts have inherent authority to do anything they want to do. She stated that she hopes that most judges conduct themselves differently and that those that do not probably need to be removed. The rules are, of course, written for the vast majority of lawyers and judges who follow them and who want processes to be thoughtfully created and uniformly applied. A driving force behind Rule 35 is to give judges, who do not believe that they can unilaterally act, a blueprint to follow to reduce the strain that vexatious litigants place on the courts and on other citizens.

Judge Norby also pointed out that there were some comments that claimed both that the rule is probably unconstitutional and that it duplicates processes that are already available to the court. She noted that both of those propositions cannot

be true. She stated that some comments argued that the rule is targeted to be weaponized against litigants with legitimate claims. However, a litigant cannot be deemed vexatious under this rule without a judge considering all of the factors in section D. Judge Norby stated that she believes that there is a fundamental difference between placing obstacles in the path of those who seek to abuse the courts and placing obstacles in the path of those who bring legitimate claims. She expressed surprise at the fact that so many of those who objected to the rule seem to think that judges and courts are ill equipped to differentiate between those two categories of litigants. She stated that she hoped that this is because they have had the good fortune not be involved in repetitive disputes with malicious opponents and not because they have a deeper lack of confidence in judges that the rule is not equipped to address.

Judge Norby opined that the fact that the published Rule 35 integrates the existing options that have been used by courts over time to appropriately deal with truly vexatious litigants recommends it as meritorious and constitutional. The fact that the committee's and Council's work was conformed to suggestions from representatives of entities that would be responsible for administratively implementing it, also seems to recommend it as thoughtful. And finally, the fact that it was requested by an anonymous responder to the Council's questionnaire, and that many judges on the Council support it, indicates that it is needed.

Mr. Crowley thanked the committee for its work. He asked if there were any guests or Council members who wanted to comment on the proposed Rule 35.

Leland Baxter-Neal introduced himself as the Director of Community Lawyering for Oregon Consumer Justice (OCJ), a statewide nonprofit that works to safeguard the rights of consumers through advocacy, strategic litigation, research, education, and community engagement. He stated that OCJ strongly opposes Rule 35 as drafted. He explained that OCJ has submitted detailed comments in writing and that he would briefly highlight a few of those for the Council today.

Mr. Baxter-Neal explained that OCJ has serious concerns about the impact the proposed rule would have on consumer access to justice, most particularly on low-income litigants, many of whom are forced to proceed as self-represented litigants because they cannot afford access to counsel. OCJ believes that there is already existing authority to address instances of vexatious filing, and that the way that this rule is written conflicts with the Oregon constitution and raises questions of federal constitutionality.

Mr. Baxter-Neal stated that OCJ believes that the definition of a vexatious litigant as drafted could prevent consumers who seek legitimate relief to which they may be entitled from having their day in court. This risk could be particularly heightened for consumers seeking to challenge a default judgment in a debt collection case. Too many collection cases result in default judgments because the

consumers never received notice of the case and do not know how to engage until after the judgment is entered. In cases where a consumer seeks to challenge the judgment, the rule could create serious additional barriers, and could further tip the scales in favor of debt collectors over consumers.

OCJ is also troubled by the proposed security deposit provision, which creates yet another barrier to access to justice for low-income Oregonians. The proposed rule conditions the ability of certain litigants to proceed on their ability to post a financial deposit, most importantly without any inquiry into their income level or their ability to pay. There may be two equally situated Oregonians with different income levels, both deemed vexatious litigants, and one will be able to proceed because they can afford to pay the deposit and one will not be able to proceed because they cannot pay. As drafted, OCJ believes the rule raises significant questions of constitutionality. The right to seek redress of grievances is fundamental to the right to seek a remedy that is protected under article 1, section 10 of the Oregon constitution and the First Amendment of the US Constitution. OCJ believes that the rule represents an unacceptable threat to that right. In addition, in multiple contexts, the U.S. Supreme Court and other federal and state courts have been clear that the government may not discriminate against individuals on account of their poverty by conditioning their ability to access justice on their ability to pay. OCJ believes that the security deposit requirement does just that. Mr. Baxter-Neal stated that he understands that the Council is seeking to strike a balance between the very real challenges imposed by by this issue, but that OCJ believes that the rule as drafted simply does not strike that balance appropriately.

Judge Peterson noted that lawyers are able to look for a scorpion under every rock because it is a part of their training – they always look for what could go wrong. He stated that he sees a lot of that in the comments in opposition to Rule 35. He noted that the Council had made a substantial change to Rule 27 a few biennia ago, and primarily plaintiffs' attorneys were terrified that those changes were going to cause all kinds of problems. They raised some real issues in terms of the statute limitations, and those got resolved. Judge Peterson noted that Judge Bob Herndon in Clackamas County, who was on that committee at the time, pointed out that the very good practitioners who had concerns about the change in the rule never saw the problems that arose under the previous rule, such as children being appointed as guardians ad litem of their adult parents and having those parents divorced in order to gain property. Judge Peterson pointed out that judges do see problems like this, as they do with vexatious litigants. He also noted that the changes to Rule 27 were made and, so far as he knows, the sky has not fallen.

Judge Peterson also observed that there appears to be some concern that lawyers who are bringing cutting-edge litigation will not only have their cases dismissed, which happens frequently anyway with cutting-edge litigation, but that they will

be branded with a scarlet letter and be essentially precluded from bringing more claims. He pointed out that it is fairly obvious when a claim is a cutting-edge claim versus a nonsense claim that is beyond the bounds of propriety. He stated that he is hearing that judges have all of this inherent power, even as far back as a 1906 case, but this is like saying that we have the tools, but we think we left them out in the back yard somewhere, they are probably rusty, we are not sure how to use them, and no one knows where the user manual might be. He opined that Rule 35 is just a huge user manual for those tools, and that it would be hugely beneficial for judges.

Mr. Andersen referred to the enhanced prevailing party fee available in ORS 20.190 and the fact that one of the factors that can be used to assess whether to award that fee is whether the conduct of a party was reckless, willful, malicious, in bad faith, or illegal. The statute also talks about the extent to which an enhanced prevailing party fee would deter others from asserting meritless claims and defenses. He expressed concern that the proposed Rule 35 would violate the statute. He also wondered what the proposed rule would accomplish that cannot already be accomplished by ORS 20.190(3). Mr. Crowley stated that proposed Rule 35 addresses the situation up front rather than after the fact. He asked why Mr. Andersen believes that Rule 35 would violate the statute. Mr. Andersen stated that ORS 20.190 already lays claim on the territory of meritless litigation. He stated that he was unaware of anything that empowers the Council to propose a rule without authorization in a statute. Mr. Crowley stated that there is a lot of other authority behind the proposed new rule that has been covered fairly extensively throughout the year.

Judge Norm Hill echoed Judge Peterson's point that trial court judges see this issue differently than some of the other members of the Council. To the point of those telling him that he has the inherent authority to designate a litigant as vexatious, he offered the following thoughts. Over the last five to seven years, an awful lot of what he understood for the previous almost 30 years as a lawyer to be the inherent authority of the trial court, he is now being told is not so inherent and that he does not have the authority to do as a judge. It used to be that if a lawyer did not show up to court habitually, a judge could strike that lawyer's pleadings as part of the court's inherent authority. Courts are now being told they cannot do that. His sense now is that he is not certain that the courts have the inherent authority to do anything. What this proposed rule would to is to take the very real problem of vexatious litigants and create a procedural framework that allows judges to apply the law fairly and appropriately, across the board and across jurisdictions. He stated that this is a significant improvement over the current situation. In the current climate, he prefers to have a rule that tells him what his authority is. And he thinks that there are a lot of judges in the same boat.

Ms. Holley stated that she thinks that one of the problems is that she hears folks saying that there is some inherent authority to address people who are

weaponizing litigation and harassing people, but she believes that it is more narrow than how this rule is written. If, for example, an incarcerated person who continues to make filings regarding their incarceration is determined to be a frivolous filer under paragraph A(1)(b) of the proposed rule, the punishment for that is that they would not be allowed to commence any actions. Would that include not being able to be a co-petitioner in a divorce case? She thinks that the amendment is more broad than the inherent authority that already exists. In talking to a number of lawyers, she has heard from people who really have been harmed by truly harassing litigation and weaponized litigation, so she recognizes that it can be harmful. However, she thinks that the language as written is too broad to address it.

Mr. Larwick acknowledged that he is not a judge and does not see the problem of self-represented litigants filing harassing lawsuits and clogging up the court system. He did not dispute that it is a problem. However, he is only looking at the text of the proposed rule. His main problem is with paragraph A(1)(b), which defines a vexatious litigant to be 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. He pointed out that there is nothing in the rule that that limits this to self-represented litigants. He stated that he could imagine motions being filed between lawyers arguing that something was intended to cause unnecessary delay, or that a certain motion or pleading was frivolous. Mr. Larwick noted that plaintiffs' attorneys routinely receive multiple affirmative defenses raised by a defendant, sometimes with no evidence presented on many of them. He asked how that would not be considered frivolous pleading. Some of these defendants are institutional defendants like government agencies or insurance companies that are repeat players in the court system. From the defense bar's perspective, if a plaintiffs' lawyer is able to convince one judge that some of these tactics were employed, and they get branded with the scarlet letter of being a vexatious litigant, the rule does not even contain a procedure for them to undo that process. Mr. Larwick stated that lawyers are smart, and he predicted that they would find a way to weaponize this rule.

Mr. Hood thanked Judge Norby for leading the charge on this rule. He stated that he is in support of it, and sees vexatious litigants as a real problem. He also stated that he did not hear that there is any opposition to the idea that there is a problem that needs to be fixed. He stated that he does not see a better solution for it. If the courts already have the inherent authority to deem a litigant vexatious, it is probably better for everyone that the process is codified in some way, so that everyone knows what the standards are. With regard to Mr. Andersen's point about the prevailing party fee, in the cases that Mr. Hood has had where this type of troublesome litigant has been involved, they have had absolutely no care about what the financial stakes are. They have either divested themselves of any of their property through shell games, or the money just does not matter to them. In fact, he has had some of these litigants tell him that it does

not matter what the courts do or how they rule, that they will keep filing cases, appealing, and filing lawsuits on the same issue again. This is the kind of litigant that this rule is designed for.

Judge Peterson responded to Mr. Larwick that perhaps one of the things a court could consider is whether there is an attorney involved in the case. This might mitigate against finding an attorney vexatious, since it is primarily self-represented litigants who are causing these problems. However, an attorney who has earned it could potentially also receive the scarlet letter. Judge Peterson noted that ORS 20.190 does not fix the problem because, as Mr. Hood pointed out, one would be lucky to get five cents out of some of these litigants because they are either impecunious or they have made themselves appear impecunious. The financial impact is not an issue there. Judge Peterson stated that he was a little surprised that consumer advocates would think that judges are going to punish debtors who have a default judgment against them. He stated that he has not met any judges who are looking to create problems for people who are simply trying to legitimately raise access to justice issues in the court. This rule is designed for litigants that make judges say, "Wow, this is unbelievable. And we have to deal with this over and over because the person has the right to come in here and just keep filing this stuff."

Judge Bailey stated that he thinks that there are two different types of vexatious litigants. There is one type who files a lot of different claims. The other type files multiple motions in the same action. He stated that judges see a lot of the latter type in family law matters, which are different and perhaps more suited for this rule. Judge Bailey expressed disdain at the idea that people would be shut out of the system and unable to make their claims. He noted that the rule states that a litigant can file an ex parte request to file litigation, and that the presiding judge or designee must take a look at that request and determine whether there is or is not merit to the case. He stated that he thinks that the rule does not cut off anyone's ability to litigate.

a. ACTION ITEM: Vote on Whether to Promulgate Draft of ORCP 35

Mr. Hood made a motion to promulgate the draft of Rule 35. Judge Bailey seconded the motion. The motion had twelve votes in favor and 8 votes against, but did not carry a super majority. The rule was not promulgated.

B. Vote on Whether to Send Recommendations for Amendments to Legislature

1. ORS 45.400

Judge Peterson explained that this is a proposal for a recommendation to the Legislature to amend ORS 45.400, which currently requires 30 days' advance notice for remote testimony. He stated that the COVID-19 pandemic had made

remote testimony more commonplace, and also gave lawyers the tools to do it better. The suggestion is to simply make the requirement that the motion has to be sufficiently in advance so that the parties can weigh in on it and say whether it is a good idea or whether it is a bad idea, and then the court can approve it or not.

From the Council's extensive deliberations, it was determined that technology must be available not only to the courts, but to attorneys, parties, and witnesses. There is accordingly a suggested change to the language in 3(c)(E). Finally, in section 6, there is a suggestion for a correction of a typographical error in the existing statute.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed recommendation regarding ORS 45.400. Hearing none, he entertained a motion to approve the recommendation. Ms. Holley made a motion to approve the recommendation. Mr. Andersen seconded the motion, which was approved unanimously (20-0) by roll call vote.

2. ORS 46.415

Judge Peterson withdrew this item from the agenda, since it would only be applicable had Rule 35 been promulgated.

3. ORS 136.600

Judge Peterson reminded the Council that ORS 136.600 contains references to the old numbering of Rule 55. The proposed recommendation to the Legislature would correct those references, since Legislative Counsel did not address this issue in a reviser's bill.

Mr. Crowley asked if there were any guests or Council members who wanted to comment on the proposed recommendation regarding ORS 136.600. Hearing none, he entertained a motion to approve the recommendation. Judge Jon Hill made a motion to approve the recommendation. Mr. Goehler seconded the motion, which was approved unanimously (20-0) by roll call vote.

IV. New Business

No new business was raised.

V. Adjournment

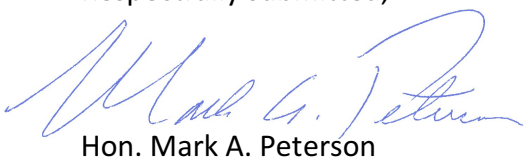
Mr. Crowley stated that he had very much enjoyed his time on the Council, and that he had gone from what he considered to be a civil procedure geek to an even more learned scholar of the ORCP during his tenure. He stated that he deeply appreciates everyone's involvement, particularly during the pandemic. Mr. Crowley encouraged the Council to take another look at

vexatious litigation and the subpoena rule next biennium.

Judge Norby thanked Mr. Crowley on the Council's behalf for his steady hand during over the course of the biennium and for running great virtual meetings.

Mr. Crowley adjourned the meeting at 11:33 a.m.

Respectfully submitted,



Hon. Mark A. Peterson
Executive Director